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2024 (II) ILR-CUT-1

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

W.P.(C) NO. 43024 OF 2023

RAJ KISHORE SAHOO ……Petitioner

-V-

STATE OF ODISHA & ORS. ……Opp.Parties

CONSTITUTION OF INDIA, 1950 – Article 226 – Judicial Review in tender matter – The state authority put certain conditions, minimum eligibility criteria of work experience in construction and resources to mark effective execution of work while inviting tender – Whether the action of the authority is arbitrary and irrational, needs judicial interference? – Held, No – In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be concealed to the state authorities – Unless the action of the tender authority is found to be malicious and misuse of statutory power, interference by the court exercising power of judicial review is not warranted.

Case Laws Relied on and Referred to :-

1. (1994) 6 SCC 651: Tata Cellular vs. Union of India.
2. (2019) 4 SCC 401: M/s. ICOMM Tele Ltd. vs. Punjab State Water Supply & Sewerage.
3. (2012) 8 SCC 216 : M/s. Michigan Rubber (I) Ltd. vs. State of Karnataka & Ors.
4. (2014) 3 SCC 760 : Maa Binda Express Carrier & Anr vs. North-East Frontier Rly. & Ors.
5. (2005) 4 SCC 435 : Global Energy Ltd. & Anr. vs. Adani Exports Ltd. & Anr.
6. (2005) 1 SCC 679 : Association of Registration Plates vs. Union of India & Ors.
7. (2004) 4 SCC 19 : Directorate of Education vs. Educomp Datamatics Ltd.

For Petitioner : Ms. Shradha Das

For Opp.Parties : Mr. P.K. Muduli, AGA

JUDGMENT Date of Judgment : 10.04.2024

CHAKRADHARI SHARAN SINGH, C.J.

No person can claim a fundamental right to carry on a business with the Government, and in a matter of formulating conditions of tender documents and awarding the contract, greater latitude is required to be conceded to the State authorities. Unless the action of the tendering authority is found to be malicious and misuse of statutory powers, interference by the Court exercising power of judicial review is not warranted. Though, the Courts can scrutinize the award of contracts by the Government or its agencies in exercise of their powers of judicial review to prevent arbitrariness or favoritism, there are, however, limitations in exercise of power of judicial review in such matters, which have been succinctly laid down by the Supreme Court in its various decisions; ***[see Tata Cellular v. Union of India, (1994) 6 SCC 651; M/s. ICOMM Tele Ltd. vs. Punjab State Water Supply and Sewerage, (2019) 4 SCC 401; M/s. Michigan Rubber (I) Ltd. vs. State of Karnataka and Others, (2012) 8 SCC 216]***.

2. There is a long line of decision on limited scope of judicial review in exercise of power under Article 226 of the Constitution of India concerning terms of invitation to tender, the same being in realm of contract. With these settled legal premise in mind, I proceed to address the challenge made by the writ petitioner to the stipulation in the minimum eligibility criteria for the registered contractors for qualifying in the technical bid i.e. the registered contractors should have successfully completed RCC Drain, RCC Culvert, RCC Bridge work of single agreement amount not less than 30-40% of the amount put to tender in any one financial year.

3. The short facts of the case as pleaded in the writ petition are that the City Engineer, Bhubaneswar Municipal Corporation (Opposite Party No.4) invited e-tender vide Tender Bid Reference No.BMC-DD-CE-04/2023-24 dated 07.10.2023 for the work "Construction of RCC Drain from backside of Reliance Fresh to Br-579 connecting to Railway Culvert Area, Drain No.5 in Ward No.41" with an estimated cost of Rs.3,26,15,648/-.

4. The petitioner is a registered A Class contractor. Responding to the said tender notice, he submitted his bid by making payment of EMD and tender fee. He is said to have submitted the documents/particulars necessary for being eligible for technical evaluation. The petitioner was communicated about rejection of his tender, based on a tender evaluation, through letter dated 07.11.2023. The petitioner wanted a clarification as regards reason for such rejection. The petitioner was informed by opposite party No.4 through letter dated 16.11.2023 that the petitioner could not qualify the technical bid for non-fulfillment of the tender conditions pertaining to the minimum eligibility criteria i.e. 'the registered contractors should have successfully completed RCC Drain, RCC Culvert, RCC Bridge work of single agreement amount not less than 30-40% of the amount put to tender in any one financial year'.

5. It is the petitioner's case that the eligibility criteria for bidders as laid down in the letter dated 01.01.2019 (Annexure-1) does not contain such stipulation as contained in the tender notice as noted above. Clause 3(a) of the letter dated 01.01.2019 reads as under:

> ***"3. Eligibility criteria for bidders:***
>
> *(A) Tender for works value above Rs.50.00 lakh and upto Rs.7.00 Cr. Irrespective of nature of work either Category-I or category-2 as above shall have no qualifying criteria, except tender cost, EMD, valid RC, GSTIN and PAN No.; Affidavit Undertaking regarding no relationship certificate, which are mandatory."*

6. With reference to the said clause, it is the petitioner's case that for works with valuation less than Rs.7 crore, except tender cost, EMD, Valid RC, GSTIN and PAN No.; Affidavit, Undertaking regarding no relationship certificate are the only mandatory requirements. It is, accordingly, the petitioner's contention that BMC (opposite party No.4) has put such minimum eligibility criteria of registered contractors who have earlier successfully completed similar nature of work in any one financial year of value not less than 30-40% of the estimated cost of corresponding

work put together, to exclude new registered contractors and create monopoly in favour of class of bidders.

7. Ms. Shradha Das, learned counsel appearing on behalf of the petitioner has argued that because of the aforesaid stipulation in the tender notice, the petitioner and new registered contractors can no longer participate in any subsequent tender, if such condition persists. It has also been argued that such restriction in the tender notice has been incorporated to favour a class of bidders by creating monopoly. She has placed reliance on the following Supreme Court's decisions to make out a case that the aforesaid term of the tender notice deserves interference, though they are in the realm of contract, as they are arbitrary, discriminatory tailor-made and actuated by malice to benefit a particular tenderer or class of tenderers, who can fulfill the said criteria :-

> *(i)* ***Maa Binda Express Carrier and another vs. North-East Frontier Railway and Others, (2014) 3 SCC 760,***
>
> *(ii)* ***Michigan Rubber India Limited vs. State of Karnataka and Others, (2012) 8 SCC 216***
>
> *(iii)* ***Icomm Tele Limited vs. Punjab State Water Supply and Sewerage Board and Another, (2019) 4 SCC 401***
>
> *(iv)* ***Global Energy Limited and another vs. Adani Exports Ltd. and Another, (2005) 4 SCC 435***
>
> *(v)* ***Association of Registration Plates vs. Union of India and Others, (2005) 1 SCC 679***

She has also placed reliance on a coordinate Bench decision of this Court rendered on 24.07.2017 in W.P.(C) No.7120 of 2017 (***Ajay Kumar Jain vs. State of Odisha and Others***).

8. Per contra Mr. P.K. Muduli, learned Addl. Government Advocate appearing on behalf of the opposite party-BMC has submitted that no person can claim a fundamental right to carry on any business with the Government. So as to ensure successful execution of the work, certain conditions are required to be laid down for ensuring that the contractor had the capacity, experience and resources to effectively execute the work. Since action of the tendering authority in this case cannot be said to be malicious and misuse of discretion, the aforesaid tender condition cannot be successfully assailed. He, accordingly, submits that this writ petition has no merit and deserves to be dismissed. He has also placed reliance on the Supreme Court's decision in case of ***Association of Registration Plates vs. Union of India &Ors. (2005) 1 SCC 679*** to bolster his contention.

9. It is manifest from the e-Tender Notice dated 07.10.2023 in question that it related to the works for construction of RCC Drain with an estimated cost of Rs.3,26,15,648/-. It was in that background that one of the eligibility criteria laid down in the tender notice was that the registered contractors should have successfully completed RCC Drain, RCC Culvert and RCC Bridge works of single agreement amount not less than 30-40% of the amount put to tender in any one financial year.

10. It is not the petitioner's case that he had ever undertaken the work as contractor for construction of RCC Drain, RCC Culvert or RCC Bridge. The stipulation in the tender notice concerning minimum eligibility criteria of the above nature was apparently to ensure that the work in question could be executed by a contractor having potential and experience to execute the work. The only question which arises in the present writ petition is as to whether such stipulation in the tender notice, which is under challenge, is open to judicial scrutiny, in the wake of nature of work which was the subject matter of the tender notice. To answer the said question, it would be beneficial to refer to some of the judicial pronouncements of the Supreme Court of India in this context. In case of ***Tata Cellular v. Union of India*** (supra), the Supreme Court, after having taking into account the past precedents on the point of the scope of judicial review in the matter of terms of invitation to tender has held in most unambiguous terms, that the terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. It further held that the State must have freedom of contract and a free play in the joints is a necessary concomitant for an administrative body, functioning in an administrative sphere or quasi-administrative sphere. The Supreme Court further held that such decision must not only be tested by the application of ***Wednesbury*** principles of reasonableness but must be free from arbitrariness, not affected by bias or actuated by mala fides.

11. The aforesaid view has been reiterated subsequently in case of ***Directorate of Education v. Educomp Datamatics Ltd., (2004) 4 SCC 19***, paragraph-2 of which reads thus:-

> *12. It has clearly been held in these decisions that the terms of the invitation to tender are not open to judicial scrutiny, the same being in the realm of contract. That the Government must have a free hand in setting the terms of the tender. It must have reasonable play in its joints as a necessary concomitant for an administrative body in an administrative sphere. The courts would interfere with the administrative policy decision only if it is arbitrary, discriminatory, mala fide or actuated by bias. It is entitled to pragmatic adjustments which may be called for by the particular circumstances. The courts cannot strike down the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical. The courts can interfere only if the policy decision is arbitrary, discriminatory or mala fide.*

12. It is noteworthy at this juncture that the petitioner has not been able to make out any case of *mala fide* or bias. The minimum eligibility criteria of work experience of construction of successful completion of work of construction of RCC Drain, RCC Bridge or RCC Culvert cannot be said to be arbitrary or discriminatory as the BMC by making such stipulation considered it more pragmatic to have the service of the persons having potential and experience in the field of construction of RCC Drain, RCC Bridge and RCC Culvert. In such view of the matter, the impugned term of the tender prescribed by the Government should not be struck down by this Court exercising power of judicial review under Article 226 of the Constitution of India on a vague plea that the said stipulation amounts to the exclusion of other contractors and newly registered contractors from award of work of the said nature.

13. In case of ***Global Energy Limited*** (*supra*), the Supreme Court again reiterated the principle that the terms of the invitation to tender are not open to judicial scrutiny and the Courts cannot whittle down the terms of the tender as they are in the realm of contract unless they are wholly arbitrary, discriminatory or actuated by malice.

14. In case of ***Michigan Rubber India Limited*** (*supra*), the Supreme Court has held in paragraph-23, as under:-

> *"23. From the above decisions, the following principles emerge:*
>
> *(a) The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;*
>
> *(b) Fixation of a value of the tender is entirely within the purview of the executive and the courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by courts is very limited;*
>
> *(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of the tendering authority is found to be malicious and a misuse of its statutory powers, interference by courts is not warranted;*
>
> *(d) 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; and*
>
> *(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by court is very restrictive since no person can claim a fundamental right to carry on business with the Government.*
>
> *(Emphasis supplied)*

15. The Supreme Court further stated in case of ***Michigan Rubber India Limited*** (*supra*) that a Court exercising power of judicial review should pose to itself the following questions before interfering with, in a tender or contractual matters:-

> *"(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached"? and*
>
> *(ii) Whether the public interest is affected?*

If the answers to the above questions are in the negative, then there should be no interference under Article 226 of the Constitution of India, the Supreme Court held.

16. In the present case, I am not inclined to accept the submissions made by learned counsel on behalf of the petitioner that the impugned condition in the notice inviting tender is so arbitrary and irrational that no responsible authority acting reasonably and in accordance with the relevant law could have put such conditions. It was manifestly to ensure that the persons having capacity, potential and expertise only could participate in the tender process, by laying down the minimum eligibility criteria, as noted-above. I also find that there is nothing on record for this Court to reach a conclusion that because of the impugned stipulation in the tender notice, public interest stands adversely affected which is one of the conditions precedent for this Court to exercise power of judicial review in tender or contractual matters, as laid down in case of ***Michigan Rubber India Limited*** (*supra*).

17. ***Maa Binda Express Carrier*** (*supra*), has stated the law relating to the scope of judicial review in the matters concerning award of contracts by the State and its instrumentalities after noticing a long line of decisions of the Supreme Court and has held in paragraph-8 as under:-

> *"8. The scope of judicial review in matters relating to award of contracts by the State and its instrumentalities is settled by a long line of decisions of this Court. While these decisions clearly recognize that power exercised by the Government and its instrumentalities in regard to allotment of contract is subject to judicial review at the instance of an aggrieved party, submission of a tender in response to a notice inviting such tenders is no more than making an offer which the State or its agencies are under no obligation to accept. The bidders participating in the tender process cannot, therefore, insist that their tenders should be accepted simply because a given tender is the highest or lowest depending upon whether the contract is for sale of public property or for execution of works on behalf of the Government. All that participating bidders are entitled to be a fair, equal and non-discriminatory treatment in the matter of evaluation of their tenders. It is also fairly well settled that award of a contract is essentially a commercial transaction which must be determined on the basis of consideration that are relevant to such commercial decision. This implies that terms subject to which tenders are invited are not open to the judicial scrutiny unless it is found that the same have been tailor-made to benefit any particular tenderer or class of tenderers. So also, the authority inviting tenders can enter into negotiations or grant relaxation for bona fide and cogent reasons provided such relaxation is permissible under the terms governing the tender process."*

18. Similar view has been echoed by the Supreme Court in case of ***Icomm Tele Limited*** (*supra*) laying down that terms of invitation of tender are not open to judicial scrutiny as they are in the realm of contract, unless they are arbitrary, discriminatory or actuated by malice. It would also be useful to notice the observations made by the Supreme Court in case of ***Association of Registration Plates*** (*supra*), wherein it has been held that in the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities. Proceeding further, the Supreme Court has held in paragraph-43 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 a 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 the Government in its dealings with tenderers and contractors."*

19. Based on the pleadings and other materials brought on record by the petitioner, I am of the considered view that it cannot be said that the petitioner has been unfairly treated and discriminated, to the detriment of public interest. The petitioner's claim that the impugned term of notice inviting tender amounts to creating a monopoly in favour of the parties having experience of execution of similar work as mentioned in the notice is wholly unsubstantiated. Taking a cue from the Supreme Court's decision in case of ***Association of Registration Plates*** (*supra*), I am of the view that in the absence of any indication from the records, the plea that the terms and conditions were tailor-made to promote a class of persons to the exclusion of others, is untenable.

20. Situated thus, I do not find any merit in this writ petition, which accordingly stands dismissed.

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2024 (II) ILR-CUT-7

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

AHO NO.79 OF 2001

MUNDA GUDIA TULA ……Appellant

-V-

ISHAN KUMAR PAUL & ORS. ……Respondents

(A) ODISHA SCHEDULED AREAS OF TRANSFER OF IMMOVABLE PROPERTY (BY SCHEDULE TRIBE) AMENDMENT REGULATION, 1976 – Section 3 – Whether a women who by birth is member of Schedule Tribe consequent upon her marriage to a man not belonging to ST, ceases to be a member of the Schedule Tribe? – Held, No – Caste is determined by birth not by marriage – If a woman belongs to ST by birth and marries to a man not belonging to ST does not cease to be a member of Schedule Tribe. (Paras 11-18)

(B) ODISHA SCHEDULED AREAS OF TRANSFER OF IMMOVABLE PROPERTY (BY SCHEDULE TRIBE) AMENDMENT REGULATION, 1976 – Explanation to Regulation 3 – Whether the explanation can be said as

clarificatory in nature and have retrospective effect? – Held, No – The explanation is not clarificatory in nature rather it introduces a substantive provision prohibiting transfer of an immovable property by a member of ST – In the absence of any legislative intent to apply the said explanation retrospectively it cannot be given retrospective effect.

(Paras 19-27)

Case Laws Relied on and Referred to :-

1. (AIR 1955 SC 661) : Bengal Immunity Co. Ltd. vs. State of Bihar.
2. (AIR 1991 SC 704) : Yeddapati Venkateswaralu vs. State of Andhra Pradesh.
3. (AIR 1994 SC 152) : Sulochana Amma vs. Narayan Nair.
4. (AIR 1985 SC 582) : S. Sundaram Pillai vs. V.R. Pattabhiraman.
5. (AIR 1967 SC 389) : Bihta Co-operative Development & Cane Marketing Union Ltd. vs. Bank of Bihar.
6. 1989 (II) OLR 580 : Kalara Dei & Ors. vs. Sudam Charan Mohanty & Ors.
7. (1996) 3 SCC 545 : Valsamma Paul (Mrs.) vs. Cochin University & Ors.
8. (2012) 3 SCC 400 : Rameshbhai Dabhai Naika vs. State of Gujarat & Ors.
9. (AIR 1959 SC 1318) : V.V. Giri vs. Dippala Suri Dora.
10. (2010) 112 (2) Bom LR 762 : Rajendra Shrivastava vs. The State of Maharashtra.
11. (2018) 2 SCC 493 : Sunita Singh vs. State of U.P.
12. (2020) SCC Online SC 705 : L.R.Bothers Indo Flora Ltd. vs. Commissioner of Central Excise.
13. (1994) 4 SCC 602 : Hitendra Vishnu Thakur vs. State of Maharasthra.
14. (1992) 1 SCC 673 : Union of India vs. Zora Singh.
15. (AIR 1985 SC 582) : S. Sundarraman Pillai vs. V.R. Pattabiraman.
16. (AIR 1973 SC 1034) : Hiralal Ratanlal vs. State of U.P.

For Appellant : Mr. S.K. Dash

For Respondents : Mr. Abinash Nayak, Mr. Swapnil Roy.

JUDGMENT Date of Judgment : 08.05.2024

CHAKRADHARI SHARAN SINGH, C.J.

The present intra-Court appeal has been filed under Clause 10 of the Letters Patent Appeal of the High Court of Patna read with Clause 4 of the Orissa High Court Order, 1948 assailing an order dated 18.10.2000 passed by a learned Single Judge in a writ petition i.e. OJC No.4774 of 1999 whereby a learned Single Judge of this Court has quashed an order dated 30.01.1993 passed by the respondent No.4, whereby he had declared a sale deed dated 19.03.1964 as void with a direction for restoration of the land in favour of the appellant herein.

2. The foundational facts relevant for adjudication of the present case are not all in dispute. The appellant is a member of the Schedule Tribe (in short, 'ST'). Her father-in-law, also a member of the ST owned an immovable property *admeasuring* 6.47 acres (in short 'land in question'). The appellant had made an application before respondent No.4 with an allegation that the land in question was under unlawful occupation of respondent No.6 (not a member of ST). In a proceeding under the provisions of the Odisha Scheduled Areas Transfer of Immovable Property (by Schedule Tribes) Regulation, 1956 (hereinafter referred to as 'the Regulation') the respondent No. 6 denied the allegation with a plea that his father-in-law, a member

of ST, had purchased the land in the name of his daughter respondent No.7 who was married to him (respondent No.6) and requisite permission from the competent authority in that regard was obtained. He produced an attested copy of the permission order No.13434/79 issued in OSATTP Case No.37/1979 of 21.11.1979 in respect of Plot No.139 under Khata No.65/5 in village Similiguda admeasuring 2.79 acres. Respondent No.6 claimed himself to be a member of ST which was found by the respondent No.4 to be untrue. Respondent No.4 concluded, in his order dated 30.01.1993 that the permission order No.13434/79 issued in OSATTP Case No.37/1979 on 21.11.1979 was incompetent to validate the registered sale deed dated 19.03.1964. He also concluded that respondent No.7, in whose name the land in question was purchased, ceased to be a member of the ST for the purpose of Regulation 2 of the Regulation consequent upon her marriage to respondent No.6, not a member of ST. Respondent No.4 accordingly held that respondent No.6 had grabbed the land of a member of ST fraudulently taking advantage of simplicity, ignorance and illiteracy of the vendor. Accordingly, respondent No.4 had directed for restoration of the land in favour of the appellant after declaring the said registered sale deed dated 19.03.1964 executed in favour of respondent No.7 to be void. While directing correction of the records accordingly, respondent No.4 imposed penalty on respondent No.6 @ Rs.200/- *per acre* per year of unauthorized occupation.

3. Challenging the said order dated 30.01.1993, respondent Nos.1, 2 & 3 approached this Court by filing the aforesaid writ petition i.e., OJC No.4774 of 1999. By the impugned order dated 18.10.2000, the learned Single Judge allowed the writ petition setting aside the order passed by the respondent No.4, taking into account the admitted fact that respondent No.7 was admittedly a member of ST. As has been noticed above, the respondent No.4 had set aside the sale deed invoking Section 3(1) of the Regulation on the ground that respondent No.6 ceased to be a member of the ST after her marriage to respondent No.6 (since deceased). The learned Single Judge opined in the impugned order that merely by virtue of marriage to a non-member, a member of the ST does not cease to be a member of the ST and therefore, no permission was required for the transaction made in the year 1964. A submission was advanced before the learned Single Judge that the transaction was *Benami* inasmuch as the property was purchased by the father of respondent No.6 in the name of respondent No.7. The learned Single Judge found that father of respondent No.7, in any case, was a member of a ST.

4. Assailing the impugned order passed by the learned Single Judge, learned counsel appearing on behalf of the appellant has submitted that the status of respondent No.7 as ST, in whose name the property was purchased by the sale deed dated 19.03.1964, stood altered with her marriage to respondent No.6, not a member of ST. In support of his submission, he has heavily relied on the Explanation added to Section 3 of the Regulation introduced by the Odisha Scheduled Areas of Transfer of Immovable Property (By Scheduled Tribe) Amendment Regulation, 1976 (‘Amendment

Regulation, 1976' for short) which came into force with effect from 31.01.1977, which reads as under:

> *"**Explanation**- for the purposes of this sub-section, a transfer of immovable property in favour of a female member of a Scheduled Tribe who is married to a person who does not belong to any Scheduled Tribe, shall be deemed to be a transfer made in favour of a person not belonging to a Scheduled Tribe."*

He has argued that the said explanation being clarificatory in nature should be read as if it was there since very promulgation of the Regulation with effect from 04.10.1956.

5. Learned counsel for the appellant has relied on the following Supreme Court's decisions to contend that the explanation appended to the Regulation by way of subsequent insertion is not a substantive provision which is merely clarificatory in nature and, therefore, the explanation should be read as if it has existed from the very inception of the Regulation:-

> *(i)* ***Bengal Immunity Co. Ltd. v. State of Bihar (AIR 1955 SC 661);***
> *(ii)* ***Yeddapati Venkateswaralu v. State of Andhra Pradesh (AIR 1991 SC 704);***
> *(iii)* ***Sulochana Amma v. Narayan Nair, (AIR 1994 SC 152);*** *and*
> *(iv)* ***S. Sundaram Pillai v. V.R. Pattabhiraman, (AIR 1985 SC 582).***

6. Reliance has also been placed on the Supreme Court's decision in the case of ***Bihta Co-operative Development and Cane Marketing Union Ltd. v. Bank of Bihar (AIR 1967 SC 389)*** to submit that there could be more than one reason for a statutory explanation, namely, to make clear what seems to be obscure, or to make explicit that which is implicit, to render patent and obvious that which is latent.

7. He has also relied on a decision of this Court in the case of ***Kalara Dei and others v. Sudam Charan Mohanty and others***, reported in ***1989 (II) OLR 580*** wherein, while considering the challenge to a transaction made by a lady belonging to ST marrying a non-tribal Khandayat without necessary permission of the competent authority, underlying purpose behind the promulgation of regulation and subsequent insertion of the explanation, i.e., to provide protection against exploitation of ST persons has been explained.

8. We deem it apt to record at this juncture itself that this Court's decision in the case of ***Kalara Dei*** (*supra*) has no application in the present facts and circumstances of the case, which was rendered after coming into force of the Amendment Regulation, 1976 with effect form 31.01.1977. The decision rendered in the case of ***Kalara Dei*** (*supra*) is because of the said Explanation introduced in 1977.

9. The controversy involved in the present case poses the following two questions of seminal significance:-

> (i) Whether a woman, who by birth is a member of ST consequent upon her marriage to a man not belonging to ST, ceases to be a member of the ST?

> (ii) Whether the Explanation inserted by way of amendment under Regulation 3 of the Regulation can be said to be clarificatory in nature, and therefore, it should have retrospective effect, despite clear stipulation in the Amendment Regulation, 1976 that it shall come into force at once?

10. Mr. S.K. Dash, learned counsel appearing on behalf of the appellant has attempted to convince this Court that a woman, on marriage becomes a member of the family to which her husband belongs to and she gets herself transplanted in that family. He submits that respondent No.7, a member of ST after having married to respondent No.6 lost her status as a ST, and therefore, the sale deed executed by the appellant in her favour was a forged document by operation of Regulation 3 of the Regulation.

11. In our opinion, this question is no more res integra in view of series of decisions of the Supreme Court laying down the law that caste is determined by birth and cannot be changed only by marriage. It will be useful to refer to the decision in the case of ***Valsamma Paul (Mrs.) vs. Cochin University and others*** reported in ***(1996) 3 SCC 545***, to begin with.

12. In the said case, Valsamma, a Syrian Catholic Woman (a forward class) had married a Latin Catholic man (a backward class). A question fell for consideration before the Supreme Court as to whether by virtue of her marriage to a person belonging to a backward class; she could claim the benefit of reservation in appointment. The Supreme Court answered the said question in negative and held in paragraph 34 as under: -

> "34. *In Murlidhar Dayandeo Kesekar v. Vishwanath Pandu Barde and R. Chandevarappa v. State of Karnataka* this Court had held that economic empowerment is a fundamental right to the poor and the State is enjoined under Articles 15(3), 46 and 39 to provide them opportunities. Thus, education, employment and economic empowerment are some of the programmes the State has evolved and also provided reservation in admission into educational institutions, or in case of other economic benefits under Articles 15(4) and 46, or in appointment to an office or a post under the State under Article 16(4). *Therefore, when a member is transplanted into the Dalits, Tribes and OBCs, he/she must of necessity also have had undergone the same handicaps, and must have been subjected to the same disabilities, disadvantages, indignities or sufferings so as to entitle the candidate to avail the facility of reservation. A candidate who had the advantageous start in life being born in Forward Caste and had march of advantageous life but is transplanted in Backward Caste by adoption or marriage or conversion, does not become eligible to the benefit of reservation either under Article 15(4) or 16(4), as the case may be. Acquisition of the status of Scheduled Caste etc. by voluntary mobility into these categories would play fraud on the Constitution, and would frustrate the benign constitutional policy under Articles 15(4) and 16(4) of the Constitution."* (Emphasis added)

It may be noted at this juncture that in a subsequent decision in the case of ***Rameshbhai Dabhai Naika v. State of Gujarat and Others*** reported in ***(2012) 3 SCC 400*** the Supreme Court explained the observations made in paragraph 31 of ***Valsamma*** (*supra*) which reads as under: -

> "31. It is well-settled law from *Bhoobun Moyee Debia v. Ramkishore Acharj Chowdhary* that judiciary recognised a century and half ago that a husband and wife are one under Hindu law, and so long as the wife survives, she is half of the husband. She is 'Sapinda' of her husband as held in *Lulloobhoy Bappoobhoy Cassidass Moolchund v. Cassibai*. It would, therefore, be clear that be it either under the Canon law or the Hindu law, on marriage wife becomes an integral part of husband's marital home entitled to equal status of husband as a member of the family. Therefore, the lady, on marriage, becomes a member of the family and thereby she becomes a member of the caste to which she moved. The caste rigidity breaks down and would stand no impediment to her becoming a member of the family to which the husband belongs and she gets herself transplanted."

In case of ***Rameshbhai Dabhai Naika*** (*supra*), the Supreme Court ruled that ratio of ***Valasamma's*** decision lies in paragraph 34 of the judgment and what was said earlier in paragraph 31 of the judgment, was in facts of that case and it would be an error to take it as the ratio of the decision. The Supreme Court added that it would be wrong to take paragraph 31 of the ***Valsamma*** (*supra*) as a premise for drawing the corollary or the direction that the child born from an inter-caste marriage or marriage between a tribal and a non-tribal would invariably take his caste from his father.

13. The Supreme Court further held in the case of ***Rameshbhai Dabhai Naika (supra)*** that the view expressed in ***Valsamma Paul (Mrs.)*** (*supra*) that in an inter caste marriage between a tribal and a non-tribal, the woman gets transplanted into the family of her husband and takes her husband was clearly in not affirming with the view expressed by the Constitution Bench of the Court in ***V.V. Giri vs. Dippala Suri Dora (AIR 1959 SC 1318)***.

14. It is noteworthy that in the case of ***V.V. Giri*** (*supra*) the election of an returned candidate was challenged on the ground that he had ceased to be a member of ST and had become a *Kshatriya* which was deemed to be proved by the leading evidence to show that he had adopted customs and rituals of *Kshatriya* caste and marriages in his family were celebrated as they would be amongst the *Kshatriya*. Rejecting the said contention, a three Judge Bench of the Supreme Court held in paragraph 23 as under: -

> "23.…In dealing with this contention it would be essential to bear in mind the broad and recognized features of the hierarchical social structure prevailing amongst the Hindus. It is not necessary for our present purpose to trace the origin and growth of the caste system amongst the Hindus. It would be enough to state that whatever may have been the origin of Hindu castes and tribes in ancient times, **gradually castes came to be based on birth alone. It is well known that a person who belongs by birth to a depressed caste or tribe would find it very difficult, if not impossible, to attain the status of a higher caste amongst the Hindus by virtue of his volition, education, culture and status. The history of social reform for the last century and more has shown how difficult it is to break or even to relax the rigour of the inflexible and exclusive character of the caste system**. It is to be hoped that this position will change, and in course of time the cherished ideal of casteless society truly based on social equality will be attained under the powerful impact of the doctrine of social justice and

> equality proclaimed by the Constitution and sought to be implemented by the relevant statutes and as a result of the spread of secular education and the growth of a rational outlook and of proper sense of social values; but at present it would be unrealistic and utopian to ignore the difficulties which a member of the depressed tribe or caste has to face in claiming a higher status amongst his co-religionists. (Emphasis added)

15. It is also noteworthy at this juncture that the following question had come up for consideration on reference before a Full Bench of Bombay High Court in case of ***Rajendra Shrivastava vs. The State of Maharashtra*** reported in ***(2010) 112 (2) Bom LR 762***:-

> "If a woman, who by birth belongs to a scheduled caste or a scheduled tribe marries to a man belonging to a forward caste, whether on marriage she ceases to belong to the schedule caste or the scheduled tribe?"

16. After having examined ***Valsamma Paul (Mrs.)*** *(supra) and* ***V.V. Giri*** *(supra),* the Full Bench of Bombay High Court in ***Rajendra Shrivastava*** *(supra)* opined that the observations made in paragraph 31 of the decision in ***Valsamma Paul (Mrs.)*** *(supra)* could not be read as the ratio laying down that on marriage, a wife is automatically transplanted into the caste of her husband. The Bombay High Court held in the case of ***Rajendra Shrivastava*** *(supra)* that when a woman born in SC/ST and marries to a person belonging to a forward caste, her caste by birth does not change by virtue of marriage. A person born as a member of SC/ST has to suffer from disadvantages, disabilities and indignities only by virtue of belonging to the particular caste which he or she acquires involuntarily on birth. The suffering of such a person by virtue of caste is not wiped out by a marriage with the person belonging to a forward caste. The label attached to a person born into a scheduled caste or a scheduled tribe continues notwithstanding the marriage.

17. The opinion of the Full Bench decision of the Bombay High Court in the case of ***Rajendra Shrivastava*** *(supra)* has been fully endorsed by the Supreme Court in the case of ***Rameshbhai Dabhai Naika*** *(supra)*, as the only correct view. After having said so, the Supreme Court leaving no scope of ambiguity held in paragraph 47 as under: -

> "47. In light of the discussion made above it is clear that the view expressed in Paragraph 31 of the Valsamma judgment that in an inter-caste marriage or a marriage between a tribal and a non-tribal the woman must in all cases take her caste from the husband, as a rule of constitutional law is a proposition, the correctness of which is not free from doubt. And in any case, it is not the ratio of the Valsamma decision and does not make a binding precedent."

Further, in the case of ***Sunita Singh vs. State of U.P.*** reported in ***(2018) 2 SCC 493***, the Supreme Court has reiterated the view that the caste is determined by birth which cannot be changed by way of marriage only.

18. In view of the above discussion, after having noticed some of the Supreme Court's decision, we come to a definite conclusion, while answering question No.1

that if a woman belongs to ST by birth and marries to a man not belonging to ST does not cease to be a member of ST.

19. Coming to the question no.(ii) as to whether the Explanation introduced by Amendment Regulation, 1976 can have retrospective effect, the same being clarificatory in nature as argued by Mr. S.K. Dash, learned counsel for the appellant, we deem it apt to delve into the consequence of incorporation of the said Explanation by way of amendment. Regulation 3 (1) of the Regulation is a non-obstante clause and provides that notwithstanding anything contained in any law for the time being in force, any transfer of immovable property situated within a scheduled area, by a member of the ST shall be absolutely null and void and of no force or effect whatsoever "unless made in favour of another member of ST". The said regulation, thus, proscribed transfer of immovable property by a member of ST to a person, not a member of an ST. To put it differently, the said provision permitted, transfer of an immovable property by a member of ST in favour of another member of ST, for which no previous consent in writing of the competent authority was required.

20. While answering question No.(i) as above, we have reached a definite conclusion that the status of a woman as a member of the ST, does not change consequent upon her marriage to a person, who is not a member of ST. For the first time, with the insertion of Explanation in Section 3, the regulation provides that transfer of immovable property in favour of a female member of ST, who marries to a person, who does not belong to any ST, shall be deemed to be transferred made in favour of a person not belonging to ST. Apparently, thus, by a deeming fiction, transfer of an immovable property by a member of ST in favour of a person married to someone who does not belong to ST, thus, came to be prohibited by inserting Explanation by way of amendment though Amendment Regulation, 1976 which came into force with effect from 31.01.1977 which is the date of its publication in the official gazette.

21. It is trite that unless contrary intention appears, no statute can be construed to have a retrospective operation. In the present case, we find that no such intention appears on careful reading of the Amendment Regulation, 1976. It rather mentions that the regulation shall come into force at once i.e. from the date when it was notified in the official gazette. Had it been the legislative intent to give a retrospective effect, the same would have been mentioned in the Amendment Regulation, 1976.

22. Further, if the Explanation inserted by way of Amendment Regulation, 1976 is to be read retrospectively right from the date of promulgation of the Regulation, 1956, it shall have disastrous consequences of all the such transactions right from 1956 till 1976 becoming null and void which were otherwise valid. We are, however, of the view that the Explanation was inserted with a purpose i.e. to remedy a mischief in the nature of acts of the persons to frustrate the legislative intent

enshrined in Regulation 3 of the Regulation, i.e., acquisition of immovable property by persons, who are not members of the ST, in the name of members of ST, in the garb of marriage of such member of ST to a non-member. The Explanation in question puts a new bar on transfer of immovable property by a member of ST consequent upon his/her marriage to a person, who is not a member of ST.

23. We reiterate, with reference to the law laid down by the Supreme Court in the case of ***L.R. Bothers Indo Flora Ltd. Vs. Commissioner of Central Excise*** reported in ***(2020) SCC Online SC 705***; ***Hitendra Vishnu Thakur vs. State of Maharasthra*** reported in ***(1994) 4 SCC 602*** and ***Union of India Vs. Zora Singh*** reported in ***(1992) 1 SCC 673*** that all amendments are deemed to apply prospectively unless expressly specified to apply retrospectively or intended to have been done so by the legislature.

24. In the case of ***S. Sundarraman Pillai vs. V.R. Pattabiraman (AIR 1985 SC 582)***, the Supreme Court has explained the object of an Explanation as under:

> "Thus, from a conspectus of the authorities referred to above, it is manifest that the object of an Explanation to a statutory provision is-
>
> (a) to explain the meaning and intendment of the Act itself,
>
> (b) where there is any obscurity or vagueness in the main enactment, to clarify the same so a- to make it consistent with the dominant object which it seems to subserve,
>
> (c) to provide an additional support to the dominant object of the Act in order to make it meaningful and purposeful,
>
> (d) an Explanation cannot in any way interfere with or change the enactment or any part thereof but where some gap is left which is relevant for the purpose of the Explanation, in order to suppress the mischief and advance the object of the Act it can help or assist the Court in interpreting the true purport and intendment of the enactment, and
>
> **(e) it cannot, however, take away a statutory right with which any person under a statute has been clothed or set at naught the working of an Act by becoming an hindrance in the interpretation of the same."(Highlighted for emphasis).**
>
> Merely because of a particular provision in a statute is labelled as an Explanation, it does not mean that it is inserted merely with an view to explain the meaning of words contained in Section of which it forms a part. True scope and effect of an Explanation can only be judged by its express language and not merely by label given to it. (See ***Vrajalal Manilal and Co. v. State of MP (1986) 63 STC 1 (SC) : AIR 1986 SC 1085***.

25. In the case of ***Hiralal Ratanlal vs. State of U.P. (AIR 1973 SC 1034)***, the Supreme Court has observed that if on a true reading of an Explanation, it appears that it has widened the scope of main section, effect should be given to legislative intent, notwithstanding the fact that the legislature named that provision as an Explanation.

26. We may not, at this juncture, lose sight of the fact that by operation of the Explanation, the transfer of immovable property in favour of a female member of ST, who is married to a person who does not belong to any ST has been treated as transfer made in favour of a person not belonging to ST for the purpose of regulation

3 by a deeming fiction, which is suggestive of the fact that such transfer of immovable property which did not fall earlier within the mischief of Regulation 3 of the Regulations, by the said deeming provision have been brought within the purview of the said regulation.

27. In view of the discussions noted above, we conclude while answering question No.(ii) that the Explanation under Regulation 3 of the Regulations inserted by the Amendment Regulation, 1976 is not clarificatory in nature rather it introduces a substantive provision prohibiting transfer of an immovable property by a member of ST to a female member of ST after her marriage to a person, who is not a member of ST. In the absence of any legislative intent to apply the said Explanation retrospectively, the said regulation cannot be given retrospective effect. We hold that the said Explanation under Regulation 3 (1) of the Regulation came into force with effect from 31.01.1977 i.e. the date of publication of notification in the official gazette.

28. After having answered two questions noted above, we are of the view that the opinion recorded by the learned Single Judge in the impugned order that merely by virtue of marriage, a member of ST does not cease to be a member of ST, is based on sound principles of law. That being the position, no permission was required for the transactions which had taken place in 1964, stipulated under Regulation 3(1) of the Regulation by a competent authority.

29. We, accordingly, do not find any merit in the present intra-Court appeal, which is dismissed. There shall be no order as to costs.

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2024 (II) ILR-CUT-16

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

W.A. NO. 820 OF 2024

Dr. MINARANI BHUYAN ……Appellant

-V-

STATE OF ODISHA & ORS. ……Respondents

SOCIETIES REGISTRATION ACT, 1860 – Whether the Registrar or Additional Registrar have the jurisdiction under the Act to approve a managing committee of a society? – Held, No – The changes if any made in the managing committee of the society are to be intimated to the Registrar as stipulated U/ss. 4 & 4-A of the Act.

Case Law Relied on and Referred to :-

1. 2006 (Supp.II) OLR 529 : Pravat Ku.Manadhata v. Addl. District Magistrate, Khurda & Ors.

For Appellant : Mr. S.N. Biswal

For Respondents : Mr. D.K. Mohanty, A.G.A (State), Ms. Deepali Mohapatra.

ORDER Date of Order : 09.05.2024

BY THE BENCH

This matter is taken up through Hybrid mode.

2. We have heard Mr. S.N.Biswal, learned counsel appearing for the appellant, Mr. D.K.Mohanty, learned Additional Government Advocate for the State-respondents and Ms. Deepali Mohapatra, learned counsel for respondent No.5.

3. The appellant in the present intra-Court appeal has put to challenge an order dated 28.03.2024 passed by a learned Single Judge of this Court in W.P.(C) No.37883 of 2023. It appears from the records and the impugned order that an order dated 12.07.2023 passed by the Additional District Magistrate-cum-Additional Registrar of Societies, within the meaning of Section 1 of the Societies Registration Act, 1860 (in short 'Act of 1860') in Misc. Case No.1 of 2022 was under challenge in the writ proceeding.

4. The dispute related to the Management of Lutheran Mahila Samiti, admittedly a Society, registered under the Societies Registration Act. The order passed by respondent No.3-Addl. District Magistrate, Kendrapara was challenged on the ground that respondent No.3 had wrongly opined that he did not have the jurisdiction for approval of the Managing Committee of the Society. Learned Single Judge after having heard the parties and examined the pleadings on record has held in paragraph 5 as under:-

> "5. Since the proceeding in Misc. Case No.01 of 2022 was disposed of with an order under Annexure-10 and with a direction that opposite party No.3 lacked jurisdiction for approval of the Managing Committee of the petitioner which has been clarified by the State in its counter affidavit, the subject matter in dispute needs a fresh adjudication by opposite party No.3. In other words, since opposite party No.3 being Additional Registrar of the Societies, in view of the reply of the State with the counter affidavit on record that he has jurisdiction instead, the Court is of the conclusion that it should be looked into with an order on merit with the participation of both the sides as the same would serve the purpose and meet the ends of justice."

5. After having held so, learned Single Judge, upon setting aside the said order dated 12.07.2023 has directed the opposite party/respondent No.3 to consider the matter after providing an opportunity of hearing to the petitioner of the said case as well as the intervener.

6. Learned counsel appearing on behalf of the appellant has submitted that the Act of 1860 does not contemplate approval of a Managing Committee by any authority under the Act of 1860. He has submitted that specific stand to this effect was also taken in the counter affidavit filed on behalf respondent No.3 in the writ proceeding. He has argued that the Act of 1860 provides remedy for disputes under Section 6 of the Act of 1860 and Section 11-A thereof, in case of any dispute as regards the affairs and management of the Society. He has further argued that Section 4 or Section 4-A of the Act of 1860 does not give any power to the Registrar

or the Additional Registrars to approve a Managing Committee. The said provisions require an intimation to the Registrar/Asst. Registrar of the Society in case of change in personnel or alteration made in the rules and regulations of the Society.

7. Ms. Deepali Mohapatra, learned counsel appearing on behalf of respondent No.5, who was the writ petitioner has relied upon a Division Bench decision of this Court in the case of ***Pravat Kumar Manadhata v. Addl. District Magistrate, Khurda and Others*** reported in ***2006 (Supp.II) OLR 529*** to submit that the Addl. Registrar has such powers. She has referred to paragraphs 8 and 9 of the said decision, which read thus:

> "8. From the above provisions as amended by the State, we find that it is clearly provided that changes in the list mentioned in Section 4 which relates to the members of the committee of a Society are to be intimated to the Registrar of the Society within two months of such changes. Thus, in the present case, since there was a change in the Executive Committee of the Society, law required that such change was to be filed before the Registrar of Societies within two months thereof. Therefore, no fault can be found with the opp.parties in filing the list of persons elected to form a new Executive Committee, bringing a change to the previous committee.
>
> 9. It is also brought to the notice of the Court that by the Societies Registration (Orissa Amendment) Act, 1979, an amendment was brought to Section 1 of the Act and a provision was made for the State Government to appoint one or more Additional Registrars by issuing notification therefore to exercise jurisdiction over an area as may be assigned to them by the State Government and such Additional Registrar, subject to the approval of the Registrar of Societies, shall exercise such of the powers and perform such of the functions of the Registrar of the Societies as the State Government may authorize in that behalf. By notification dated 1.9.1981 made by the Government of Orissa in its Commerce and Transport Department, the Government appointed the Addl. District Magistrate in each district of the State as Additional Registrars of the Societies and authorized them to exercise the powers and perform all the functions of the Registrar of Societies within the limits of their respective districts subject to control of the Registrar of Societies."

8. Mr. D.K.Mohanty, learned Additional Government Advocate appearing on behalf of the State-respondents has also submitted that the Act of 1860 does not make any provision for approval of the Managing Committee of a Society under the Act of 1860.

9. Upon careful examination of the provisions of the Act of 1860 we find force in the submission advanced on behalf of the appellant no provision contemplates approval by the Registrar/Addl. Registrars of the constitution of a Managing Committee or any changes made therein. The subsequent changes made, if any, are to be intimated to the Registrar under the Act of 1860 as stipulated under Sections 4 and 4-A of the Act of 1860.

10. It has emerged, based on the submissions advanced on behalf of the parties that there is some dispute between two groups of the members of the society. Section 11-A of the Act of 1860 as inserted by Orissa Act 10 of 2021 lays down the procedure for resolution of such disputes.

11. The Division Bench decision in the case of ***Pravat Kumar Manadhata v. Addl. District Magistrate, Khurda and Others*** cited by learned counsel for respondent No.5 has no application in relation to the present controversy. The said decision does not lay down a law that the Registrar or the Additional Registrar shall be required to approve the constitution of a Managing Committee of a society. The said decision, after having taken note of the Societies Registration (Orissa Amendment) Act 1979 and the notification issued on 01.09.1981 has held that the Additional Registrar of the Societies is authorized to exercise all powers and perform all functions of the Registrar of the Societies within the limits of their respective jurisdiction subject to the control of the Registrar of the Societies.

12. We are, accordingly, of the view that since the Additional Registrar does not have the jurisdiction under the Act of 1860 to approve a Managing Committee, such power could not be conferred upon him, by an order passed in exercise of power under Article 226 of the Constitution.

13. Situated thus, the impugned order dated 28.03.2024 passed by a learned Single Judge of this Court in W.P.(C) No.37883 of 2023requires interference. The said order is, accordingly, set aside.

14. This appeal is allowed. The writ petition i.e. W.P.(C) No.37883 stands dismissed. It goes without saying that the parties shall be at liberty to invoke dispute resolution provision under the Societies Registration Act, 1860, in case any dispute exists, relating to affairs of the society.

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2024 (II) ILR-CUT-19

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

W.A. NO. 2265 OF 2023

PURUSOTTAM SWAIN ……Appellant

-V-

STATE OF ODISHA (S.& M.E.DEPT) & ORS. ……Respondents

(A) ORISSA HIGH COURT ORDER, 1948 – Article 4 r/w Clause 10 of the letter patent constituting the High Court of Judicature of Patna – Scope of interference by the Appellate Court against a view taken in exercise of discretion by the learned single judge – Explained.

(B) PROMISSORY ESTOPPEL – The services of the appellant in the post of peon were approved on 28.03.2009 wrongly, which was modified by the inspector of school who is the appropriate authority – Whether principle of promissory estoppel would be attracted in the present case? – Held, No – If any mistake is committed by an authority and on its detection, the same was rectified by modifying the order, no infirmity can be imputed.

Case Laws Relied on and Referred to :-

1. (1985) 4 SCC 369 : Union of India Vrs. Godfrey Phillips India Ltd.
2. (2003) 10 SCC 411 = AIR 2003 SC 1009 = 2004 (I) OLR (SC) 517 : State of Odisha Vrs. Rajendra Kumar Das.
3. 1999 (II) OLR 176 : Dipak Kumar Sahoo Vrs. State of Odisha.
4. (1994) 1 SCR 316 : Ram Janam Singh Vrs. State of Uttar Pradesh.
5. (2007) 4 SCR 1: Andhra Pradesh Cooperative Oil Seeds Growers Federation Ltd. Vrs. D. Achyuta Rao.
6. (1993) Supp.(2) SCR 219 : Bhey Ram Vrs. The Haryana State Electricity Board.
7. (1990) Supp.(1) SCC 727=AIRONLINE 1990SC156 : Wander Ltd. Vrs. Antox India Pvt. Ltd.

For Appellant : Mr. Prasanta Kumar Jena & Ms. Pratima Das.
For Respondents : Mr. Manoj Kumar Khuntia, A.G.A.

JUDGMENT Date of Hearing : 02.05.2024 : Date of Judgment : 15.05.2024

M.S. RAMAN, J.

THE CHALLENGE:

Challenge has been laid to Judgment dated 09.08.2023 rendered by the learned Single Judge in the writ petition bearing W.P.(C) No.29187 of 2019 and W.P.(C) No.18128 of 2009 in the matters of applications under Article 226/227 of the Constitution of India, the petitioner therein, being aggrieved, preferred the intra-Court appeals beseeching to invoke provisions of Article 4 of the Odisha High Court Order, 1948 read with Clause 10 of the Letters Patent constituting the High Court of Judicature at Patna and Rule 6 of Chapter-III and Rule 2 of Chapter-VIII of the Rules of the High Court of Orissa, 1948.

2. This matter was on Board on 02.05.2024 under the heading "Fresh Admission". Learned Additional Government Advocate has raised objection against entertainment of single writ appeal against common judgment dated 09.08.2023 passed in two writ petitions and submitted that there is little scope for interference with the decision of the learned Single Judge in the writ appeal filed by the appellant-writ petitioner.

3. The facts culled out from the pleadings reveal that in pursuance of Resolution dated 10.01.2001 of the Managing Committee of Nanda Kishore High School, Tilada, Sarugaon in the district of Balasore, the appellant joined on 18.01.2001 against the second post of peon in the said School, which got approved by the Inspector of Schools, Balasore *vide* Office Order No.2376, dated 28.03.2009 with effect from 01.04.2008.

3.1**.** However, pursuant to the Odisha Education (Payment of Grant-in-Aid to High Schools, Upper Primary Schools, etc.) Amendment Order, 2008 (for brevity, "Amendment Order, 2008") *vide* Order No.23611-IX-SME (Sch)-35/2008-SME, dated 08.12.2008 and with reference to Letter No.63144, dated 18.12.2008 of the Director, Secondary Education, Odisha, the Inspector of Schools by way of Order No.9008, dated 13.10.2009 modified the approval. Consequent thereof, the position of Gayadhar Nayak-respondent No.6 was approved as Science Attendant and the

post of appellant-Purusottam Swain, was approved as Night Watchman-*cum*-Sweeper with effect from 01.04.2008.

3.2. The appellant assailed such modified Order of approval before this Court by way of a writ application, which was registered as W.P.(C) No.18128 of 2009, which came to be dismissed for non-prosecution on 11.07.2017, and subsequently, stood restored *vide* Order dated 10.01.2019 passed in CMAPL No.344 of 2018.

3.3. As it revealed from the record, an FIR was lodged against the appellant by the Headmaster of the School on 26.09.2018 and on 28.09.2018, a show-cause notice was issued to furnish reply as to why action would not be taken against him for disobedience of the direction to work as Night Watchman-*cum*-Sweeper in the School. Consequently, Resolution has been passed by the Managing Committee on 10.10.2018 to suspend the appellant, which was placed before the District Education Officer, Balasore for approval.

3.4. It is stated by the appellant that on the last date fixed for filing said show cause reply, he was arrested on 05.10.2018 and got released on bail on 18.10.2018. Thereafter, he could submit his reply on 20.10.2018. Nonetheless, the District Education Officer, Balasore approved the Order of suspension on 28.11.2018.

3.5. Challenging the Order of suspension, the appellant approached this Court in W.P.(C) No.122 of 2019, which was disposed of by an Order dated 07.03.2019 with a direction to consider the representation. The District Education Officer having considered such representation, rejected it by Order dated 20.09.2019.

3.6. The District Education Officer taking note of modified approval Order held in the said Office Order dated 20.09.2019 that:

> *"Perused the application of the petitioner under Annexure-II, documents/records available in the files in Resolutions submitted by the Managing Committee of N.K. High School, Tilada.*
>
> *Sri Purusottam Swain was approved as Peon of the N.K. High School, Tilada, vide Inspectorate Order No.2376, dated 28.03.2009 and subsequently it was modified and approved as Night Watchman-cum-Sweeper with effect from 01.04.2008 vide this Office Order No.9008, dated 13.10.2019. On perusal of records/documents available in file and reports of the Headmaster-cum-Secretary of Nanda Kishore High School, Tilada, it is revealed that Sri Swain is the junior most of the peons considering the date of joining and approval of Sri Swain as 3rd peon (Night Watchman-cum-Sweeper) is justified and genuine. The claim of the petitioner to act as Peon-II (Science Attendant) is devoid of merit and liable to be rejected. ***"*

3.7. After recording such fact emanating from record/documents, the Inspector of Schools in the aforesaid Order directed for reinstatement of the appellant in service in the said School with immediate effect by vacating order of suspension. Thereupon, the Headmaster of the School on 01.11.2019 issued a Letter addressing the appellant by instructing him to join the School against 3rd post of peon (Night Watchman-*cum*-Sweeper). Said Order of the Headmaster has been the subject-matter of challenge in W.P.(C) No.29187 of 2019.

4. It is the stand of the respondents in the counter affidavit filed by the District Education Officer that the appellant had questioned the propriety of Order dated 13.10.2009 of the District Education Officer before this Court in W.P.(C) No.18128 of 2009, which was dismissed for non-prosecution *vide* Order dated 11.07.2017. However, in compliance of direction issued *vide* Order dated 07.03.2019 in W.P.(C) No.122 of 2019 to consider the representation, the said Officer had disposed of the same by directing reinstatement of the appellant in 3rd post of peon as he was found to be junior most in the category of peon.

4.1**.** In the counter affidavit the District Education Officer clarified that the School had three peons who were duly appointed by way of Resolution of the Managing Committee. Sri Trilochan Senapati being appointed by Resolution dated 16.03.1987, joined in service against 1st post of peon on 21.03.1987; whereas Sri Gayadhar Nayak being appointed by Resolution dated 11.04.1988, joined in service as peon (Watchman-*cum*-Sweeper). Though his service was approved as such initially, the same got subsequently modified by Order dated 13.10.2009. Later to joining of said Gayadhar Nayak, the instant appellant joined in service on 18.01.2001 pursuant to Resolution of the Managing Committee dated 10.01.2001. His service was approved by way of modification in said Order dated 13.10.2009 to perform as Night Watchman-*cum*-Sweeper.

4.2**.** The action has been stated to be justified in the counter affidavit that the Headmaster of the School, being the Secretary of the Managing Committee, is authorised to carry out instructions imparted and decisions taken by the Managing Committee and the higher authorities.

4.3**.** Perusal of the impugned Judgment of the learned Single Judge transpires that an affidavit sworn to by the District Education Officer was filed before the writ Court affirming specifically therein that the appellant did not join the School despite direction of the Headmaster of the School.

5. With the aforesaid backdrop of facts, this Court took up the writ appeal for entertainment. Heard Sri Prasanta Kumar Jena, learned Advocate for the appellant and Sri Manoj Kumar Khuntia, learned Additional Government Advocate.

6. Sri Prasanta Kumar Jena learned Advocate submitted that the learned Single Judge fell in grave error in considering the legality of modification of order of approval as the same is impermissible under law. Advancing his argument further, he submitted that there is no principle envisaged that the Science Attendant (second post of peon) *vis-à-vis* the Watchman-*cum*-Sweeper (third post of peon) shall be assigned in the order of seniority. It is strenuously contended by referring to Office Order No.2376 dated 28.03.2009 of the Inspector of Schools, Balasore that since the services of the present appellant had already been approved with effect from 01.04.2008 in the post of 'Peon' in Nanda Kishore High School, Tilada, there was no occasion for modification of such approval by way of issue of further Order dated 13.10.2009.

6.1. Sri Prasanta Kumar Jena, learned counsel for the appellant vehemently urged that the respondent No.6 was appointed against fourth post of Peon, which is meant for "Night Watchman-*cum*-Sweeper" by virtue of Resolution No.13 dated 11.04.1988 of the Managing Committee of the School, which is apparent from Annexure-5 enclosed to the writ appeal. Having his service being approved by the District Education Officer, Balasore, the same could not have been allowed to be modified with effect from 01.04.2008 on the specious plea of the change contained in the Amendment Order, 2008.

6.2. Winding up his argument, the learned counsel for the appellant urged that in the garb of rectification, the approval already accorded to the appointment of the appellant in the second post of Peon (Science Attendant), the challenge being made against the Order dated 13.10.2009 of the Inspector of Schools, does deserve to be interfered with and as a consequence thereof, the respondents-authorities are required to be directed to accept the joining of the appellant in the post of second post of Peon (Science Attendant).

7. Responding to the averments made and contentions put forth in the writ appeal, Mr. Manoj Kumar Khuntia, learned Additional Government Advocate appearing for the Respondents-functionaries of the State of Odisha, vehemently opposed admission of the writ appeal and pleaded to dismiss the same *in limine*, contending that the writ appeal, being devoid of merit, needs no consideration.

7.1. He submitted that appropriate reasoned order has been placed in the impugned Judgment rendered by the learned Single Judge, which does not warrant any indulgence. In view of the ratio laid down in *Union of India Vrs. Godfrey Phillips India Ltd., (1985) 4 SCC 369*, as referred to by the learned Single Judge, no promissory estoppel can be attracted to the public authority in case any error in approval occurred. When it is admitted fact and not disputed by the appellant that Gayadhar Nayak (respondent No.6) was appointed by issue of Letter dated 12.04.1988 by the Secretary of Nanda Kishore High School, Tilada against fourth post of Peon pursuant to Resolution dated 11.04.1988 of the Managing Committee of the School, he was senior to the appellant. Therefore, Mr. Manoj Kumar Khuntia, learned Additional Government Advocate urged that inadvertent mistake on the part of the Inspector of Schools got rectified by Order dated 13.10.2009, keeping in mind that the senior employee would be adjusted against second post of peon and next below employee would get the third position.

7.2. Under the aforesaid premises, it is submitted by the learned Additional Government Advocate that the learned Single Judge having correctly appreciated facts emanating from material available on record and held that legality of Amendment Order(s), 2008 being not questioned, the action of the Headmaster instructing the appellant to join in the 3rd post of peon, i.e., Watchman-*cum*-Sweeper does not deserve interference.

8. Considered the rival contentions, heard arguments of counsel for respective parties and perused the records.

9. The yardstick has been specified for entitlement of peons in the Circulars of the year 1981 and 1992 of the Government of Odisha in Education and Youth Services Department and the nature and the number of peons are prescribed in the Amendment Order, 2008 made to the Odisha Education (Payment of Grant-in-Aid to High Schools, Upper Primary Schools, *etc.*) Order, 2004, issued in exercise of powers conferred by sub-section (4) of Section 7C of the Odisha Education Act, 1969.

9.1**.** Circular bearing No.28465/EYS, dated 8th July, 1981, issued by the Government of Odisha in Education and Youth Services, so far as relevant for the present purpose, is reproduced hereunder:

> *"I am directed to say that the question of fixation of standard staff for the non-Government Secondary Schools has been felt necessary by the Government due to introduction of the revised syllabus under 10 years schools pattern. After careful consideration of various aspects, Government has now been pleased to decide that the standard staffs both teaching and non-teaching for different categories of non-Government Secondary Schools shall be follows:*
>
> *A. For the Schools having no additional sections:*

	Category of staff(1)	*3-Class(2)*	*5-Class(3)*	*7-Class(4)*
1 to 8	***			
9.	*Peons—*			
	(i) Office peon	*1*	*1*	*1*
	(ii) Science Attendant	*1*	*1*	*1*
	(iii) Night Watcher-cum-Sweeper	*1*	*1*	*1*

> *Note.—*
> ***
>
> *(C) Additional post of Clerks/Peons.—*
>
> *(i) Where the roll strength of the school exceeds 1,000 or more one post of U.D.C. would be admissible in addition to the existing post of L.D.C.*
> *(ii) Where the roll strength of the school exceeds 100 one post of Daftary is admissible.*
> *(iii) For the schools running in shift system for shortage of accommodation one additional post of peon is admissible.*
>
> *The above yardstick will come into force with effect from 1st July, 1981. ***"*

9.2**.** Aforesaid Circular dated 8th July, 1981 has been modified by way of issue of Circular bearing No. 15500-SVIIEP-50/91/E, dated 27th March, 1992, with respect to the post of "Peon" and "Daftary" to the following extent:

> *"I am directed to say that the question of fixation of revised yardstick for appointment of Class IV employees in Non-Government Secondary Schools shall be as follows:*

	Category of staff(1)	*3-Class(2)*	*5-Class(3)*	*7-Class(4)*
(i)	*Office Peon*	*1*	*1*	*1*
(ii)	*Science Attendant*	*1*	*1*	*1*
(iii)	*Night Watcher-cum-Sweeper*	*1*	*1*	*1*

> *Where the roll strength of a 3-class High School is 500 (five hundred) or more one post of Daftary is admissible.*
>
> *For the schools running in shift system for shortage of accommodation one additional post of peon is admissible.*
>
> *The above yardstick will come into force with effect from 01.01.1992 and Government order referred to above stands modified to the extent indicated above."*

9.3. As is apparent from the Amendment Order, 2008 Office Peon, Science Attendant, Night Watchman-cum-Sweeper come under the category "Peon". It transpires from one of the grounds agitated by the learned counsel for the appellant that the respondent No.6 being appointed against the "4th peon post of Night Watchman-*cum*-Sweeper and being approved by the Inspector of Schools, such position could not be changed after approval of the appellant in the post of 'peon' by virtue of Office Order dated 28.03.2009 and was assigned to work as "Science Attendant". Close reading of said Office Order dated 28.03.2009 *vide* Annexure-4 to the writ appeal indicates that "the services of Sri Purusottam Swain (appellant), Peon, Nanda Kishore High School, Tilada" has been approved with effect from 01.04.2008. There is no indication of approval being accorded in the post of "Peon" to work as "Science Attendant". The Amendment Order, 2008 clearly specifies that 3 peons in the order of Office Peon, Science Attendant and Watchman-*cum*-Sweeper can be appointed by eligible High School.

9.4. The Hon'ble Supreme Court of India in the case of *State of Odisha Vrs. Rajendra Kumar Das (2003) 10 SCC 411 = AIR 2003 SC 1009 = 2004 (I) OLR (SC) 517*, repelling the stance "*According to State Government the post of 'Daftary' is a promotional post and therefore, the concept of 'forth peon as sought to be canvassed by the writ petitioners is without any legal foundation*", expressed the view by holding that:

> *"It is to be noted that post of 'Daftary' carries higher scale of pay and is a promotional post for Class IV employees. That being the position, the High Court was not justified in directing approval of the writ petitioners' services as 'fourth peon'. But one significant aspect cannot be lost sight of. If a school was entitled to have a 'Daftary', certainly the appointment was to be made by promoting one of the three persons i.e. Office Peon, Office Attendant and Night Watcher-cum-Sweeper, there being no other class IV post in the institution.* ***It is for the Managing Committee of the institution to decide who is to be promoted and thereafter seek approval of the concerned authorities. That way the claims of the writ petitioners could have been considered by the authorities, on being appropriately moved by the Management****. It is undisputed that the writ petitioners were appointed by the Managing Committee, may be under a misreading of the relevant Government Orders."*

9.5. In view of said Judgment of the Hon'ble Supreme Court in the case of *Rajendra Kuumar Das (Supra)* and the Judgment of this Court in *Dipak Kumar Sahoo Vrs. State of Odisha, 1999 (II) OLR 176*, there is no manner of doubt persists that the post of "Daftari" is a promotional post and is to be filled up by way of promotion from amongst the Peons on the basis of merit-cum-suitability with due regard to seniority.

9.6. The case of Rajendra Kumar Das (supra), was a case of 4th post of peon appointed by the Management Committee which was not accorded approval, yet in such circumstance, the Hon'ble Supreme Court came to direct as follows:

> *"10. We, therefore, while allowing these appeals direct that the Management of the concerned institution shall move the concerned authorities for approval to the promotional appointment of a Class IV employee, as 'Daftary'. Simultaneously, it can also recommend for appointment to the Class IV post, in case approval is accorded to the recommendation for appointment of 'Daftary' on promotion. The decision on both motions shall be taken within three months from the date of submission of the recommendation in accordance with law* ***keeping in view the operative yardsticks in force at the time of appointments were made****. Even if there has been refusal earlier, the matter shall be reconsidered in the light of what has been stated above."*

9.7. Thus being clarity with respect to appointment of "Daftary", promotional post, to be selected from amongst the Peons on the basis of merit-*cum*-seniority, the remaining peons are to be adjusted in their respective positions maintaining seniority. It is asserted by the District Education Office in his counter affidavit before the writ Court that Sri Gayadhar Nayak was approved as Peon (Watchman-*cum*-Sweeper) including all other staff of the School with effect from 01.04.2008, when at the relevant period only two posts of peons were admissible in the High Schools entitled for Grant-in-Aid as per Government Order No.5061/SME, dated 10.03.2008.

9.8. Perusal of said Order dated 10.03.2008, i.e., the Odisha Education (Payment of Grant-in-Aid to High Schools, Upper Primary Schools, etc.) Amendment Order, 2008 it has been stipulated as follows:

> *"(b) qualified non-teaching employees shall be that there shall be that there shall be only one Junior Clerk, one Office Peon and one Watchman-cum-Sweeper for every eligible High School."*

9.9. But said Amendment Order of 2008 *vide* No.IX-SME (Sch.)-29/06— 5061, dated 10.03.2008 got further notified by Order No.23611-IX-SME (Sch.)-35/2008-SME, dated 08.12.2008, which is called as "the Odisha Education (Payment of Grant-in-Aid to High Schools, Upper Primary Schools, etc.) Order, 2008", by virtue of which, the Odisha Education (Payment of Grant-in-Aid to High Schools, Upper Primary Schools etc.) Order, 2004 was sought to be amended in exercise of powers conferred by sub-section (4) of Section 7C of the Odisha Education Act, 1969. With respect to "Peons" the following amendment was brought into force with effect from 01.04.2008 by way of publication in the Odisha Gazette, Extraordinary No.2357, dated 26.12.2008:

> *"3.3.(b)—*
> *Qualify non-teaching employees shall consist of only one junior clerk, three peons, i.e., one office peon, one science attendant and one watchman-cum-sweeper for every eligible High School."*

9.10. By this Amendment Order, 2008, it is made abundantly unambiguous that the posts of three Peons have been chronologically set forth, *viz*., one Office peon, one Science Attendant and one Watchman-*cum*-Sweeper. It is, thus, clear that the date of appointment is, as normally perceived in service jurisprudence, the starting point of the computation of the length of service. The date of entry into the service is the relevant factor. Late comers cannot steal a march over early arrivals, who were already in regular queue.

9.11. In the case of *Ram Janam Singh Vrs. State of Uttar Pradesh, (1994) 1 SCR 316* it has been laid down that the date of entry into service is relevant factor for consideration of seniority. The following is the observation made in the said reported case:

> *"**It is now almost settled that seniority of an officer in service is determined with reference to the date of his entry in the service, which will be consistent with the requirement of Articles 14 and 16 of the Constitution**. Of course, if the circumstances so require a group of persons, can be treated a class separate from the rest, for any preferential or beneficial treatment while fixing their seniority. But, whether such group of persons belong to a special class for any special treatment, in matters of seniority, has to be decided on objective consideration and on taking into account relevant factors which can stand the test of Articles 14 and 16 of the Constitution."*

9.12. Perusal of record transpires that the appellant having joined on 18.01.2001, his service as "Peon" was approved with effect from 01.04.2008, and the service of Gayadhar Nayak (respondent No.6), who was admittedly senior to the appellant, having joined on 16.04.1988 was placed as Night Watchman-*cum*-Sweeper. Realising mistake the District Education Officer modified and positioned both the peons appropriately. In the said modification of Order of approval, the appellant was placed at third post of Peon (Watchman-*cum*-Sweeper), which is stated to be in consonance with Order No.23611-IH-SME (SCH.)-35/2008-SME, dated 08.12.2008 (i.e., the Amendment Order, 2008). It may not be inapt to say that an employee cannot be made to suffer due to a *bona fide* mistake of fact committed by the functionary of the Government.

9.13. The learned Single Judge also has taken note that Gayahdar Nayak, being senior to the appellant, is entitled to the second post (Science Attendant) and thereby the appellant has no right to claim the said post.

9.14. In this respect, the norms of seniority may be relevant to be taken note of. According to Black's Law Dictionary (6th Edition) "seniority" means: "Precedence or preference in position over others similarly situated. As used, for example, with reference to job seniority, worker with most years or service is first promoted within range of jobs subject to seniority, and is the last laid off, proceeding so on down the line to the youngest in point of service".

9.15. In *Andhra Pradesh Cooperative Oil Seeds Growers Federation Ltd. Vrs. D. Achyuta Rao, (2007) 4 SCR 1* it has been held that:

*"*** Even the learned Single Judge was hesitant in accepting seniority by reference to dates of promotion granted in Unions. The learned Judge, therefore, ingeniously worked out a chart and identified a date which, if taken as the date of promotion, would cause least inconvenience to the employees. Unfortunately such a principle cannot be followed in service matters where seniority confers a very valuable right on an employee and his entire future career is at times dependent upon such seniority. Seniority, therefore, must be determined by rules validly framed or norms enunciated and/or followed which are consistent with the principles enshrined in Articles 14 and 16 of the Constitution of India."*

9.16**.** In *Bhey Ram Vrs. The Haryana State Electricity Board, (1993) Supp. (2) SCR 219*, it is succinctly stated as follows:

"It is well-known that while determining the seniority of an officer, the date of his appointment is more important factor than the date of his joining.

***

This Court has examined the question of fixation of seniority inter se between officers appointed from different sources, i.e., by promotion and by process of direct recruitment. ***It is almost settled that while determining the inter se seniority amongst officers recruited from different sources or between officers appointed by the same process at different times, the date of entering in the service is relevant****. A person who enters in the service first shall rank senior unless there is some Rule providing otherwise which can be held to be consistent with Articles 14 and 16 of the Constitution. Reference in this connection may be made to the cases of N.K Chauhan Vrs. State of Gujrat, AIR 1977 SC 251; Paramjit Singh Vrs. Ram Rakha Mal, AIR 1983 SC 314; A. Janardhana Vrs. Union of India, AIR 1983 SC 769 and A.N. Pathak Vrs. Secy. to the Govt., Ministry of Defence, AIR 1987 SC 716. The same view was approved by a Constitution Bench of this Court in the case of Direct Recruit Class II Engineering Officers' Association Vrs. State of Maharashtra, (1990) 2 SCC 715."*

9.17**.** It remained factually undisputed that the appellant was junior to the respondent No.6. It is seen that although the services of the appellant in the post of "Peon" at Nanda Kishore High School, Tilada, were approved on 28.03.2009, the same was later modified by the Inspector of Schools by appropriately positioning the respondent No.6 by an Order dated 13.10.2009. Consequently, the services of the respondent No.6-Gayadhar Nayak, Peon was approved as "Science Attendant" and the services of appellant-Purusottam Swain as "Peon" (Night Watchman-*cum*-Sweeper) with effect from 01.04.2008.

10. It is noteworthy that the learned Single Judge has taken a view on consideration of order of seniority having regard to entry into service as "Peon" that the appellant was the junior most and being wrongly issued with approval of his service against second post of Peon, such an inadvertent act of the Authority cannot confer any inviolable right on him and, thereby no promissory estoppel would be attracted in the present case. It is trite that if any mistake is committed by an Authority and on its detection, the same was rectified by modifying the order, no infirmity can be imputed. Therefore, the learned Single Judge has rightly refused to exercise extraordinary jurisdiction invoking Article 226 of the Constitution of India.

In this respect, the learned Single Judge has rightly noticed that no person can take advantage of mistake committed by the Authority, whereby certain benefit/status was conferred upon him.

11. The Amendment Order, 2008 recognizes "Office Peon", "ScienceAttendant" and "Watchman-*cum*-Sweeper" under one category, *viz*., "Peon". Therefore, the question of assigning of seniority arises only in relation to employees who are similarly situated, i.e., where they are functioning in the same rank, grade or cadre. This is because seniority is a comparative or relative concept. Pondering thus, it is safe to say that there is no illegality committed by the learned Single Judge in holding that the authority concerned is competent to rectify the mistake committed in assigning seniority on the basis of dates of entry into service by the respondent No.6 and the appellant.

12. The scope of interference with the undisputed finding of the learned Single Judge that the appellant is junior to respondent No.6 is very limited in consideration of appeal under Clause-10 of the Letters Patent constituting the High Court of Judicature at Patna read with Article 4 of the Orissa High Court Rules, 1948. It is laid down in the case of *Wander Limited Vrs. Antox India Pvt. Ltd., (1990) Supp. (1) SCC 727 = AIRONLINE 1990 SC 156* that the appellate Court should not substitute its own view against a view taken in exercise of discretion by the learned Single Judge, except where such discretion has been shown to have been arbitrary or capricious or ignorance of certain principle of law. It is also not out of context to say that if the learned Single Judge has applied his mind in good faith with due regard to the relevant material available on record, even if two views are possible, the Division Bench in writ appeal should not take a different view.

13. In such view of the matter, having found no manifest error in the Judgment of the learned Single Judge warranting interference, the writ appeal, sans merit, is liable to be dismissed. In the result, the writ appeal is dismissed, but in the circumstances, there shall be no order as to costs.

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2024 (II) ILR-CUT-29

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

W.P.(C) NO. 22925 OF 2018

PRASANNA KUMAR BISWAL ……Petitioner

-V-

STATE OF ODISHA & ORS. ……Opp.Parties

(A) ODISHA CIVIL SERVICES (CLASSIFICATION, CONTROL AND APPEAL) RULES, 1962 – Rule 13(VI-A) – The proceeding was started in the year 1995 by that time, clause (VI-A) had not been incorporated in rule 13 of 1962 Rule, as one of the natures of penalties – The clause

came into force by way of substitution on 08.12.1998 – Whether the penalty of with-holding of increment can be imposed upon the petitioner? – Held, Yes – By the time the Enquiry Officer concluded the proceeding, the amendment had come into force, therefore authority can impose the penalty. (Para 15)

(B) DISCIPLINARY PROCEEDING – Guidelines, where the court can interfere with the order passed by the disciplinary authority – Enumerated. (Para 11)

Case Laws Relied on and Referred to :-

1. AIR 1983 SC 852 : (1983) 3 SCC 284 : Y.V.Rangaiah & Ors. v. J. Sreenivasa Rao & Ors.
2. AIR 2015 (SC) 545 : Union of India v. P. Gunasekharan.
3. AIR 1957 SC 82 : Lakshmi Devi Sugar Mills Ltd. v. Pt. Ram Sarup.
4. (2006) 4 SCC 278 : Standard Chartered Bank v. Enforcement of Directorate.

For Petitioner : M/s. Rabinarayan Nayak, N.Sen, K.Moharana & G.N.Rout.
For Opp.Parties : Mr. S.N.Nayak, A.S.C

JUDGMENT Date of Hearing : 27.03.2024 : Date of Judgment : 03.04.2024

Dr. B.R. SARANGI, J.

The petitioner, who has been imposed with penalty of withholding three increments with cumulative effect and treating the period of suspension as such by following departmental proceeding under Rule 15 of the Odisha Civil Services (Classification, Control and Appeal) Rules, 1962 (for short "OCS (CC&A) Rules, 1962"), vide order dated 13.08.2013 under Annexure-10, has filed this writ petition seeking to quash the said order as well as its confirming order dated 05.05.2018 passed by the Odisha Administrative Tribunal, Bhubaneswar in O.A. No. 2821 of 2013 under Annexure-11.

2. The factual matrix of the case, in a nutshell, is that the petitioner was working as Forest Ranger in the Manamunda Range of Boudh Forest Division during the year 1992. During his incumbency in the said Range, he committed some irregularities, for which a departmental proceeding was drawn up against him by the Principal Chief Conservator of Forest, Odisha-opposite party no.2, vide office order dated 09.01.1995, by framing 21 charges. The Divisional Forest Officer, Phulbani Forest Division-opposite party no.3 was appointed as Enquiring Officer to conduct the inquiry into the departmental proceedings drawn up against the petitioner, vide office order dated 27.07.1995 of the opposite party no.2. The A.C.F. Boudh Division was nominated as Presenting Officer in the said departmental proceeding. Thereafter, the petitioner was placed under suspension on 15.04.1995 pending drawl of departmental proceeding and was reinstated in service on 28.04.1995. As such, the petitioner was supplied with the documents relied upon by the authority in the memo of charge. Thereafter, the petitioner prepared a response and submitted a show cause on 10.02.1996.

2.1. The proceeding was initiated in the year 1995 with 21 charges. Opposite party no.3, being the Enquiring Officer, conducted the inquiry in accordance with the provisions as laid down under OCS (CC&A) Rules, 1962. The opposite party no.3, vide memo dated 30.10.1995, furnished the name of prosecution witness to be examined. The enquiry was started fixing date to 09.04.1997 giving notices to Sri D. Behera, ACF through the DFO, Keonjhar Division, vide memo dated 22.03.1997, Sri Prasanna Kumar Biswal, Forest Ranger, the petitioner through the DFO, Puri Division, vide memo dated 22.03.1997, Sri B.K. Bhanj, Forester, Sri R.K. Samal, Forest Guard, Sri Bibekananda Mohanty, Forest Guard through the DFO, Boudh Division, vide memo dated 22.03.1997, and to the Asst. Conservator of Forests, Boudh Division, Presenting Officer, vide memo dated 22.03.1997. The statements of the petitioner and PWs were recorded during the course of inquiry. The Enquiring Officer-opposite party no.3, after conclusion of the inquiry, prepared the inquiry report regarding finalization of each of the charges and submitted the same before opposite party no.2 on 26.09.2005. The findings of the Enquiring Officer were communicated to the petitioner on 02.05.2006.

2.2. After receiving the enquiry report, the petitioner submitted a representation to opposite party no.2 mentioning therein that he was not provided with the documents. Thereafter, he submitted another representation on 30.07.2007 to discard the enquiry report and to drop the proceeding. Since the petitioner became Group-B Officer, opposite party no.1 issued a show cause notice on 18.06.2010 in which it was proposed to finalize the departmental proceeding by imposing the penalties of stoppage of three increments with cumulative effect and to treat the period of suspension as such. After receiving the notice, the petitioner submitted a detailed representation on 03.08.2010 and 06.03.2012. Thereafter, opposite party no.1, vide order dated 13.08.2013, imposed the proposed penalty. Challenging the aforesaid order, the petitioner approached the tribunal by filing O.A. No. 2821 of 2013 and the tribunal, after due adjudication, came to a hold that the allegation made that there was inordinate delay in disposal of the departmental proceeding, is due to the delinquent petitioner, who took various adjournments and such delay alone will not be sufficient to allow the Original Application. By observing so, the tribunal held that the proceeding to have been conducted as per rules giving adequate opportunities to the petitioner. As such, the Enquiring Officer has given cogent findings holding the petitioner guilty of some of the charges and an appropriate penalty has been passed. By holding so, the tribunal did not feel inclined to entertain the findings and the punishment imposed by the authority and ultimately dismissed the Original Application. Hence, this writ petition.

3. Mr. Rabinarayan Nayak, learned counsel appearing for the petitioner contended that the punishment of withholding three increments with cumulative effect, as imposed by the authority, cannot be sustained in the eye of law. It is contended that the proceeding was initiated against the petitioner in the year 1995 and by way of amendment to the OCS (CC&A) Rules, 1962 the punishment of stoppage

of increment was introduced in the year 1998. Therefore, on the date of initiation of the proceeding since there was no provision for imposition of penalty of stoppage of increment, the order so passed by the authority cannot be sustained in the eye of law and the same should be quashed. It is further contended that there has been inordinate delay in disposal of the proceeding initiated against the petitioner. As such, the proceeding was initiated against the petitioner in the year 1995, but the same was completed in the year 2013, but the tribunal failed to appreciate the contention raised by learned counsel for the petitioner to the above context. Therefore, the orders impugned passed by the authority in imposing penalty and consequential confirmation made thereof by the tribunal cannot be sustained in the eye of law and are liable to be quashed.

To substantiate his contention, learned counsel appearing for the petitioner has relied upon the judgment of the apex Court in the case of ***Y.V. Rangaiah and others v. J. Sreenivasa Rao and othe*rs**, AIR 1983 SC 852 : (1983) 3 SCC 284.

4. Mr. S.Nayak, learned Addl. Standing Counsel appearing for the State-Opposite Parties contended that since 21 charges were framed against the petitioner and by following due procedure and in compliance of principles of natural justice the Enquiring Officer found the petitioner guilty of certain charges and accordingly imposed the penalty, as referred to above, the tribunal is well justified in not interfering with the same. Therefore, the order so passed by the tribunal is well justified, which does not warrant interference of this Court at this stage.

To substantiate his contention, learned Addl. Standing Counsel appearing for the State-Opposite Parties has placed reliance on the decision of the apex Court in the case of ***Union of India v. P. Gunasekharan*** (SLP (C) No. 23631 of 2008), reported in AIR 2015 (SC) 545.

5. This Court heard Mr. Rabinarayan Nayak, learned counsel appearing for the petitioner and Mr. S. Nayak, learned Addl. Standing Counsel appearing for the State-Opposite Parties through hybrid mode and perused the record. Pleadings having been exchanged between the parties, with the consent of learned counsel for the parties this writ petition is being disposed of finally at the stage of admission.

6. The contention, which has been raised by learned counsel for the petitioner, is that there was delay in finalization of the inquiry and, therefore, the punishment imposed thereon cannot be sustained in the eye of law, but, as per the materials available on record, it is made clear that delay in enquiry was caused mostly due to the non-attendance and adjournment request of the petitioner and also due to non-attendance of the petitioner, PWs and P.O. in one day at a time.

7. A detailed counter affidavit has been filed by opposite party no.3 incorporating all the documents, wherein it has been stated that during the course of inquiry three D.F.Os. were transferred from the Division resulting delay in conducting the inquiry. The Enquiring Officer conducted the inquiry in accordance

with the provision as laid down in the OCS (CCA) Rules, 1962. Ample opportunity was provided to the petitioner to defend his case and the principle of natural justice was meticulously followed. The opposite party no.3, vide his memo no.5326 dated 30.10.1995, furnished the name of prosecution witnesses to be examined. The inquiry was started fixing date to 09.04.1997 giving notices to Sri D. Behera, ACF through the DFO, Keonjhar Division, vide memo no. 1516 dated 22.03.1997, Sri Prasanna Ku. Biswal, Forest Ranger (petitioner herein) through the DFO, Puri Division, vide memo no. 1528 dated 22.03.1997, Sri B.K. Bhanja, Forester, Sri R.K. Samal, Forest Guard, Sri Bibekananda Mohanty, Forest Guard through the DFO, Boudh Division, vide memo no.1530 dated 22.03.1997 and to the Assistant Conservator of Forests, Boudh Division, Presenting Officer, vide memo no.1532 dated 22.03.1997.

8. The petitioner and prosecution witness Sri B.K Bhanja, Forester attended the inquiry on 09.04.1997. The Presenting Officer and other PWs were absent on that date, for which next date was fixed to 23.05.1997 and notices were issued, vide memo no.2443 dated 07.05.1997, to the petitioner, memo no.2445 dated 07.05.1997 to the Assistant Conservator of Forest, Boudh (Presenting Officer), Sri B.K. Bhanja, Forester, Sri P.K. Sasmal, Forest Guard and Sri Dhabaleswar Singh, Forest Guard vide memo no.2447 dated 07.05.1997, Sri Bibekananda Mohanty, Forest Guard and Sri D. Behera, ACF, Keonjhar, vide memo no.2447 dated 07.05.1997 and memo no.2449 dated 07.05.1997, but the inquiry was not conducted due to non-attendance of the Presenting Officer as well as the PWs. Subsequently, the date was fixed to 02.11.1998 and notices were issued to the petitioner, vide memo no.5226 dated 24.10.1998, Sri D. Behera, ACF, Keonjhar, vide memo no.5228 dated 24.10.1998, Sri B.K. Bhanja, Forester, Sri P.K. Sasmal, Forest Guard, Sri Dhabaleswar Singh, Forest Guard and Sri Bibekananda Mohanty, Forest Guard, vide memo no.5230 dated 24.10.1998, and the ACF, Boudh (Presenting Officer), vide memo no.5232 dated 24.10.1998. On 02.11.1998, the inquiry was not conducted due to non-attendance of the petitioner and the next date of enquiry was posted to 11.01.1999. Accordingly, notices were issued to Sri Duryodhan Behera, ACF, Keonjhar, vide memo no.6353 dated 09.12.1998, to the petitioner, vide memo no.6355 dated 09.12.1998, Sri B.K. Bhanja, Forester, Sri P.K. Sasmal, Forest Guard, Sri Dhabaleswar Singh, Forest Guard and Sri Bibekananda Mohanty, Forest Guard, vide memo no.6357 dated 09.12.1998, and the A.C.F. Boudh (Presenting Officer), vide memo no.6359 dated 09.12.1998. On 11.01.1999, the inquiry was posted to another date on the request of the petitioner. Thereafter, notices were sent to the petitioner as well as other Govt. Officials, vide memo no.2170 dated 17.03.1999, fixing the date to 28.03.1999 for inquiry and on the said date inquiry was not conducted due to non-attendance of the petitioner as well as the PWs. Again, on 24.05.1999, notices were sent fixing the date to 22.06.1999 for inquiry to the petitioner as well as other Govt. officials, vide memo no.3609 dated 24.05.1999. On 22.06.1999, inquiry was not conducted due to non-attendance of the petitioner as well as other PWs and the

enquiry was finally posted to 05.08.1999 and notices were issued to the ACF, Boudh (Presenting Officer), vide memo no.4571 dated 25.06.1999, to the petitioner, vide memo no.4573 dated 25.06.1999, Sri B.K. Samal, Forest Guard, Sri Dhabaleswar Singh, Forest Guard and Sri Bibekananda Mohanty, Forest Guard, vide memo no.4575, dated 25.06.1999, Sri B.K. Bhanja, Forester, vide memo no.4577 dated 25.06.1999, and Sri D.Behera, ACF, Keonjhar, vide memo no.4579 dated 25.06.1999. On 05.08.1999, the petitioner and one PW-Sri B.N. Mohanty were present and others were absent and their statements were recorded and the inquiry was posted to 29.06.2000 and notices were issued to Sri B.K. Bhanja, Forester, vide memo no.3901 dated 27.05.2000, Sri D. Behera, ACF, Keonjhar, vide memo no.3903 dated 27.05.2000, the ACF, Boudh Division (Presenting Officer), vide memo no.3905 dated 27.05.2000, Sri B.K. Samal, Forest Guard, Sri Dhabaleswar Singh, Forest Guard, vide memo no.3907 dated 27.05.2000, and the petitioner, vide memo no.3909 dated 27.05.2000. On 29.06.2000, Sri B.K. Bhanja, Forester and the petitioner attended the enquiry and others were absent and statement of Sri B.K. Bhanja, Forester was recorded and the inquiry was posted to 16.03.2004. On 16.03.2004, the Presenting Officer, Sri A.K. Swain, ACF, Boudh was present with all connected records and presented the same. The petitioner did not attend the inquiry. Therefore, the inquiry was finally posted to 22.03.2004. Further, notices were sent to Sri D. Behera, ACF, Keonjhar, vide memo no.1057 dated 03.03.2004, Sri Arun Ku. Swain (Presenting Officer)-cum-ACF, Boudh, Sri Rabindra Ku. Samal, Forest Guard, Sri Dhabaleswar Singh, Forest Guard and the petitioner, vide memo no.1227 dated 17.03.2004 to attend the inquiry on 22.03.2004. On 22.03.2004, the petitioner appeared for hearing and submitted his statement and prayed for one month time, for which final hearing was fixed to 05.05.2004. Accordingly, notice was sent to the petitioner, vide memo no.1766 dated 23.04.2004, to attend the inquiry on 05.05.2004. On that date (05.05.2004), the petitioner was present and his statement was recorded and the inquiry was posted to 20.05.2004 and notice, vide memo no.1967 dated 12.05.2004, was sent to the petitioner to attend the inquiry. Hence, the allegation made by the petitioner that after more than a decade the opposite party no.3 had to cover the matter all of a sudden and petitioner was asked to attend the inquiry is not at all a fact and baseless. The statement of the petitioner and PWs were recorded during the course of inquiry.

9. From the above sequence of events, it is made clear that the delay cannot be attributable to the Enquiring Officer, rather for some reason or other, the petitioner, PWs and P.O. sought adjournment. But that cannot vitiate the inquiry proceeding so as to cause interference of this Court at this stage. The same has been considered by the tribunal while passing the order impugned. Therefore, the contention raised by learned counsel for the petitioner that there was delay in the inquiry and, therefore, the proceeding initiated against the petitioner should be quashed, cannot be sustained and, as such, the same cannot be acceded to. Further more, the statements of the petitioner and PWs were recorded during the course of inquiry and, as such,

the petitioner had never asked for any document for his reference during the course of inquiry. Thereby, the contention raised, that the petitioner was not supplied with the documents, is also bereft of records. As such, on the basis of materials available on record, it is evident that by affording due opportunity of hearing in compliance of principles of natural justice, the petitioner was given ample scope to defend his case. Thereby, the contention raised by learned counsel for the petitioner, that the inquiry and the ultimate punishment are in violation of statutory provisions, cannot be sustained in the eye of law. Further, the allegation has been made that the inquiry was conducted in one day, but the materials available on record do not speak about the same. Therefore, such allegations are not correct. As it appears, several dates were fixed, statements of the delinquent and prosecution witnesses were recorded and documents were taken on record and the Enquiring Officer submitted report as per Rule 15 (7) of the OCS (CC&A) Rules, 1962, in which statement of witnesses are also attached. Thereby, the inquiry, which has been conducted by the Enquiring Officer, is in accordance with Rule 15 of the OCS (CC&A) Rules, 1962. As such, no irregularity has been committed by the Enquiring Officer while conducting the inquiry so as to require interference of this Court.

10. As it appears from the judgment passed by the tribunal, the departmental proceeding file was called for and on scrutiny of the same, the tribunal found that as many as forty annexures were attached to the charge framed, though there is nothing on record to show whether those documents were supplied to the petitioner before issuance of show cause notice. But it is seen that regularly notices were sent to the petitioner to attend the departmental inquiry by the DFO, Phulbani, i.e., opposite party no.3. As such, on a large number of occasions, the petitioner also participated in the inquiry. The statements of the petitioner as well as witnesses were recorded on various dates and the petitioner was allowed to cross-examine those witnesses and several documents were exhibited. As such, the signature of the petitioner is also available on the deposition of various witnesses. The petitioner also submitted a written note of defence on 20.05.2004 denying the charges levelled against him and prayed to exonerate him from all the charges. Therefore, on the basis of documents available on record, the Enquiring Officer framed following charges:-

> *1. Charge No.1: Submission of false and fabricated M.Rs with an ulterior motive.*
> *2. Charge No.2: Improper maintenance of Govt. records particularly the records involved with Govt. accounts.*
> *3. Charge No.3: Taking acquaintance of mulias without payment of misleading his superiors to obtain fund for his personal gain. 4.*
> *4. Charge No.4 : Gross negligence in duty*
> *5. Charge No.5: Disobedience of orders of the superiors*
> *6. Charge No.6: Committing serious finance irregularities and indiscipline.*
> *7. Charge No.8: Unauthorized expenditure of Government Money*
> *8. Charge No.9: Ignorance of Departmental Rules, Codal Provisions and Accounts Procedure*
> *9. Charge No.18 : Late and non attendance in the R.Os and non-submission of Agenda items."*

On the basis of aforementioned findings, charge nos.7, 10, 11, 12, 13, 14, 15, 16, 17, 19, 20 and 21 were held not to have been proved against the petitioner. The findings of the Enquiring Officer were accepted by the Government, i.e., Disciplinary authority and after observing due formalities the penalty was imposed. Thereby, no irregularity has been committed by the authority in imposing penalty on the petitioner.

11. In ***Union of India v. P. Gunasekharan***, AIR 2015 (SC) 545, the apex Court has laid down the guidelines where the Court can interfere with the orders passed by the disciplinary authority. The guidelines read thus:-

> *" The 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."*

12. Relying upon the aforesaid guidelines rendered by the apex Court and applying the same to the present case, it is made clear that the Court cannot sit as an appellate authority over the findings arrived at by the Enquiring Officer and the disciplinary authority. As such, nothing has been placed on record to interfere with the quantum of punishment imposed by the authority. Thereby, this Court is not inclined to interfere with the quantum of punishment imposed by the disciplinary authority, which has been confirmed by the tribunal.

13. Mr. Rabinarayan Nayak, learned counsel appearing for the petitioner in course of hearing raised a point, which has been recorded in the order dated 08.05.2023 to the following effect:-

> *"Mr. R.N. Nayak, learned counsel for the petitioner contended that proceeding was initiated against the petitioner in the year 1995. But by virtue of the amendment made in Rule-13 of the OCS (CC &A) Rules with regard to imposition of penalty of withholding of increments with cumulative effect, which has been published in the official gazette no.1609 dated 08.12.1998, the authority could not have imposed penalty of stoppage of three increments with cumulative effect, as by the time initiation of proceeding was made in the year 1995, punishment has not been incorporated in the Rules. However, he seeks time to satisfy the Court by citing some judgments to that effect by the next date.*
>
> *On his request, list this matter after two weeks."*

14. The petitioner, in support of the above stand, has relied upon the judgment of the apex Court in the case of ***Y.V. Rangaiah*** (supra). But on perusal of the said judgment it appears that the same does not whisper anything with regard to the proposition advanced by learned counsel appearing for the petitioner. Rather, the said judgment deals with the proposition that vacancies which occurred prior to the amended rules would be governed by the old rules and not by the amended rules. In that case, the apex Court held that they have not slightest doubt that the posts which fell vacant prior to the amended rules would be governed by the old rules and not by the new rules.

15. In the instant case, even though the proceeding was started in the year 1995, by that time clause (vi-A) had not been incorporated in Rule-13 of the OCS (CC&A) Rules, 1962, as one of the natures of penalties, and, as such, the same came into force, by way of substitution, on 08.12.1998. There is, thus, no dispute before this Court that by the time the Enquiring Officer concluded the proceeding, the amendment had come into force, where withholding of increments (with cumulative effect) had been incorporated. Therefore, the Enquiring Officer imposed penalty of withholding of increment with cumulative effect, which has been accepted by the disciplinary authority and confirmed by the tribunal by the orders impugned, along with the period of suspension to be treated as such.

16. In ***JowLL'S Dictionary of English Las***, Vol. 2, (2nd Edn. by JOHN BURKA), it has been held that punishment is the penalty for transgressing the law.

In ***New Shorter Oxford English Dictionary***, Vol. 2, 3rd Edn., reprint 1993, it has been held that 'punishment', infliction of a penalty in retribution for an offence; penalty imposed to ensure application and enforcement of a law.

In ***GLANVILLE WILLIAMS*** Criminal Law, 575 (2nd ed. 1961), it has been held that punishment in all its forms is a loss of rights or advantages consequent on a breach of law. When it loses this quality it degenerates into an arbitrary act of violence that can produce nothing but bad social effects.

In ***Standard Chartered Bank v. Enforcement of Directorate***, (2006) 4 SCC 278, the apex Court has referred the aforesaid meaning of punishment otherwise also a sanction, such as a fine, penalty, confinement, or loss of property, right, or privilege-assessed against a person who has violated the law.

In ***Lakshmi Devi Sugar Mills Ltd. v. Pt. Ram Sarup***, AIR 1957 SC 82, the apex Court held that the word "punishment" may be defined as penalty for the transgression of law. Any action of the employer to the detriment of the employee would not come within the ambit of the expression punishment so long as no offence was found to have been committed by the employee. It has also been held that suspension would not be a punishment by itself. When it is felt that the continuance on duty of a public servant pending inquiry would be prejudicial to public interest, he can be placed under suspension. Such an order cannot be said to be by ay of punishment. As such, the term "penalty" and "punishment" are frequently used as synonymous of each other.

17. In view of the facts and law, as discussed above, the penalty imposed on the petitioner, being in conformity with the provisions of law, this Court is not inclined to interfere with the same. Consequentially, the order dated 13.08.2013 under Annexure-10 passed by the authority imposing penalty and also the order dated 05.05.2018 passed by the Odisha Administrative Tribunal, Bhubaneswar in O.A. No. 2821 of 2013 under Annexure-11 confirming the same do not call any interference by this Court.

18. In the result, therefore, the writ petition merits no consideration and the same is hereby dismissed. But, however, in the facts and circumstances of the case, there shall be no order as to costs.

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2024 (II) ILR-CUT-38

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

W.P(C) NO. 2440 OF 2024

ONENESS EDUCATIONAL & CHARITABLE TRUST, BHUBANESWAR .....Petitioner

-V-

COMMISSIONER OF INCOME TAX (EXEMPTION), HYDERABAD & ANR. .....Opp.Parties

INCOME TAX ACT, 1961 – Section 119(2)(b) – The petitioner filed an application for condonation of delay of 10 months 15 days in filling the revised return – The Opp.Party No. 1 rejected the application – Whether the rejection order is sustainable under law? – Held, No – When the petitioner filed an application indicating its genuine hardship, the Opp. Party No.1 could have considered the same in proper perspective, but without doing so, rejected such application which cannot be sustained in the eyes of law. (Paras 17-22)

Case Laws Relied on and Referred to :-

1. (2018) 11 ITR-OL 468 : Commissioner of Income Tax (Exemptions) v. Subros Educational Society.
2. MANU/GJ/3206/2022 : Shree Maharaja Agrasen Seva Sansthan v. Commissioner of Income Tax (Exem).
3. 2017 SCC OnLine Kar 6868 : Dr.Sujatha Ramesh v. Central Board of Direct Taxes & Anr.
4. 2019 SCC OnLine Del 6861 : G.V. Infosutions Pvt. Ltd. v. Deputy Commissioner of Income-Tax and Anr.
5. AIR 1962 SC 361 : Ranka & Others v. Rewa Coalfields.
6. AIR 1952 SC 16 : Commissioner of Police, Bombay v. Gordhandas Bhanji.
7. AIR 1978 SC 851 : Mohinder Singh Gill and another v. The Chief Election Commissioner, New Delhi and others.
8. (2008)4 SCC 144 : Bhikhubhai Vithlabhai Patel and others v. State of Gujarat & Anr.
9. 2016 (II) OLR 237 : M/s. Shree Ganesh Construction v. State of Orissa & Ors.
10. (2008) 10 SCC 617 : B.M. Maiani v. Commissioner of Income Tax & Anr.

For Petitioner : M/s. S.S. Padhy, G.M. Rath, A.S. Mohanty, S. Jena, P.Mohanty, M.A. Bohidar & D. Chaudhury

For Opp.Parties : Mr. S.C. Mohanty, Sr. Standing Counsel, Income Tax Dept.

JUDGMENT Date of Hearing : 05.04.2024 : Date of Judgment : 09.04.2024

Dr. B.R.SARANGI, J.

The petitioner, by means of this writ petition, seeks to quash the order dated 22.01.2024 under Annexure-1, by which opposite party no.1 has rejected his application filed under Section 119(2)(b) of the Income Tax Act, 1961 for condonation of delay in filing the revised return of income claiming refund for the assessment year 2021-22, and to issue direction to the opposite party authority to allow all consequential reliefs, allowances, deductions and exemptions as permissible under the Act.

2. The factual matrix of the case, in brief, is that the petitioner is an educational and charitable trust constituted by execution of trust deed dated 16.08.2008 for educational and charitable purposes. It has been duly registered under Section 12A(1)(aa) of the Income Tax Act, 1961 (for short "I.T. Act"), as per registration certificate dated 30.06.2017 and the said registration has been renewed from time to time. In terms of the said registration, the petitioner is entitled to get exemption under Sections 10(23C), 11 & 12 of the I.T. Act and subjected to nil taxable income and such exemptions have been granted to the petitioner since the date of registration.

2.1. For the assessment year 2021-22, the petitioner had filed its return of income on 15.03.2022 claiming exemption/deduction as available under Section l1 of the I.T. Act. While processing the return of income under Section 143(1) of I.T. Act, the exemption claimed by the petitioner was disallowed on the ground of delay in filling audit report in Form-10B, which was to be done before one month from the due date of filling of return of income and, thereby, a demand of Rs.5,47,24,100/- was raised by issuing order under Section 143(1) of the I.T. Act. At the beginning of

the financial year 2020-21, the petitioner had an accumulated deficit of Rs.5,41,52,906/-, as evident from the audited financial statement for the financial year 2019-20. During the financial year 2020-21 corresponding to the assessment year 2021-22, there was one time settlement (0TS) of loan availed from its Banker-Union Bank of India and an amount of Rs.6,36,03,707.49 was sacrificed by the said banker in the OTS. Although the petitioner has never claimed the loan principal amount as income or repayment as application and further the accumulated interest also remained unabsorbed and duly reflected as deficit in the balance sheet, the said sacrificed amount of Rs.6,36,03,707.49 was shown as income and included in the total income of Rs.10,39,22,994.49 in the audited income and expenditure account of the petitioner for the financial year 2020-21. Further, the past accumulated deficit of Rs.5,41,52,906.70 was not adjusted in the said audited income and expenditure account, which resulted in excess of income over expenditure of Rs.6,37,56,104.56. The petitioner inadvertently failed to claim such deficit in the return of income filed for the assessment year 2021-22. Consequently, it filed First Appeal bearing No. NFAC/2020-21/10199005 before the Commissioner of Income Tax (Appeal) assailing the order dated 27.10.2022 processing the return under Section 143(1) of the I.T. Act. Upon discovering the apparent mistake, the petitioner also filed a rectification petition under Section 154 of the I.T. Act seeking rectification of the intimation order under Section 154 of the I.T. Act.

2.2. Opposite party no.2-Assessing Officer, vide order dated 21.06.2023 rejected the rectification petition filed by the petitioner under Section 154 of the I.T. Act stating that the mistakes pointed out in the order under Section 143(1) of the IT Act are not coming within the purview of Section 154 of the I.T. Act. While rejecting the application of the petitioner, opposite party no.2 did not dispute the claim of the petitioner regarding non-adjustment of accumulated deficit. In the meantime, on the application of the petitioner, opposite party no.1, vide order dated 23.08.2023, in exercise of power under Section 119(2)(b) of the I.T. Act, condoned the delay in filling Form-10B. Consequently, the Assessing Officer, by giving effect to the order dated 23.08.2023 passed by opposite party no.1, rectified the demand raised in the intimation under Section 143(1) of the IT Act by reducing it from Rs.5,47,24,000/- to Rs.3,29,30,185/- vide rectification order dated 30.08.2023.

2.3. The petitioner took additional grounds regarding rejection of the rectification application before the First Appellate Authority by filing grounds of appeal agitating about not allowing the set off of past deficit as application of income. The petitioner further stated about its inadvertent mistake in claiming the past deficit of Rs.5,41,52,906.70 against the current year's income under Section 11(1) of the I.T.Act. It highlighted that a bare look at its audited statement for the Financial Year 2019-20 & 2020-21 would reveal that the petitioner has complied with the requirement under Section 11(1) of the I.T. Act and it also referred to the judgments of the Supreme Court governing the field. But, the Appellate Authority, however, failed to consider this aspect of the matter and dismissed the appeal by

observing that the claim of the petitioner, that in the return it had not set off the past years' deficit against the income on account of interest waiver under the 0.T.S. by the Bank, can only be considered if the petitioner files revised return claiming such set off. It was further observed that if the time limit for filing revised return has lapsed, the only remedy available to the petitioner is, to make application under Section 119(2)(b) of the IT. Act.

2.4. The Central Board of Direct Taxes (CBDT) issued circular no.09 of 2015 dated 09/06/2015 containing comprehensive guidelines to deal with applications for condonation of delay in filing returns *inter alia* claiming set off under Section 119(2)(b) of the I.T. Act. The said circular was modified on 31.05.2023 vide circular no.07 of 2023 to the extent of revising the monetary limits for applications for condonation of delay.

2.5. The petitioner, in terms of the said circulars, filed application dated 16.10.2023 registered on 27.10.2023 under Section 119(2)(b) of the I.T. Act before opposite party no.1 seeking condonation of delay in filing revised return of its income to claim refund of Rs.21,350/- for the assessment year 2021-22. In the said application, the petitioner stated that at the time of filing of its return of income for the assessment year 2021-22, it had erred in claiming the past deficit of Rs.5,41,52,906.70 against the current year's income under Section 11(1) of the I.T. Act of Rs.6,37,56,104.56 as application of income and offered the said total income of Rs.6,37,56,104.56 as income chargeable to tax. Had the past deficit of Rs.5,41,52,906.70 been claimed as application of income, the net surplus would have been Rs.96,03,197.86, which is 9.24% of the total income. In other words, the petitioner had applied 90.76% of its total income against the requirement of 85% of the total income which complies with the requirement under Section 11(1) of the I.T. Act. Such allowing of set off of previous years' deficit against income of the assessment year 2021-22 would entitle the petitioner to a refund of Rs.21,350/-. The petitioner also referred the judgments of the Supreme Court and other High Courts holding that any excess expenditure incurred by the Trust/Charitable Institution in earlier assessment year could be allowed to be set off against income of subsequent years in terms of Section 11 of the IT. Act. Under the circumstances, the petitioner prayed for condonation of delay in filing the revised return of income claiming refund of Rs.21.350/- for the assessment year 2021-22 by annexing comparative statement of computation as per the original return filed and proposed revised return.

2.6. Opposite party no.1 in utter disregard to the statutory provisions under Section 119(2)(b) of the I.T. Act as well as the governing circulars, vide order dated 22.01.2024 under Annexure-1, rejected the application filed by the petitioner for condonation of delay in filing the revised return stating that the petitioner having filed the original return of income after due consideration with an undertaking that the said information is correct and in spite of enough time, no revised return of income having been filed, the genuine hardship for non-filing of revised return of income is not justified. Hence, this writ petition.

3. Mr. G.M. Rath, learned counsel along with Mr. S.S. Padhy, learned counsel appearing for the petitioner vehemently contended that the order dated 22.01.2024 under Annexure-1 passed by opposite party no.1 in rejecting application for condonation of delay in filing the revised return is in utter disregard to the statutory provision contained in Section 119(2)(b) of the I.T. Act as well as the circular no.09 of 2015 dated 09.06.2015 issued by the CBDT. Thereby, the order so passed by opposite party no.1 is arbitrary, unreasonable and contrary to the provisions of law which cannot be sustained in the eye of law. It is further contended that Section 119(2)(b) of the I.T. Act empowers CBDT to issue order authorizing any income tax authority to condone the delay in filing revised return claiming refund if the same is considered desirable or expedient so as to avoid genuine hardship to an assessee. Therefore, opposite party no.1 has not applied its mind to that effect and has not made any endeavor to see that the claim made by the petitioner is correct or genuine or whether there is any genuine hardship on merits caused to the petitioner. Instead of doing so, opposite party no.1 rejected the application merely observing that the petitioner had filed the original return of income after due consideration and undertaken that the information so submitted is correct and has not filed the revised return in time. It is further contended that opposite party no.1 has failed to consider that it is only to avoid genuine hardship to the assesses, who have not been able to comply with the provisions under the I.T. Act within the time stipulated therein that such power has been vested with the CBDT to issue appropriate order to deal with such belated claims. It is further contended that the First Appellate Authority in its order dated 27.12.2023 while considering the propriety of rejection of the rectification application of the petitioner, has categorically observed that the claim of set off of past years' deficit against the income on account of interest waiver under OTS can only be made by filing revised return and seek condonation of delay for filing such revised return in terms of Section 119(2)(b) of the I.T. Act. Therefore, invoking such provision if the application was filed for condonation of delay, the same could not have been rejected. It is further contended that the petitioner, in the application for condonation of delay, highlighted the genuine hardship caused to it due to non-consideration of its claim and further highlighted that in the audited balance sheet, the accumulated deficit of Rs.5,41,52,906/- although has been adjusted against the excess of income over the expenditure, yet such deficit has inadvertently not been claimed in the return of income. Further, if such past years' deficit of Rs.5,41,52,906/- is claimed as an application of income, then the next surplus would be 9.24% of the total income, which is within the mandated 15% as per Section 11(1) of the I.T. Act. Therefore, it is contended that the order dated 22.01.2024 under Annexure-1 passed by opposite party no.1 rejecting the application of the petitioner for condonation of delay in filing the revised return is arbitrary, unreasonable and illegal, which warrants interference of this Court at this stage.

To substantiate his contentions, learned counsel for the petitioner has relied upon ***Commissioner of Income Tax (Exemptions) v. Subros Educational Society***, (2018) 11 ITR-OL 468; ***Shree Maharaja Agrasen Seva Sansthan v. Commissioner of Income Tax (Exem)***, MANU/GJ/3206/2022; ***Dr. Sujatha Ramesh v. Central Board of Direct Taxes and Anr.***, 2017 SCC OnLine Kar 6868 and ***G.V. Infosutions Pvt. Ltd. v. Deputy Commissioner of Income-tax and Anr.***, 2019 SCC OnLine Del 6861.

4. Mr. S.C. Mohanty, learned Senior Standing Counsel appearing for the opposite parties, while justifying the order dated 22.01.2024 passed by opposite party no.1, contended that no illegality has been committed in the said order and, as such, the impugned order has been passed by the competent authority after due application of mind considering the merits and facts of the case and it does not suffer from any infirmity, as alleged by the petitioner. It is further contended that the contention raised by learned counsel for the petitioner, that the order dated 22.01.2024 passed by opposite party no.1 rejecting the application filed under Section 119(2)(b) of the I.T. Act for condonation of delay is illegal and complete disregard to the CBDT circulars governing the field, is factually incorrect. It is further contended that the petitioner has failed to demonstrate the genuine hardship or sufficient cause that prevented it from filing the revised return within the prescribed time, as per applicable circulars of the CBDT and judicial precedents, which require such hardship to be proved by cogent evidence. It is further contended that at the time of considering the case under Section 119(2)(b) of the I.T. Act, the petitioner shall ensure that the income/loss declared and/or refund claimed is correct and genuine and also that the case is of genuine hardship on merits. Opposite party no.1 is empowered to direct the jurisdictional Assessing Officer to make necessary enquiries or scrutinize the case in accordance with the provisions of the Act to ascertain the correctness of the claim. If the petitioner failed to justify the genuine hardship on merits that prevented it from filing revised return, the rejection of the application for condonation of delay in filing the revised return is well justified. It is further contended that the delay has not been substantiated with cogent explanation and evidence which is a pre-requisite for condonation. It is further contended that the petitioner has not explained each day's delay, as required under the law laid down by the apex Court in ***Ranka & Others v. Rewa Coalfields***, AIR 1962 SC 361. Therefore, it is contended that the order dated 22.01.2024 under Annexure-1 passed by opposite party no.1 in rejecting the application of the petitioner for condonation of delay in filing the revised return is well justified and it does not warrant interference of this Court at this stage and, therefore, seeks for dismissal of the writ petition.

5. This Court heard Mr. G.M. Rath, learned counsel appearing for the petitioner and Mr. S.C. Mohanty, learned Senior Standing Counsel appearing for the opposite parties in hybrid mode. Pleadings have been exchanged between the parties and with the consent of learned counsel for the parties, the writ petition is being disposed of finally at the stage of admission.

6. Before delving into the merits of the case, for better appreciation, certain provisions of Income Tax Act and circulars are extracted hereunder.

Section 119(2)(b) of the Income Tax Act reads as follows:-

> *"119.* **Instructions to subordinate authorities**.
>
> 1. xxxxx xxxxx xxxxx
>
> 2. *Without prejudice to the generality of the foregoing power:-*
>
> a) xxxx xxxx xxxx
>
> b) ***the Board may, if it considers it desirable or expedient so to do for avoiding genuine hardship*** *in any case or class of cases, by general or special order, authorize to admit an application or claim for any exemption, deduction, refund or any other relief under this Act after the expiry of the period specified by or under this Act for making such application or claim and deal with the same on merits in accordance with law;"*

Clause Nos.3 to 5 of Circular No.09 of 2015 (F.No.312/22/2015-OT) dated 09.06.2015 issued by CBDT read as follows:-

> *"3. No condonation application for claim of refund/loss shall be entertained beyond six years from the end of the assessment year for which such application/claim is made. This limit of six years shall be applicable to all authorities having powers to condone the delay as per the above prescribed monetary limits, including the Board. A condonation application should be disposed of within six months from the endo f the months in which the application is received but the competent authority, as far as possible.*
>
> *4. In a case where refund claim has arisen consequent to a Court order, the period for which any such proceedings were pending before any Court of Law shall be ignored while calculating the said period of six years, provided such condonation application is filed within six months from the end of the month from the end of the month in which the Court order was issued or the end of financial year whichever is later.*
>
> *5.The powers of acceptance/ rejection of the application within the monetary limits delegated to the Pr.CCsIT/ CCsIT /Pr.CsIT /CsIT in case of such claims will be subject to Following conditions:*
>
> *I. At the time of considering the case under Section 119(2) (b), it shall be ensured that the income/loss declared and/or refund claimed is correct and genuine and also that the case is of genuine hardship on merits.*
>
> *II. The Pr. CCIT/CCIT/Pr. CIT/CIT dealing with the case shall be empowered to direct the jurisdictional assessing officer to make necessary inquiries or scrutinize the case in accordance with the provisions of the Act to ascertain the correctness of the claim."*

7. The petitioner filed an application under Section 119(2)(b) of the Income Tax Act, 1961 for condonation of delay claiming refund for assessment year 2021-22 before opposite party no.1 referring to circular no.07/2023 dated 31.05.2023 in F.No.312/ 63/2023-OT issued by CBDT stating as follows:-

> *"1. That the legal counsel of the assessee had filed an incorrect Return of Income for AY 2021-22 on 15.03.2022 disclosing a net tax payable of Rs.3, 29, 08,840.00 instead of claiming a refund of Rs. 21,350.00 with NIL income. (**ITR-V Copy Attached vide Annexure:2**)*

> *2. That there was an inadvertent mistake of disclosing unearned interest income of Rs.6,36,03,707.49 without adjusting the deficit of Rs. 5,41,52,906.70 primarily resulting due to unabsorbed interest."*

The opposite party no.1, while rejecting the application of the petitioner for condonation of delay in filing the revised return of income, vide impugned order dated 22.01.2024 under Annexure-1, assigned reasons to the following effect:-

> *"After careful consideration of the submission made by you regarding condonation for filling or revised return, the original return of income was filed by you after due consideration and you have undertaken that, all the information filed as verified and correct and it is hence concluded that, genuine hardship for non-filling of revised return of income is not justified. Moreover, the assessee had enough time to file the revised return of income, but you chose not to file revised return of income in time."*

In view of the aforesaid provisions, the petitioner having made out a case of genuine hardship in its favour, the rejection of application filed for condonation of delay in filing of revised return of income, vide order dated 22.01.2024, has no justification.

8. In paragraph-10 of the counter affidavit, the opposite parties have stated as follows:-

> *"10. That the averments made in paragraphs 15, 16 and 17 of the Writ Petition are wrong and hence denied. It is submitted that the Petitioner has only made vague claims of "genuine hardship" and has been unable to substantiate the same with cogent documentary evidence, which is a prerequisite for delay condonation as per settled legal position. The petitioner stated in its petition that has highlighted the genuine hardship caused to it due to non- consideration of its claim and the CIT (E) has not considered the genuine hardship for non-filing of revised return of income is not justified. Hence impugned order contravenes principles of Natural Justice."*

The reason assigned in the counter affidavit is contrary to the impugned order dated 22.01.2024 and, therefore, the same cannot be sustained in the eye of law.

9. On scrutiny of the impugned order dated 22.01.2024 vis-à-vis the counter affidavit filed by the opposite parties, the petitioner emphatically submitted that the illegality and sustainability of the allegation made by the opposite parties cannot be substantiated by way of counter affidavit by giving/supplanting fresh reasons.

10. In ***Commissioner of Police, Bombay v. Gordhandas Bhanji***, AIR 1952 SC 16, the apex Court held as follows :

> *"Public orders publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the acting and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself. Orders are not like old wine becoming better as they grow older."*

11. In ***Mohinder Singh Gill and another v. The Chief Election Commissioner, New Delhi and others***, AIR 1978 SC 851, the apex Court held as follows:

> *"When a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise an order bad in the beginning may by the time it comes to Court on account of a challenge, get validated by additional grounds later brought out."*

Similar view has also been taken in ***Bhikhubhai Vithlabhai Patel and others v. State of Gujarat and another***, (2008)4 SCC 144. This Court has also taken the same view in ***M/s. Shree Ganesh Construction v. State of Orissa & Ors.***, 2016 (II) OLR 237, in which one of us (Dr. B.R. Sarangi, J.) is a Member.

12. In view of law laid down by the apex Court, the reasons which have been assigned in the counter affidavit cannot be sustained in the eye of law and accordingly the same are not accepted.

13. On perusal of the provisions contained in Section 119(2)(b) of the Income Tax Act read with circular no.09/2015 dated 09.06.2015 issued by CBDT, it appears that "genuine hardship" which the petitioner is required to establish is the hardship that would be caused to the petitioner if the delay is not condoned or the time limit is not extended. In other words, at the time of considering the application under Section 119(2)(b) of the I.T. Act, the statutory authority is to ensure that the income/loss declared and/or refund claimed by the assessee is correct and genuine and the same will cause genuine hardship to the assessee unless the time limit is extended.

14. The petitioner has clearly stated in its application filed under Section 119(2)(b) of the I.T. Act under Annexure-11 that at the time of filing of its return of income for assessment year 2021-22, it has inadvertently erred in claiming the past years' deficit of Rs.5,41,52,906.70 against the current year's income under Section 11(1) of the I.T. Act of Rs.6,37,56,104.56 as application of income and instead offered the total income of Rs.6,37,56,104.56 as income chargeable to tax. Had the past deficit of Rs.5,41,52,906.70 been claimed as application of income, the petitioner would have entitled to a refund of Rs.21,350/-. But for such inadvertent mistake of the petitioner, it has been saddled with a demand of Rs.3,29,08,840.00. The petitioner has also demonstrated that past deficit of Rs.5,41,52,906.70 mentioned in the balance sheet filed by it and, as such, set off of past deficit is permissible in law. A bare reading of the application under Section 119(2)(b) of the Act filed by the petitioner demonstrates that its claim is genuine and unless the time limit is extended for filing revised return making such claim, the petitioner would be liable to pay a sum of Rs.3,29,08,840.00 instead of getting refund of Rs.21,350/-, which will cause genuine hardship to the petitioner

15. In ***B.M. Maiani v. Commissioner of Income Tax & Anr.***, (2008) 10 SCC 617, the apex Court held as follows:

"16. The term "genuine" as per the New Collins Concise English Dictionary is defined as under:

"Genuine' means not fake or counterfeit, real, not pretending (not bogus or merely a ruse)".

17. For interpretation of the aforementioned provision, the principle of purposive construction should be resorted to. Levy of interest is statutory in nature, inter alia, for recompensating the Revenue from loss suffered by non-deposit of tax by the assessee within the time specified therefor. The said principle should also be applied for the purpose of determining as to whether any hardship had been caused or not. A genuine hardship would, inter alia, mean a genuine difficulty. That per se would not lead to a conclusion that a person having large assets would never be in difficulty as he can sell those assets and pay the amount of interest levied.

18. The ingredients of genuine hardship must be determined keeping in view the dictionary meaning thereof and the legal conspectus attending thereto. For the said purpose, another well-known principle, namely, a person cannot take advantage of his own wrong, may also have to be borne in mind. The said principle, it is conceded, has not been applied by the courts below in this case, but we may take not o f a few precedents operating in the field to highlight the aforementioned proposition of law. [See Priyanka Overseas (P) Ltd. v. Union of India [1991 supp (1) SCC 102] (SCC at pp. 122-23, para 39); Union of India v. Major General Madan Lal Yadav (Retd.) [(1996) 4 SCC 127 : 1996 SCC (Cri) 592] (SCC at p. 142, paras 28-29); Ashok Kapil v. Sana Ullah [(1996) 6 SCC 342] (SCC at p. 345, para 7); Sushil Kumar v. Rakesh Kumar [(2003) 8 SCC 673] (SCC at 9.692, para 65, first sentence); Kusheswar Prasad Singh v. State of Bihar [(2007) 11 SCC 447] (SCC at pp. 451-52, paras 13-14 and 16).]"

16. If considered from other angle, opposite party no.1 has neither in the impugned order dated 22.01.2024 nor in the counter affidavit filed on their behalf denied the entitlement of the petitioner to claim such set off of past years' deficit. Rather, the Commissioner of Income Tax (Appeals) in its order dated 27.12.2023 has acknowledged the entitlement of the petitioner to such claim. Thereby, the petitioner has established the requirement of "genuine hardship", as enumerated under Section 119(2)(b) of the I.T. Act. As such, the finding of opposite party no.1, that the petitioner has failed to demonstrate "genuine hardship", is thoroughly misconceived, and the observation made to that effect cannot be sustained in the eye of law. It is revealed that as per Section 139 of the I.T. Act read with the Rules framed thereunder, the due date for filing return for the assessment year 2021-22 was 15.03.2022 and the petitioner filed its return on 15.03.2022. The time limit for filing revised return under Section 139(5) of the I.T. Act for the assessment year 2021-22 was 31.12.2022. The petitioner, after receipt of the intimation order under Section 143(1) of the I.T. Act for the assessment year 2021-22, initially filed an application under Section 154 of the I.T. Act before the Assessing Officer-opposite party no.2 for rectification on account of mistake of the total income of Rs.6,37,56,104.56 being chargeable to tax without setting off the past deficit, which is apparent from the record. But the Assessing Officer-opposite party no.2, vide order dated 21.06.2023, rejected the said application. The petitioner assailed the intimation order under Section 143(1) of the I.T. Act as well as the order passed

under Section 154 of the I.T. Act before the First Appellate Authority under Section 250 of the I.T. Act, which was dismissed, vide order dated 27.12.2023, with an observation that the petitioner has the remedy of making application under Section 119(2)(b) of the I.T. Act. Thereby, finding no other alternative, the petitioner approached opposite party no.1 by filing an application under Section 119(2)(b) of the I.T. Act. But opposite party no.1, without taking into consideration "genuine hardship" of the petitioner, mechanically rejected the said application, vide impugned order dated 22.01.2024, which cannot be sustained in the eye of law.

17. In view of the provisions contained in Section 119(2)(b) of the I.T. Act read with circular dated 09.06.2015 issued by CBDT, which stipulates that application for claim of refund/loss is to be made within six years from the end of the assessment year for which such application/claim is made. The last date for filing of revised return for the assessment year 2021-22 was 31.12.2022 and the petitioner made application under Section 119(2)(b) on 16.10.2023 for condonation of delay in filing revised return. Thereby, the application filed by the petitioner is well within six years time limit, as stipulated in the circular. When the petitioner filed application indicating its "genuine hardship", opposite party no. 1 could have considered the same in proper perspective, but, without doing so, it rejected such application vide impugned order dated 22.01.2024 which cannot be sustained in the eye of law.

18. In ***G.V.Infosutions Pvt. Ltd.*** (supra), the High Court of Delhi in paragraphs-8, 9 and 10 held as follows:-

> *"8. The rejection of the petitioner's application under section 119(2) (b) I sonly on the ground that according to the Chief Commissioner's opinion the plea of omission by the auditor was not substantiated. This court has difficulty to understand what more plea or proof any assessee could have brought on record to substantiate the inadvertence of its advisor. The net result of the impugned order is in effect that the petitioner's claim of inadvertent mistake is sought to be characterized as not bonafide. The court is of the opinion that an assessee has to take leave of its senses if it deliberately wishes to forego a substantial amount as the assessee is ascribed to have in the circumstances of this case."Bona fide" is to be understood in the context of the circumstance of any case. Beyond a plea of the sort the petitioner raises (concededly belated)y), there cannot necessarily be independent proof or material to establish that the auditor in fact acted without diligence. The petitioner did not urge any other grounds such as illness of someone etc., which could reasonably have been substantiated by independent material. In the circumstances of the case, the petitioner, in our opinion, was able to show bona fide reasons why the refund claim could not be made in time.*
>
> *9. The statute for period of limitation prescribed in provisions of law; however, wherever the Legislature intends relief against hardship in cases where such statutes lead to hardships, the concerened authorities; including the Revenue authorities have to construe them in a reasonable manner. That was the effect and purport of this court's decision in Indglonal Investment and Finance Ltd. (supra). This court I s of the opinion that a similar approach is to be adopted in the circumstances of the case.*
>
> *10. For the above reasons, the impugned order dated march 28, 2018 rejecting the petitioner's application under section 119(2) (b) is hereby set aside and quashed……"*

19. In ***Dr. Sujatha Ramesh*** (supra), the High Court of Karnataka, taking note of the judgment of the apex Court in ***B.M. Maiani*** (supra), held in paragraph-12 of the said judgment as follows:-

> *"12. The general and wide powers given to the Board in this regard, "if it considers it desirable or expedient so to do for avoiding genuine hardship in any case...", not only gives wide powers to the Board, but confers upon it an obligation to consider facts relevant for condonation of delay as well as the merit of the claim simultaneously. If the claim of exemption or other claim on merits is eminently a fit case for making such claim, it should not normally be defeated on the bar of limitation, particularly, when the delay or the time period for which condonation is sought is not abnormally large. It will of course depend upon the facts of the each case, where such a time period or the merit of the claim deserves such exercise of discretion in favour of the assessee under section 119(2)(b) of the Act or not and therefore, no straitjacket formula or guidelines can be laid down in this regard. However, such orders passed by the Central Board of Courts. If the good conscience of the court is pricked, even though such orders rejecting the claims on the bar of limitation may appear to be prima fade tenable, the courts may exercise their jurisdiction to set aside such orders and allow the claims on merits, setting aside the bar of limitation."*

20. In ***Shree Maharaja Agrasen Seva Sansthan*** (supra), the High Court of Gujarat, referring to the judgment of the apex Court in ***B.M. Maiani*** (supra) and taking into consideration the meaning of "genuine" and also the judgment of the High Court of Delhi in ***G.V. Infosutions Pvt. Ltd*** (supra), quashed the impugned order dated 17.06.2021 and allowed the delay condone application filed by the assessee therein.

21. In ***Subros Educational Society*** (supra), the apex Court in paragraphs 1 & 2 of the said judgment held as follows:-

> *"1. In this application filed by the Income-tax Department it is stated that Civil Appeal No. 5171 of 2016 arises out of Special Leave Petition (C)... .CC No. 8982/2016 was tagged with other appeals and the batch matters were decided by this court on December 13, 2017. However, the following question was also raised in the instant appeal which was not the subject matter of those appeals.*
>
> *"(a) Whether any excess expenditure incurred by the trust/charitable institution in earlier assessment year could be allowed to be set off against income of subsequent years by invoking section 11 of the Income-tax Act, 1961 ?"*
>
> *2. To this extent, Mr. K. Radhakrishnan, learned senior counsel appearing on behalf of the applicant/appellant is correct. Therefore, we have heard him on the aforesaid question of law as well but did not find any merit therein."*

22. Taking into consideration the fact and law, as discussed above, this Court is of the considered view that the order dated 22.01.2024 passed by opposite party no.1 in rejecting the application filed by the petitioner under Section 119(2)(b) of the I.T. Act for condonation of delay in filing the revised return under Annexure-1 for the assessment year 2021-22 cannot be sustained in the eye of law. Therefore, the said order dated 22.01.2024 is liable to be quashed and is hereby quashed. Accordingly,

this Court directs the authority concerned to take follow up action in accordance with law.

23. In the result, therefore, the writ petition is allowed. But, however, under the facts and circumstances of the case, there shall be no order as to costs.

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2024 (II) ILR-CUT-50

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

W.P.(C) NO. 651 OF 2017

SUSANTA KUMAR MUKHERJEE ……Petitioner

-V-

UNION OF INDIA & ORS. ……Opp.Parties

SERVICE LAW – Petitioner joined as teacher in Central Tibetan School – Before completion of probation period petitioner left the School without the permission and leave sanction resulting unauthorized absent from duty – The authority terminated the service of petitioner without assigning any reason – Whether the termination is sustainable? – Held, Yes – Since, the appointment of the petitioner was temporary and there was no order of confirmation, no fault can be found with the order of termination simplicitor as the authorities are not bound to assign reason for such termination.

Case Laws Relied on and Referred to :-

1. AIR 2004 SC 3256 : Mir Mohmmad Khasim vrs Union of India & Ors.
2. (2010) 8 SCC 155 : Khazia Mohammed Muzammil vrs State of Karnataka & Anr.

For Petitioner : Ms. B.K.Pattanaik

For Opp.Parties : Mr. H.Tripathy

JUDGMENT Date of Hearing & Judgment : 25.04.2024

G. SATAPATHY, J.

1. In exercise of power under Articles 226 & 227 of the Constitution of India, the petitioner has filed this writ petition praying to quash the orders dated 30.12.1995 under Annexure-8, dated 11.12.1995 under Annexure-10 relieving him of his duty w.e.f. 07.12.1995 and terminating him from service respectively and order dated 06.12.2016 under Annexure-11 by which the Central Administrative Tribunal, Cuttack Bench, Cuttack (hereinafter referred to as the "Tribunal") has dismissed his Original Application in T.A. No. 17 of 2015.

2. Briefly stated, the relevant facts of the writ petition are that in response to an advertisement of Primary Teacher of Central School for Tibetans, the petitioner applied, appeared and was selected in the recruitment test. After his selection, he was offered with an appointment vide an order dated 02.03.1993 on certain terms

and conditions and he accepted the offer of appointment by agreeing to the said terms and conditions. Accordingly the petitioner joined as a Primary Teacher in Central School for Tibetans at Chandragiri, Odisha on 17.03.1993 under a formal order of appointment. According to the petitioner, on 28.12.1994 the petitioner was, however, transferred by OP No.3 to Lobersing Branch of the School and he also completed his in-service training course for Primary Teachers conducted by the Central Tibetan Schools' Administration, New Delhi with effect from 16.06.1994 to 25.06.1994 in Karnataka and also successfully completed the Teachers' Training and evaluation workshop for English conducted by Central Institute of Indian language, Mysore at Masoorie from 16.08.1994 to 21.08.1994. According to the petitioner, he had successfully completed his provisional service for six months and probation for two years at Chandragiri Central School for Tibetans. In view of change of medium of instruction, personal and family difficulties and risk of career and life, on 06.12.1995 the petitioner made a representation to OP No.2 for his transfer and posting in some school at Darjeeling District of his native province in West Bengal, but when on 07.12.1995 the petitioner entered into the office of his Branch School, all of a sudden the Principal asked him to put his signature on a blank paper, but he refused and thereafter, on forcefully intervention of one Sonam and finding no alternative, the petitioner unwillingly signed on such paper and he went to the Office of the Principal as per instruction, but in vein and in the process, he discharged his duty in the main school at Chandragiri till 13.12.1995 by signing the relevant Register, but on 12.12.1995 the petitioner on receipt of telephone call regarding his mother's illness, left the school on 14.12.1995 by leaving an application of leave in the Office of Principal in his absence and thereafter, due to continuous illness of his mother, he remained on leave by sending letter through registered post and telegram till mid of February, 1996. However, the petitioner received relieve order bearing No. CSTC-P(SM)93-95/819 dated 30.12.1995 from opposite party by registered post on 10.01.1996. Against such order, the petitioner knocked the door of this Court in OJC No. 1147 of 1996 and in the counter affidavit to such proceeding, an order dated 11.12.1995 of OP No. 2 was annexed showing termination of service of the petitioner with effect from 11.12.1995. The aforesaid OJC was subsequently transferred to the Tribunal and renumbered as T.A. No. 17 of 2015 which was dismissed by the Tribunal vide Annexure-11. Finding no way out, the petitioner again knocked the door of this Court in this writ petition praying to quash Annexures-8, 10 & 11.

3. In the proceeding before the Tribunal, the Central Tibetans School Administration represented by its Secretary and the Principal who were OP Nos. 2 & 3 in T.A. No. 17 of 2015 had filed counter affidavit stating inter alia that the petitioner left the school on 07.12.1995 without permission and sanction of leave and remained in unauthorized absent from duty from 07.12.1995 onwards till the date of his relieve on 30.12.1995 and the petitioner was appointed purely on temporary basis terminable at any time without assigning any reason and the termination

of the petitioner from service on 11.12.1995 was in terms of his appointment order and thereby, the petitioner is not entitled to any relief. It was also stated in the counter affidavit that the service of the petitioner was not confirmed and his termination was desirable in the interest of institution and exigency of public service and the Principal had accordingly informed the Central Tibetans School Administration, New Delhi about the abscondance of the petitioner since 12.12.1995 and the petitioner was accordingly terminated.

4. Ms.B.K.Pattanaik, learned counsel appearing for the petitioner has emphatically submitted that since the petitioner has successfully completed the probation period as a teacher in the Central Tibetans School, Chandragiri, his service was deemed to have been confirmed and therefore, the petitioner having terminated from service by OP No.3 unilaterally without any Disciplinary Proceeding, such termination order cannot sustain in the eye of law. She further submits that the petitioner was duly selected to the post of Primary Teacher in Central School of Tibetans and was also offered with an appointment on 02.03.1993 and the petitioner accordingly joined his service on 17.03.1993 and discharged his duty till he availed leave on 12.12.1995, but in absence of any proceeding, how come he would be terminated from service with effect from 11.12.1995 on the ground of unauthorized absence from duty and such order is non-est in eye of law since he was terminated from service on a day he was in service, but being oblivious of the aforesaid facts, which is clearly established by documents, the learned Tribunal has failed to appreciate the facts and circumstance of the case and erroneously dismissed the TA which is not only arbitrary, unsustainable, but also liable to be quashed. In relying upon the decision in ***Mir Mohmmad Khasim vrs Union of India and others; AIR 2004 SC 3256***, Ms. Pattanaik has urged before this Court that since the service of the petitioner was deemed to have been confirmed for completing the probation period, the petitioner cannot be terminated from service without any regular Disciplinary Proceeding initiated against him and thereby, the order passed by OP No.3 at Annexures-8 & 10 are liable to be quashed, so also the order of the Tribunal at Annexure-11. Ms. Pattanaik has accordingly prayed to allow the writ petition by quashing Annexures-8, 10 & 11.

As against these submissions, Mr.H.Tripathy, learned counsel for OP Nos. 5 to 8 has submitted that since the appointment of the petitioner was purely on temporary basis and his service having not been confirmed, the action of OP No.3 terminating the petitioner from service cannot be questioned, more particularly when he remained in unauthorized absence from duty for a indefinite period with effect from 07.12.1995 and therefore, the learned Tribunal has rightly appreciated the facts and documents and accordingly dismissed the TA of the petitioner. Mr.Tripathy has further submitted that the confirmation of service in this case is purely dependent upon successful completion of probation period for two years which is six months after the trial period and therefore, for confirmation of service, the petitioner has to establish that he had successfully completed two years probation period in addition

to satisfactory performance of six months for trial period, but the petitioner having not done so and remained in unauthorized absence before completing the probation period, the order of termination of the petitioner cannot be legally questioned in any forum. Mr.Tripathy by relying upon the decision in ***Khazia Mohammed Muzammil vrs State of Karnataka and another; (2010) 8 SCC 155*** has submitted that the petitioner cannot be considered to have deemed to have been confirmed in service and therefore, the actions of OP No.3 being legally sound cannot be interfered with and the writ petition is accordingly liable to be dismissed.

5. None appears for the rest of the opposite parties, even though they had entered appearance through learned counsel initially, but they have not participated in the hearing.

6. After having considered the rival submissions upon perusal of record, the solitary question emerges for consideration in this writ petition is whether the order of termination of the petitioner from service under Annexure-10 is unsustainable in the eye of law for want of any regular Disciplinary Proceeding since the service of the petitioner was deemed to have been confirmed and consequently, the order relieving him from duties under Annexure-8 is liable to be quashed. It is not in dispute that the petitioner was offered with an appointment vide an order dated 02.03.1993 which is placed at Annexure-1, but paragraph-2 of such order clearly discloses the terms and appointment of the petitioner, which reads as under:-

> ***"The Terms and appointment are as follows:-***
>
> *(i) The Post is purely temporary but is likely to continue,*
>
> *(ii) His/her appointment shall be treated as provisional for the first six months from the date of appointment and his/her continuance beyond that period shall be determined only after obtaining a special report in respect of his/her work during this period. If his/her appointment is continued beyond the first six months, he/she shall be kept on probation for two years beginning with the date of appointment.*
>
> *(iii) After the trial period for as long as he/she is appointed in a temporary capacity, the appointment may be terminated at any time by one month's notice given on either side viz. (by appointee or the appointing authority) without assigning any reason. The appointing authority however reserves the right of terminating the service of the appointee forthwith or before the expiry of the stipulated period of notice by making payment to him/her a sum equivalent to the Pay and Allowances for the period of notice of the unexpired portion thereof".*

A subtle glance of Annexure-1 would go to reveal that the post in which the petitioner was appointed was purely temporary in nature and such appointment was being treated as provisional for the first six months from the initial date of appointment and the continuation of the petitioner beyond that period of six months would have to be determined only after obtaining a special report. It further reveals that had the appointment of the petitioner continued beyond the first six months, then he would have to remain in probation for a period of two years with effect from the date of his initial appointment. The appointment order of the petitioner herein stipulates that after the trial period, for as long as the petitioner was appointed in a

temporary capacity, the appointment can be terminated at any time by one month's notice given on either side without assigning any reason, but the Appointing Authority, however, reserved the right of terminating the service of the appointee forthwith. One of the factual aspect of this case is that the petitioner was terminated vide order under Annexure-10 by the school authority by giving one month salary in lieu of notice in terms of offer of appointment vide memorandum dated 02.03.1993. Much argument was advanced with regard to deemed confirmation service of the petitioner, but in absence of any statutory rules, the offer of appointment would be considered appropriate to decide the nature of service of the petitioner and whether his service was confirmed or not. Learned counsel for the petitioner, however, acknowledges that no order was passed with regard to confirmation of service of the petitioner, but she, however, urges to this Court to consider that the service of the petitioner was deemed to have been confirmed in view of his completion in service for two years service in the post.

7. The principle that is normally followed in Service Jurisprudence for confirmation of service is no more res-integra and when probation period is prescribed for a post, the same by itself mean that the service of the incumbent would be confirmed only on successful completion of probation period by the incumbent in the post. In this case, neither any document nor any material was produced before this Court to show that the petitioner has satisfactorily completed the period of probation for the post of Primary Teacher in Central School for Tibetans at Chandragiri. Once it is found that the probation period is not successfully completed, the service of the petitioner cannot be considered to be deemed to have been confirmed merely on the ground that the petitioner has worked in the school for some period and that too, his appointment was purely on temporary basis. The decision in ***Mir Mohmmad Khasim(supra)*** as relied on by the petitioner is respectfully considered, but found distinguishable from the facts of the present case inasmuch as in the relied on case, there was a declaration in favour of the applicant for satisfactory completion of period of probation, but the same situation is not here in this case. On the other hand, in ***Khazia Mohammed Muzammil(supra)***, the Apex Court in paragraph-19 has held thus:-

> xx xx xx xx xx xx xx
>
> *"The act is not a mere formality but a mandatory requirement which has to be completed by due application of mind. The* ***suitability or unsuitability****, as the case may be,* ***has to be recorded by the authority after due application of mind*** *and once it comes to such a decision the other requirement is that* ***a specific order in that behalf has to be issued*** *and* ***unless such an order is issued it will be presumed that there shall not be satisfactorily completion of probation period****. The Rules, being specific and admitting no ambiguity, must be construed on their plain language to mean that the concept of 'deemed confirmation' or 'automatic confirmation' cannot be applied in the present case."*

8. This Court, however, on this point believes that a probationer remains on probation, unless he has successfully completed the probation period which needs to

be evaluated on the basis of work and performance of the probationer. In absence of any statutory rules with regard to manner and procedure for declaration of successful completion of probation period by the probationer, the Competent Authority of the institution/organization has to seriously evaluate the work performance of the probationer, but that too, not to be done in an arbitrary, casual or cavalier manner. The concerned authority has to apply its mind judiciously to take a decision with regard to suitability or unsuitability of the probationer to the post or further extension of probation period of the probationer by taking into pragmatic consideration while evaluating the work performance of the probationer vis-à-vis the duties and responsibilities attached to the post. It is, however, made clear that unless the probationer has successfully completed the probation period on the basis of work evaluation, he cannot be confirmed in service merely because he has completed some period in the service which has not been evaluated by the authority, but the same principle is not applicable universally, more particularly when the authority demonstrates latches or negligence to evaluate the performance of the probationer after the prescribed period without any reason.

9. Reverting back to the factual aspect of the writ petition, the petitioner himself has stated in the writ petition that on 06.12.1995 he made representation to O.P.No.2 for transfer, but on 07.12.1995 he unwillingly signed on a plain paper on coercion by Principal and another person and on 14.12.1995, he went on leave by leaving an application for leave and headquarter leaving permission in the Office of the Principal in his absence and on 14.12.1995, on his way at Bolpur, he sent a telegram to the Principal for recording his leave. Again on 23.12.1995, he requested for extension of his leave till 30.12.1995 by sending letter through Registered Post. Further, he states that due to continuance of illness of his mother, he extended his leave on 30.12.1995, 03.01.1996 & 23.01.1996 by sending letter through Registered Post and in the process he extended his leave till mid of February, 1996, but the petitioner only could produce a typed letter under Annexure-6 stated to have been submitted by him without his signature and without any proof to have sent it to the authority nor could he produce any scrap of paper to evidence that he went on leave and extended such leave till mid of February, 1996. On the other hand, Annexure-8 to the writ petition discloses that with reference to the Secretary, C.T.S.A., Telegram and telegram confirmation letter No.4-20/93-CTSA-S-III dated 11.12.1995, the petitioner was relieved of his duty with effect from 07.12.1995. Further, Annexure-9 also discloses that in response to the Telegram No.1520 dated 10.09.1996 regarding extension of leave, the petitioner was communicated not to make unnecessary correspondence, especially when his service has been terminated vide HQS Order No.F-4-20/93-CTSA-SIII dated 11.12.1995. The above narration of facts quite reveal that the petitioner had remained absent from the school without any permission, but since the service of the petitioner was not confirmed and his service was purely on temporary basis, the school authority terminated his service and relieved him from his duty which can neither be considered as illegal, arbitrary or unreasonable in the circumstance nor can it be considered as violative or contrary to the terms of appointment of the petitioner.

10. On wholesome analysis of the facts and order impugned in this writ petition which was passed by the Tribunal under Annexure-11, it appears to the Court that the Tribunal on analysis of facts and documents has rightly come to a conclusion that since the appointment of the petitioner is purely temporary and there is no order of confirmation, no fault can be found with the order of termination simplicitor as the authorities are not bound to assign reason for such termination, when it is followed by one month's salary in lieu of notice which is the primary terms and conditions of the appointment. Thus, such finding being on proper appreciation of law and facts, this Court is reluctant to interfere with the order of the Tribunal. Consequently, no ground is made out by the petitioner to grant any relief to the petitioner.

11. Resultantly, the writ petition being devoid of merit stands dismissed on contest, but no order as to costs.

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2024 (II) ILR-CUT-56

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

W.P.(C) NO. 29572 OF 2023

JYOTIRMOY MOHAPATRA ……Petitioner

-V-

STATE OF ODISHA & ORS. ……Opp.Parties

INDUSTRIAL DISPUTE ACT, 1947 – Section 33-C(2) – Petitioner submited legal notice to management claiming three months' salary – The legal notice was received by the management – No objection/reply was filed by the employer – The Labour Court did not relied the legal notice which was exhibited before it and passed impugned order of denying the arrear salary – Whether the impugned order is sustainable? – Held, No – Reason indicated. (Paras 7-9)

For Petitioner : Mrs. Umarani Panda

For Opp.Parties : Mr. A.K. Sharma (AGA), Mr. D.K. Pani

JUDGMENT Date of Hearing & Judgment : 28.02.2024

ARINDAM SINHA, J.

1. Mrs. Panda, learned advocate appears on behalf of petitioner and submits, her client is a workman. He made application under section 33-C(2) in Industrial Disputes Act, 1947. By order dated 10th August, 2023 the labour Court did not compute the salary payable to her client but dismissed the application. She seeks interference. On query from Court she submits, opposite party no.6 is the employer.

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

3. Mr. Pani, learned advocate appears on behalf of opposite party no.6 (management). He submits, there should be no interference with impugned order as petitioner miserably failed to prove his case on facts. He did not work in the months of December, 2021, January and February, 2022. No salaries were payable to him and question of computation of any amount did not arise. There has been no determination on the claim of petitioner having worked for three months. He reiterates the labour Court did not find satisfaction on proof of the claim of petitioner. In fact the labour Court said that petitioner had admitted his failure to prove.

4. Mrs. Panda in reply draws attention to internal page 7 in certified copy of impugned judgment to submit, the document being legal notice dated 8th July, 2022 given by her client through advocate, was marked exhibit-2 in the proceeding. The labour Court acted with illegality in not relying upon the document, original of which the management received. She wants to rely on further documents to show her client reported on his work online. On query from Court she submits, those documents were not tendered as exhibits in the labour Court.

5. There were two documents tendered in the labour Court. First was copy of appointment letter dated 15th April, 2021 marked as ext.1, without objection. Second was copy of said legal notice marked ext.2, with objection. No other document was tendered by either party. By impugned order, it appears, the labour Court dealt with petitioner's contention on ext.2, erroneously reflected as ext.B therein.

6. Nothing turns on erroneous description of ext.2 as ext.B in impugned order. However, we have before us petitioner, who had made a claim by advocate's letter dated 8th July, 2022, tendered and marked ext.2. On further scrutiny we find, the objection did not relate to genuineness of the document but only to its contents. Hence, the legal notice was received by the management, who denied its contents. There is nothing tendered by the management to substantiate its dispute on the contents of the notice. This read with statement made by opposite party no.1 during cross-examination that petitioner worked till December, 2022 and thereupon to immediately say, he does not remember exact date, month, year of his last work under the management can, in the facts and circumstances, reasonably be presumed to be December, 2021. It is one of the three months, for which petitioner says he was not paid his salary.

7. The oral and documentary evidence before the labour Court was in respect of a claim asserted by petitioner, not demonstrated to be without basis. Making objection as to contents of the claim letter does not render the claim bad. Least the management could have done was to reply to the notice, disputing the claim. That it did not do. No document of reply denying the claim was tendered in evidence.

8. So far as contention of the management regarding determination is concerned, same did not find favour with the labour Court. Petitioner (workman) has challenged impugned order contending perversity on finding of facts. We have adjudicated the

challenge as aforesaid and are not required to deal with the management's contention of no determination, on its allegation that petitioner abandoned work in December, 2021. Where the claim for salary of the three months was made but not disputed and the workman had applied for execution under section 33-C(2), the question raised of determination was misconceived.

9. Impugned order is set aside and quashed as not based on the evidence. The labour Court is directed to proceed with computing the benefit claimed and dispose of the case as expeditiously as possible.

10. The writ petition is disposed of.

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2024 (II) ILR-CUT-58

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

MATA NO. 51 OF 2024

HARA KUMAR RATH ……Appellant

-V-

DIPTIMAYEE MISHRA & ANR. ……Respondents

HINDU MARRIAGE ACT, 1955 – Section 19 – Jurisdiction – Meaning – Explained. (Para 7)

Case Laws Relied on and Referred to :-

1. AIR 1922 Calcutta 274 : Jyotish Prokas Vs. Bagla Kanta.
2. 1995 Criminal Law Journal 1486 : Brij Kishore Singh vrs. Smt. Nutan Singh.
3. (2015) 6 SCC 412 : Foreshore Co-operative Housing Society Ltd. vrs. Praveen D Desai(D) Their LRs. & Ors.

For Appellant : Mr. Deba Kumar Rath
For Respondents : Mr. S. Mohanty

JUDGMENT Date of Hearing & Judgment : 19.03.2024

ARINDAM SINHA, J.

1. Mr. Rath, learned advocate appears on behalf of applicant/appellant-husband. He submits, his client is aggrieved by order dated 19th October, 2023 of the Family Court refusing to admit his client's civil proceeding for dissolution of the marriage on ground of lack of jurisdiction. The appeal was presented on reported delay of nine days. The delay be condoned and the appeal admitted.

2. Mr. Mohanty, learned advocate appears on behalf of respondent-wife and in fairness does not oppose the application.

3. We have perused the application and accept the causes shown. The delay is condoned and the appeal admitted. The application is disposed of.

4. Mr. Rath submits, the marriage was solemnized on 18th May, 2011 as per Hindu rites and customs at Dhenkanal. The marriage happened within local limits of the district Court at Dhenkanal. Under section 7 in Family Courts Act, 1984 the Family Court has jurisdiction. First sentence from para-3.i in impugned order is reproduced below.

> *"3.i. In the plaint, it is averred that the petitioner married the respondent on 18.05.2011as per Hindu rites and customs at Dhenkanal*."

5. He relies on clause-(i) under section 19 in Hindu Marriage Act, 1955. He submits, place where marriage was solemnized is a jurisdictional fact. The Family Court erred in not appreciating the fact. No other fact discussed in impugned order can overcome the jurisdictional fact. He adds, his client filed for divorce first before the Family Court and thereafter respondent-wife filed in the Court at Bengaluru.

6. Mr. Mohanty submits, civil proceeding for dissolution of marriage was filed by his client before the competent Court at Bengaluru. Appellant-husband is contesting the case, at present referred to mediation. He submits further, his client filed the civil proceeding in the Court at Bengaluru bona fide as she had not till then been noticed in the civil proceeding instituted by respondent husband in the Family Court at Dhenkanal. These and other facts were considered by said Court. Also considered were authorities on interpretation of term 'jurisdiction'. As such, interference in appeal is not warranted.

7. There can be no doubt that place where a marriage was solemnized is a jurisdictional fact giving jurisdiction to the district Court, within the local limits of whose ordinary original civil jurisdiction, it was done. Clearly, the Family Court has jurisdiction to receive try and determine the civil proceeding instituted by appellant-husband for dissolution of the marriage. The authorities relied upon by the Family Court to hold otherwise are not applicable as none of them deal with jurisdiction based statutory provision on jurisdictional fact. In **Jyotish Prokas Vs. Bagla Kanta** reported in **AIR 1922 Calcutta 274** view taken was on jurisdiction in context of nature of cause of action and relief sought. **Brij Kishore Singh vrs. Smt. Nutan Singh**, reported in **1995 Criminal Law Journal 1486** is view taken on jurisdiction in context of limits imposed on power of Court to hear and determine issues between parties seeking to avail themselves of its process by reference to factors including, inter alia, subject matter of the issue. Judgment of the Supreme Court in **Foreshore Co-operative Housing Society Ltd. vrs. Praveen D Desai (D) Their Lrs. & Others** reported in **(2015) 6 SCC 412** is interpretation of term 'jurisdiction' as an expression used in a variety of senses as draws colour from its context. Expanded meaning was given to the term rather than a conventional and narrow one.

8. Impugned order is reversed in appeal. The Family Court will proceed to try and determine the civil proceeding. We observe that reasons of geography may cause respondent-wife to be advised to move the Supreme Court for transfer of the case to the Court at Bengaluru.

9. The appeal is allowed and disposed of.

2024 (II) ILR-CUT-60

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

MATA NO. 55 OF 2016

SAMITA MISHRA ……Appellant

-V-

SURYAKANTA HOTA ……Respondent

HINDU MARRIAGE ACT, 1955 – Section 13 – Cruelty – The learned Family Court dissolved the marriage at the instance of husband – The learned Family Court held that, the husband attributed mental cruelty on the plea that, wife is a self-centered and carrier oriented – The wife in her written statement stated that, she would join, after her period of temporary appointment as guest faculty is over – The husband did not wait and was impatient to file an application for divorce – Whether the divorce granted by the Court below on the ground of cruelty is sustainable? – Held, No.

Case Law Relied on and Referred to :-

1. AIR 2009 SC 589 : Suman Kapur Vrs. Sudhir Kapur.

For Appellant : Mr. S.K. Pradhan-3
For Respondent : Mr. M. Mishra

JUDGMENT Date of Hearing & Judgment : 03.04.2024

ARINDAM SINHA, J.

1. The appeal has been preferred by appellant-wife being aggrieved by judgment dated 3rd May, 2016 of the Family Court dissolving the marriage at instance of the husband, carrying consequential directions regarding alimony and maintenance for her and her minor son. Mr. Pradhan, learned advocate appears on behalf of appellant-wife and Mr. Mishra, learned advocate for respondent-husband, who has also filed cross objection challenging the directions for alimony.

2. Order sheet reveals appellant-wife before us wanted reconciliation, at least for well being of the child. She wanted and still wants to go back and live with her husband. Here it would be appropriate to reproduce below paragraphs-1 to 3 from our order dated 4th March, 2024.

> *"1. Mr. Pradhan, learned advocate appears on behalf of appellant-wife and submits, his client is in Court. He reiterates, she wants to reconcile in wanting to go back, with the son, to her husband and stay with him.*
>
> *2. Mr. Mishra, learned advocate appears on behalf of respondent husband and submits, his client is in Court. We asked respondent husband to step forward and on query from Court regarding his wife being present and having expressed her desire to reconcile, he with folded hands declined.*
>
> *3. The parties are excused from further appearance."*

So the appeal has been called on for hearing.

3. Mr. Pradhan submits, there was no act of cruelty by his client. Impugned judgment is erroneous in finding otherwise. He reiterates, his client wants reconciliation and the son, she is confident, will cause it. His client is ready to live with her husband and she wants to put everything behind her and together move forward.

4. Mr. Mishra submits, the Family Court correctly appreciated the facts. It was an arranged marriage. There was no demand for dowry. She had no regard, neither for his client nor members of his family. She picked up quarrel with his client's mother. There were abuse hurled at his client and his mother. Appellant-wife was adamant. All this amounted to cruelty and was found so in impugned judgment. Appellant-wife having married into a good family, was career oriented. She put her career first to desert him.

5. Appellant-wife upon having meted out cruelty and deserted his client, she having been gainfully employed, directions regarding monthly alimony and provision for residential accommodation were erroneously made. His client is unemployed and not in a position to comply with the directions. Hence, cross objection has been filed.

6. We have perused impugned judgment and the oral evidence adduced. We have also seen exhibit-A series being electronic mail conversation between the parties. The husband's contention of his wife being adamant and schizophrenic had been alleged in the petition. There was no mention nor reliance therein upon the electronic mail conversation between the parties. The written statement and cross examination of the husband were accordingly confined to case made out by the husband.

7. Father of respondent-husband was second witness for him. The witness referred to an incident of quarrel between his wife and daughter-in-law, when appellant-wife had said she wanted early divorce. In his cross-examination several additional facts were drawn from him, including mutual understanding between the parties that after marriage his daughter-in-law would be allowed to continue with her studies. Party witness no.3 of respondent-husband said he is a neighbor. Paragraph-4 from his evidence in chief by affidavit is reproduced below.

> *"4. That, so far my knowledge is concerned, wife of Suryakanta Hota is a quarrelsome lady, to which her father is also supported. Due to her adamant behavior and non-cooperate attitude, some different of opinion is going on, on the matrimonial life of Suryakanta Hota and his family."*

In cross-examination, on behalf of appellant-wife it was elicited from the witness that he had sold a plot of land to respondent husband.

8. Mother of respondent-husband was witness no.4 on his side. She introduced allegation as would appear from paragraph-4 in her evidence in chief by affidavit. Said paragraph is reproduced below.

"4. That, my daughter in law by character is suspicious in nature. She even did not hesitate to entangle my son relationship with me. Even in so many occasion she accused us that, we are taking attempt of her murder by mixing poison with her medicine."

We looked at the cross-examination but refrain from saying anything because the allegation introduced by appellant's mother-in law did not find place, neither in the petition nor cross-examination of respondent-husband.

9. We appreciate that appellant-wife after marriage was allowed to pursue her studies and achieve her higher qualification. She then obtained engagement in academic field. The engagement was at a place away from her matrimonial home. This act of her has been found in impugned judgment to be an incident of cruelty meted out by her towards her husband. It must be mentioned here, respondent husband's first ground of desertion was rejected by the Family Court on finding that the petition stood presented before expiry of the statutory period.

10. In paragraph-22 of impugned judgment allegation regarding four incidents of cruelty stand recorded. The paragraph is reproduced below.

"22. Bearing the above parameters of law, in my mind, I proceed to analyse the evidence adduced by the parties to determine whether there is existence of any cruelty either physical or mental, so that the Court can pass a decree of dissolution of marriage. The petitioner attributed mental cruelty on four aspects. They are as follows:-

i) Not doing household chores
ii) Misbehaving him and his parents
iii) Self centered and career oriented
iv) Making unethical and unholy allegation linking up the character of the husband with the character of the mother-in-law."

The Family Court found on allegations (iii) and (iv). Regarding allegation (iii) finding was respondent-husband helped appellant wife to complete her M.Phil and admitted her for Ph.D. in Ravenshaw College. However, respondent-husband (they) did not want that appellant-wife should be employed. She with her father went to Puri on 9th July, 2013 with assurance to return on 18th July, 2013 but instead went to Paralakhemundi and she joined as English Lecturer in Paralakhemundi College. On those facts the Family Court found it apparent that appellant-wife is career oriented and regardless for restoration of matrimonial obligations. Reliance was placed on judgment of the Supreme Court in **Suman Kapur vrs. Sudhir Kapur** reported in **AIR 2009 SC 589**. The Family Court said, accordingly the point stood answered in favour of respondent husband.

11. In the case before us it is an admitted position that the husband supported his wife to obtain higher educational qualification but he and, it is presumed his parents, did not want the wife to be employed. Aspiring to give fruit to one's education cannot be seen as an act of cruelty towards a spouse. In **Suman Kapur** (supra) there was finding that the wife was career oriented lady wanting to pursue her professional career to achieve success, constantly and continuously avoiding staying with the husband and preventing him matrimonial relation, amounting to mental cruelty. In

this case and in the context, pleading of appellant-wife in paragraph-17 of her written statement is reproduced below.

> *"17. The desire for restitution of conjugal rights was not sincere.* ***The respondent had always said she would come after her period of temporary appointment as guest faculty is over. The petitioner did not wait and was rather impatient to file for divorce.***
>
> *It is a fact that the petitioner has filed the proceeding only to save him and his parents from the misdeeds they have done towards the respondent. And the allegations made are denied herewith.*
>
> *And hence there is no cause of action of the proceeding and also there is no specific reasonable grounds."* (emphasis supplied)

We have not been shown from the oral evidence adduced that appellant-wife stood discredited on her statements made in above reproduced paragraph of her written statement, under emphasis. As such, this case appears to be distinguishable on facts from **Suman Kapur** (supra), whereby the Supreme Court had confirmed concurrent decrees of divorce on facts found by the trial Court that the wife was interested in her career only and she had neglected towards matrimonial obligations and exercise of conjugal rights by the husband. The trial Court also held that termination of pregnancy by wife was without consent or even knowledge of the husband which was in the nature of mental cruelty.

12. The other incident of cruelty found by the Family Court as had been inflicted on respondent-husband is allegation made by appellant-wife against respondent-husband, of him having physical relationship with his mother. As aforesaid, this was not pleaded by respondent-husband in his petition nor adduced by way of evidence in chief in the affidavit filed by him. There was no suggestion in cross-examination put to him by learned advocate representing appellant-wife in the Family Court. The examination of party witness nos.2 and 3 from side of respondent-husband also did not disclose such allegation. The allegation was introduced by appellant's mother-in-law and weighed with the Family Court. The learned Judge in several places of impugned judgment mentioned that the 'radix' of the dispute is physical intimacy of respondent husband with his mother. However, it is trite that in adversarial litigation there must be notice of case. In the Family Court there was no notice of such a case by the husband against the wife. Notice of case is the purpose of pleadings. Proof of allegations made in pleadings are to come pursuant to foundation laid thereby, on evidence adduced in support thereof. In this connection it must be said that disclosure of the electronic mail conversation between the parties was made by respondent-husband. Appellant-wife said many things, in the electronic mail conversation, private between husband and wife, disclosed by the husband and by her answers to questions in cross-examination. We understand she was provoked. Those statements are irrelevant for the purpose of our adjudication because the evidence was not in support of a case made out by the husband, not by his pleadings nor by his oral evidence.

13. For reasons aforesaid, we confirm finding of the Family Court regarding inability of respondent-husband to have maintained his ground of desertion by appellant-wife. We set aside the findings on cruelty, firstly by distinguishing on facts this case from **Suman Kapur** (supra) and secondly, the subsequent finding on cruelty being based on irrelevant material.

14. Impugned judgment is accordingly reversed. The appeal is allowed and disposed of. The cross objection is also thus disposed of.

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2024 (II) ILR-CUT-64

D. DASH, J.

CRLREV NO. 408 OF 2023

M/s.D.N.HOMES PVT. LTD, KHURDA & ANR. ……Petitioners

-V-

UNION OF INDIA ……Opp.Party

(A) CRIMINAL PROCEDURE CODE, 1973 – Section 397(1)(2) r/w 271(C) of the Income Tax Act, 1961 – The Trial Court has taken cognizance of the offences U/s. 276(B), Section 2(35) & 278(B) of the IT Act & issued summon to the Petitioners – Whether revision U/s. 397 is maintainable against the order of cognizance of the offences taken by the Trial Court? – Held, Yes – The order in question clearly falls within the ambit of intermediate order – Thus it is amenable to revisional jurisdiction. (Para 13)

(B) WORDS & PHRASES – Difference between "Sufficient cause & Reasonable cause" & difference between "Interlocutory & Intermediate order" – Discussed. (Paras 10 - 12)

(C) INCOME TAX ACT, 1961 – Section 271(C) – Penalty – Whether levy of penalty U/s. 271(C) is automatic? – Held, No – Before levying penalty the concern officer is required to find out whether the explanation offered by the assesse or the person, as the case may be, as regards to the reason for failure was on account of reasonable cause.

Case Laws Relied on and Referred to :-

1. (2007) 11 SCC 297 : Madhumilan Syntex Ltd. & Ors. Vs. Union of India & Anr.
2. 2022 SCC OnLine Jhar 537 : (2023) 454 ITR 48 : Dev Multicom Pvt. Ltd. & Anr. Vs. State of Jharkhand & batch.
3. (2017) 14 SCC 809 : Girish Kumar Suneja Vs. Central Bureau of Investigation.
4. (1977) 4 SCC 551: Madhu Limaye v. State of Maharashtra.
5. 2000 245 (ITR) 322 (Madras) : ITO Vrs. Roshni Cold Storage.
6. (2001) SCC Online Del 1429 : Woodward Governor India Pvt. Ltd. Vrs. Commissioner of Income Tax & Ors.

For Petitioners : Mr. R.P. Kar, Senior Advocate, Mr. A.K. Dash

For Opp.Party : Mr.S.S. Mohapatra, Senior Standing Counsel, (Income Tax).

JUDGMENT Date of Hearing : 23.08.2023 : Date of Judgment :13.10.2023

D.DASH, J.

The Petitioners, by filing this Revision under section-397 read with section-401 of the Criminal Procedure Code; 1973 (for short hereinafter referred to as 'the Cr.P.C.') have called in question the legality and propriety of an order dated 02.02.2023 passed by the learned Additional Chief Judicial Magistrate (Special Court), Cuttack in 2(CC) Case No.04 of 2023.

2. On 13.01.2023 the Opposite Party represented by the Assistant Commissioner of Income Tax (TDS), Bhubaneswar filed a complaint alleging commission of offence punishable under section 276B of the Income Tax Act (for short 'the IT Act') by the Petitioner No.1, the Private Limited Company, as named and the Petitioner No.2 its Principal Officer-cum-Managing director arraigning them as the accused persons.

The Trial Court by order dated 02.02.2023 has taken cognizance of the offences under sections 276B, section 2(35) and 278B of the IT Act and issued summon to these Petitioners who have been arraigned as accused persons in the said complaint alleging commission of the said offences. The impugned order taking cognizance of the offences alleged to have been committed by these Petitioners (accused persons) passed by the court below is now the subject matter of this present Revision.

I. FACT OF THE CASE:-

3. Facts necessary for the purpose are as under:-

(A) The Petitioner No.1 (Accused No.1) is a Private Limited Company having its registered office at Bhubaneswar has been accorded with the Tax Deduction and Collection Account Number (TAN) to Deduct Tax at Source (TDS) and the Opposite Party No.2 (Accused No.2) is the Director and Principal Officer of the Opposite Party No.1-Company (Accused No.1) who is accountable/responsible for the day to day affairs of Petitioner No.1-Company (Accused No.1) as per the provision of section 2(35) and section 278B of the IT Act.

(B) By the virtue of the same, the Petitioner No.2 (Accused No.2) carries the responsibility to deduct and deposit TDS. As per the System Generated Statement reprieved from the portal, i.e., TDS Reconciliation and Correction Enabling System (TRACES), the Petitioner No.2 (Accused No.2) is said to have deducted a sum of Rs.2,58,29,945.00 for the Financial Year 2020-21 (Assessment Year 2021-22) as TDS. It is stated that the said amount was not deposited with the Central Government by the due dates. The Petitioner are said to have withheld such dues thereby have failed to pay in the account of the Central Government, the collected TDS. However, they have deposited the said amount in phased manner with delay of 31 days to 214 days. Hence, the complaint case, alleging that the Petitioners (accused persons) have committed the offence under section 276(B) of the IT Act punishable with rigorous imprisonment for a

term not less than three months and may extend to 7 years and fine for contravention of the provisions contained in chapter-XVII-B of the IT Act and Rule-30 of the Income Tax Rules, 1962 (for short, 'IT Rules'), which mandates the deposits to be made by 7th of the next month and for the deduction for the month of March, the same be deposited by 30th of April of the next Financial Year. The specific allegation is that the Petitioners have caused delay in depositing the TDS amount in the account of the Opposite Party (Complainant) ranging from 31 days to 214 days. Thus, it is said that the Petitioners (accused persons) have defaulted in depositing the TDS amount in the account of the Opposite Party within the time stipulated under the law.

It is further alleged that the Petitioners (accused persons) have violated the mandatory provisions contained in IT Act and Rules made in that regard and have deliberately withheld the dues for the period.

(C) It is stated in the complaint by the Opposite Party (Complainant) that in this connection a show cause letter dated 28.02.2022 was issued to the Petitioners (accused persons) calling upon to file the reply on or before 22.03.2022 and responding to the same, the Petitioners (accused persons) had submitted the show cause. That reply being incomplete, the Opposite Party (complainant) further directed the Petitioners (accused persons) through the second show cause notice dated 04.05.2022 for furnishing certain additional informations which was responded to by the Petitioners (accused persons) on 30.05.2022. The Opposite Party (Complainant) identified the Petitioner No.2 (Accused No.2) as the Principal Officer of the Petitioner No.1 (Accused No.1) as per the provisions of section 2(35) read with section 278B of the IT Act.

(D) On perusal of the records, the explanations furnished in the show cause reply by the Petitioners (accused persons) being found by the Authority to be unsatisfactory, two other notices were issued on 07.12.2022 calling upon the Petitioners (accused persons) to submit their reply on or before 21.12.2022, which were so tendered. Thereafter, the Commissioner, Income Tax (TDS), Bhubaneswar by an order under section 279(1) of the IT Act accorded sanction for launching the prosecution against the Petitioners for commission of offence under section 276B of the IT Act, the present complaint against the Petitioners have come to be filed in the court of law in which the Court below by the impugned order has taken the cognizance of the offences as afore-noted. Hence, this present Revision is at the instance of the Petitioners (accused persons) is at the instance of the Petitioners (accused persons).

II. PETITIONERS SUBMISSION:-

4. Mr.R.P.Kar, learned Senior Counsel for the Petitioners submitted that the present prosecution which is being faced by the Petitioners is on account of non-deposit of the TDS with the Central Government account within the time provided under the statute, and therefore, it is said that the Petitioners have committed the offences under section- section-276B and 278B of the IT Act and accordingly, are to be visited with the penal consequences provided thereunder. He further submitted that in the instant case, the Petitioners have only deposited the TDS collected from different persons with the interest as per law within few months of respective collections and the delay is ranging between 31 to 214 days and such payments have already accepted by the Authorities without any demure. Hence, the same is revenue neutral. He next submitted that the delay occasioned in such deposit of the collected TDS by the Petitioners is solely for the reason of prevalence of COVID-19 Pandemic

situation during that Financial Year 2020-21 and the Petitioners having not been able to deposit the collected TDS within the time stipulated, they had requested the Authority not to launch the prosecution for such delay in depositing the collected TDS as it was beyond the care and control of the Petitioners but for unforseable and unavoidable situations emerged due to lockdowns/shutdowns imposed on the advent of the novel Corona-19 Pandemic. For the said measures imposed by the Central and State Government, all work places including their offices which remained closed. Due to which there was lack of coordination amongst the staff dealing with matters and the staff worked from their house which caused the delay. And as such the same way not a willful attempt to delay or evade payment.

Drawing the Court's attention to the record, learned Senior Counsel submitted that the Authority several times being moved with request not launch the prosecution on such delayed deposit of the collected TDS by the Petitioners as the non-deposit by the time was backed by reasonable cause have paid no heed to the same and as such prayers were whittled-down.

The learned Senior Counsel at this juncture endeavoured to press into service the provisions of law under I.T. Act submitting therein that the penal provision for failure to deposit TDS prescribed under section 276B of the I.T. Act is not qualified and must be read with the provision contained in section 276AA of the I.T. Act. In effect that the penal provision only stands attracted when the assessee fails to show to the satisfaction that there was no reasonable cause for such failure.

It was submitted that the Authority had thus decided to file the complaint taking a view that there was no reasonable cause for the failure on the part of the Petitioners in depositing the collected TDS during the period covered under the Financial Year 2020-21.

Further citing the position of law laid down by the Hon'ble Apex Court in case of *Madhumilan Syntex Ltd. and Others Vrs. Union of India and Another*; (2007) 11 SCC 297; learned Senior Counsel submitted that the Hon'ble Apex Court while dealing with the provision under section 276B of the I.T. Act has held therein that whenever Company is required to deduct tax at source and pay it to the account of the Central Government, failure on the part of the Company in deducting or in paying such amount constitute an offence under the Act and is punishable. Therefore, it cannot be said that the prosecution against the Company or its Directors in default of deducting or paying tax is not envisaged by the Act.

Distinguishing this present case in hand, he points out that the non-deposit of tax deducted at source by the Petitioners in time as provided under law albeit is a delayed deposit of the said TDS along with interest but was for 'reasonable cause' i.e. for the reason of prevalence of first bout of COVID-19 Pandemic situation not only in the entire country but also across the globe when the normalcy with respect to life, livelihood and business activities came to a grinding halt and life of the citizens remained confined to four walls of their respective houses grappling under panic stricken condition fighting with the Pandemic. Therefore, according to him,

the Authority in this particular case with its peculiar factual matrix should have held that there was a reasonable cause for delayed deposit of such TDS after expiry of the statutory time stipulated which in the given case is also not that long. Therefore, the causes of this nature is squarely covered within the ambit of "reasonable cause" employed in section 278AA so as to come to the rescue of the Petitioners as per the learned Senior Counsel. Consequently, he with emphasis submitted that the Petitioners here are not projecting the reasonable cause for their failure citing the reason/s centering round the Company's affair and the employees in charge which by no doubt can and would only stand for consideration in the Trial as has been posited/ observed in case of *Madhumilan Syntex Ltd. and Others* (supra); however in the present case, the delay occasioned due to the Pandemic situation prevailing at that point is a globally admitted fact, that would not warrant any proof by leading evidence. He submitted that the clear intention of the legislature behind employment of the word 'reasonable cause' as expressed in section-276A, 276AB, 276B; and section-176BB is in order to protect the TDS collector from being saved from prosecution for the delay in depositing the TDS being prevented by such type of reason/s which are not personal but general and therefore, it is said that in case of existence of such admitted reasonable cause, no offence under section 276B would stand attracted.

He then contended that in the peculiar factual settings of the case, the reasonable cause for such failure being quite real and not apparent there arises no need to be further proved for being decided on the basis of the evidence during trial in as much as when the Petitioners for establishing such reason for delay would not be required to prove any such fact as those stand accepted across the globe including highest Court of the Country as well as Government Authorities. Thus according to him, this complaint could not have been accorded the sanction in taking the steps of launching prosecution against these Petitioners for such violation as to non-deposit of the TDS within the prescribed time limit; for the delay was due to reasonable cause which is an established and admitted one and the delay in doing so was neither intentional nor deliberate nor even for the reasons or causes centering round the Petitioners affair or their employees but for the COVID-19 Pandemic situation, a global phenomenon.

Moreso, placing reliance on various notifications, he submitted that Central Government and the State Government had made several notifications under the Disaster Management Act, 2005 and when even the Hon'ble Apex Court taking cognizance of such situation has extended the period of limitation by providing several exemptions to the statutory provisions being not made applicable and keeping those in suspension during the period. He submitted that when the Authority had repelled the contentions of the Petitioners that there was reasonable cause for such failure to deposit the TDS in time and taken a view to the contrary, the learned Magistrate while taking cognizance of the offences has failed to apply its mind in finding out as to whether on the basis of the materials placed from the side of the

Petitioners in their reply to the show-cause notice, the action of the Authority in launching the prosecution without due consideration and dealing with the submissions furnished to that effect that there was reasonable cause for such non-compliance of the provision contained in section-278AA of the I.T. Act read with the relevant rule is arbitrary or unjust. He further contended that the learned Magistrate in the particular case thus ought to have applied his judicial mind in arriving at a prima facie satisfaction on that score and on factual aspects which stand admitted before taking cognizance of the offence based on the complaint. The learned Senior Counsel urged that such non-application of judicial mind in taking a view as to whether there was reasonable cause for the alleged failure on the part of the Petitioners is premised on facts admitted, makes the order impugned in this Revision vulnerable and thus it suffers from the vice of non-application of mind and is illegal and liable to be interfered. Thus he submits that it would be evident when cognizance for the offences under section 2(35) and also under section 278(B) of the I.T. Act which two are not the penal provisions have been taken. In view of all these, he contended that the prosecution initiated under the order of cognizance is an abuse of process of Court.

5. He next referred to several similar cases being dealt with and disposed by the Hon'ble High Court of Jharkhand on 28.02.2022. In *Dev Multicom Pvt. Ltd. and Another Vrs. State of Jharkhand and batch*; (2022 SCC OnLine Jhar 537); (2023) 454 ITR 48) wherein the High Court was of the view that the prosecution for such failure to deposit the TDS by the person concerned when is not launched after receiving the said amount with interest and not immediately amounts to abuse the process of Court. It was additionally submitted that the Hon'ble Jharkhand High Court in those cases having taken that view has taken a cue from the CBDT instructions, vide F.No.255/339/79-IT (Inv.) dated 28.05.1980 which reads that the prosecution under section-276B of the I.T. Act shall not normally be proposed when the amount involved and/or the period of default is not substantial and the amount in default has been deposited in the meantime to the credit of Government.

It was submitted that in the present case, admittedly there has been no loss of the revenue and it is not in dispute that the Petitioners while depositing the collected TDS have also deposited the interest being computed in terms of the provisions contained in the statute. Therefore, it was contended that the prosecution initiated by the order of cognizance is an abuse of process and the Court below by going through the discussion of the facts contained in the sanction order ought not to have taken cognizance of said offences and thus according to him, the impugned order has caused failure of justice.

6. Per contra, Mr. S.S. Mohapatra, learned Senior Standing Counsel for the Income Tax, while not disputing the distinguishing factual settings of the case of *Madhumilan Syntex Ltd. and Others* (supra) to the extent that the Petitioners therein had not projected the situation like Pandemic COVID-19 to be the reasonable cause for the failure to deposit the TDS; however at the outset raised, the question as to

maintainability of this Revision in challenging the order by which the learned Magistrate has taken cognizance of the offences and issued process to the Petitioners. According to him, the order being an interlocutory one as the right of the Petitioners to raise the main ground on which they now question the impugned order to be bad and illegal is not altogether foreclosed during trial, this Revision calling in question the order of cognizance is not maintainable.

He, however, also submitted that for the delayed deposit of TDS, since the statute provides that the person concerned is liable for prosecution; the question of existence of reasonable cause is a matter to be only decided in the trial and not at this stage.

He further submitted that while directing that the prosecution be launched against the Petitioners, the Authority having taken into account all those contentions and upon their consideration since has not found favour with the defence of the Petitioners that the delay in depositing the TDS was backed by reasonable cause for prevalence of Pandemic COVID-19, now the only course left open to the Petitioners is to establish all those in their defence for being taken into account in the trial which is to adjudicate the culpability of the Petitioners on account of such failure which is not factually denied.

7. In response to the first limb of objection raised by Mr. Mohapatra, learned Senior Standing Counsel for the Income tax; Mr. Kar, learned Senior Counsel for the Petitioners responded that the order impugned cannot be taken to be an interlocutory order even though at the same time, it would be impermissible to term it as a final order in view of the law laid down in case of '*Girish Kumar Suneja Vrs. Central Bureau of Investigation*; (2017) 14 SCC 809; reiterating the earlier view taken in case of *Madhu Limaye v. State of Maharashtra*;(1977) 4 SCC 551. He relying on the line of decisions submitted that the Revision against said order of taking cognizance is squarely maintainable and does not get caught within the net of the provision contained in sub-section-2 of Section-397 of the Cr.P.C.

IV. ISSUES FOR CONSIDERATION:-

8. Having heard the respective parties and on perusal of the material on record, the issues falling for consideration to be dealt are as follows:-

(A) Whether the present Revision is maintainable?

(B) Whether the impugned order suffers from the vice of non-application of mind as the learned Magistrate without going through the sanction order and without taking a prima facie view that the failure on the part of the Petitioners to deposit the collected TDS was not because of some reasonable cause which are apparent and thus being improper and illegal has caused failure of justice and amount to abuse of process?

9. Addressing the objection as to the maintainability of the Revision in challenging the order impugned hereafter as at 8(A); it is noticed that when the text of sub-section-1 of Section-397 of the Cr.P.C. is too wide in conferring the powers upon the Court in exercising the Revisional jurisdiction, it has been drastically

curtailed by the very next sub-section i.e. sub-section (2) of said section. This provision introduces a complete prohibition on the Revisional Court in respect of interlocutory orders. Therefore, the nature of order whose legality and propriety is called in question before a Revisional Court liable for interference in exercise of revisional jurisdiction is the focal point for ruling touching on the entertainability of the Revision so as to exercise the jurisdiction conferred thereunder.

10. Further, reiterating and clarifying this conundrum, the Hon'ble Apex Court has been held in case of *Girish Kumar Suneja* (supra) that there are three categories of order that a Court can pass:-

> "final, intermediate and interlocutory. There is no doubt that in respect of a final order, a court can exercise its revision jurisdiction – that is in respect of a final order of acquittal or conviction. There is equally no doubt that in respect of an interlocutory order, the court cannot exercise its revision jurisdiction. As far as an intermediate order is concerned, the court can exercise its revision jurisdiction since it is not an interlocutory order"

11. In subsequent paragraphs of the said decision, the Hon'ble Apex Court has further discussed on the subject as under:-

> *"17. The concept of an intermediate order first found mention in Amar Nath v. State of Haryana; (1977) 4 SCC 137; 1977 SCC (Cri) 585 in which case the interpretation and impact of Section 397(2) of the Cr.P.C. came up for consideration. This decision is important for two reasons. Firstly it gives the historical reason for the enactment of Section 397(2) of the Cr.P.C. and secondly considering that historical background, it gives a justification for a restrictive meaning to Section 482 of the Cr.P.C.*
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> *18. As far as the historical background is concerned, it was pointed out that the Cr.P.C. of 1898 and the 1955 amendment gave wide powers to interfere with orders passed in criminal cases by the subordinate courts. These wide powers were restricted by the High Court and Hon'ble Apex Court, as matter of prudence and not as a matter of law, to an order that "suffered from any error of law or any legal infirmity causing injustice or prejudice to the accused or was manifestly foolish or perverse." (Amar Nath (supra).This led to the courts being flooded with cases challenging all kinds of orders and thereby delaying prosecution of a case to the detriment of an accused person.*
>
> *19. The Statement of Objects and Reasons of the Cr.P.C. state that the Government kept in mind the following for the purposes of enacting the Cr.P.C.:-*
>
> *"3. (i) an accused person should get a fair trial in accordance with the accepted principles of natural justice;*
>
> *(ii) every effort should be made to avoid delay in investigation and trial which is harmful not only to the individuals involved but also to society; and*
>
> *(iii) the procedure should not be complicated and should, to the utmost extent possible, ensure fair deal to the poorer sections of the community." As regards Section 397(2) of the Cr.P.C. paragraph 5(d) of the Statement of Objects and Reasons mentioned that:-"*
>
> "(5) Some of the more important changes proposed to be made with a view to speeding up the disposal of criminal cases are –
> (d) the powers of revision against interlocutory orders are being taken away, as it has been found to be one of the main contributing factors in the delay or disposal of criminal cases."

In reply to the debate on the subject, it was stated by Shri Ram Niwas Mirdha the concerned Minister that:-

"It was stated before the Select Committee that a large number of appeals against interlocutory orders are filed with the result that the appeals got delayed considerably. Some of the more notorious cases concern big business persons. So, this new provision was also welcomed by most of the witnesses as well as the Select Committee. . . . This was a well-thought out measure so we do not want to delete it."

20. As noted in Amar Nath (supra) the purpose of introducing Section 397(2) of the Cr.P.C. was to curb delays in the decision of criminal cases and thereby to benefit the accused by giving him or her a fair and expeditious trial. Unfortunately, this legislative intendment is sought to be turned topsy-turvy by the appellants.

21. The concept of an intermediate order was further elucidated in Madhu Limaye v. State of Maharashtra; (1977) 4 SCC 551: 1978 SCC (Cri) 10, by contradistinguishing a final order and an interlocutory order. This decision lays down the principle that an intermediate order is one which is interlocutory in nature but when reversed, it has the effect of terminating the proceedings and thereby resulting in a final order. Two such intermediate orders immediately come to mind – an order taking cognizance of an offence and summoning an accused and an order for framing charges. Prima facie these orders are interlocutory in nature, but when an order taking cognizance and summoning an accused is reversed, it has the effect of terminating the proceedings against that person resulting in a final order in his or her favour. Similarly, an order for framing of charges if reversed has the effect of discharging the accused person and resulting in a final order in his or her favour. Therefore, an intermediate order is one which if passed in a certain way, the proceedings would terminate but if passed in another way, the proceedings would continue.

22. The view expressed in Amar Nath (supra) and Madhu Limaye (supra) was followed in K.K. Patel v. State of Gujarat;(2000) 6 SCC 195, wherein a revision petition was filed challenging the taking of cognizance and issuance of a process. It was said:-

"11…It is now well-nigh settled that in deciding whether an order challenged is interlocutory or not as for Section 397(2) of the Code, the sole test is not whether such order was passed during the interim stage (vide Amar Nath v. State of Haryana, Madhu Limaye v. State of Maharashtra, V.C. Shukla v. State through CBI; 1980 Supp. SCC 92 and Rajendra Kumar Sitaram Pande v. Uttam; (1999) 3 SCC 134). The feasible test is whether by upholding the objections raised by a party, it would result in culminating the proceedings, if so any order passed on such objections would not be merely interlocutory in nature as envisaged in Section 397(2) of the Code. In the present case, if the objection raised by the appellants were upheld by the Court the entire prosecution proceedings would have been terminated. Hence, as per the said standard, the order was revisable."

23. We may note that in different cases, different expressions are used for the same category of orders – sometimes it is called an intermediate order, sometimes a quasi-final order and sometimes it is called an order that is a matter of moment. Our preference is for the expression 'intermediate order' since that brings out the nature of the order more explicitly."

12. In proceeding to further deliberate upon the subject, the Hon'ble Apex Court has held as follows:-

"3. While we fully agree with the view taken by the learned Judge that where a revision to the High Court against the order of the Subordinate Judge is expressly barred under sub-section (2) of Section 397 of the 1973 Code the inherent powers contained in Section 482 would not be available to defeat the bar contained in Section 397(2). Section 482 of the 1973 Code contains the inherent powers of the Court and does not confer any new powers but preserves the powers which the High Court already possessed. A harmonious construction of Sections 397 and 482 would lead to the irresistible conclusion that where a particular order is expressly barred under Section 397(2) and cannot be the subject of revision by the High Court, then to such a case the provisions of Section 482 would not apply. *It is well settled that the inherent powers of the Court can ordinarily be exercised when there is no express provision on the subject-matter. Where there is an express provision, barring a particular remedy, the Court cannot resort to the exercise of inherent powers."*

25. The persistent view has been reaffirmed as settled by the Hon'ble Apex Court in the landmark case of Madhu Limaye (supra) when the following principles were approved in relation to Section 482 of the Cr.P.C. in the context of Section 397(2) thereof. The principles are:-

(1) That the power is not to be resorted to if there is a specific provision in the Code for the redress of the grievance of the aggrieved party;

(2) That it should be exercised very sparingly to prevent abuse of process of any Court or otherwise to secure the ends of justice;

(3) That it should not be exercised as against the express bar of law engrafted in any other provision of the Code.

Therefore, it is quite clear that the prohibition in Section 397 of the Cr.P.C. will govern Section 482 thereof. We endorse this view.

26. In this context, reliance on A.R. Antulay Vrs. R.S. Nayak; (1988) 2SCC 602 is completely misplaced. In that case, this Court was concerned with Section 9 of the Criminal Law Amendment Act of 1952 which reads as follows:-

9. Appeal and revision -The High Court may exercise, so far as they may be applicable, all the powers conferred by Chapters XXXI and XXXII of the Code of Criminal Procedure, 1898 (5 of 1898) on a High Court as if the Court of the Special Judge were a Court of Session trying cases without a jury within the local limits of the jurisdiction of the High Court".

It is quite obvious that the Section is with reference to the Cr.P.C. of 1898 and not the Cr.P.C. of 1973. The law as it stood with reference to the Criminal Procedure Code of 1898 is radically different from the law with reference to the Criminal Procedure Code of 1973. Moreover and quite obviously, since this Court had directed in A.R. Antulay (supra) that the trial would have to be conducted not by the Special Judge but by the High Court, no revision would lie to the High Court from its own order. Therefore, we are of opinion that the appellants cannot draw any support for their submissions from A.R. Antulay (supra)."

27. Our conclusion on this subject is that while the appellants might have an entitlement (not a right) to file a revision petition in the High Court but that entitlement can be taken away and in any event, the High Court is under no obligation to entertain a revision petition – such a petition can be rejected at the threshold. If the High Court is inclined to accept the revision petition it can do so only against a final order or an intermediate order, namely, an order which if set aside would result in the culmination of the proceedings. As we see it, there appear to be only two such eventualities of a revisable order and in any case only one such eventuality is before us. Consequently the

result of paragraph 10 of the order passed by this Court is that the entitlement of the appellants to file a revision petition in the High Court is taken away and thereby the High Court is deprived of exercising its extraordinary discretionary power available under Section 397 of the Cr.P.C.

28. However, this does not mean that the appellants have no remedy available to them – paragraph 10 of the order does not prohibit the appellants from approaching this Court under Article 136 of the Constitution. Therefore all that has happened is that the forum for ventilating the grievance of the appellants has shifted from the High Court to this Court. It was submitted by one of the learned counsel that this is not good enough for the appellants since this Court is not obliged to give reasons while dismissing such a petition unlike the High Court which would necessarily have to give reasons if it rejected a revision petition. In our opinion, the mere fact that this Court could dismiss the petition filed by the appellants under Article 136 of the Constitution without giving reasons does not necessarily lead to the conclusion that reasons will not be given or that some equitable order will not be passed. The submission of learned counsel has no basis and is only a presumption of what this Court might do. We cannot accept a submission that has its foundation on a hypothesis.

29. This leads us to another facet of the submission made by learned counsel that even the avenue of proceeding under Section 482 of the Cr.P.C. is barred as far as the appellants are concerned. As held in Amar Nath (supra) and with which conclusion we agree, if an interlocutory order is not revisable due to the prohibition contained in Section 397(2) of the Cr.P.C. that cannot be circumvented by resort to Section 482 of the Cr.P.C. There can hardly be any serious dispute on this proposition.

30. What then is the utility of Section 482 of the Cr.P.C.? This was considered and explained in Madhu Limaye (supra) which noticed the prohibition in Section 397(2) of the Cr.P.C. and at the same time the expansive text of Section 482 of the Cr.P.C. and posed the question: In such a situation, what is the harmonious way out? This Court then proceeded to answer the question in the following manner:-

"In such a situation, what is the harmonious way out? In our opinion, a happy solution of this problem would be to say that the bar provided in sub-section (2) of Section 397 operates only in exercise of the revisional power of the High Court, meaning thereby that the High Court will have no power of revision in relation to any interlocutory order. Then in accordance with one of the other principles enunciated above, the inherent power will come into play, there being no other provision in the Code for the redress of the grievance of the aggrieved party. But then, if the order assailed is purely of an interlocutory character which could be corrected in exercise of the revisional power of the High Court under the 1898 Code, the High Court will refuse to exercise its inherent power. But in case the impugned order clearly brings about a situation which is an abuse of the process of the Court or for the purpose of securing the ends of justice interference by the High Court is absolutely necessary, then nothing contained in Section 397(2) can limit or affect the exercise of the inherent power by the High Court. But such cases would be few and far between. The High Court must exercise the inherent power very sparingly."

31. The expanse of Section 482 of the Cr.P.C. was also discussed in great detail in State of Haryana v. Bhajan Lal; 1992 Supp (1) 335 in the context of quashing a first information report or a complaint. After giving several illustrations, this Court cautioned that the power available under Section 482 of the Cr.P.C. should be exercised in the "rarest of rare" cases. It was said:

> *"103. We also give a note of caution to the effect that the power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases; that the court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the court to act according to its whim or caprice."*
>
> *32. In Satya Narayan Sharma v. State of Rajasthan; (2001) 8SCC 607 this Court considered the provisions of the PC Act and held that there could be no stay of a trial under the PC Act. It was clarified that that does not mean that the provisions of Section 482 of the Cr.P.C. cannot be taken recourse to, but even if a litigant approaches the High Court under Section 482 of the Cr.P.C. and that petition is entertained, the trial under the PC Act cannot be stayed. The litigant may convince the court to expedite the hearing of the petition filed, but merely because the court is not in a position to grant an early hearing would not be a ground to stay the trial even temporarily. With respect, we do not agree with the proposition that for the purposes of a stay of proceedings recourse could be had to Section 482 of the Cr.P.C. Our discussion above makes this quite clear.*

13. In the light of the above settled legal principles, the order impugned in this Revision being put to the feasibility tests for obtaining the result, it can be well said that the objection raised by the Petitioners to the impugned order if accepted and upheld, the entire prosecution will stand terminated. Therefore, the order in question clearly falls within the ambit of intermediate order. Thus, it is amenable to revisional jurisdiction and is revisable. The objection of the learned Senior Standing Counsel for the Income Tax stands accordingly answered.

14. Coming to the core contention of the learned Senior Counsel for the Petitioners that the order of taking cognizance of the offences impugned in this Revision suffers from the vice of illegality and impropriety as at 8(B). The ground being that the said failure of the Petitioners in depositing the collected TDS within the time stipulated, premised on the admitted facts was for all the reasonable causes in support. In that view of the matter, while passing said order in question initiating the proceeding against the Petitioners that aspect has been totally over looked besides the fact that the sanction for prosecution passed mechanically has also been given a go by.

15. In case of *Madhumilan Syntex Ltd. and Others* (supra), the Hon'ble Apex Court delving with a factual matrix wherein prosecution had been launched against the Company and its officials who were the Petitioners therein for commission of the offences punishable under section-278B of the I.T. Act for the failure of the Petitioners-Company and others in crediting the TDS to the Central government as required by section-276B of the I.T. Act. The Petitioner-Company and others therein contended that they had not committed any offence for violation of the provision of I.T. Act. It was stated that it was not a case of non-payment of TDS. The amount of tax along with interest had been paid and all the statutory provisions had been complied with. They further contended that there was some delay in receiving the loan from their Banker due to which the TDS could not be paid in time and furthermore, because of construction of one unit by the Company, there being

shortage of liquid fund, the payment was delayed. So, they stated that there was reasonable cause for non-payment of the collected TDS within the prescribed period and thus, when the payment had been made with interest and there was no loss to the revenue, according to the Petitioners therein, no case had been made out for taking action against them by launching the prosecution.

16. The Hon'ble Apex Court while answering the controversy discussed as under:-

> "23. Before adverting to the controversy raised in the appeal, it is necessary to consider the relevant provisions of the Act. Chapter XVII deals with "Collection and Recovery of Tax" and 'Deduction at Source' in certain cases. It requires certain persons to deduct tax at source and also consequences of failure to deduct or pay such tax. Whereas Section 200 provides that any person deducting any sum under the Act has to pay within the prescribed period the sum so deducted to the credit of the Central Government, Section 201 lays down consequences of failure to deduct or to pay such tax.
>
> 24. Chapter XXII relates to offences and prosecutions. Section 276B deals with "Failure to pay tax". The section at the relevant time read as under:-
>
> "276B. *Failure to pay the tax deducted at source*.- If a person fails to pay to the credit of the Central Government, the tax deducted at source by him as required by or under the provisions of Chapter XVII-B he shall be punishable with rigorous imprisonment for a term which shall not be less than three months but which may extend to seven years and with fine.
>
> 25. Section 278B covered cases where offences were committed by Companies. The section stated:
>
> "278B. *Offences by companies*.- (1) Where an offence under this Act has been committed by a company, every person who, at the time the offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company as well as the company shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:
>
> Provided that nothing contained in this sub- section shall render any such person liable to any punishment if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence.
>
> (2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.
>
> *Explanation*.- For the purposes of this section,-
> (a) "company" means a body corporate, and includes-
> (i) a firm; and
> (ii) an association of persons or a body of individuals whether incorporated or not; and
>
> (b) "director", in relation to-
> (i) a firm, means a partner in the firm;
> (ii) any association of persons or a body of individuals, means any member controlling the affairs thereof".

> 26. Clause (20) of Section 2, inter alia, defines 'Director' in relation to a Company having the meaning assigned to it in the Companies Act, 1956. Section 2(13) of the Companies Act, 1956 defines 'Director'. The definition is inclusive and includes "any person occupying the position of Director by whatever name called". Clause (31) of Section 2 defines 'person' which includes Company. Clause (35) defines 'principal officer' and it reads;
>
> "2. (35) 'principal officer', used with reference to a local authority or a company or any other public body or any association of persons or anybody of individuals, means-
> (a) the secretary, treasurer, manager or agent of the authority, company, association or body; or
> (b) any person connected with the management or administration of the local authority, company, association or body upon whom the Assessing Officer has served a notice of his intention of treating him as the principal officer thereof;".
>
> 27. From the above provisions, it is clear that wherever a Company is required to deduct tax at source and to pay it to the account of the Central Government, failure on the part of the Company in deducting or in paying such amount is an offence under the Act and has been made punishable. It, therefore, cannot be said that the prosecution against a Company or its Directors in default of deducting or paying tax is not envisaged by the Act.

17. In the present case in hand, the distinguishable factual settings of the facts behind the projected reasonable cause vis-à-vis the case of *Madhumilan Syntex Ltd. and Others* (supra) is that here the Petitioners do not project the causes concerning the Petitioner-Company or its officials-in-charge or their business affairs or the conduct of some other party/agency posing any hurdle/hindrance to the Petitioner-Company in operation causing hindrance to the smooth running of their business activities, but they proffer the prevalence of Pandemic COVID-19 situation in the country to be the reasonable cause standing on their way leading to the delay in depositing the collected TDS, thereby failing to strictly comply with the provision contained in the provision in Chapter-XVII-B of the IT Act read with the Rule-30 of the I.T. Rules thereunder which is a punishable offence.

18. The above being the crucial distinguishable factual aspect in the cited case of *Madhumilan Syntex Ltd. and Others* (supra) to that of the case at hand which is being now dealt with, this Court is of the considered view that the prevalence of COVID-19 Pandemic situation in the country, when stands admitted, it would not be impermissible to say that the said factual settings being projected by the Petitioners as the reasonable cause occasioning their failure thus cannot be taken to be the failure falling within the ambit of reasonable cause which cannot be gone into at this stage but to be delved upon only in the trial; more so when that aspect can be judged without even the Petitioners tendering any evidence in support of the same.

Therefore, now it stands to be examined as to whether prevalence of the Pandemic COVID-19 situation in the given factual settings of the case at hand was the reasonable cause which had stood on the way of the Petitioners to comply with the provisions contained in the I.T. Acts and Rules in relation to the deposit of the TDS.

19. The word 'reasonable'; we find from the Black's Law Dictionary, 10th Edition as fair, proper or moderate under the circumstance.

What is reasonable cause cannot be laid down with precision which would depend on the factual background. The reasonable cause as applied to human action is that which would constrain a person of average intelligence and ordinary prudence. Expression reasonable is not susceptible be of a clear and precise definition; for a an attempt to give a specific meaning to the word reasonable would be trying to count what is not number and measure what is not space. It has to be described as rational according to the dictates of reasons and is not excessive was immoderate. The word reasonable has in law, the prima facie meaning of reasonable with regard to those circumstances of which actor, called on to act reasonably, knows or ought to know [see-In-re, A Solicitor,(1945) KB 368 (CA)].

The expression 'reasonable cause' used in section 278AA of the I.T. Act in my considered view may not be 'sufficient cause'. But such 'reasonable cause' would have a wider connotation than the expression 'sufficient cause'. Therefore, the phrase 'reasonable cause' for not visiting with the penal consequences would have to be considered liberally based on facts of each individual case. It is thus not in dispute that issue of there being a reasonable cause or not is a question of fact and inference of law can be drawn.

Reasonable can be reasonably said to be a cause which prevents a man of average intelligence and ordinary prudence, acting under normal circumstances, without negligence or inaction or want of bona fides. The test then is an objective one so as to warrant a belief by a reasonable man.

20. The legislative intent would be well discernable when simultaneously, we glance at the provision of section 201 and 221 of the IT Act which says that penalty is not leviable when the Company proves that the default was for 'good and sufficient reasons'; whereas, the expression used in section-278AA is 'reasonable cause'. The legislature has carefully and intentionally used these different expressions in the situations envisaged under those provisions.

The intent and purport being to mitigate the hardship that may be caused to genuine and bonafide transactions where the assessee was prevented by the cause that is reasonable. Such cases thus can be well visualized by the legislature. Therefore, the Court must lean for an interpretation which is consistent with the "object, good sense and fairness" thereby eschew the others which render the provision oppressive and unjust, as otherwise, the very intent of the legislature would be frustrated. It is in all plausibility therefore to be inferred that to cater such exigencies, the legislature has enacted section 278AA of the I.T. Act.

It is also crucial to note that the legislative intent is well discernable so far the usage of the word 'reasonable cause' under section 278AA of the I.T. Act is concerned which qualifies the penal provision laid under section 276B of the Act.

Both the provisions accordingly are to be read together to ascertain the attractability of the penal provision.

21. It is well settled law that in a criminal proceeding by merely showing a reasonable cause, an accused can be exonerated and for showing that reasonable cause, the standard of proof of such fact in support of the same is lighter than the proof of such fact in support of good and sufficient reason. A reasonable cause may not necessarily be a good and sufficient reason. It may not be out of place to note here that in case the *ITO Vrs. Roshni Cold Storage*; 2000 245 (ITR) 322 (Madras), the terrible financial stringency, heavy losses, colossal losses and carry forward losses, have been recognized as reasonable cause in further holding that paucity of funds and financial stringency would fall as reasonable cause within the scope and ambit of the meaning of reasonable cause.

22. Coming to the case before us, the prosecution has been launched against the Petitioners for delay in deposit of the collected TDS for the Financial Year, 2020-21 (Accounting Year, 2021-22). The collected TDS was admittedly not deposited with the Central Government by the due date. The Petitioners thus have failed to deposit the collected TDS within the time stipulated as ordained under provision of the I.T. Act and Rules. They have deposited the said amount in phase manner with the delay in making the deposit which begins with the minimum of 31 days, ending at 214 days. It is not in dispute that the Petitioners have by the time of consideration of the matter as to launching of the prosecution for such delayed deposit, had deposited the entire TDS with the interest as they were liable to pay as per this statutory provision for such delayed deposit of the TDS. The collected TDS with interest as above has been accepted and gone to the State Exchequer when by then no loss to the Revenue was standing to be viewed.

23. COVID-19 had come as a novel virus and disease resulting in a Pandemic for the entire world. The whole world has faced this phenomenon with differing intensity, mutations and waves, impacting life itself, healthcare systems, livelihood, access to amenities, liberties etc. making it a global health challenge affecting all countries.

When COVID-19 virus started spreading in our country, the Union of India proactively notified COVID-19 as a pandemic in order to exercise the responsibility of mitigating the loss of life under Disaster Management Act, 2005 (DMA, 2005). The Ministry of Home Affairs, keeping in view the spread of COVID-19 virus in India vide its letter dated 14.03.2020 decided to treat it as 'notified disaster' for the purpose of providing assistance under the State Disaster Response Fund (SDRF). It has always been considered as a 'disaster' within the meaning of DMA, 2005.

Several important steps have been taken by the Central Government under DMA, 2005, as also, the steps taken specifically as Nation's response to COVID-19 Pandemic wherein more comprehensive, multipronged, multi sectoral, whole of society and whole of Government, while at the same time dynamic approach has been

adopted, from time to time with the evolving nature of COVID-19 virus during first, second and third surges. Various steps have been taken by the Union of India, to strategies nations response to COVID-19, a once in a lifetime Pandemic inflicted on the entire world, wherein not just the funds of NDRF and SDRF, but even from the Consolidated Fund of India had been utilized. Specific steps have been taken for ramping up the entire health care infrastructure, preparedness, relief, restoration, mitigation and reconstruction, in a very short time to include:-

a) testing, tracing, treatment and quarantine facilities;
b) augmenting hospital facilities, oxygenated, beds, ventilators, ICU facilities etc;
c) augmentation of health work force and their insurance;
d) augmentation, allocation, supply and transportation of oxygen and other essential drugs;
e) research, development, enhanced production and administration of vaccinations to rapidly cover one of the world's largest eligible population of beneficiaries;
f) ensuring food security to the vulnerable groups;
g) minimizing the adverse impact of large-scale economic disruptions by multipronged approach; and
h) rehabilitation, protection and education of children orphaned due to COVID-19.

The situation required day to day expenditure, day to day monitoring, day to day change in priorities and day to day change in the methods and modalities to deal with the same.

24. It goes without saying that COVID-19 Pandemic has caused serious economic disruption. However, the Government both at Central and State level have made herculean efforts to deter it from becoming a matter of economic distress.

In order to contain and arrest, the sporadic / rapid spread of the Virus, there have been frequent lock downs, shut downs, declaration of contentment zones, total ban on some activities, partial allowance of in some specific activity and even restraints on number of employees coming to perform those allowable activities. The Real Estate Sector heavily faced the wrath of Pandemic COVID-19 situation when even there were serious labour migrations, stoppage of all forms of construction activities as well as buying and selling of real estate projects which are all undeniable facts.

Considering the economy wide impact, the Government of India announced several packages, protecting cheap credit to small and medium business, relaxing the payment of loan dues by extending the period of repayment, exempting payments of certain taxes and fees in many areas and sectors and extending the submission of tax returns from time to time waiver of interest and / or restructuring of loan account. Similarly, various State Governments also declared all such relaxations in various Revenue related matters. The press release dated 30.12.2020 of the Ministry of Finance Department of Revenue, Government of India and the circular dated 11th January, 2022 state all these reliefs etc., keeping in view the challenges faced by taxpayers in meeting the statutory and regulatory compliances due to outbreak of COVID-19.

All these situations caused by such COVID-19 Pandemic passing though first, second and third surges somehow came to normalize only after March, 2022 which as such as a phenomenon is irrefutable.

25. At this juncture, it would be pertinent to take note of a Division Bench decision of the High Court of Delhi in case of *Woodward Governor India Pvt. Ltd. Vrs. Commissioner of Income Tax and others*; (2001) SCC Online Del 1429. In that case in dealing with the provision of levying of penalty as envisaged under section-271C of the IT Act, the question was of the existence of reasonable cause or otherwise was linked with the main question as to whether there was short deduction of tax at source. It was held that the stand of the Petitioner was on terra firma. On going through the pivotal provisions of the I.T. Act, the Division Bench has been held as under:-

> "6. Section 273B starts with a non obstante clause and provides that notwithstanding anything contained in several provisions enumerated therein including section 271C, no penalty shall be imposable on the person or the assessed, as the case may be, for any failure referred to in the said provisions, if he proves that there was reasonable cause for the said failure. A clause beginning with "notwithstanding anything" is sometimes appended to a section in the beginning with a view to give the enacting part of the section in case of conflict an overriding effect over the provision or Act mentioned in the non obstante clause. (See Orient Paper & Industries Ltd. v. State of Orissa AIR 1991 SC 672). A non obstante clause may be used as a legislative device, to modify the ambit of the provision or law mentioned in the non obstante clause, or to override it in specified circumstances (See *T.R. Thandar v. Union of India*; AIR 1996 SC 1643). The true effect of the non obstante clause is that in spite of the provision or Act mentioned in the non obstante clause, the enactment following it will have its full operation or that the provisions embraced in the non obstante clause will not be an impediment for the operation of the enactment (See *Smt. P.F.K. Kalliani Amma v. K. Devi*; AIR 1996 SC 1963). Therefore, in order to bring in application of section 271C in the backdrop of section 273B, absence of reasonable cause, existence of which has to be established by the assessed, is the sine qua non.
>
> 7. Levy of penalty under section 271C is not automatic. Before levying penalty, the concerned officer is required to find out that even if there was any failure referred to in the concerned provision the same was without a reasonable cause. The initial burden is on the assessed to show that there existed reasonable cause which was the reason for the failure referred to in the concerned provision. Thereafter the officer dealing with the matter has to consider whether the explanation offered by the assessed or the person, as the case may be, as regards the reason for failure, was on account of reasonable cause. "Reasonable cause" as applied to human action is that which would constrain a person of average intelligence and ordinary prudence. It can be described as a probable cause. It means an honest belief founded upon reasonable grounds, of the existence of a state of circumstances, which assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the person concerned, to come to the conclusion that same was the right thing to do. The cause shown has to be considered and only if it is found to be frivolous, without substance or foundation, the prescribed consequences follow."

Having said above, for non-consideration of the plea raised by assessee about the existence of the reasonable cause, the order impugned therein was held to have been vitiated.

26. The Petitioners in their show cause before the Authority considering the question of launching the prosecution appear to have placed all those factual settings stated therein for consideration in their proper perspectives which can be seen on a plain reading of the same which forms a part of the record. It appears from the record that the Petitioners in their show-cause while describing all those difficulties which they had faced during the prevalence of the COVID-19 situation had also stated as under:-

> "1. The assessee has duly deducted the TDS and deposited the same along with interest in the account of Central Government-No prosecution be launched. Due to the certain conditions beyond the control o the assessee which primarily were severe effect of COVID-19, non-availability of staff, non-availability of consultants or their staff, frequent lockdowns, cash flow crisis there was a slight delay in deposit of the amount as against the prescribed dates. It is submitted that the Chartered Accountant who was handling the TDS matters of assessee died due to COVID which made really difficult for the assessee to deposit the amount in time.
>
> The Department has issued a show cause for launch of prosecution proceedings for such default of the assessee. The provisions related to launching of prosecution in case of failure of assessee to pay TDS have been prescribed in section 276B of the Act. The said section states that where the assessee has failed to pay to the credit of the Central Government tax deducted at source as required by or under the provisions of chapter-XVII-B, the person shall be punishable with imprisonment In this case, we submit that the assessee has paid the amount of Tax Deducted at Source to the account of Government and has neither used the money for personal purposes of the directors nor has mis-utilized the money nor has earned any interest on the same. The only fact is that there was a delay in deposit to conditions beyond the control of the assessee.
>
> At the cost of repeatation, it is important to bring before you the exact delay in deposit of TDS made by the assessee. A crux chart depicting the same is as under:-

TDS Deposit due dates and payment dates			
Month	**Due Date**	**Date of Deposit**	**Delay**
April	07.05.2020	07.07.2020	61
May	07.06.2020	31.07.2020	54
June	07.07.2020	30.09.2020	85
July	07.08.2020	31.10.2020	85
August	07.09.2020	30.11.2020	84
September	07.10.2020	31.12.2020	85
October	07.11.2020	30.01.2021	84
November	07.12.2020	27.02.2021	82
December	07.01.2021	31.03.2021	83
January	07.02.2021	30.04.2021	82
February	07.03.2021	30.04.2021	54
March	30.04.2021	31.05.2021	31

> Your attention is drawn to provisions of section 278AA of the Act which reads as under:-
>
> 278AA.Notwithstanding anything contained in the provisions of section-278A, section 276AB or section 276B (or section 276BB), no person shall be punishable for any failure referred to in the said provisions, if he proves that there was reasonable cause for such failure.
>
> A perusal of the above section reveals that where there is a reasonable cause for any failure on the part of the assessee, it may not be punished. In the present case, the delay was beyond the control of the assessee as has been explained herein above by the assessee.
>
> Your attention is drawn to the CBDT Instructions F.No.255/339/79-IT (Inv.), dated 28.05.1980 where it has been stated that "The prosecution under section 276B should not normally be proposed when the amount involved and/ or the period of default is not substantial and the amount in default has also been deposited in the meantime to the credit of the Government." In the present, the TDS liability has arose on day to day transactions of the assessee. The CBDT intention vides this circular that where the amount has been by the assessee, the prosecution proceedings need not be launched. Moreover, if each entry is seen majority of entries of deduction of TDS are meager and very small in amount, as law as Rs.50/-. Therefore, launching of prosecution may be undue hardship on the assessee.

27. It would not be out of place to state that the Hon'ble Apex Court during that period prevalence of Pandemic COVID-19 situation in the country in suo moto Writ Petition (C) No.03 of 2020 from time to time, has taken cognizance of the said situation and has even extended the period of limitation for all proceedings before the Courts/ Tribunals w.e.f. 15.03.2020 first of all, till 14.03.2021. But then due to second surge in COVID-19 cases, the move being made by the Supreme Court Advocates on Record Association (SCORA) that period was further extended from 15.03.2020 till 28.02.2022 by stating that the same period would stand excluded.

28. In the given case, it is simply stated in the complaint that the Commissioner of Income Tax (TDS), Bhubaneswar after thorough analysis and due application of mind on the basis of perusal of each of the documents and after scrutinizing the same, he held that there was no justification for late deposit of TDS amount by the accused person. The point for consideration by the Authority was not cull out the justification for delay in depositing the TDS since no justification is permissible to be accepted in law for delaying the deposit and that is the reason automatically, the interest starts running notwithstanding any justification and as such no justification whatsoever can exonerate the deductee from paying the interest. The matter for consideration is however whether to launch the prosecution.

> In the order under section-279(1) of the I.T. Act, it is stated as under:-
>
> "8.Assessee deductor's submissions were carefully considered. The financial year 2020-21 is the year of consideration of this sanction for launch of prosecution. As COVID restriction measures were imposed during the month of March 2020 and as the delay in remittance is not limited only to the period when pandemic restrictions were imposed, and as the assessee has not been able to submit copy of any circular/notification granting

relaxation, if any, of the limitation period regarding remittance of TDS sum covering the various periods of delay for the relevant Financial Year, the explanation of the deductor assessee for late remittance ascribing COVID restriction measures as the cause is not acceptable. Once tax has been deducted from the payments made to the party or from the amount credited to the party's account in the books of the assessee, the deductor is duty bound to remit the sum so deducted to the Central Govt. account. Day to day difficulties in managing finance or employee staff/management cannot be taken as exceptions for not doing so. The explanations mentioning the reasons for delay, therefore, do NOT constitute a reasonable cause as contained in section 278AA of the Act. Due diligence needs to be exercised by the assessee deductor for remittance of the amount which duly belongs to the Government once the amount has been deducted. From the compliance pattern of the assessee deductor it is observed that substantial delays are noticed in respect of remittance of TDS amount for the Financial Year 2019-20 and 2021-22 as well. Delay in remittance deprives the Government of the funds which genuinely belong to the Government and also results in undue delay in granting credit to the person from whose behalf tax has been deducted/ collected. The bonafides of the reasons explained for delay on various occasions have not been clearly established in this case. After considering various fettering and manacling circumstances as being ameliorating causes put forth by the assessee deductor, the factual evidence of delayed remittance in respect of the quantum of tax belatedly remitted and the periods of delay, it can be safely concluded that the causes as attributed do not constitute a reasonable cause as prescribed in section 278AA of the Act. It is further contended that TDS has already been remitted to the Govt. Account along with late payment interest and therefore, sanction for launching prosecution may not be warranted. In this regard, it is apt to quote the Hon'ble Apex Court judgment in Madhumilan Syntex Vrs. Union of India (290 ITR 199) wherein disapproving Hon'ble Calcutta High Court Judgment, it is held as below- "Once a statute requires to pay tax and stipulates period within which such payment is to be made, the payment must be made within that period. If the payment is not made within that period, there is default and an appropriate action can be taken under the Act."

9. The assessee deductor deducted TDS but failed to deposit the deducted tax to the Government within stipulated period. The assessee itself admitted the said fact. The deductor Assessee is duty bound to remit the deducted TDS amount within stipulated period of time as prescribed in Rule 30 of the Income Tax Rules 1962 and the failure to remit the TDS after its deduction within stipulated period of time attracts penal provisions contained in section 276B of the Income Tax Act. The deducted TDS amount belongs to the Government and the prayer acts in fiduciary capacity. Thus, it is the bounden duty to remit TDS to the Government account and no amount of helplessness and financial difficulty will come in the rescue of the prayer. The prayer is not entrusted to retain the deducted TDS and use the same for any other purpose. Thus, the assessee has failed to comply with the statutory provisions without reasonable cause, hence committed an offence punishable under section 276B of the Act.

10. It is not disputed that the assessee deductor had made delayed remittance in respect of the TDS amount ofRs.2,58,29,945/- during the Financial Year, 2020-21 involving various periods of delay as noted above. It is admitted that the assessee deductor has not deposited said amount (comprising of various sums) within stipulated period i.e. on or before 7th day of next month.

Rule 30 of the Income Tax Rules, 1962 states that:

xxxx	xxxx	xxxx	xxxx	xxxx
xxxx	xxxx	xxxx	xxxx	xxxx

xxxx	xxxx	xxxx	xxxx	xxxx
xxxx	xxxx	xxxx	xxxx	xxxx

> 11. It is also admitted position that subsequently out of the total amount deducted under various sections, the assessee paid all the amounts with interest of Rs.12,37,782/- as required under section 201(1A) of the Act owing to the delay in payment of TDS amount. The deductor remitted the TDS amount after the statutory period. The assessee thus deducted TDS but not deposited during the statutory time limit but after substantial period of delay ranging from 31 to 214 delays. The deductor has not denied these facts. Since the assessee deductor is responsible to remit/ deposit the deducted TDS amount within the stipulated time as per sanction 200 and 204 of the Act, the assessee deductor has committed the default which comes under the offence as provided in section 276B of the Act.
>
> 12. Section 3(38) of General Clauses Act defines an "offence" to mean "any act or omission made punishable by any law for the time being in force". Payment of the TDS is an obligation and duty covered bystatute and the default of such payment, which has been made an offence continuous from day to day till the payment, is made. The evidence regarding the delay in remittance is not only admitted but also unassailable ex-facie. The evidence is not un-worthy of credit or absurd as such to make it a prima-facie fit case for launch of prosecution. In view thereof, the case *prima-facie* is a fit one in which prosecution needs to be launched."

29. The above part of the order being tested in the touchstone of what have been discussed in the foregoing paras, the view taken by the Commissioner, Income Tax (TDS), Bhubaneswar is found to be suffering from the vice of non-consideration of the admitted factual settings as to the existence of reasonable cause for the said failure of the Petitioners in depositing the TDS.

30. For all the aforesaid, this Court is of the considered view that the present complaint is vitiated as the failure on the part of the Petitioners to comply within the provision of law as to deposit of the deducted TDS was on account of the reasonable causes for the prevalence of COVID-19 Pandemic standing on their way. The order of sanction thus being found to have been passed without due application of mind and in a mechanical manner even putting the blame upon the Petitioners for not filing any exemption/ relaxation notifications/.circulars, the same stands vitiated. The Court below in the facts and circumstances ought not to have taken cognizance of the offence under section-279B, section 2(35) and 278(B) of the I.T. Act when even the latter two are no penal provisions and as such is bad in law and liable to be set aside.

31. Accordingly, the Revision is allowed. The impugned order dated 02.02.2023 passed by the learned ACJM (Spl.), Cuttack in 2(CC) Case No.04 of 2023 stands set aside.

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2024 (II) ILR-CUT-86

D. DASH, J.

RSA NO. 234 OF 2022

SARAT MOHANTA & ORS. ……Appellants

-V-

SUBAS MOHANTA & ORS. ……Respondents

LIMITATION ACT, 1963 – Section 116 – The Trial Court persuing the report of the Civil Court commissioner found well in order and in consonance with the preliminary decree, accepted the same on 23.10.2016 – The final decree has been engrossed on stamp paper and signed on 01.07.2017 – Which date should be reckoned as the date of final decree for the purpose of computation for the period for filing the Appeal – Held, the date of acceptance of the report of the Civil Court commissioner should be reckoned for filing of Appeal.

For Appellants : Mr. B. Bhuyan

For Respondents : None

JUDGMENT Date of Hearing : 02.04.2024 : Date of Judgment:15.04.2024

D.DASH, J.

The Appellants, by filing this Appeal, under Section-100 of the Code of Civil Procedure, 1908 (for short, 'the Code') have assailed the judgment and decree passed by the learned Additional District Judge, Karanjia in RFA No.40 of 2017. The Respondent No.1 as the Plaintiff had filed the suit (Civil Suit No.21 of 2008) in the Court of the learned Civil Judge (Senior Division), Karanjia for partition arraigning these Appellants and Respondent Nos.2 and 3 as the Defendants. The suit having been preliminarily decreed, the Respondent No.1 (Plaintiff) filed necessary application to make the preliminary decree final. In the final decree, the Civil Court Commissioner being deputed to cause division of the properties amongst the parties and all of them the shares accordingly in terms of the preliminary decree, he submitted his report. That report having been accepted, the final decree was drawn, the supplied stamp papers and signed on 01.07.2017.

The Appellants (Defendant Nos.1 to 4) being aggrieved by the said final decree carried an Appeal under section 97 of the Code. The said Appeal having been dismissed, the present Second Appeal is at the instance of the Appellants (Defendants), who claim to have suffered from that final decree being the Defendant Nos.1 to 4 before the Trial Court as the allotment of the land to the parties is not as per their shares.

2. For the sake of convenience, in order to avoid confusion and bring in clarity, the parties hereinafter have been referred to, as they have been arraigned in the Trial Court.

3. The suit filed by the Plaintiff for partition was preliminarily decreed by the Trial Court by its judgment dated 09.03.2011 followed by the preliminary decree

dated 21.03.2011. There being no challenge to the said judgment and preliminary decree passed by the Trial Court, the same have attained finality. Thereafter at the instance of the Plaintiff the final decree has been drawn on 01.07.2017 after acceptance of the report of the Civil Court Commissioner as to allotment of properties of the parties which is under challenge.

4. Mr. B. Bhuyan, learned counsel for the Appellants (Defendants) without disputing the position that the preliminary decree drawn in terms of the judgment passed by the Trial Court having attained finality, the parties are precluded from disputing its correctness submitted that when the final decree has not been passed in consonance with the preliminary decree taking all those equitable factors and features in respect of the properties and parties into consideration and when such manifest errors surface with the report of the Civil Court Commissioner as to allotment of the properties to the parties, the Trial Court ought not to have drawn the final decree. He submitted that when that was challenged, the First Appellate Court ought not to have confirmed the same by whittling down the contentions raised from the side of these Defendant Nos.1 to 4. He further submitted that after the Civil Court Commissioner submitted his report as to the division of the properties amongst the parties in the field allotting them specific land which is said to be in accordance with their shares, these Defendant Nos.1 to 4 were not given the opportunity to file their objection in specifically showing as to how and where the errors have been committed by the Civil Court Commissioner and where lies the fault which require due rectification to bring the said allotment in consonance with the preliminary decree as far as possible and practicable respecting the positioning of the parties vis-à-vis the properties and possession, convenience etc. According to him, the First Appellate Court is not justified in holding that sufficient opportunity was provided to the Defendant Nos.1 to 4 before acceptance of the report of the Civil Court Commissioner. He further submitted that when prima facie it appears from the allotment sheet that the Civil Court Commissioner has deviated from the preliminary decree while making the allotment in respect of the ancestral homestead and thereby allotting 50% share from Plot No.86 wherein the constructed portion of the dwelling house exists; the First Appellate Court is not correct in holding that as because from the total extent of homestead plot 1/4th share was allotting the Plaintiff and Defendant Nos.5 and 6, the same is within their shares. He thus urged for admission of the Appeal to answer the above as the substantial question of law.

5. Keeping in view the rival submission made, I have carefully read the judgments passed by the Courts below.

6. Before proceeding to address the submission of the learned counsel for the Appellants in ascertaining as to whether there surfaces the substantial question of law for being answered meriting admission of this Appeal, some points which touch upon the very entertainability of the First Appeal under section 97 of the Code by the learned Additional District Judge and consequentially, this Appeal.

7. It appears from the judgment of the First Appellate Court that these Defendants, except Defendant No.4, being served with the notice of the final decree proceeding entered appearance on 21.03.2012 and the Defendant No.4 did not appear despite service of notice. The Trial Court having received the report of the Civil Court Commissioner posted the matter to 22.08.2016 inviting objections from the parties. On 22.08.2016, the Defendants were absent and no step was taken on their behalf. Even in that situation, the Trial Court providing opportunity posted the case to 06.10.2016 for hearing in the matter of acceptance of the report of the Civil Court Commissioner. On 06.10.2016 the Defendants again did not appear. But then again the Trial Court posted the case to 23.10.2016 for hearing on the acceptance of the report of the Civil Court Commissioner. On 23.10.2016, as the same state of affair recurred and the opportunities repeatedly given were not availed; the Trial Court perusing the report of the Civil Court Commissioner and finding it to be well in order and in consonance with the preliminary decree accepted the same. Thus having accepted the report of the Civil Court Commissioner, the Trial Court made the preliminary decree final on 23.10.2016 indicating that the report would from a part of the final decree. Thereafter, the stamps payable being assessed, the same was directed to be supplied for the final decree to be engrossed with those stamp papers so as to make the final decree executable if so desired. Stamp papers being provided, the final decree has been engrossed on the stamp papers and signed on 01.07.2017.

8. The order of acceptance of the report of the Civil Court Commissioner being passed on 23.10.2016 that stands as the date to be reckoned as the date of final decree for the purpose of computation for the period for filing the Appeal as per Article 116 of the Limitation Act. Although the supply of the stamp papers and engrossment of the final decree thereon is for the purpose of making it executable, yet for all other purposes, the date of acceptance of the report of the Civil Court Commissioner followed by the order of the Court that the final decree to be passed and the report is to form the part of it, is the date of final decree. So, the Memorandum of First Appeal having been filed on 20.11.2017 that to without annexing the order whereby the report of the Civil Court Commissioner was accepted and preliminary decree was made final with the said report for being a part of it; the First Appeal was already barred by limitation and it too was not entertainable for substantial non-compliance as to non-filing of the order as above. The Appellant No.2, as it appears from record, stating that he was looking after the litigation for and on behalf of all the Appellants had filed an application under section 5 of the Limitation Act for condonation of delay in filing the Appeal stating that he being ill from 28.06.2017 till 08.11.2017 was prevented from filing the Appeal. But as per the legal position expressed above even before 28.06.2017, when that Appellant No.2 fell ill, the period of Appeal had already expired. Moreover, the Memorandum of Appeal would go to show that the challenge was to the final decree dated 01.07.2017 which too is misconceived and that Appeal ought to have been against the final decree dated 23.10. 2016

Therefore by the time the First Appeal was filed, the final decree had attained finality after expiry of the period of thirty days from the said date of the order of acceptance of the report of the Civil Court Commissioner and passing of the final decree. The First Appellate Court thus ought not to have entertained the Appeal which as per law was not entertainable. Therefore, in my considered view, the right of the Defendant Nos.1 to 4 to challenge the final decree by carrying an Appeal under section 97 of the Code stood extinguished by the date they presented the Memorandum of Appeal before the First Appellate Court even upon condonation of delay for the period which the Appellant claimed to have been prevented by sufficient cause.

9. Next coming to address the submission of the learned counsel for the Appellant (Defendants) as regards the complaint of the Defendant Nos.1 to 4 being not provided with opportunity of raising their objection to the report of the Civil Court Commissioner, it be stated that Defendant Nos. 4 having received notice in the final decree proceeding had not appeared before the Trial Court. So for her to say that she was not given opportunity to object to the report of the Civil Court Commissioner and to have not been provided with the opportunity to raise objection to the report of the Civil Court Commissioner, is simply to be whittled down. The record when reveals that several opportunities had been provided to these Defendant Nos.1 to 4 and in spite of their absence, the Trial Court had repeatedly adjourned the matter for filing objection and then for hearing on the question of acceptance of the report of the Civil Court Commissioner, as already discussed in the foregoing paras; it was too late in the day for them to complain on that score in carrying the First Appeal.

10. The total extent of the suit property is Ac.12.28 dec. and the division having been made for Ac.12.18 dec.; the Civil Court Commissioner appears to have provided the explanation that the same being the actual extent of land available; there might have been a typographical mistake in the preliminary decree, going unnoticed and the Trial Court as well as the first Appellate Court have accepted the same. As regards allotment of the dwelling house under Plot No.86 in favour of Defendant Nos.2 and 4 and allotment of vacant land without any house, the First Appellate Court has dealt the matter in great detail in finding out the justification for the Civil Court Commissioner's division to be well in order.

In the wake of aforesaid, this Court is of the view that no substantial question of law surfaces forb being answered meriting admission of this Appeal.

11. In result, the Appeal stands dismissed. There shall, however, be no order as to cost.

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2024 (II) ILR-CUT-90

D. DASH, J.

RSA NOs.110 & 122 OF 2023

1. RAGHUNATH SAHU, ……Appellants
2. BISWANATH SAHU,
3. GEDUA SAHU @SAHOO

-V-

1. PRAMILA KUMARI SAHU, ……Respondents
2. JAGABANDHU SAHU @SAHOO

(A) HINDU LAW – Gift of undivided ancestral property – Whether a coparcener can dispose of his undivided interest in coparcener property by gift? – Held, No – The coparcener, father or other managing member has the power to make a gift within "reasonable limits" of ancestral immovable property for "pious purpose".

(B) WORDS & PHRASES – "Reasonable limit" & "Pious purpose" – Explained with reference to the case laws.

Case Laws Relied on and Referred to :-

1. AIR 1964 SC 510 : Guramma Bhratar Chanbasappa Deshmukh and Ors. vs.Mallappa Chanbasappa and Anr.
2. AIR 1967 SC 569 : Ammathayi @ Perumalakkal and Anr. Vs. Kumaresan @ Balakrishnan & Ors.
3. (2004) 1 SCC 295 : R.Kuppaya vs. Raja Gounder.
4. AIR 1963 Orissa 59 : Tara Sahuani vs. Raghunath.
5. AIR 1987 SC 1775 : Thamma Venkata Subbamma (dead) by L.R. v. Thamma Rattamma & Ors.

For Appellants : Mr. S.P. Mishra, Sr. Adv., Mr. S. Mishra, O. Panda, A.Agarwal, R.K. Agrawal, M. Mishra & G.N. Parida (in RSA No.110/23)
Mr.L.K. Maharana & R. Barik (in RSA No.122/23)

For Respondents : Mr. K.C. Kar & P.K. Das, Mr.L.K. Maharana & R. Barik (in RSA No.110/23)
Mr.P.K.Das & D.K. Sahoo, Mr.S.Mishra, O. Panda, A.Agarwal & R.K. Agrawal (in RSA No.122/23)

JUDGMENT Date of Hearing : 29.02.2024 : Date of Judgment : 15.04.2024

D. DASH, J.

Since in both these Second Appeals, as at (A) and (B), filed under section 100 of the Code of Civil Procedure, 1908 (for short, 'the Code'), the judgment and decree dated 26th December, 2022 & 5th March, 2023 respectively passed by the learned District Judge, Jajpur, in RFA No.40 of 2015 have been challenged; those were heard together for being disposed of by this common judgment.

The Respondent No.1 in both the Appeals as at (A) and (B) as the Plaintiffs had filed the suit (C.S. No.313 of 2009) in the court of the Civil Judge (Sr.Division),

Jajpur, as then was. The suit is for partition and allotment of half share to herself with the rest half going to these Appellants (Defendant Nos.3 and 4) and Respondent No.2 (Defendant No.2) of the Appeal as at (A) who are the Appellant and Respondent of the Appeal as at 'B'. The suit having been preliminarily decreed allotting half share over the suit land to the Respondent No.1 (Plaintiff); this Appellant (Defendant Nos.3 and 4) of the Appeal as at (A) had filed the Appeal under section 96 of the Code. The First Appeal has been dismissed.

With the above result in the First Appeal, these Appellants of the Appeal as at (A) who are the Defendant Nos.3 to 4 in the suit when have questioned those judgments and preliminary decrees passed by the Trial Court, First Appellate Court confirming the judgment and preliminary decrees passed by the Trial Court, the Appellant (Defendant No.2) of the Appeal as at (B) who is the Defendant No.2 in the suit has also called in question, the said judgments and preliminary decrees passed by the Trial Court as well as the First Appellate Court.

2. For the sake of convenience, in order to avoid confusion and bring in clarity, the parties hereinafter have been referred to, as they have been arraigned in the Trial Court.

3. Plaintiffs case is that the suit property which is situated in Unit No.8, Jajatinagar in Jajpur Town under Plot No.875 appertaining to Khata No.303 is the joint ancestral homestead of the Plaintiff and Defendants. The suit land recorded in the name of Chanda Bibi, wife of Hari Sahu who happens to the grandmother of the parties. The father of the Plaintiffs and the father of the Defendants are uterine brothers. They are having their house over the suit properties. The Plaintiff's father shifted to village Taramadan, Habeli Bazar by constructing a building there over his own purchased land. It is stated that he had executed a registered deed of gift on 24.01.1983 in faovur of the Plaintiff. So, the Plaintiff claims to have become the owner in possession of the gifted property to the extent of half of the suit property. Accordingly, it is stated that the rest half of the suit property remains as the entitlement of the Defendants. In the Major Settlement Record of Right, the suit land is recorded in the name of the Plaintiff and Defendants jointly.

The Plaintiff is an unmarried helpless lady and taking advantage of that all the Defendants who are the legal heirs and successors of Madhu who is the brother of the father of the Plaintiff, namely, Sukadev are trying to take possession of more than their share over that property ignoring the demand of the Plaintiff for partition of the said property in two halves making her entitlement to half. Hence the suit.

4. The Defendant Nos.1,3 to 5 in their written statement while traversing the plaint averments have stated that one Hari Sahu was the common ancestor of the party and Chanda was his widow. They died leaving behind two sons, Sukadev and Madhu. Sukadev died leaving behind his wife Santilata and two sons, namely, Jagabandhu (Defendant No.2) and Ananta as also two daughters, namely, Pramila (Plaintiff) and Putuli. The branch of Madhu is represented by his wife Sukuti (Defendant

No.1), three sons; Raghunath (Defendant No.3), Biswanath (Defendant No.4) and Gedu (Defendant No.5). It is stated that the Plaintiff has been falsely and purposely shown Jagabandhu (Defendant No.2) to be the son of Madhu when Jagabandhu is her own brother being the son of Sukadev. It has been further stated that the suit land is the ancestral joint family property and have never been partitioned. The thatched roofed house consisting of six rooms standing over the suit land was burnt to ashes on 15.04.2009. The Defendants having repaired two rooms are occupying the same. The Plaintiff and her family members do not reside over the suit land. The deed of gift standing in favour of the Plaintiff as claimed by her is stated to be void as gift of undivided share without the consent of other co-sharers is not legally permissible. Similarly, it is stated that the recording of the name of the Plaintiff in the Record of Right cannot create title over the suit land in her favour. These Defendants have also taken the plea that the suit as framed for the reliefs claimed is not maintainable without the brothers, sister and mother of the Plaintiff, who are the necessary parties being so arraigned.

5. On the rival pleadings, the Trial Court framed in total six issues. Sitting over to answer Issue Nos.3 and 4 together which relate to the validity of the gift deed dated 08.01.1973 followed by the deed of rectification dated 24.01.1983 and accordingly, the partition of the suit land in accordance with same as prayed by the Plaintiff, upon examination of evidence and their evaluation as also taking note of the decisions as quoted in the judgment, the Trial Court ruled those issues in favour of the Plaintiffs. That has practically led to pass the preliminary decree in acceptance of the prayer of the Plaintiff.

6. The First Appellate Court on being moved by the Defendant Nos.3 to 5 being highly aggrieved by the said judgment and preliminary decree passed by the Trial Court has gone to affirm said important findings returned by the Trial Court and accordingly, the judgment and preliminary decree passed by the Trial Court have been confirmed and the following order thus has come out.

> "The appeal be and the same is dismissed on contest against the respondents, however, without cost. The judgment dated 10.04.2015 and decree dated 18.04.2015 passed by the Civil Judge (Sr. Division), Jajpur in C.S. No.313/2009 are hereby confirmed."

7. These Appeals have been admitted to answer the following substantial questions of law: -

> "(i) Whether the gift deed under Ext.3 is valid?; and
>
> (ii) Whether there was valid acceptance of the gift by the Plaintiff under Ext.3?"

For all essential purpose, both these above questions relate to the validity of the gift claimed by the Plaintiff to have been made in her favour by her father Sukadev and, therefore, those are required to be taken up together for being answered.

8. Heard Mr. Soumya Mishra, learned Counsel for the Appellants in the Appeal as at 'A' and Mr. N.K. Maharana, learned Counsel for the Appellants in the Appeal as at 'B'.

None appeared on behalf of the Respondent No.1 (Plaintiff), when called on 29.02.2021 and taken up for hearing and also providing one more opportunity when brought under the heading of 'To be Mentioned' on 02.04.2024.

9. Learned Counsel for the Appellants of the Appeal as at 'A' and "B" sail in the same boat since their main defence is to bulldoze the deed of gift besides of course challenging the sonship of Defendant No.3 as shown by the Plaintiff from the beginning. Before proceeding further at this stage, it is stated that as per the case of the Plaintiff, the Defendant No.1, Jagabandhu is the son of Madhu and that had been shown in the cause title of the plaint that he is the full blooded brother of Defendant Nos.3,4 and 5. On the contrary, the case of the Defendants is that Jagabandhu is the son of Sukadev, the father of the Plaintiff and as such is the full blooded brother of the Plaintiff. The Trial Court as well as the First Appellate Court on this issue upon examination of evidence and their evaluation have returned the concurrent finding that Jagabandhu is the son of Madhu, what the Defendants asserted has been accepted and what has been the case of the Plaintiff in the plaint has been turned down. Said concurrent finding is not facing any challenge in these Appeals from the side of the Plaintiffs and the substantial question of law are also not touching upon that.

It is also seen that she has neither filed any cross-appeal or cross-objection. When the fact also stands that such finding against the Plaintiffs having been given by the Trial Court, she had not also filed any cross-appeal or cross-objection before the First Appellate Court, in the Appeal carried by the Defendant Nos.3, 4 and 5. Therefore, the finding that the Defendant No.2 is the son of Sukadev has attained finality. So, the Plaintiff when was claiming that Madhu had four sons, that stand has been rejected. So, we proceed with the factual setting that the Plaintiff as well as Defendant No.2 are the heirs and successors of Sukadev standing to succeed his properties.

10. The relevant pleading in the plaint as to the nature of the property are first of all required to be gone into and the relevant portions, therefore, are reproduced herein below:-

> "(i) That the suit land fully described in schedule of the plaint is the joint family ancestral homestead of the Plaintiff and Defendants; and
>
> (ii) That the suit schedule land stood recorded in the name of late Chanda Dei, grandmother of the parties. Chanda is the mother of Sukadev and Madhu ad the wife of Hari, who is the father of Sukadev and Madhu."

11. The Plaintiff claims half share over the suit schedule property basing upon the gift said to have been made by her father, Sukadev in her favour in respect of the half interest that he was having over the suit schedule property with the rest half resting with Madhu. It is, thus, the case of the Plaintiff that her father as the donor had executed the deed of gift which was registered in gift away his half interest over the suit schedule property to the Plaintiff. In fact, as per the admitted case, Sukadev

had half interest over the suit schedule property and therefore, when as per the case of the Plaintiff she is the only daughter of Sukadev who had no other heir of Class-I surviving at that time, then there was no necessity at all for executing the registered deed of gift except to facilitate that the Plaintiff gets the property immediately without waiting till the death of Sukadev or for the reason that the donor Sukadev was apprehending that it would not be safe for him anymore to hold the property as he was unable to maintain and preserve etc. and, therefore, the Plaintiff , who is his daughter should step into look after. Here the fact remains that the Plaintiff having got the deed of gift, Ext.3 in her favour has not filed the suit immediately but it is after more than about three and half decades of that deed coming into being.

The deed of gift is 08.01.1973 and the suit has been filed on 10.06.2009. That apart the prayer in the suit filed by the Plaintiff is for a preliminary decree for partition of the suit land entitling her to half share over the suit schedule property. The legal implication of that is quite significant in the sense that either the said donee was not in possession of any part of the property or if the part of the property was in her possession, she was not certain as to if which would be enjoyed by her as the gifted property and, therefore, in seeking partition, she claims any part notwithstanding her possession, if any but saving the extent, i.e., half interest/share.

One more disturbing feature appears here in that after about 12 (twelve) years of execution of the gift deed, the same donor has executed a rectification deed when it is not said as to why that necessity arose or that how for 12 years, the mistake went unnoticed and if so what necessitated to go for a subsequent deed.

12. In the above situation, if the judgments and decrees passed by the Courts below would stand confirmed, then the Plaintiff would be getting half share over the suit schedule property, that is total share which her father had, as otherwise also if the deed of gift is held invalid, the Plaintiff would be getting $1/4^{th}$ share, when $1/4^{th}$ share would also stand as the entitlement of the Defendant No.2. The Plaintiff in the entire plaint does not state to have been in possession of any portion of the land or house standing over on the suit schedule property. She rather states that the Defendants have constructed a building over the suit lands and the old kacha (thatched) house existing on the suit land had been raised to ground. It is next stated that the Defendants taking advantage of jointness of the suit land even now are trying to take more land than their legitimate share. At the same time, we find the averments in the plaint to be there in clear terms that the father of the plaint namely, Sukadev having purchased a piece of land in village Taramadan (Habeli Bazar) had constructed a building over there and was residing with his family on the said plot and premises which was his self-acquired property.

13. The Trial Court as well as the First Appellate Court have concurrently held that since the deed of gift was executed by Sukadev for pious purpose, it is not void and instead it is valid to the extent of share of Sukadev and as such the Plaintiff has half share over the suit land. The reasons in support of the same, is that the purpose

behind execution of the gift deed Ext.3 since shows that the Plaintiff was taking care of her Sukadev and being satisfied with such care, bestowed upon Sukadev, he had executed the deed of gift to the extent of his share and therefore, the purpose was pious.

This Court now taking a pause here is constraint to ask a question to itself that if we say the above to be the pious purpose then when a gift is made out of love and affection for the service rendered, for what purpose it can be said to have been made. A father gifting away his property in favour of the daughter excluding the son being satisfied with the service that the daughter had been rendering and by saying that the daughter used to take his care by paying proper attention can never be said to be a gift backed with pious purpose.

The term pious purpose is a gift for charitable and/or religious purpose. In case of *Guramma Bhratar Chanbasappa Deshmukh and Others vs. Mallappa Chanbasappa and Another*; *AIR 1964 SC 510*, the principle of law has been laid down as under:-

> "It may, therefore, be conceded that the expression "pious purposes" is wide enough, under certain circumstances, to take in charitable purposes though the scope of the latter purposes has nowhere been precisely drawn. But what we are concerned with in this case is the power of a manager to make a gift to an outsider of a joint family property. The scope of the limitations on that power has been fairly well settled by the decisions interpreting the relevant texts of Hindu law. The decisions of Hindu law sanctioned gifts to strangers by a manager of a joint Hindu family of a small extent of property for pious purposes. But no authority went so far, and none has been placed before us, to sustain such a gift to a stranger however much the donor was beholden to him on the ground that it was made out of charity. The Hindu law permits him to do so only within strict limits. We cannot extend the scope of the power on the basis of the wide interpretation given to the words "pious purposes" in Hindu law in a different context. In the circumstances, we hold that a gift to a stranger of a joint family property by the manager of the family is void".

In case of *Ammathayi @ Perumalakkal and Anr. Vs. Kumaresan @ Balakrishnan and Ors.*; *AIR 1967 SC 569*, whereeven the donor stated that as wished by his father, he was making the gift to his wife which was in discharge of pious obligation; the Court rejected the ground. It then had taken a view that if that was the father's desire, since the father-in-law could not have done so at the time of marriage of his daughter-in-law, he would not be competent to do so in so far as ancestral immovable properties are concerned.

14. The consideration as to the daughter's love and affection to the father and that of the daughter to father as also the service for the care and attention given to father by the daughter, if would fall within the ambit of pious purpose, then it would not be impermissible to say that the gift to any one backed by the reasons such as a love and affection etc. can also be said to be a gift having the backing of pious purpose. The term pious purpose is a gift for charitable or religious purpose. A Hindu father or any other managing member of a Hindu undivided family have the

power to gift the ancestral property only for pious purpose. A gift with regard to the ancestral property executed out of love and affection does not come within scope and ambit of the term 'pious purpose'.

The gift of ancestral immovable property to a daughter by the father up to a reasonable extent at the time of marriage even though is permissible, yet that is not so permitted as one for pious purpose but for the reason that in the ancient days as the right of the daughter in presence of son over the father's property that too ancestral was not there at all and even without the son their interest was limited and it was then that the daughters were taken as liabilities for the father, and they were given on 'Kanyadaan', such reasonable extent of immovable property of ancestral in nature was permitted.

Therefore, the finding of the Courts below to that effect cannot be sustained. The gift by a father/ mother/ guardian and even grandfather/grandmother in favour of their children or grandchildren cannot be said to be in the direction of exhibiting the piousness of the donor.

The Plaintiff herself in the plaint even though states that the land was recorded in the name of her grandmother but has very pin pointedly projected the case that the suit schedule property was the ancestral joint family homestead. Therefore, the gift by Sukadev in her favour is impermissible in the eye of law and as such is void as the donor had no power.

In the present case, when the gift was made by Sukadev, the Plaintiff was not having any interest over the suit schedule property and she has been conferred with the interest that her father had over the suit property. It is not stated that the same had the consent of the Defendants or the predecessor-in-interest of Defendant Nos. 3 to 5 and also the mother of the Plaintiff, if she was then alive.

15. There is a long catena of decision holding that the gift by coparcener of his undivided interest in the coparcenary property is void. It is not necessary to refer all these decisions instead it would be suffice for the purpose in referring to the following statement of law in Mayne's Hindu Law, 11th Edition Para-382:-

> "382, Gift Invalid – It is now equally well settled in all the provinces that a gift or devise by a coparcener in a Mitakshara family of his undivided interest is wholly invalid. ….. coparcener cannot make a gift of his undivided interest in the family property, movable or immovable, either to a stranger or to a relative except for purposes warranted by special tests."

Mulla's Hindu Law, 24th Edition Article-256 Para -405 is as follows:-

> "256, Gift of undivided interest- (1) According to the Mitakshara Law as applied in all the States, no coparcener can dispose of his undivided interest in coparcenary property by gift. Such transaction being void altogether there is no estoppel or other kind of personal bar which precludes the donor from asserting his right to recover the transferred property. He may, however, make a gift of his interest with the consent of the other coparceners."

16. It is the settled law that a Hindu father or other managing member has the power to make a gift within reasonable limits of ancestral immovable property for 'pious purposes'.

In case of R.Kuppaya vs. Raja Gounder (2004) 1 SCC 295, the Hon'ble Apex Court, examining the whole question, has held that it was competent for a father to make a gift of immovable property to a daughter, if the gift is of reasonable extent having regard to the properties held by the family. The emphasis has been that the gift must be a 'reasonable extent'. Thus, on facts, in order to say that it is invalid, it has to be found that it is beyond the reasonable limit.

This Court, in Tara Sahuani vs. Raghunath; AIR 1963 Orissa 59, has held that a father can make a gift of a small portion of ancestral immovable property to his daughter at or after her marriage if the extent of gift is reasonable and particularly if she is in poor circumstances.

17. In the given case, gift being in respect of the whole interest that the donor namely, Sukadev was having over the suit schedule property where at that point of time, the Defendant No.2 who has been found to be the son of Sukadev was also having the interest by the birth as a coparcener, the gift under circumstances cannot be held to be the either of reasonable extent. Nor it is the case that the Defendant No.2 had at least the consent if not the Defendant Nos. 3 and 5.

18. We may now refer to Mulla's Hindu law of Article- 258 of 15th Edition, it has been stated as follows:-

> "Gift of undivided interest- (1) According to the Mitakshara law as applied in all the States, no coparcener can dispose of his undivided interest in coparcenary property by gift. Such transaction being void altogether there is no estoppels or other kind of personal bar which preclude the donor from asserting his right to recover the transferred property. He may, however, make a gift of his interest with the consent of the other coparceners."

19. The Supreme in case of *Thamma Venkata Subbamma (dead) by L.R. v. Thamma Rattamma and Others*, *AIR 1987 SC 1775* has held:-

> "The Supreme Court held that an individual member of the joint Hindu family has no definite share in the coparcenary property. By an alienation of his undivided interest in the coparcenary property, a coparcener cannot deprive the other coparceners of their right to the property. The object of this strict rule against alienation by way of gift is to maintain the jointness of ownership and possession of the coparcenary property. It is true that there is no specific textual authority prohibiting an alienation by gift and the law in this regard has developed gradually, but that is for the purpose of preventing a joint Hindu family from being disintegrated.
>
> The rigor of this rule against alienation has been to some extent relaxed by the by gift Hindu Succession Act, 1956, Section 30 of the Act permits the disposition by way of will of a male Hindu in a Mitakshara coparcenary property. The most significant fact which may be noticed in this connection is that while the Legislature was aware of the strict rule against alienation by way of gift, it only relaxed the rule in favour of disposition by a will the interest of a male Hindu in a Mitakshara coparcenary property. The Legislature

> did not, therefore, deliberately provide for any gift by a coparcener of his undivided interest in the coparcenary property either to a stranger or to another coparcener. Therefore, the personal law of the Hindu, governed by Mitakshara School of Hindu Law, is that a coparcener can depose of his undivided interest in the coparcenary property by a will, but he cannot make a gift of such interest."

In the wake of aforesaid discussion and reasons, the answer to the substantial questions of law is so provided by holding that the deed of gift, Ext.3 is invalid in the eye of law and as such cannot hold the field that the Plaintiff as the donee under the said deed of gift had acquired the right over half share out of suit schedule property which was the share of her father, donor.

20. Having said so, now it has been conclusively found that Sukadev has not sold her interest over the suit schedule property in favour of anyone else, nor it is said that he had executed any Will or made any other testamentary disposition as regards her interest over the suit schedule property.

The Plaintiff and Defendant No.2, being the Class-I heirs of Sukadev, are legally entitled to 1/4th share each over the suit schedule property and the entitlement of the Defendant Nos.3, 4 and 5 together stands to the extent of ½ half share. It is be stated here that in view of the total omission of the provision contained in section 23 of the Hindu Succession Act, 1955 by the Amendment Act, 2005 coming into force on 9th September 2005 which has the effect of being never in the statute at all and can even be taken into account in pending suits, appeals etc., the impediment as to partition of the same does no more stand and that right is no more to remain under suspension abeyance till happening of the contingent as found place in that section 23 of the Act. In that view of the matter, this Court is of the view that instead of non-suiting the Plaintiff, she has to be favoured with the preliminary decree as afore-stated.

21. The suit is thus preliminarily decreed for partition of the suit property declaring 1/4th share of the Plaintiff and Defendant No.2 each and 1/6th share of Defendant Ns.3, 4 & 5 each over the suit land. The parties are directed to make amicable division of the property in accordance with their above allotted share amongst themselves within one month hence and in the event of failure, final decree be passed after deputing the Civil Court Commissioner to make the division by allotment of the specific land to the parties as per their share as aforesaid and acceptance of the report that effect as per law. It is further directed that the Civil Court Commissioner, while making the division, shall give due regard to the possession of the parties and their convenience as far as possible and practicable.

22. Accordingly, both the Appeals stand disposed of. There shall, however, be no order as to cost.

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2024 (II) ILR-CUT-99

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

JAIL CRIMINAL APPEAL NO. 150 OF 2005

PRAFULLA PATRA ……Appellant

-V-

STATE OF ODISHA ……Respondent

CRIMINAL TRIAL – The Learned Trial Court found the appellant guilty of the offence charged U/s. 302 of the IPC basing on the testimony of the informant and eye witnesses – The doctor who conducted post-mortem disputed the time of death as the rigor mortis had passed of – Whether findings of the doctor regarding rigor mortis can dislodge the ocular version of P.Ws? – Held, no straight jacket formula can be laid down that in every case, the rigor mortis would appear at a particular point of time and disappear after a particular time irrespective of the age, the surroundings, the type of assault made to the deceased etc. – When the evidence of two eye witnesses are clear trustworthy and reliable, on the basis of the expert's opinion with respect to the time gap of death, the court cannot disbelieve the evidence of the two eye witnesses. (Para 9)

Case Law Relied on and Referred to :-

1. (2006) 13 SCC 65 : Baso Prasad Vrs. State of Bihar.

For Appellant : Mr. Samvit Mohanty (Amicus Curiae)
For Respondent : Mr. Arupananda Das, Addl. Govt. Adv.

JUDGMENT Date of Hearing & Judgment: 12.02.2024

BY THE BENCH

The appellant Prafulla Patra faced trial in the Court of learned Adhoc Additional Sessions Judge, Bonai in Sessions Trial No.24/67 of 1999-2004 for offence punishable under section 302 of the Indian Penal Code (hereinafter 'I.P.C.') on the accusation that 29.08.1998 at 4 p.m. at Malarbasa Badajor Nala situated near village Sarsara under Tikayatpali police station in the district of Sundargarh, he committed murder of his wife Subhadra Patra (hereinafter 'the deceased').

The learned trial Court, vide impugned judgment and order dated 23.08.2005, found the appellant guilty of the offence charged and sentenced him to undergo imprisonment for life under section 302 of the I.P.C. and to pay fine of Rs.1,000/-, in default to undergo simple imprisonment for six months.

Prosecution Case:

2. The prosecution case, as per the first information report (Ext.2) lodged by Tikeswar Patra (P.W.2), the paternal uncle of the deceased, on 29.08.1998 before P.W.14, the Circle Inspector of Police, Bonai, in short, is that the deceased was the daughter of his younger brother. Three years prior to the occurrence, the deceased

married to the appellant and they were staying together. The appellant used to assault the deceased and in the morning hours of 26.08.1998, the appellant assaulted the deceased, for which she came to her father's place and complained before the Secretary of the village, namely Lingaraj Patra (P.W.3). On 29.08.1998, when the deceased had been to attend call of nature to Badajor Nala, the appellant followed her and killed her by stabbing with a knife. At about 2 p.m. on that day, while P.W.2 was in his house, one Natha Patra came and informed him that the appellant had committed murder of the deceased and that the dead body was lying at Badajor Nala at Malarbasa. Getting such information from Natha Patra, P.W.2 rushed to the spot and found that the deceased was lying dead in the water channel at Malarbasa and stab wound was visible on her right side abdomen and a number of persons had congregated at the spot. When P.W.2 confronted Kunti Patra (P.W.4), Rebati Patra (P.W.5) and Minati Patra, they told that on that day at about 1.30 p.m., while they were engaged in weeding out grass in the land of one Sribacha Patra, all on a sudden they heard "Maridela Maridela" and noticed that the appellant stabbed the deceased and the dead body of the deceased was lying in the water channel. When they rushed to the spot, the appellant fled away towards jungle holding the knife and they also noticed stab wound on the belly of the deceased. It is further stated in the F.I.R. that P.W.2 along with P.W.13 Basanta Kumar Nayak came to the police station and orally reported the incident to the police.

P.W.14 Kalu Charan Pati, the Circle Inspector of Police, Bonai reduced the oral version of P.W.2 into writing, read over and explained the contents thereof to him, who admitted the same to be correctly recorded and accordingly, his signature was taken and it was treated as F.I.R. and P.W.14 registered Tikayatpali P.S. Case No.15 dated 29.08.1998 under section 302 of the I.P.C. against the appellant and himself took up investigation of the case.

During the course of investigation, P.W.14 examined the informant (P.W.2) and the accompanying witnesses, recorded their statements, visited the spot and prepared the spot map (Ext.11). He also held the inquest over the dead body in presence of the witnesses and prepared the inquest report (Ext.3). He seized sample earth and blood stained earth from the spot in presence of the witnesses and then sent the dead body for post mortem examination to Sub-Divisional Hospital, Bonai through constable. On 29.08.1998, P.W.14 seized a letter written by the deceased, which was kept in the custody of P.W.3 Lingaraj Patra on his production as per seizure list Ext.4. On 30.08.1998, P.W.14 seized the wearing apparels of the deceased on production by the constable after the post mortem examination, which was seized as per seizure list Ext.10. The appellant was arrested on 05.09.1998 and while he was in custody, he confessed his guilt and on the basis of his statement, recorded under section 27 of the Evidence Act, in the presence of witnesses and on being led by the appellant, the weapon of offence i.e. knife (M.O.I), which was concealed near a rock inside Jagyanhudi hill, was seized as per seizure list Ext.6. The appellant also disclosed the place of concealment of the wearing apparels, which

he had worn at the time of occurrence and took the police party to his house and produced the wearing apparels i.e. one ganjee, check lungi and one napkin, which were seized in presence of the witnesses as per seizure list Ext.7. Requisition was sent by the I.O. (P.W.14) to the Medical Officer, Sarsara for collection of sample blood and nail clippings of the appellant and on the same day, it was produced before him and seized as per seizure list Ext.1 and on 05.09.1998, the appellant was forwarded to Court. After receiving the post mortem examination report, P.W.14 made a query from the S.D.M.O., Bonai by sending the weapon of offence i.e. knife for seeking an opinion regarding possibility of the injury sustained by the deceased with such weapon. He also made a prayer before the learned S.D.J.M., Bonai to send the seized articles for chemical examination to R.F.S.L., Ainthapalli, Sambalpur and received the chemical examination report vide Ext.16. On 19.10.1998, P.W.14 examined some more witnesses and recorded their statements and on 01.12.1998 on completion of investigation, he submitted charge sheet against the appellant under section 302 of the I.P.C.

After complying with the due committal procedure, the case was committed to the Court of Session where the 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 & Material Objects:

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

P.W.1 Sankar Ghasi was working as a sweeper at Sarsara P.H.C. He is a witness to the seizure of blood sample and nail clippings as per seizure list Ext.1, which were kept in different vials in a sealed condition.

P.W.2 Tikeswar Patra is the informant in this case and he is the uncle of the deceased. He narrated the incident as it unfolded on the fateful day and also supported the prosecution case.

P.W.3 Lingaraj Patra, was the Secretary of the community to which the deceased belonged to and he stated that the deceased had given a written complaint alleging therein that she had frequently been assaulted by the appellant. He further stated that on the basis of such written complaint, he along with the President of their community had decided to convene a meeting after two days to decide the matter but unfortunately, the deceased was killed by the appellant on the same day. He is a witness to the seizure of the written complaint of the deceased as per seizure list Ext.4.

P.W.4 Kunti Patra and P.W.5 Rebati Patra are the eye witnesses to the occurrence. They stated that while they, along with one Minati Patra, were weeding out grass from the cultivable land of one Sribacha Patra, they heard the deceased crying “MARIGALI BUA”. They further stated that when they rushed to the spot, they found the deceased lying dead on the spot with profuse bleeding injury on her

right side belly. They also saw the appellant fleeing away towards jungle holding a knife.

P.W.6 Tankadhar Dalai is a post-occurrence witness who stated that seven to eight days after the death of the deceased, the police called him to Jagyanhudi hill. He further stated that the police arrested the appellant from that jungle and while under arrest, the appellant confessed his guilt to have killed the deceased. He also stated that the appellant led the police team as well as witnesses and gave recovery of a knife which he had concealed in the jungle.

P.W.7 Dhananjay Dalai is a witness to the seizure of wearing apparels of the appellant, i.e. one half ganji, one lungi and one napkin as per seizure list Ext.7.

P.W.8 Dr. Debadutta Mohanty was posted as the Assistant Surgeon at Sub-Divisional Hospital, Bonai. On police requisition, he held post-mortem examination over the dead body of the deceased and proved his report vide Ext.8.

P.W.9 Arikhita Patra was the President of Patra community, to which the deceased and the appellant belonged to and he stated that one day prior to the occurrence, the deceased had given him a written complaint which he had handed over to P.W.3 with an instruction to settle the matter after two days.

P.W.10 Sudam Charan Atti is a witness to the seizure of blood-stained wearing apparels of the appellant, i.e. one half ganji, one lungi and one napkin as per seizure list Ext.7.

P.W.11 Nityananda Badnaik stated that the police asked him to accompany them to Jagyanhudi hill. He also stated that one knife was lying on a piece of rock in the hill which was seized by the police in his presence. However, he denied knowing anything more about the case for which he was declared hostile by the prosecution.

P.W.12 Dasamati Patra is the mother of the deceased who stated that the appellant used to assault the deceased repeatedly during her lifetime. One day before her death, the appellant had assaulted the deceased by means of a stick for which she had come to her house. She further stated that the deceased had given a written complaint to the village committee for resolving the matter. However, on that very day, the appellant killed the deceased by stabbing on her abdomen.

P.W.13 Basanta Kumar Nayak is the Grama Rakshi who is a witness to the seizure of the wearing apparels of the deceased as per seizure list Ext.10.

P.W.14 Kalu Charan Pati was working as the C.I. of Police, Bonai and he is the investigating officer of this case.

The prosecution exhibited sixteen documents. Exts.1, 4, 6 and 10 are the seizure lists, Ext.2 is the F.I.R., Ext.3 is the inquest report, Ext.5 is the confessional statement, Ext.7 is the seizure list of wearing apparels of appellant, Ext.8 is the post mortem report, Ext.9 is the opinion of the doctor (P.W.8), Ext.11 is the spot map, Ext.13 is the command certificate, Ext.14 is the requisition to doctor, Ext.15 is the office copy of the forwarding memo and Ext.16 is the chemical examination report.

The prosecution proved six material objects. M.O.I is knife, M.O.II is Sando ganjee, M.O.III is cheque lungi, M.O. IV is napkin, M.O.V is the Sambalpuri saree and M.O.VI is the blouse.

Defence Plea:

4. Defence plea is one of complete denial. However, the defence neither examined any witness nor proved any document to dislodge the prosecution case.

Findings of the Trial Court:

5. The learned trial Court, after assessing the oral as well as the documentary evidence on record, came to hold that from the inquest report (Ext.3), the post mortem report (Ext.8) and the evidence of the doctor (P.W.8), who conducted post mortem examination, it was evident that the deceased suffered homicidal death. The learned trial Court assessed the evidence of two eye witnesses to the occurrence i.e. P.W.4 and P.W.5 and found that nothing was elicited to discredit the testimonies of these two witnesses and that there are no contradictions in the evidence of these two eye witnesses. The learned trial Court further held that though one Minati Patra was in the company of P.W.4 and P.W.5 while weeding operation was going on and she has not been examined during the trial but the same cannot be a ground to disbelieve the prosecution case. The evidence of P.W.4 and P.W.5 was held to be reliable and trustworthy and leading to discovery of the weapon of offence i.e. knife (M.O.I) on the basis of the statement made by the appellant was also held to be corroborative to the direct evidence of P.W.4 and P.W.5 coupled with the evidence of the doctor (P.W.8). The learned trial Court further held that even if the motive of the appellant is not established, since there is overwhelming evidence on record that the appellant caused the fatal injury on the deceased resulting in her death, it is sufficient to convict the appellant. Accordingly, the learned trial Court concluded that basing on the testimony of the informant and eye witnesses to the occurrence i.e. P.W.4 and P.W.5, which gets ample corroboration to the evidence of Medical Officer, the prosecution has been able to prove its case beyond all reasonable doubt against the appellant that it is none else than the appellant, who committed the murder of the deceased. Accordingly, the appellant was found guilty under section 302 of the I.P.C.

Contention of the Parties:

6. Mr. Samvit Mohanty, learned Amicus Curiae appearing for the appellant contended that the presence of the two witnesses i.e. P.W.4 and P.W.5 at the time of occurrence is very much doubtful. He submitted that from the place where the two witnesses were weeding out grass i.e. from the cultivable land of one Sribacha Patra, they could not have marked the appellant leaving the spot in view of the distance, as has been brought from the evidence of the Investigating Officer. It is further argued that according to the evidence of these two eye witnesses, the occurrence took place at about 1 to 2 p.m. on 29.08.1998 whereas the doctor (P.W.8), who conducted post mortem examination on the very next day i.e. on 30.08.1998 at 11.30a.m., stated that

time since death was more than 36 hours of his post mortem examination as the rigor mortis had passed off. Since the post mortem was conducted within 22 hours of the time as stated by the two witnesses, therefore, in view of the post mortem report finding, the death could have occurred much prior to the date and timing stated by the eye witnesses and therefore, their version that the occurrence took place in between 1 to 2 p.m. on 29.08.1998 is not acceptable. Learned counsel further argued that though one knife was stated to have been seized at the instance of the appellant, but the chemical examination report indicates that no blood was noticed on it and therefore, the recovery of the knife becomes inconsequential. The learned Counsel further submits that in view of the absence of motive behind commission of the offence and when the evidence of eye witnesses are doubtful, particularly taking into account the time of death as stated by the doctor conducting post mortem examination, it is a fit case where benefit of doubt should be extended in favour of the appellant.

Mr. Arupananda Das, learned Addl. Government Advocate, on the other hand, submitted that rigor mortis cannot be the determinative factor for ascertaining the exact time when the assault took place on the deceased and she died as it depends upon varieties of factors as per the medical jurisprudence. Since the only reason assigned by the doctor P.W.8 that time since death was more than thirty six hours as rigor mortis had passed off is against the medical jurisprudence, on the basis of such expert's evidence, the evidence of two eye witnesses i.e. P.W.4 and P.W.5 cannot be discarded particularly when nothing has been brought out in the cross-examination to disbelieve their evidence. The learned counsel further argued that the witnesses were at a distance of just 100 feet from the place of occurrence and the land, in which they were working, was at a higher level than the Nala where the dead body was found and it was an open field and thus, there would have hardly any difficulty on the part of P.W.4 and P.W.5 in seeing the appellant running away from the spot holding a knife after hearing the shriek of the deceased. Learned counsel further drew attention of this Court to the evidence of witnesses which indicated that the deceased had complained against the conduct of the appellant in assaulting her few days prior to the date of occurrence and therefore, a complaint was lodged before the headman of the community and a meeting was supposed to be held on Monday, but the occurrence in question took place on Saturday and therefore, in view of the eye witnesses' account coupled with the medical evidence and the previous conduct of the appellant, it can be said that the prosecution has successfully established its case against the appellant and there is no infirmity in the impugned judgment.

Whether the deceased met with a homicidal death?:

7. Adverting to the contentions raised by the learned counsel for the respective parties, let us first examine whether the prosecution has successfully established that the deceased met with a homicidal death or not. Apart from the inquest report (Ext.3) prepared by P.W.14, the doctor (P.W.8), who conducted the post mortem

examination over the dead body of the deceased at Sub-Divisional Hospital, Bonai on 30.08.1998 at 11.30 a.m., gave the following findings:-

> **"(i)** On external examination, she was average body built, eye closed, face pale, rigor mortis disappeared.
>
> **(ii)** External wounds: (a) stab wound size 5 c.m. X 2 c.m. x 7 c.m. (on right side of abdomen, grievous in nature/oblique in direction) (b) incised wound 2 c.m. X 1 c.m. below right breast, simple in nature.
>
> **(iii)** On internal examination: The stab wound was directed oblique upwards and was penetrated in right side liver. Muscle and peritoneum below the wound was cut. Abdomen was filled with clotted blood. The margins of the wound showed gaping. Liver was pale and penetrated. Spleen and kidney were pale. Heart contracted both chambers empty. Right lung and left lung were pale.
>
> **(iv)** Presence of bleeding and gaping of margin of wounds indicate that both the wound were ante mortem in nature."

P.W.8 opined the cause of death to be haemorrhagic shock resulting from stab wound and the time since death was more than thirty six hours as rigor mortis had passed off at the time of post-mortem examination. He has proved the post mortem examination report marked as Ext.8. On 10.09.1998, on police requisition and query made by the I.O., P.W.8 examined the weapon of offence i.e. knife (M.O.I) and opined that the injury sustained by the deceased could be caused by the knife produced before him and the injury no.1 i.e. the stab wound could cause death of a person in ordinary course of nature.

Therefore, in view of the inquest report as well as the evidence of the doctor (P.W.8) and the findings as per the post mortem report (Ext.8), we are of the view that the learned trial Court has rightly come to the conclusion that the deceased met with a homicidal death.

Whether the evidence adduced by P.W.4 & P.W.5 is trustworthy and reliable?:

8. P.W.4 Kunti Patra has stated that at the time of occurrence which was in between 1 to 2 p.m., she along with P.W.5 and one Minati Patra was weeding out grass from the cultivable land of one Sribacha Patra and Malarbasa Nala was at a distance of 100 feet from the place where they were working. She further stated that upon hearing the cry of the deceased "Marigali Bua", they rushed to the spot and found the deceased was lying dead at the spot with profuse bleeding injury on the right side belly and they also found that the appellant was running away from the spot holding a knife towards the jungle. They raised alarm for which the villagers came to the spot. In the cross-examination, P.W.4 has stated that the land, where they were working, was at a higher level than the Nala, which was visible to their kiari and in between that land and the Nala, the land of one Sada Patra lies. She further stated that she along with P.W.5 and Minati Patra simultaneously came running to the spot. She further stated that nobody was at the spot by the time of their arrival and it was a rainy season. However, at the relevant time, it was not raining. She further stated that she had not seen the assault on the deceased by the

appellant. Though 161 Cr.P.C. statement was confronted to P.W.4 that she had not stated before the I.O. about hearing the cry of the deceased, raising alarm, villagers coming to the spot and that the appellant was running away from the spot holding the knife and it was also proved through the I.O. (P.W.14), however, the learned counsel for the State drew our attention to the 161 Cr.P.C. statement of P.W.4 and submitted that in fact there are no such contradictions in the 161 Cr.P.C. statement vis-à-vis the evidence adduced by P.W.4 in Court. When the statement recorded under section 161 Cr.P.C. was confronted to P.W.4 by the learned defence counsel, it was the duty of the Public Prosecutor so also the learned trial Court to verify such statement as to whether the confrontation was correctly made or not. Similarly when the I.O. was examined and the confrontations made to P.W.4 were sought to be proved, at that time also both the Public Prosecutor and the Court should have been careful to make necessary verification. In this case, had the Public Prosecutor and the Court been vigilant, the learned defence counsel would not have been permitted to make such confrontations regarding absence of some specific statements as given in the trial, in the statement recorded under section 161 Cr.P.C.

When an accused is facing criminal trial on murder charge, the Public Prosecutor should be aware about processes of such trial and perform his duties in presenting the prosecution case with utmost sincerity and to the best of his ability. The learned trial Judge should also display vigil and alertness and not remain as a silent spectator or a mute observer. A criminal trial is not to be conducted in a casual manner which would display negligence on the part of the prosecution and the trial Court. It is the duty of the Court to see that neither the prosecution nor the accused play truancy with the criminal trial or corrode the sanctity of the proceeding.

To arrive at the truth and in order to overcome the error of record, if any, the appellate Court in the interest of justice can look into 161 Cr.P.C. statement, but its use is restricted and should be in accordance with law. We find that there are no such contradictions in the evidence of P.W.4 vis-à-vis her 161 Cr.P.C. statement and nothing has been brought out in the cross-examination to disbelieve the evidence of P.W.4. It has been brought out from the evidence of the I.O. that there is no passage to the stream from the land of Sribacha Patra and one has to come to the Nala through the field. From this evidence, we are not in a position to accept the contention of the learned Amicus Curiae that by the time P.W.4 and P.W.5 reached at the spot, the appellant would not have been there. When both the eye witnesses were at distance of just 100 ft. and hearing the shout of the deceased, they rushed to the spot, it cannot be said that they would not have been in a position to notice the appellant running away from the spot holding a knife.

The evidence of P.W.5 Rebati Patra corroborates the evidence of P.W.4 and she has also stated that she along P.W.4 and Minati Patra were weeding out grass from the land of Sribacha Patra and upon hearing the cry of the deceased, they rushed to the spot and found the deceased was lying with bleeding injury on her belly and at that time the appellant was running away towards the jungle holding a

knife. She further stated that they noticed profuse bleeding from the injury caused to the belly of the deceased. She has also stated in the cross-examination that she had not seen the actual assault on the deceased and further stated that the place where the dead body was lying was not visible to the place where they were working. However, the position of the field is such that if someone comes to one end of the field after hearing the noise, he can easily see the place where the deceased was lying in view of the distance of just 100 ft. so also the fact that the it was situated at a upper level. Nothing further has been elicited in the cross-examination to disbelieve the evidence of P.W.5. Merely because the other witness, namely, Minati Patra was not examined by the prosecution, the same cannot be a ground to discard the evidence of these two eye witnesses. Moreover, quantity of evidence was never considered to be a test for deciding a criminal trial and the emphasis of Courts is always on quality of evidence.

Whether findings of the doctor (P.W.8) regarding rigor mortis can dislodge the ocular version of P.Ws.4 & 5?:

9. As per the version of both P.Ws. 4 and 5, the timing of occurrence was in between 1 to 2 p.m. on 29.08.1998. The doctor (P.W.8) conducted post-mortem examination on 30.08.1998 at 11.30 a.m. and thus it can be said that the post-mortem was conducted within twenty two hours of the death of the deceased. The doctor has stated that the time since death was more than 36 hours of his post mortem examination as rigor mortis had passed off.

At this juncture, it would be beneficial to refer to the Journal of Forensic Sciences and Criminal Investigation [ISSN: 2476-1311] in which in a research oriented article titled as 'Time Since Death from Rigor Mortis: Forensic Prospective', it is observed that there are several factors which affect the process of rigor mortis, such as **(i)** age, sex and physical condition of the body; **(ii)** biochemical changes in the body; **(iii)** mode of death; **(iv)** surrounding environmental temperature; **(v)** humidity and movement of air around the body etc. The period of onset, lasting and passing off rigor mortis varies from case to case.

Therefore, in our humble view, no straight jacket formula can be laid down that in every case, the rigor mortis would appear at a particular point of time and disappear after a particular time irrespective of the age, the surroundings, the type of assault made to the deceased etc. Further it is an admitted position of law that exact time of death cannot be established scientifically and precisely, only because of presence of rigor mortis or in the absence of it. **[Ref: Baso Prasad -Vrs.- State of Bihar, (2006) 13 Supreme Court Cases 65]**.

In the case in hand, since the reason assigned by the doctor is not in consonance with medical jurisprudence and when the evidence of two eye witnesses are clear, trustworthy and reliable, on the basis of the expert's opinion with respect to the time since death, we cannot disbelieve the evidence of the two eye witnesses.

The weapon of offence was seized from a open place inside the jungle after a few days and it was a rainy season as stated by the witnesses and therefore, non-finding of the blood on the knife as per the chemical examination report (Ext.16) cannot be a factor to doubt the prosecution version that knife was used in assaulting the deceased.

Coming to the motive part, P.W.2 has stated that the appellant used to assault the deceased off and on, as a result of which she was frequently visiting her parents' place. P.W.12, the mother of the deceased has stated that the appellant assaulted the deceased with a stick and as it was unbearable, she came to her paternal house, showed the assault part of the body and reported the matter before the village committee. From the evidence of P.W.3 and P.W.9, it appears that a written complaint was made by the deceased relating to the assault made on her by the appellant and P.W.9 handed over the written complaint to P.W.3 with instruction to settle the matter and the meeting was supposed to be held on Monday, but unfortunately the occurrence took place on 29.08.1998 i.e. Saturday. Therefore, the prosecution has also established the motive behind the commission of the crime.

In view of the foregoing discussions, when the eye witnesses account are acceptable, which is getting corroboration from the medical evidence and the motive factor is also present in the case, we are of the humble view that the learned trial Court has rightly held the appellant guilty under section 302 of the I.P.C. We find no merit in this Jail Criminal Appeal, which is accordingly dismissed.

It appears that the appellant was granted bail by this Court as per order dated 04.05.2010. He shall surrender before the learned trial Court within four weeks from today, failing which the trial Court shall take necessary steps in accordance with law for his arrest to serve out the remaining sentence.

Before parting with the judgment, we put on record our appreciation to Mr. Samvit Mohanty, learned Amicus Curiae for rendering his valuable assistance in arriving at the above decision. The learned Amicus Curiae shall be entitled to his professional fees which is fixed at Rs.7,500/- (rupees seven thousand five hundred only). We also appreciate Mr. Arupananda Das, learned Additional Government Advocate for ably and meticulously presenting the case on behalf of the State.

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2024 (II) ILR-CUT-108

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

JCRLA NO. 148 OF 2005

1. MANGRA MUNDA ……Appellants
2. GOBARA MUNDA
3. SUNIA MUNDA @ KATE

-V-

STATE OF ORISSA …… Respondent

(A) CRIMINAL TRIAL – Absence of motive – The appellants are convicted for commission of offences U/ss. 302/201/34 of the IPC – Effect of absence of motive in a case based on circumstantial evidence – Discussed with reference to case laws.

(B) CRIMINAL TRIAL – Last seen theory – Whether the circumstance of last seen together can by itself form the basis of holding the accused guilty of the offence? – Held, No – Reason indicated with reference to case law.

Case Laws Relied on and Referred to :-

1. (2005) 12 Supreme Court Cases 438 : Jaswant Gir -Vrs.- State of Punjab.
2. (2017) 14 Supreme Court Cases 359 : Anjan Kumar Sarma -Vrs.- State of Assam.
3. 2023 Supreme Court Cases Online S.C. 564 : Supreme Court Cases 359 & Dinesh Kumar -Vrs.- State of Haryana.
4. (1984) 4 Supreme Court Cases 116 : Sharad Birdhi Chand Sarda -Vrs- State Of Maharashtra.
5. (2010) 8 Supreme Court Cases 593 : G. Parshwanath -Vrs.- State of Karnataka.
6. (2014) 4 SCC 715 : (2014) 2 SCC (Cri) 413 : Kanhaiya Lal v. State of Rajasthan.
7. (2010) 15 SCC 588 : (2012) 4 SCC (Cri) 767 : Madho Singh v. State of Rajasthan.
8. 1994 Supp (2) SCC 372 : 1994 SCC (Cri) 1551 : Arjun Marik v. State of Bihar [Arjun Marik v. State of Bihar.
9. (2003) 3 SCC 106 : 2003 SCC (Cri) 738 : Bharat v. State of M.P.
10. (2007) 3 SCC 755 : (2007) 2 SCC (Cri) 162 : State of Goa v. Sanjay Thakran.
11. 2023 SCC Online SC 564 : Dinesh Kumar -Vrs. State of Haryana.
12. (2023) Supreme Court Cases 534 : Ram Gopal -Vrs.- State of Madhya Pradesh.

For Appellants : Mr. Susanta Kumar Tripathy (Amicus Curiae)
For Respondent : Mr. Priyabrata Tripathy, Addl. Standing Counsel.

JUDGMENT Date of Hearing and Judgment: 15.02.2024

BY THE BENCH

There are three appellants in this JCRLA, i.e., Mangra Munda, Gobara Munda and Sunia Munda @ Kate. Learned counsel for the State has produced the written instruction received from the I.I.C., Koira Police Station dated 16.03.2023 wherein it is mentioned that the appellants Mangra Munda and Gobara Munda are living with their families and maintaining their livelihood by working as daily labourers whereas the appellant Sunia Munda @ Kate is dead since ten to twelve years. In view of section 394(2) of Cr.P.C., since no near relative of the appellant Sunia Munda @ Kate has applied before this Court for leave to continue the appeal, this JCRLA in respect of the said appellant Sunia Munda @ Kate stands abated. Therefore, now this JCRLA is confined only to the appellants Mangra Munda and Gobara Munda.

Both these appellants along with Sunia Munda @ Kate faced trial in the Court of learned Adhoc Additional Sessions Judge, Bonai in Sessions Trial No.29/72 of 2000-2004 for commission of offences under sections 302/201/34 of the Indian Penal Code (hereinafter 'I.P.C.'), on the accusation that on 03.10.1999 at

about 3.00 p.m. near Chandiposh road side, they committed murder of Keshab Chandra Patra (hereinafter 'the deceased'), who happened to be Grama Rakshi, by means of stone in furtherance of their common intention and knowing or having reason to believe that the offence had been committed, they caused certain evidence to disappear by concealing the dead body of the deceased inside a ditch situated in the jungle of Chandiposh with an intention to screen themselves from legal punishment.

The learned trial Court, vide judgment and order dated 26.07.2005, found the appellants guilty of the both the charges and sentenced each of them to undergo imprisonment for life under and to pay a fine of Rs.1,000/-, in default, to undergo simple imprisonment for one month each under section 302 of the I.P.C. However, no separate sentence was awarded for the offence under section 201 of the I.P.C.

Prosecution Case:

2. P.W.3 Karunakar Patra lodged the F.I.R. on 04.10.1999 at about 9 a.m. before the Officer in-charge of Koira police station, wherein he has stated that on that day while he was proceeding towards Matadin Mines in the morning hours, near Chandiposh, he saw the dead body of the deceased who was the Grama Rakshi of Patamunda was lying by the side of the road and he suspected that somebody had committed his murder by attacking him with stone on his head.

On the basis of such F.I.R., P.W.13 Prakash Chandra Pal, the O.I.C. of Koira police station registered Koira P.S. Case No.31 dated 04.10.1999 under section 302 of the I.P.C. against unknown persons and took up investigation of the case. He examined the informant, recorded his statement and made requisition to D.F.S.L., Rourkela for deployment of scientific team and dog squad. He visited the spot and prepared the spot map marked as Ext.13. He held inquest over the dead body of the deceased in presence of witnesses and prepared inquest report marked as Ext.11. The dead body was sent for post-mortem examination. A letter issued to the deceased by P.W.13 with a direction to produce the appellant Sunia Munda @ Kate was seized so also one stone weighing about 10 kgs. stained with blood as per seizure list Ext.7. P.W.13 examined some more witnesses, arrested all the accused persons, seized their wearing apparels under seizure list Exts.3, 4 & 5. The wearing apparels of the deceased were also seized as per seizure list Ext.2 being produced by the constable after the post-mortem examination. On 05.10.1999, a requisition was made to Medical Officer, Koira P.H.C. for collection of blood sample and nail clippings of the appellants. P.W.13 made a query to the Medical Officer, Koira P.H.C. for examination of the stone and opinion regarding possibility of the injury sustained by the deceased with such stone and received the opinion and also the post-mortem examination report (Ext.8) of the deceased. On the prayer of the Investigating Officer (P.W.13) before the S.D.J.M., Bonai, the seized articles were sent for chemical examination to R.F.S.L., Ainthapalli, Sambalpur and chemical examination report (Ext.16) and serological report(Ext.17) were received by P.W.13.

On completion of investigation, P.W.13 submitted charge sheet against the appellants under sections 302, 201/34 of the I.P.C. on 21.12.1999.

Framing of Charges:

3. The case was committed to the Court of Session following due committal procedure and the learned trial Court framed charges as aforesaid. Since the appellants pleaded not guilty and claimed to be tried, the sessions trial procedure was resorted to establish their guilt.

Prosecution Witnesses, Exhibits & Material Objects:

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

P.W.1 Padman Buda was working as a constable in Koira Police Station. He accompanied the dead body of the deceased to Koira hospital for post-mortem examination. After the post-mortem examination, he obtained the wearing apparels of the deceased and produced the same before P.W.13. He is also a witness to the seizure of the wearing apparels of the appellants as per seizure list Exts.3 to 5.

P.W.2 Pitambar Bariha was posted as a constable in Koira Police Station. He is a witness to seizure of the wearing apparels of the deceased as per seizure list Ext.2. He is also a witness to the seizure of the wearing apparels of the appellants as per seizure list Exts.3 to 5.

P.W.3 Karunakar Patra is the informant in this case. He narrated about the incidents as described in the F.I.R. and supported the prosecution case. He is also a witness to the seizure of one stone, weighing about 8 to 9 kgs. lying on the spot, as per the seizure list Ext.7.

P.W.4 Sati Patra stated that on the date of occurrence at about 3 p.m. when she along with some other labourers was engaged in the weeding operation in her land, she found three persons quarrelling with the deceased in a loud voice. On the next day, she came to know that the deceased had been killed.

P.W.5 Padma Patra was working as a labourer in the land of P.W.4 on the date of occurrence. She stated that at about 12 noon, she saw three persons quarrelling with the deceased in loud voice. Upon being shown by the Court, she identified the appellants as the those three persons. On the next day, she came to learn that somebody had killed the deceased and his dead body was lying by the side of the road which led to Koida.

P.W.6 Manohar Patra is a witness to the seizure of one stone and one written notice from the pocket of the deceased as per seizure list Ext.7. He further stated that the stone was stained with blood.

P.W.7 Laxman Nag stated that a day after the occurrence, he came to know that the deceased was killed and his dead body was lying by the side of the road leading to Baldihi-Koida. He also stated that one day prior to the incident, he found two of the accused persons quarrelling with the deceased on the issue of fishing and

he intervened and pacified the quarrel. However, he denied to have any further knowledge about the case for which he was declared hostile by the prosecution.

P.W.8 Dr. Madhusudan Singh Mankee was working as the Medical Officer at the C.H.C., Koira. He, on police requisition, conducted post-mortem examination on the dead body of the deceased and proved his report vide Ext.8. He also opined that the injuries found on the dead body of the deceased were possible by the stone produced before him for examination.

P.W.9 Mohan Charan Das was working as the supervisor in the office of Mines at Patmunda. He stated that on the date of occurrence at about 11 a.m., the deceased came to him being accompanied by the appellants and asked him to provide a dumper so as to take the appellants to Koira police station as they were required by the police. However, he expressed his inability to provide the dumper for which all of them left the place. He further stated that at about 03.30 p.m. on that day, he found the deceased with the appellants moving towards Koira. On the next day, he heard that the deceased was killed.

P.W.10 Fakir Mohan Patra is the son of the deceased who stated that on 02.10.1999, the deceased had received a notice from Koira police station to produce two of the appellants in the police station. On the date of occurrence, the deceased along with the appellants came to his house at about 01.00 p.m. and after taking meal/handia, they left for Koira police station. On the next day morning, he got the information that the deceased was lying dead by the side of a road and upon getting such information, he went to the spot and saw the dead body of the deceased with bleeding injuries on the head. He is also a witness to the preparation of the inquest report vide Ext.11.

P.W.11 Kokila Patra is the wife of the deceased who also stated that on the date of occurrence, the deceased proceeded towards Koira police station along with the appellants and on the following day morning, she got information about the death of deceased and accordingly, proceeded to the spot. She was later declared hostile by the prosecution.

P.W.12 Prasanta Kumar Pradhan was working as the Scientific Officer, D.F.S.L., Rourkela who, on police requisition, visited the spot of occurrence. He stated to have found extensive blood stain under a Sal tree. He also found a blood stained small stone and dragging mark. He collected blood stained earth, sample earth and one blood stained stone. He examined those materials and proved his report vide Ext.12.

P.W.13 Prakash Chandra Pal was working as the Officer in-Charge of Koira Police Station. He is the investigating officer of the case who on completion of investigation, he submitted the charge sheet against the three appellants.

The prosecution exhibited seventeen documents. Ext.1 is the command certificate, Ext.2 is seizure list of clothes of the deceased, Exts.3, 4, 5 and 7 are the seizure lists, Ext.6 is the F.I.R., Ext.8 is the post-mortem report, Ext.9 is the collection

of nail clippings and the blood report, Ext.10 is the opinion of the doctor (P.W.8), Ext.11 is the inquest report, Ext.12 is the report of the Scietific Officer (P.W.12), D.F.S.L., Rourkela, Ext.13 is the spot map, Ext.14 is the dead body challan, Ext.15 is the office copy of forwarding of M.Os. to R.F.S.L., Bhubaneswar and Ext.17 is the serological report.

The prosecution proved three material objects. M.O.I is the khaki shirt of the deceased with Grama Rakshi badge, M.O.II is the sky colour chadi of the deceased and M.O.III is the khaki full pant of the deceased.

Defence Plea:

5. The defence plea of the appellants is one of denial. However, the defence neither examined any witness nor exhibited any document to dislodge the prosecution case

Findings of the Trial Court:

6. The learned trial Court after assessing the oral as well as the documentary evidence on record, the evidence of Medical Officer (P.W.8), the post mortem examination report (P.W.8) and the inquest report (Ext.11) came to the hold that the deceased suffered a homicidal death. The learned trial Court accepted the versions of P.Ws. 4, 5, 9 and 10, who have stated about the last seen of the appellants in the company of the deceased and further held that a quarrel took place between the appellants on one hand and the deceased on the other. The learned trial Court further held that since the occurrence took place in a secluded place and the dead body was lying in a ditch, in the circumstance, it is very difficult to find out the exact time when the occurrence took place. However, it held that the death must have been occurred after 3.30 p.m. and within 2 to 4 hours from leaving the house of the deceased for the last time. The learned trial Court further held that since the deceased was taking the appellant Sunia Munda @ Kate along with the other appellants to the police station, there must have been some apprehension in their mind for which they might have decided to eliminate the deceased. It is further held that the prosecution case cannot be viewed with suspicion even if the evidence is lacking as regards to the motive on the part of the appellant to kill the deceased. The learned trial Court also took into account that the wearing apparels of the deceased contained human blood of group-B and same blood group was detected on the sky colour full pant of the appellant Sunia Munda @ Kate and no explanation has been offered by the said appellant as to how the blood group of the deceased got stained with his pant, but simply he has taken denial plea during his examination under section 313 of the Cr.P.C., which is an additional circumstance against the appellant Sunia Munda @ Kate. It was further held that since the appellants Mangra Munda and Gobara Munda were also in the company of the deceased along with the appellant Sunia Munda @ Kate, their sharing common intention in committing the murder cannot be ruled out. The learned trial Court summed up the evidence on record and observed that the following circumstances are available against the appellants in the case:-

(i) The deceased suffered homicidal death;
(ii) The accused persons were proceeding towards Koira P.S. in the company of the deceased;
(iii) The deceased was last seen alive along with the accused persons on the road near Chandiposh road leading to Koira;
(iv) A wordy quarrel between the accused persons on the one side and the deceased on the other side was noticed by the witnesses;
(v) The dead body of the deceased was lying in a ditch by the side of Chandiposh road inside Baldihi reserve forest area;
(vi) No explanation has been offered by the accused persons as to what happened to the deceased on the way to police station and why without going to police station, they returned back to their village;
(vii) The chemical examination report and serological report vide Exts.16 and 17 indicate that the blood group detected on the wearing apparels of the deceased was found on the full pant of the accused Kate @ Sunia Munda.

The learned trial Court ultimately concluded that the appellants ghastly committed murder of the deceased, who was the Grama Rakshi, while he was discharging his duty by taking the appellants to the police station on being instructed by his superior officer, i.e., O.I.C., Koira police station and thus, found the appellants guilty under sections 302/201/34 of the I.P.C.

Contentions of the Parties:

7. Mr. Susanta Kumar Tripathy, learned counsel for the appellants, who was engaged as Amicus Curiae by this Court as per order dated 05.02.2024, argued that even though it is not disputed that the deceased suffered homicidal death in view of the evidence of the doctor (P.W.8) and other materials available on record, but that there was a quarrel between the appellants on one side and the deceased on the other side, which was noticed by the witnesses so also that the deceased was last seen in the company of the appellants are doubtful features. It is further argued that last seen circumstance itself is not sufficient to convict the appellants, especially when there is no motive behind the commission of the crime. He further argued that the evidence of the wife of the deceased, who was examined as P.W.11, indicates that there was cordial relationship between the appellants and the deceased. Learned counsel further argued that the documentary evidence Ext.7/2, which is an intimation by P.W.13 to the deceased, indicates that it was only the appellant Sunia Munda @ Kate who was called to the police station for compromise of the dispute and therefore, it is not understood as to why and how the appellant Gobara Munda would accompany the deceased to the police station. The learned counsel further argued that even though in the white colour full pant of the appellant Sunia Munda @ Kate, human blood group 'B' was detected which blood group was also detected from the wearing apparels of the deceased as per chemical examination report marked as Ext.17, but since from the wearing of the two appellants, i.e., Mangra Munda and Gobara Munda, no human blood was noticed, the chemical examination report cannot be utilized against them. Learned counsel further argued that since the time gap between the last seen and recovery of the dead body of the deceased was

long, it cannot be the sole ground to convict the appellants. To that respect, reliance has been placed on the decisions of the Hon'ble Supreme Court in the cases of **Jaswant Gir -Vrs.- State of Punjab reported in (2005) 12 Supreme Court Cases 438, Anjan Kumar Sarma -Vrs.- State of Assam reported in (2017) 14 Supreme Court Cases 359 & Dinesh Kumar -Vrs.- State of Haryana reported in 2023 Supreme Court Cases Online S.C. 564.**

Mr. Priyabrata Tripathy, learned Additional Standing Counsel, on the other hand, supported the impugned judgment and argued that P.W.4 & P.W.5 have seen the quarrel while the deceased was in the company of the appellants in the afternoon and thereafter, the deceased was not seen alive by anyone and his dead body was found on the next day at about 9 O' clock in the morning. He further argued that the appellants have not discharged their burden under section 106 of the Evidence Act, as to when they parted with the deceased after they were last seen and they have simply taken a plea of denial. Learned counsel further argued that though no clinching evidence relating to the motive behind the commission of the crime has been established, but the possibility of the appellants committing the crime, as they were taken to the police station by the deceased, cannot be ruled out. Learned counsel further argued that in view of the finding of the chemical examination report (Ext.17) that the same blood group of the deceased was found on the pant of the appellant Sunia Munda @ Kate, these circumstances form the complete chain to hold the appellants liable for commission of the crime and therefore, the learned trial Court is quite justified in holding the appellants guilty under sections 302/201/34 of the I.P.C.

Standards to adjudge strength of circumstances in a case based on circumstantial evidence:

8. It is not dispute that there is no direct evidence in this case and the case is based purely on circumstantial evidence. The Hon'ble Supreme Court has laid down the 'panchasheel principles' in the case of **Sharad Birdhi Chand Sarda -Vrs- State Of Maharashtra reported in (1984) 4 Supreme Court Cases 116** which are the standard criteria to adjudge the strength of circumstances advanced by the prosecution to prove a case based on circumstantial evidence. For the sake of clarity, the said principles are reproduced as hereunder:

> "**(1)** the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned "must" or "should" and not "may be" established;
> **(2)** the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;
> **(3)** the circumstances should be of a conclusive nature and tendency;
> **(4)** they should exclude every possible hypothesis except the one to be proved; and
> **(5)** there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

In the present case, it is to be seen how far the circumstances have been established by the prosecution by cogent evidence and whether those circumstances form the complete chain unerringly pointing towards the guilt of the appellants or not.

Motive behind the commission of crime:

9. In a case of circumstantial evidence, absence of motive is a very significant factor. While elucidating the effect of absence of motive in a case based on circumstantial evidence, the Hon'ble Supreme Court in the case of **G. Parshwanath -Vrs.- State of Karnataka reported in (2010) 8 Supreme Court Cases 593** held as follows:-

> "The argument that in absence of motive on the part of the appellant to kill the deceased benefit of reasonable doubt should be given, cannot be accepted. First of all every suspicion is not a doubt. Only reasonable doubt gives benefit to the accused and not the doubt of a vacillating Judge. Very often a motive is alleged to indicate the high degree of probability that the offence was committed by the person who was prompted by the motive. In a case where the motive alleged against accused is fully established, it provides foundational material to connect the chain of circumstances. It affords a key on a pointer to scan the evidence in the case in that perspective and as a satisfactory circumstance of corroboration. However, in a case based on circumstantial evidence where proved circumstances complete the chain of evidence, it cannot be said that in absence of motive, the other proved circumstances are of no consequence. The absence of motive, however, puts the Court on its guard to scrutinise the circumstances more carefully to ensure that suspicion and conjecture do not take place of legal proof."
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> [Emphasis supplied]

In the case in hand, the evidence of P.W.11 Kokila Patra, the widow of the deceased indicates that on the date of occurrence, the appellant Mangra Munda came to her house in the morning with a notice from Koira police station and delivered the same to her deceased husband and the deceased told Mangra Munda to go to village Podadihi to call the other two appellants as they were required by the police as per the notice since a quarrel had taken place between the appellant Mangra Munda on the one side and the other appellants on the other side. She further stated that after taking tea, the deceased left for the village Podadihi to call the appellants and at about 3.00 p.m., the deceased came back to his house along with the appellants and instructed her to serve them food. She further stated that on being so instructed, she served country rice beer and one plate of chicken to the appellants. After taking their meal, the appellants being accompanied by the deceased left for Koira police station. In the cross-examination, P.W.11 has stated that the appellants Kate Munda and Gobara Munda used to call the deceased as 'Mamu' (uncle) and they were having good terms with the deceased. The son of the deceased and P.W.11 being examined as P.W.10 has stated that on 02.10.1999, the deceased received a notice from Koira police station to take the appellants, namely, Kate Munda and Gobara Munda to the police station and on 03.10.1999, the deceased went to village Podadihi and came back with the appellants at about 1.00 p.m. and thereafter, the deceased took his

meal and the appellants took Handia being served by P.W.11 and then they left for Koira police station.

From the evidence of P.W.10 & P.W.11, it appears that there was cordial relationship between the appellants and the deceased. At this stage, the notice which was issued by P.W.13 to the deceased and has been marked as Ext.7/2 needs to be considered. The I.O. (P.W.13) has stated that the said notice was issued to the deceased by him with a direction to produce the appellant Kate Munda before him and Ext.7/2 also indicates that it was only meant for production of Sunia Munda @ Kate for the purpose of compromise. There is no mention in the notice that the appellant Gobara Munda was also required by P.W.13. Learned counsel for the State argued that since Gobara Munda and Sunia Munda @ Kate are two brothers, the possibility of both of them accompanying the appellant Mangra Munda so also the deceased cannot be ruled out.

After carefully assessing the evidence of P.W.10 and P.W.11, we are of the view that the prosecution has not put forth any stong motive on the part of the appellants to do away with the life of the deceased. In the absence of motive, we have to scrutinise the circumstances more carefully.

Whether the deceased was last seen alive in the company of the appellants?:

10. Coming to the relevance of 'last seen theory' in the instant case, we find that there are five witnesses who deposed about the same and they are P.Ws.4, 5, 9, 10 & 11.

P.W.4 Sati Patra has stated that he did not know the appellants but she could identify the appellants in the dock. She only stated that while she along with co-labourers were engaged in weeding operation in her land, she found the deceased along with three persons proceeding towards Koira and heard that a quarrel ensued between them. She further stated that the distance between the places where she was working and those persons were walking was about 70 to 80 cubits. However, in the cross-examination, she has stated that the voice from the road was not audible from the land where they were engaged in the weeding work and and she did not disclose before any of her family members regarding the quarrel which took place between the deceased and the appellants and she was examined by the I.O. after a month of the occurrence. Therefore, from the evidence of P.W.4, it cannot be said that the appellants were in the company of the deceased and that she was able to hear the quarrel between them. P.W.4 has not stated that P.W.5 was also working with her.

However, P.W.5 Padma Patra stated that at about 12 noon on the date of occurrence, while she was carrying out weeding operation with P.W.4, she noticed the deceased with three appellants moving towards Koira Police Station and those three appellants were quarreling with the deceased and P.W.5 identified the appellants in the dock to be those three persons. She further stated that the appellants were working with her in the mines. She further stated that after finishing the weeding work, she went to her house at about 4.00 p.m. In the cross-examination, however, she has stated that she had no prior acquaintance with the appellants. This

statement runs contrary to her evidence in examination-in-chief that the appellants were working as labourers with her in the mines. She further stated that she used to go to her work in the morning hours and return home in the afternoon.

From the evidence of the widow of the deceased, who was examined as P.W.11, it appears that at about 3.00 p.m. in the afternoon, the deceased came with the appellants and she served them food and thereafter, the appellants being accompanied by the deceased, went towards Koira police station. In view the timing as stated by P.W.11, it is very difficult to accept the evidence of P.W.5 that at about 12 in the noon, she could see the appellants in the company of the deceased. Moreover, she has stated in the cross-examination that even if somebody shouts loudly on the road, it would not be audible to the place where they were working. Therefore, we are of the view that the evidence of P.W.4 and P.W.5 are no way helpful to the prosecution to establish that the deceased was last seen alive in the company of the appellants.

Before going to analyse the evidence of the other three witnesses to the last seen, it is relevant to discuss the evidence of the doctor (P.W.8), who conducted post mortem examination and noticed the following injuries on the body of the deceased:

> "**External appearance:** Average body built man with mouth semi open, eyes closed, blood and brain materials coming out through mouth and nose. Rigor mortis present, decomposition started.
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> **External Injuries:**
> **(i)** Laceratation 2" x 2" x ½" over left ear,
> **(ii)** Bruise 1" x 1" over left forehead,
> **(iii)** Bruise 1" x 1" over left eye brow &
> **(iv)** Laceration 1" x 1" x ½" over left side mandible.
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> **On Internal examination:** Scalp is lacerated over the left ear. Skull is fractured, left temporal and parietal bone fractured. All the layers of membranes lacerated below the left ear. Blood is collected in the sub-dural space. Left hemisphere of cerebral cortex is lacerated. Stomach contain semi solid food particles.
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> Cause of death was due to intracranial hemorrhage, shock and laceration of brain. He further opined that all the injuries were ante mortem in nature and may cause the death in ordinary course of nature."

P.W.8 conducted the post-mortem examination over the dead body of the deceased on 04.10.1999 at about 1.30 p.m. and he has opined that the time since death was 12 to 24 hours of the post-mortem examination. Thus, in view of the evidence of P.W.8, the death must have taken place in between 1.30 p.m. on 03.10.1999 to 1.30 a.m. on 04.10.1999.

The other three witnesses, who deposed about the last seen, have stated that the deceased was seen in the company of the appellants in the afternoon at about 3.00 p.m. to 3.30 p.m. The dead body was found by P.W.3 near Chandiposh on 04.10.1999 at about 9.00 a.m. by the side of the road. Therefore, the place where the appellants and the deceased were last seen and the place where the dead body was found on the next day were different. The time and place where they were seen

together and the dead body was found being not proximate, the non-explanation by the appellants with regard to the circumstance under which and when they had parted with the company of the deceased cannot be a very crucial circumstance proved against them. The possibility of someone else coming in contact with the deceased after the appellants left his company cannot be completely ruled out.

In the case of **Anjan Kumar Sarma** (supra), the Hon'ble Supreme Court held as follows:-

> "19. The circumstance of last seen together cannot by itself form the basis of holding the accused guilty of the offence. In **Kanhaiya Lal v. State of Rajasthan [Kanhaiya Lal v. State of Rajasthan, (2014) 4 SCC 715 : (2014) 2 SCC (Cri) 413]** , this Court held that : (SCC p. 719, paras 12 & 15)
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> "12. The circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing connectivity between the accused and the crime. Mere non-explanation on the part of the appellant, in our considered opinion, by itself cannot lead to proof of guilt against the appellant."
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> 15. The theory of last seen—the appellant having gone with the deceased in the manner noticed hereinbefore, is the singular piece of circumstantial evidence available against him. The conviction of the appellant cannot be maintained merely on suspicion, however strong it may be, or on his conduct. These facts assume further importance on account of absence of proof of motive particularly when it is proved that there was cordial relationship between the accused and the deceased for a long time. The fact situation bears great similarity to that in Madho Singh v. State of Rajasthan [**Madho Singh v. State of Rajasthan, (2010) 15 SCC 588 : (2012) 4 SCC (Cri) 767**] ."
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> 20. In **Arjun Marik v. State of Bihar [Arjun Marik v. State of Bihar, 1994 Supp (2) SCC 372 : 1994 SCC (Cri) 1551]**, this Court held that : (SCC p. 385, para 31)
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> "31. Thus the evidence that the appellant had gone to Sitaram in the evening of 19-7-1985 and had stayed in the night at the house of deceased Sitaram is very shaky and inconclusive. Even if it is accepted that they were there it would at best amount to be the evidence of the appellants having been seen last together with the deceased. But it is settled law that the only circumstance of last seen will not complete the chain of circumstances to record the finding that it is consistent only with the hypothesis of the guilt of the accused and, therefore, no conviction on that basis alone can be founded."
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> 21. This Court in **Bharat v. State of M.P. [Bharat v. State of M.P., (2003) 3 SCC 106 : 2003 SCC (Cri) 738]** held that the failure of the accused to offer any explanation in his statement under Section 313 CrPC alone was not sufficient to establish the charge against the accused. In the facts of the present case, the High Court committed an error in holding that in the absence of any satisfactory explanation by the accused the presumption of guilt of the accused stood unrebutted and thus the appellants were liable to be convicted.
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> 23. It is clear from the above that in a case where the other links have been satisfactorily made out and the circumstances point to the guilt of the accused, the circumstance of last seen together and absence of explanation would provide an additional link which completes the chain. In the absence of proof of other circumstances, the only circumstance of last seen together and absence of satisfactory explanation cannot be

made the basis of conviction. The other judgments on this point that are cited by Mr Venkataramani do not take a different view and, thus, need not be adverted to. He also relied upon the judgment of this Court in State of Goa v. Sanjay Thakran [**State of Goa v. Sanjay Thakran, (2007) 3 SCC 755 : (2007) 2 SCC (Cri) 162**] in support of his submission that the circumstance of last seen together would be a relevant circumstance in a case where there was no possibility of any other persons meeting or approaching the deceased at the place of incident or before the commission of crime in the intervening period. It was held in the above judgment as under : (SCC p. 776, para 34)

"34. From the principle laid down by this Court, the circumstance of last seen together would normally be taken into consideration for finding the accused guilty of the offence charged with when it is established by the prosecution that the time gap between the point of time when the accused and the deceased were found together alive and when the deceased was found dead is so small that possibility of any other person being with the deceased could completely be ruled out. The time gap between the accused persons seen in the company of the deceased and the detection of the crime would be a material consideration for appreciation of the evidence and placing reliance on it as a circumstance against the accused. But, in all cases, it cannot be said that the evidence of last seen together is to be rejected merely because the time gap between the accused persons and the deceased last seen together and the crime coming to light is after (sic of) a considerable long duration. There can be no fixed or straitjacket formula for the duration of time gap in this regard and it would depend upon the evidence led by the prosecution to remove the possibility of any other person meeting the deceased in the intervening period, that is to say, if the prosecution is able to lead such an evidence that likelihood of any person other than the accused, being the author of the crime, becomes impossible, then the evidence of circumstance of last seen together, although there is long duration of time, can be considered as one of the circumstances in the chain of circumstances to prove the guilt against such accused persons. Hence, if the prosecution proves that in the light of the facts and circumstances of the case, there was no possibility of any other person meeting or approaching the deceased at the place of incident or before the commission of the crime, in the intervening period, the proof of last seen together would be relevant evidence. For instance, if it can be demonstrated by showing that the accused persons were in exclusive possession of the place where the incident occurred or where they were last seen together with the deceased, and there was no possibility of any intrusion to that place by any third party, then a relatively wider time gap would not affect the prosecution case."

In the case of **Dinesh Kumar -Vrs. State of Haryana reported in 2023 SCC Online SC 564**, the Hon'ble Supreme Court held as follows:-

"25. The evidence of last seen becomes an extremely important piece of evidence in a case of circumstantial evidence, particularly when there is a close proximity of time between when the accused was last seen with the deceased and the discovery of the body of the deceased, or in this case the time of the death of the deceased. This does not mean that in cases where there is a long gap between the time of last seen and the death of the deceased the last seen evidence loses its value. It would not, but then a very heavy burden is placed upon the prosecution to prove that during this period of last seen and discovery of the body of the deceased or the time of the death of the deceased, no other person but the accused could have had an access to the deceased. The circumstances of last seen together in the present case by itself cannot form the basis of guilt (See: **Anjan Kumar Sarma & Others v. State of Assam**).

26. The circumstances of last seen together does not by itself lead to an irrevocable conclusion that it is the accused who had committed the crime. The prosecution must come out with something more to establish this connectivity with the accused and the crime committed. Particularly, in the present case when there is no close proximity between circumstances of last seen together and the approximate time of death, the evidence of last seen becomes weak (See: **Malleshappa v. State of Karnataka**).

27. In **Nizam & Anr. v. State of Rajasthan** where the time gap between the last seen together and the discovery of the body of the deceased was long, it was held that during this period the possibility of some other interventions could not be ruled out. Where time gap between the last seen and time of death is long enough, as in the present case, then it would be dangerous to come to the conclusion that the accused is responsible for the murder. In such cases it is unsafe to base conviction on the "last seen theory" and it would be safer to look for corroboration from other circumstance and evidence which have been adduced by the prosecution. The other circumstances here is the so called discovery, and most of these, as we have already discussed, fail to meet the requirement of Section 27 of the Evidence Act.

28. As per the postmortem which was conducted on 12.05.2000 at 4:15 P.M, the death was 48 hours prior to the post mortem, which means it was before 4:00 P.M. on 10.05.2000. Even assuming that the death has taken place, a day earlier i.e. 09.05.2000, still there is a long gap between the last seen which is at 7:00 pm on 08.05.2000 and the morning of 09.05.2000. In the case of **State of Goa** v. **Sanjay Thakran**, where in the evidence of last seen, the recovery of dead body was only a few hours before "last seen", it was not considered reliable. The same was again emphasized by this Court in **Ajit Singh** v. **State of Maharashtra** where it was emphasized that the time between victim last seen alive and the discovery of the body of the deceased has to be of close proximity, so that any other person being the author of the crime cannot be ruled out. In this case, even if we take the time between the last seen and the approximate time of death as per the postmortem, which would go beyond 48 hours preceding the time of postmortem and the time of death can be stretched to the morning of May 9, 2000, which still begs an explanation from the prosecution as to the time gap, as the deceased was last seen with the two accused on 08.05.2000 at 7:00 P.M.

29. The trial court as well as the High Court have lost sight of the vital aspect of the matter. Both the Courts have relied on Section 106 of the Act and have held that since the accused was last seen with the deceased and he has not been able to give any reasonable explanation of his presence with the deceased in his statement under Section 313 of the Cr.P.C., it has to be read against the accused and therefore it has to be counted as an additional link in the chain of circumstantial evidence. In present case in the findings of the trial court and High Court this appears to be the most important aspect which weighed with the trial court as well as the High Court in establishing the guilt of the accused. We are, however, afraid this is a complete misreading of Section 106 of the Act."

In the case of **Jaswant Gir** (supra), the Hon'ble Supreme Court held as follows:-

"5. Apart from the extra-judicial confession which we shall advert to a little later, the main incriminating fact relied upon is that the deceased was last seen by PW 14 in the company of the appellant and the other accused and that he was given a lift in the vehicle belonging to the appellant. In order to establish that the vehicle belonged to or was in de facto possession of the appellant, some evidence has been let in. The "last-seen"

> evidence is sought to be established by the testimony of PW 14. At the outset, we must observe that there is a serious doubt cast on the version of PW 14 about the deceased going in the vehicle of the appellant. The destination of the deceased was Pehowa whereas the vehicle had come from Pehowa and was proceeding towards Devigarh which is in a different direction. Prima facie there is no apparent reason why the deceased would have chosen to go in the vehicle which was proceeding to some other destination. The High Court resorted to a guess that the deceased would have been lured to consume liquor or his relatives might be there at Devigarh. Without probing further into the correctness of the "last-seen" version emanating from PW 14's evidence, even assuming that the deceased did accompany the accused in their vehicle, this circumstance by itself does not lead to the irresistible conclusion that the appellant and his companion had killed him and thrown the dead body in the culvert. It cannot be presumed that the appellant and his companions were responsible for the murder, though grave suspicion arises against the accused. There is considerable time-gap between the deceased boarding the vehicle of the appellant and the time when PW 11 found the dead body. In the absence of any other links in the chain of circumstantial evidence it is not possible to convict the appellant solely on the basis of the "last-seen" evidence, even if the version of PW 14 in this regard is believed. In view of this, the evidence of PW 9 as regards the alleged confession made to him by the appellant assumes importance."

In view of the settled position of law, since we find no other links against the appellants to connect them with the crime, the circumstance of 'last seen' itself cannot be a convincing and conclusive factor to convict the appellants for commission of murder of the deceased. Even though, no explanation has been offered by the appellants in their accused statements recorded under section 313 of the Cr.P.C., but in view of the time gap between the appellants were last seen together with the deceased while he was alive and when the dead body of the deceased was found on the next day at a totally different place, the possibility of other persons coming in contact with the deceased after the appellants left his company cannot be completely ruled out.

The decision relied upon by the learned counsel for the State in the case of **Ram Gopal -Vrs.- State of Madhya Pradesh reported in (2023) Supreme Court Cases 534**, the Hon'ble Supreme Court held as follows:

> "5. It cannot be gainsaid that when the entire case of the prosecution hinges on the circumstantial evidence, the entire chain of circumstances has to be completely proved, which unerringly would lead to the guilt of the accused and none else. So far as the evidence on record in the present case is concerned, it emerges that it was not disputed that on 19.12.1995 at about 5 PM, the petitioner-accused had taken the deceased Pratap Singh from his house. Thereafter, the deceased and the petitioner were also seen together at the shop of one Shripal at village Arhela by the witness Vijay Singh (PW-4). It was also not disputed that on the next day morning the dead body of the deceased was found lying near one field at village Chachiha. Hence, the death of the deceased Pratap Singh had taken place during the night hours of 19th and 20th December, 1995, and that the petitioner was lastly seen with the deceased on the previous evening. Thus, it was the petitioner alone, who knew as to what happened after the evening of 19th December, 1995.
>
> 6. It may be noted that once the theory of "last seen together" was established by the prosecution, the accused was expected to offer some explanation as to when and under

what circumstances he had parted the company of the deceased. It is true that the burden to prove the guilt of the accused is always on the prosecution, however in view of Section 106 of the Evidence Act, when any fact is within the knowledge of any person, the burden of proving that fact is upon him. Of course, Section 106 is certainly not intended to relieve the prosecution of its duty to prove the guilt of the accused, nonetheless it is also equally settled legal position that if the accused does not throw any light upon the facts which are proved to be within his special knowledge, in view of Section 106 of the Evidence Act, such failure on the part of the accused may be used against the accused as it may provide an additional link in the chain of circumstances required to be proved against him. In the case based on circumstantial evidence, furnishing or non- furnishing of the explanation by the accused would be a very crucial fact, when the theory of "last seen together" as propounded by the prosecution was proved against him.

9. In view of the afore-stated legal position, it is discernible that though the last seen theory as propounded by the prosecution in a case based on circumstantial evidence may be a weak kind of evidence by itself to base conviction solely on such theory, when the said theory is proved coupled with other circumstances such as the time when the deceased was last seen with the accused, and the recovery of the corpse being in very close proximity of time, the accused does owe an explanation under Section 106 of the Evidence Act with regard to the circumstances under which death might have taken place. If the accused offers no explanation or furnishes a wrong explanation, absconds, motive is established and some other corroborative evidence in the form of recovery of weapon etc. forming a chain of circumstances is established, the conviction could be based on such evidence.

10. So far as the facts in the instant case are concerned, it was duly proved that the death of the deceased was homicidal. It was not disputed that the petitioner had taken the deceased with him on the previous day evening and thereafter he was also seen with the deceased by the witness Vijay Singh (P.W.4) and the very next day early morning, the dead body of the deceased was found lying in the field at village Chachiha. The time gap between the period when the deceased was last seen with the accused and the recovery of the corpse of the deceased being quite proximate, the non-explanation of the petitioner with regard to the circumstance under which and when the petitioner had departed the company of the deceased was a very crucial circumstance proved against him. Having regard to the oral evidence of the witnesses, the enmity between the deceased and the petitioner had also surfaced. The corroborative evidence with regard to recovery of the weapon – axe alleged to have been used in the commission of crime from the petitioner, also substantiated the case of prosecution."

The factual scenario in the case of **Ram Gopal** (supra) is totally different from the case in hand, inasmuch as, there are other circumstances against the appellant in that case like enmity between the deceased and the appellant and recovery of the weapon of offence used in the commission of crime from the appellant apart from the circumstance of 'last seen'.

11. In the case in hand, though the prosecution has successfully established that the deceased met with homicidal death, but since it is a case based on circumstantial evidence and no motive behind the commission of the crime against the appellants could be proved rather it appears that there was cordial relationship between the appellants and the deceased and that the last seen evidence adduced by the witnesses

are not sufficient in itself to come to the conclusion that it is the appellants who committed the crime and further, the findings of the chemical examination report (Ext.17) are also in no way relevant for the two appellants Mangra Munda and Gobara Munda and therefore, we are of the view that the circumstances, which have been established by the prosecution do not form a complete chain and the same does not unerringly points towards the guilt of the appellants Mangra Munda and Gobara Munda. Therefore, it is a fit case where benefit of doubt is to be extended in favour of the appellants.

Accordingly, the JCRLA is allowed. The impugned judgment and order of conviction of the appellants under sections 302/201/34 of the I.P.C. is hereby set aside and the appellants are acquitted of such charges. The appellants Mangra Munda and Gobara Munda are on bail. They are discharged from the liability of their bail bonds and sureties bonds also stand cancelled.

Before parting with the case, we would like to put on record our appreciation to Mr. Susanta Kumar Tripathy, learned Amicus Curiae for the appellant for rendering his valuable help and assistance towards arriving at the decision above mentioned. The learned counsel shall be entitled to his professional fees, which is fixed at Rs. 7,500/- (rupees seven thousand five hundred only). This Court also appreciates the valuable help and assistance provided by Mr. Priyabrata Tripathy, learned Additional Standing Counsel.

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2024 (II) ILR-CUT-124

S.K. SAHOO, J.

JCRLA NO. 14 OF 2021 & CRLA NO. 135 OF 2021

DABU @SANTOSH KUMAR MUNDA ……Appellant

-V-

STATE OF ODISHA ……Respondent

&

CRLA NO. 135 OF 2021

MUKUNA@DHANU@DHANURAM KEREI -V- STATE OF ODISHA

(A) INDIAN PENAL CODE, 1860 – Section 228-A r/w Section 33(7) of the POCSO Act – Direction given not to disclose the identity of the child at any time during course of investigation or trial, with reference to pronouncement of the judgments made by the Hon'ble Apex Court.

(Para-8)

(B) CRIMINAL TRIAL – Conviction for commission of offence U/s. 376(D) of IPC – The evidence of the victim appears to be clear, trustworthy and remained unchallenged – Effect of – Held, the conviction can be sustained on the sole testimony of the victim.

(Para 13)

Case Laws Relied on and Referred to :-

1. (2004) 1 Supreme Court Cases 421 : State of Punjab -Vs.- Ramdev Singh.
2. (2019) 14 S.C.C.522 : Sangitaben Shaileshbhai Datanta -Vs.- State of Gujarat.
3. (2019) 2 Supreme Court Cases 703 : Nipun Saxena & Anr. -Vrs.- Union of India & Ors.

For Appellant(s) : Mr. Bibhuti Ranjan Mohanty, Amicus Curiae
Mr. Satyajit Mukherjee

For Respondent : Mr. Rajesh Tripathy, Addl. Standing Counsel.

JUDGMENT Date of Hearing & Judgment: 28.03.2024

S.K. SAHOO, J.

The appellant Dabu @ Santosh Kumar Munda in JCRLA No.14 of 2021 and the appellant Mukuna @ Dhanu @ Dhanuram Kerei in CRLA No.135 of 2021 faced trial in the Court of learned Additional Sessions Judge-cum-Special Judge, Keonjhar in Special Case No.29 of 2017 for offences punishable under section 450/34 of the Indian Penal Code (hereinafter 'I.P.C.'), section 506/34 of the I.P.C., section 376-D of the I.P.C. and section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereafter referred to as 'POCSO Act').

The learned trial Court vide impugned judgment and order dated 13.01.2021 found the appellants guilty of the offences charged and sentenced each of the appellants to undergo rigorous imprisonment for a period of twenty years each and to pay a fine of Rs.50,000/- (rupees fifty thousand) each, in default, to suffer further rigorous imprisonment for one year each for the offence under section 376-D of the I.P.C., rigorous imprisonment for a period of one year each and to pay a fine of Rs.1,000/- (rupees one thousand) each, in default, to suffer further rigorous imprisonment for one month each for the offence under section 506 of the I.P.C. and rigorous imprisonment for a period of five years each and to pay a fine of Rs.5,000/- (rupees five thousand) each, in default, to suffer further rigorous imprisonment for six months each for the offence under section 450 of the I.P.C. However, no separate sentence was imposed for the offence under section 6 of the POCSO Act in view of section 42 of the POCSO Act and the sentences were directed to run concurrently.

Since both the appeals arise out of same judgment, with the consent of learned counsel for the respective parties, those are heard analogously and disposed of by this common judgment.

Prosecution Case:

2. The prosecution case as per the first information report (Ext.1) lodged by Laxmi Munda (P.W.1), the mother of the victim (P.W.2) before the Inspector in-charge of Keonjhar Sadar police station on 20.03.2017, in short, is that she had been to Belda market on 18.03.2017 to purchase cattle leaving her children in the house. The victim (P.W.2), who was aged about fourteen years along with the niece of P.W.1 namely Sambari Munda (P.W.4), aged about twelve years and the son of P.W.1 namely Sanjay Munda (P.W.3), aged about sixteen years were present in the house. At about twelve midnight on 18/19.03.2017, the appellants entered inside the

house of P.W.1 by breaking open the window by switching off the light and they gagged the mouth of the victim and forcibly took her to a distance place from her house and removed her clothes and committed gang rape on her. It is further stated that they tried to kill the victim by means of a stone but the victim ran away in order to save her life from the spot. P.W.1 returned home on 19.03.2017 at about 4.00 p.m. and came to know about the occurrence from the victim and accordingly, she narrated the incident before the grama rakhi of the village, namely, Sudarsan Munda (P.W.6), who scribed the written report and the signature of P.W.1 was obtained on the written report and it was presented before the Inspector in-charge, who registered Keonjhar Sadar P.S. Case No.98 dated 20.03.2017 under sections 450/376-D/506 of the I.P.C. and section 6 of the POCSO Act against both the appellants.

P.W.10 Srikanta Sahoo, S.I. of Police attached to Sadar police station, Keonjhar was directed by the Inspector in-charge to take up investigation of the case. P.W.10 examined the informant, the victim, other witnesses, seized the wearing apparels of the victim on her production as per seizure list Ext.3. The victim was sent for medical examination on police requisition and the appellants were arrested on 21.03.2017 and then they were sent for medical examination to C.H.C., Padampur. After medical examination, the biological materials of both the appellants were collected and on being produced by the Havildar, the same was seized by the Investigating Officer as per seizure list Ext.10. The wearing apparels of the appellants were seized and the statement of the victim was recorded under section 164 Cr.P.C. The Investigating Officer (P.W.10) visited the spot on 22.03.2017 and prepared the spot map (Ext.14). He also seized the school admission register of the U.P. School where the victim was prosecuting her studies as per the seizure list Ext.4 and released the same in the zima of the Headmaster as per zimanama (Ext.5). He received the medical examination reports of the victim so also the appellants. He made prayer to send the exhibits to S.F.S.L., Rasulgarh, Bhubaneswar for chemical examination and accordingly, exhibits were sent. On completion of investigation, the Investigating Officer submitted charge sheet against the appellants on 18.05.2017 under sections 450/376-D/376(2)(i)/506 of I.P.C. and section 6 of the POCSO Act.

Charges:

3. After submission of charge sheet, the learned trial Court framed charges against the appellants on 16.03.2018 as aforesaid and since they 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, Documents Exhibited & Material Objects Proved by the Prosecution:

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

P.W.1 Laxmi Munda is the mother of the victim and the informant in the case and she supported the prosecution case.

P.W.2 is the victim who supported the prosecution case. She disclosed about the incident to P.W.1 and P.W.3.

P.W.3 Sanjay Munda is the son of the informant and brother of the victim. He stated about the disclosure made by the victim about the rape committed by the appellants on her.

P.W.4 Sambari Munda is the niece of the informant. She did not support the prosecution case and she was declared hostile and was cross-examined by the prosecution.

P.W.5 Sarat Chandra Sethy was the Headmaster of Hatikucha Nodal U.P. School where the victim was prosecuting her studies. He produced the school admission register which contained the date of admission and date of birth of the victim with other particulars.

P.W.6 Sudarsan Munda is the scribe of the F.I.R. (Ext.1).

P.W.7 Anama Charan Giri was the Homeguard attached to Sadar police station, Keonjhar, who is a witness to the seizure of School Admission Register as per seizure list Ext.4.

P.W.8 Dr. Sobhan Kumar Padhy was working as Medical Officer, C.H.C., Padampur, who medically examined the appellants on police requisition and proved his reports vide Ext.7 and Ext.8.

P.W.9 Dr. Sobhagya Mohanty was working as Medical Officer at D.H.H., Keonjhar who examined the victim on police requisition on 20.03.2017 and proved her report vide Ext.9.

P.W.10 Srikanta Sahoo was working as S.I. of Police attached Sadar police station, Keonjhar and he is the Investigating Officer of the case.

The prosecution exhibited seventeen documents. Ext.1 is the F.I.R., Ext.2 is the 164 Cr.P.C. statement of victim, Exts.3, 4, 10, 11, 12 and 13 are the seizure lists, Ext.5 is the zimanama, Ext.6 is the copy of admission register, Ext.7 is the medical report of appellant Santosh Kumar Munda, Ext.8 is the medical report of appellant Dhanuram Kerei, Ext.9 is the medical report of the victim, Exts.14 and 15 are the spot maps, Ext.16 is the prayer for sending the exhibits to S.F.S.L., Bhubaneswar for Chemical Examination, Ext.17 is the copy of forwarding letter and Ext.C-1 is the Chemical Examination Report.

The prosecution also proved fifteen material objects. M.O.I is the red-black golden mixed colour torn chudidar of victim, M.O.II is the faded blue colour chadi of the victim, M.O.III is the red colour full T-shirt of the appellant Santosh Kumar Munda, M.O.IV is the red colour half T-shirt of appellant Santosh Kumar Munda, M.O.V is the black colour half pant of appellant Santosh Kumar Munda, M.O.VI is the blue and yellow colour track full pant, M.O.VII is the white-blue colour half T-shirt of appellant Dhanuram Kerei, M.O.VIII is the blue with red colour half pant of

the appellant Dhanuram Kerei, M.O.IX is the black colour chadi of appellant Dhanuram Kerei, M.O.X is the sealed vial containing sample semen of appellant Santosh Kumar Munda, M.O.XI is the sealed vial containing sample pubic hair of appellant Santosh Kumar Munda, M.O.XII is the sealed vial containing sample semen of appellant Dhanuram Kerei, M.O.XIII is the sealed vial containing sample pubic hair of appellant Dhanuram Kerei, M.O.XIV is the sealed vial containing sample of vaginal swab of the victim and M.O.XV is the sealed vial containing sample pubic hair of the victim.

Defence Plea:

5. The defence plea of appellants is that the victim was found talking with two persons in an isolated place by the side of the village pond in the night, which was seen by D.W.3 Ramrai Munda and the appellant Mukuna @ Dhanu @ Dhanuram Kerei and on seeing them, when D.W.3 shouted, those two persons, who were talking with the victim fled away and since the victim was assaulted by D.W.3, a false case has been foisted against the appellants.

Six witnesses were examined on behalf of the defence in support of the defence plea including both the appellants as D.W.5 and D.W.6.

Finding of the Trial Court:

6. The learned trial Court after analyzing the oral and documentary evidence on record and on a conjoint reading of the entry in school admission register, ossification test report and versions of the teacher and the doctor found the victim to be below eighteen years of age as on the date of occurrence. The learned trial Court accepted the evidence of the victim and held that there is consistency in the F.I.R. story, 164 Cr.P.C. statement of the victim and the testimony of the victim relating to forcible sexual intercourse on her and that she was subjected to gang rape is amply corroborated by medical evidence and that the testimony of the victim has not been demolished in any way. The learned trial Court disbelieved the defence plea and taking into account the presumption prescribed under section 29 of the POCSO Act came to hold that the prosecution has successfully established the charge under section 6 of the POCSO Act. It was further held that the prosecution has also successfully established the ingredients of the offences punishable under sections 376-D/506/450 of the I.P.C. against the appellants and accordingly found them guilty.

Contentions of the Parties:

7. On 13.09.2023, when the matter was taken up for hearing, the previously engaged counsel Mr. Susanta Kumar Rout was not present to argue JCRLA No.14 of 2021, for which Mr. Bibhuti Ranjan Mohanty was engaged as Amicus Curiae for the appellant Dabu @ Santosh Kumar Munda and a copy of the paper book was supplied to him for preparation.

Mr. Bibhuti Ranjan Mohanty, learned Amicus Curiae appearing for the appellant Dabu @ Santosh Kumar Munda (in JCRLA No.14 of 2021) and Mr. Satyajit Mukherjee, learned counsel for the appellant Mukuna @ Dhanu @ Dhanuram Karei (in CRLA No.135 of 2021) contended that the learned trial Court was not justified in coming to the conclusion that the victim was minor as on the date of occurrence. Though the school admission register of the victim was proved but there is no material as to on what basis the date of birth was entered into in the school admission register, moreover from the evidence of the mother of the victim, who was examined as P.W.1, it appears that the victim was more than eighteen years as on the date of occurrence. Learned counsel further argued that the victim's statement that the appellants entered into the room through the window which was of the dimension 1 feet X 1 feet appears to be an improbable story and moreover, the I.O. has not seized the broken window and therefore, the access to the room where the victim was sleeping in the occurrence night by the appellants is a doubtful feature. Learned counsel further submitted that it is the prosecution case that at the time of occurrence, the victim (P.W.2) was sleeping with her cousin sister (P.W.4) in the same room, but P.W.4 has not supported the prosecution case. Even though it is the victim's evidence that both the appellants committed sexual intercourse on her one after another for which there was bleeding from her private part, but the doctor (P.W.9) has not noticed any external injury over the body of the victim and therefore, the prosecution case that the victim was subjected to gang rape becomes suspicious and as such, it is a fit case where benefit of doubt should be extended in favour of the appellants.

Mr. Rajesh Tripathy, learned Additional Standing Counsel appearing for the State of Odisha, on the other hand, supported the impugned judgment and contended that the victim's evidence has remained unchallenged and the victim has disclosed about the occurrence not only before her mother (P.W.1) but also before her brother (P.W.3) and both of them have supported the prosecution case. Learned counsel further argued that the defence plea has not been taken in the 313 Cr.P.C. statements of the appellants and if it is the case of the defence that it was D.W.3 who noticed two persons were talking with the victim in an isolated place in the night, for which he shouted and also assaulted the victim then it is not understood as to why D.W.3 was left out by the victim being implicated as an accused in the case. Learned counsel further argued that the victim's evidence regarding commission of rape on her is getting corroboration from the medical evidence adduced by P.W.9, who noticed tears in the hymen at 3, 6 and 12 O' clock position and the hymen was found bleeding on touch and it was congested, redness and tenderness were present and the doctor opined that the findings suggested that there was recent sexual intercourse and the doctor clarified in the cross-examination that recent sexual intercourse means there was intercourse within seven days. Learned counsel further argued that both the appellants were examined by the doctor who stated that they were capable of committing sexual intercourse and the possibility of recent sexual intercourse cannot be ruled out. Learned counsel further submitted that in view of school

admission register entry so also the ossification test report, the learned trial Court has rightly come to the conclusion that the victim was minor as on the date of occurrence. Learned counsel further submitted that when the occurrence took place in the intervening night of 18/19.03.2017, the mother of the victim i.e. P.W.1 was not present in the house and she returned back on the next day and came to know about the occurrence and thereafter F.I.R. was drafted and accordingly it was lodged on 20.03.2017 and as such there was no delay in the lodging of F.I.R. and therefore, the conviction of the appellants by the learned trial Court is quite justified.

8. At the outset, before dealing with the contentions of the respective parties, it is felt necessary to point out a very disturbing feature on record that in spite of repeated pronouncement of judgments by the Hon'ble Supreme Court on section 228-A of the I.P.C. and in view of the provision under section 33(7) of the POCSO Act, not to disclose the identity of the child at any time during course of investigation or trial, the name of the victim is mentioned in the deposition sheet.

In the case of **State of Punjab -Vs.- Ramdev Singh** reported in **(2004) 1 Supreme Court Cases 421**, the Hon'ble Supreme Court has made the following observations:-

> *"3.....Section 228-A Indian Penal Code makes disclosure of identity of the victim of certain offences punishable. Printing or publishing name or any matter which may make known the identity of any person against whom an offence under sections 376, 376-A, 376-B, 376-C or 376-D is alleged or is found to have been committed can be punished. True it is the restriction does not relate to printing or publication of judgment by the High Court or the Supreme Court, but keeping in view the social object of preventing social victimization or ostracism of the victim of a sexual offence for which section 228-A has been enacted, it would be appropriate that in the judgments, be it of this Court High Court or lower courts, the name of the victim should not be indicated. We have chosen to describe her as "victim" in the judgment."*

In the case of **Sangitaben Shaileshbhai Datanta -Vs.- State of Gujarat** reported in **(2019) 14 Supreme Court Cases 522**, it is held as follows:-

> *"10. The concern of the legislature in protecting the identity of the victim is further evident from the provisions of POCSO Act. Section 33(7) of the same casts a duty on the Special Court to ensure that identity of the victim is not disclosed at any time during the course of investigation or trial. Further, Section 23 of POCSO Act provides restriction on any form of media to disclose the identity of the victim which tends to lower her reputation or infringes upon her privacy. No disclosure of any particular(s) is allowed which can eventually lead to disclosure of the identity of the victim."*

In the case of **Nipun Saxena and Another -Vrs.- Union of India and Others** reported in **(2019) 2 Supreme Court Cases 703**, the Hon'ble Supreme Court observed as follows:-

> *"9. Sub-section (1) of Section 228A, provides that any person who makes known the name and identity of a person who is an alleged victim of an offence falling Under Sections 376, 376A, 376AB, 376B, 376C, 376D, 376DA, 376DB or 376E commits a criminal offence and shall be punishable for a term which may extend to two years.*

10. What is however, permitted under sub-section (2) of Section 228-A Indian Penal Code is making known the identity of the victim by printing or publication under certain circumstances described therein. Any person, who publishes any matter in relation to the proceedings before a Court with respect to such an offence, without the permission of the Court, commits an offence. The Explanation however provides that printing or publication of the judgment of the High Courts or the Supreme Court will not amount to any offence within the meaning of the Indian Penal Code.

11. Neither the Indian Penal Code nor the Code of Criminal Procedure define the phrase 'identity of any person'. Section 228A Indian Penal Code clearly prohibits the printing or publishing "the name or any matter which may make known the identity of the person". It is obvious that not only the publication of the name of the victim is prohibited but also the disclosure of any other matter which may make known the identity of such victim. We are clearly of the view that the phrase "matter which may make known the identity of the person" does not solely mean that only the name of the victim should not be disclosed but it also means that the identity of the victim should not be discernible from any matter published in the media. The intention of the law makers was that the victim of such offences should not be identifiable so that they do not face any hostile discrimination or harassment in the future.

12. A victim of rape will face hostile discrimination and social ostracisation in society. Such victim will find it difficult to get a job, will find it difficult to get married and will also find it difficult to get integrated in society like a normal human being. Our criminal jurisprudence does not provide for an adequate witness protection programme and, therefore, the need is much greater to protect the victim and hide her identity. In this regard, we may make reference to some ways and means where the identity is disclosed without naming the victim. In one case, which made the headlines recently, though the name of the victim was not given, it was stated that she had topped the State Board Examination and the name of the State was given. It would not require rocket science to find out and establish her identity. In another instance, footage is shown on the electronic media where the face of the victim is blurred but the faces of her relatives, her neighbours, the name of the village etc. is clearly visible. This also amounts to disclosing the identity of the victim. We, therefore, hold that no person can print or publish the name of the victim or disclose any facts which can lead to the victim being identified and which should make her identity known to the public at large.

xx xx xx xx xx

The Hon'ble Supreme Court finally issued the following direction:

"50.1. No person can print or publish in print, electronic, social media, etc. the name of the victim or even in a remote manner disclose any facts which can lead to the victim being identified and which should make her identity known to the public at large."

In the deposition sheet of the victim of rape, the learned trial Court has recorded the name of the victim, which should not have been done. He/she should be mentioned as 'victim' therein. The signature of the victim in his/her deposition should not be taken on the deposition sheet but should be taken in a separate sheet by the learned trial Judge and the said sheet of paper with the signature and certificate of the Judge with date shall be kept in sealed cover. A noting should be given in the deposition sheet so also in the order sheet of that day regarding taking of signature of the victim in a separate sheet and keeping the same in sealed cover.

The said procedure should also be followed while recording statement of the victim under section 164 of Cr.P.C. In the judgment, the name of the victim should never be mentioned by the Judge.

Evidence of the victim and corroborating evidence:

9. In case of this nature, the evidence of the victim (P.W.2) is most material and law is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice and there is no rule of law that her testimony cannot be acted upon without corroboration in material particulars. She stands on a higher pedestal than an injured witness.

P.W.2 has stated that on the occurrence night, she along with her cousin sister (P.W.4) were sleeping in one room and her brother (P.W.3) was sleeping in another room. She further stated that the appellant Dhanu entered inside the room after breaking railings of the window and switched off the light and then the appellant Dhanu gagged her mouth and both the appellants lifted her and took her to outside of her house by unbolting the entrance door and then they removed her wearing apparels and they also became naked and then they committed sexual intercourse on her one after another. She further stated that due to sexual intercourse, blood was oozing out from her private part and the appellants threatened her to take away her life for which out of fear, she rushed to her house holding her wearing apparels. She further stated that her sister (P.W.4) unbolted the door and she went inside the house and narrated the incident before her sister and that her mother (P.W.1) returned home on the next day at about 4.00 p.m. and she also narrated the incident before her. In the cross-examination, the victim has stated that the appellant Dhanu was her uncle as per village courtesy and appellant Santosh was her maternal uncle as per village courtesy. She further stated that the appellants entered into the room through window and the height of the said window was about six feet from the ground level and the dimension of the window was 1 feet X 1 feet. She further stated that she had no knowledge about the breaking of the window and when she got up, she found light was off and the appellant Santosh switched off the light. She denied the suggestion given by the learned defence counsel that she had got illicit relationship with some other persons and while the accused persons caught them red handed, she and her family members have foisted a false case against the appellants. Nothing has been brought out in the cross-examination of the victim to disbelieve her evidence.

The evidence of victim has not been corroborated by P.W.4, who has not supported the prosecution case and declared hostile by the prosecution.

P.W.3 Sanjaya Munda, the brother of the victim has stated that on the occurrence night, the victim knocked the door and when it was unbolted, the victim was found to be holding her undergarments with her hands and upper dress was torn and the victim disclosed that the appellants had committed sexual intercourse on her forcibly one after another and at that time, his mother (P.W.1) was absent. P.W.3 has

specifically stated that they did not take any step to lodge F.I.R. at police station and waited for the arrival of his mother, who returned on the Sunday evening and they narrated the incident before his mother, who went to the police station with Grama Rakhi of their village and thereafter the matter was reported at the police station. Nothing has been brought out in the cross-examination of P.W.3 to disbelieve his evidence.

The mother of the victim being examined as P.W.1 has stated that after her arrival in the house on 19.03.2017 at about 4.00 p.m., the victim and P.W.4 disclosed before her about the occurrence. She further stated that she narrated the incident before the Grama Rakhi and they went to Keonjhar Sadar police station and the F.I.R. was scribed by the Grama Rakhi as per her version and then it was lodged.

The disclosure made by the victim (P.W.2) first before P.W.3 and then before P.W.1 is very much relevant and it is admissible as res gestae under section 6 of the Evidence Act. Law is well settled that to be relevant under section 6 of the Evidence Act, such statement must have been made contemporaneously with the fact in issue, or at least immediately thereupon and in conjunction therewith. If there is an interval between the fact in issue and the fact sought to be proved then such statement cannot come within 'res gestae' concept.

After the F.I.R. was lodged on 20.03.2017, the victim was sent for medical examination and P.W.9, the Medical Officer at District Headquarters Hospital, Keonjhar examined the victim on 20.03.2017 and found that hymen had tears at 3, 6 and 12 O' clock position and it was bleeding on touch and the hymen was congested, redness and tenderness were present. The doctor further stated that the ossification test report of the victim indicated that she was fourteen to sixteen years at the time of his examination and the findings suggested that there was recent sexual intercourse on the victim. He proved the ossification report marked as Ext.9/2 and his own report marked as Ext.9. In the cross-examination, the doctor has stated that recent sexual intercourse means there was intercourse within seven days and he could not say the exact time of sexual intercourse and that he had given the ossification report basing on x-ray report. Therefore, the evidence of the victim regarding commission of rape is getting corroboration not only from the oral evidence of P.W.1 and P.W.3 but also from the medical evidence.

The appellants were sent for medical examination and P.W.8 examined them on 21.03.2017 and both the appellants were found to be capable of sexual intercourse and the doctor opined that the possibility of sexual intercourse cannot be ruled out. The reports have been marked as Ext.7 and Ext.8 respectively.

Delay in lodging of F.I.R.:

10. As rightly pointed out by the learned counsel for the State that delay in lodging of the F.I.R. has been successfully explained by the prosecution inasmuch as the occurrence took place in the midnight of 18/19.03.2017. The victim along with her cousin sister (P.W.4) and brother (P.W.3) were only present in the house. The

mother of the victim was not present in the house at that time and therefore, everybody waited for the arrival of the mother (P.W.1) and after P.W.1 returned on the next day in the afternoon, she came to know about the occurrence and the F.I.R. was drafted and then lodged before the police station.

In view of the nature of accusation and since in case of this nature, the family members used to take time to decide whether to lodge the F.I.R. and proceed with the case or not and therefore delay in such cases does not necessarily indicate that the F.I.R. was tainted or it was deliberate or intentional to falsely implicate the appellants in the commission of crime and therefore, I am of the view of the prosecution has successfully explained the delay, if any, in lodging the F.I.R.

Age of the victim:

11. So far as age of the victim is concerned, the victim being examined as P.W.2 has stated that she could not correctly say about her age. The Court assessed her age to be sixteen years and mentioned in deposition sheet. The ossification test report which has been proved by the doctor (P.W.9) indicated that the age of the victim was fourteen to sixteen years at the time of examination. The Headmaster of the school where the victim was prosecuting her study being examined as P.W.5 has stated that during course of investigation, the police seized the school admission register and the relevant entry so far as the date of birth of the victim is concerned was at page no.80 and it was mentioned to be 15.05.2001. Since the occurrence took place on 18.03.2017 night, therefore, the conjoint reading of school admission register and the ossification test report indicate that the victim was minor as on the date of occurrence. No doubt mother of the victim being examined as P.W.1 has stated that her marriage was solemnized twenty two years back and her son was her eldest child and he was born one year after her marriage and after her eldest child was aged about two years, the victim was born and that she could not say the date of birth of the victim, but in view of the school admission register coupled with ossification test report, I am of the humble view that the findings of the learned trial Court that the victim was minor as on the date of occurrence is quite justified.

Analysis of defence plea:

12. Coming to the defence plea of the appellants, in the 313 Cr.P.C. statements of both the appellants, no such specific plea has been taken rather the plea was of complete denial and false implication. However, six witnesses were examined on behalf of the defence. The defence plea cannot be based on surmises and speculation though the burden can be discharged by showing preponderance of probabilities in favour of the plea either by adducing positive evidence or by reference to circumstances transpiring from the prosecution evidence itself.

D.W.3 Ramrai Munda, who is the elder brother of the appellant Dabu @ Santosh Kumar Munda has stated that he had been to the pond side of the village at about 8.00 p.m. to 9.00 p.m. and found the victim was talking with two persons and when he shouted, those two persons fled away and he along with the appellant Dabu

@ Santosh Kumar Munda assaulted the victim by giving slaps and at that time, the other appellant was also present. He further stated that he disclosed about the incident to the informant. However, the informant (P.W.1) has not stated about any such disclosure being made by D.W.3.

The appellant Mukuna @ Dhanu @ Dhanuram Kerei being examined as P.W.6 has stated that he along with D.W.3 had been to pond where they found the victim was engaged in a compromising condition with two persons and seeing them, those persons fled away for which they abused the victim and assaulted her by giving slaps. D.W.6 has not stated about the presence of appellant Dabu @ Santosh Kumar Munda at the spot. Similarly, D.W.3 has stated that the victim was talking with two persons whereas D.W.6 has stated that the victim was in a compromising condition with those two persons. If D.W.3 marked the victim in the company of two persons, shouted and assaulted the victim and also informed the informant (P.W.1), it is not understood as to why the victim left him being implicated in the case. In view of these discrepancies, the learned trial Court has rightly not placed any reliance on the defence plea.

Conclusion:

13. Law is well settled that if the evidence of the victim in a case of rape appears to be clear, trustworthy and above board, the conviction can be sustained on the sole testimony of the victim. In this case, the evidence of the victim has remained unchallenged and it clearly points out the complicity of both the appellants in the commission of gage rape on her. The evidence of victim's mother (P.W.1) and brother (P.W.3) corroborates the evidence of the victim before whom the victim has made disclosure about commission of rape on her by the appellants and moreover, the medical evidence also corroborates about the commission of rape on the victim.

In view of the foregoing discussion, I find that both the appellants not only committed trespass into the house of the victim in the midnight but also committed gang rape on her and committed the act of criminal intimidation. The learned trial Court has rightly found the appellants guilty under the offences charged and the sentence imposed for the offence under section 376-D of the I.P.C. i.e. for twenty years is the minimum punishment prescribed for such offence and the sentence awarded for the other offences i.e. sections 506 and 450 of the I.P.C. is quite justified. Accordingly, the conviction of the appellants and sentence awarded by the learned trial Court is upheld.

In the result, both the Jail Criminal Appeal and the Criminal Appeal being devoid of merits, stand dismissed.

Lower Court Records with a copy of this judgment be sent down to the learned trial Court forthwith for information and necessary action.

The Registry shall place the judgment before Hon'ble the Chief Justice seeking permission to circulate the copies of this judgment to all the District Judges for onward circulation amongst the Judicial Officers under his judgeship for complying the observations made in paragraph 8 of the judgment.

Before parting with the case, I would like to put on record my appreciation to Mr. Bibhuti Ranjan Mohanty, the learned Amicus Curiae in JCRLA No.14 of 2021 for rendering his valuable help and assistance towards arriving at the decision above mentioned. The learned Amicus Curiae shall be entitled to his professional fees which is fixed at Rs.7,500/- (rupees seven thousand five hundred only).

This Court also appreciates the valuable help and assistance provided by Mr. Satyajit Mukherjee and Mr. Rajesh Tripathy, learned Additional Standing Counsel.

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2024 (II) ILR-CUT-136

K.R. MOHAPATRA, J.

W.P(C) NO. 10367 OF 2006

PRASANNA KUMAR MOHAPATRA ……Petitioner

-V-

GOKULI BHOI & ORS. ……Opp.Parties

SPECIFIC RELIEF ACT, 1963 – Sections 22(3), 28(3) – Whether the court which passed a decree for specific performance of contract does losses its jurisdiction to direct for delivery of possession U/s. 28(3) of the Act? – Held, No – The court retains the control over the decree even after the decree has been passed – Thus, Learned Trial Court was competent to exercise the power U/s. 28(1) of the Act, for extension of time, for rescinding the contract, for delivery of possession, partition and separate possession of property, if deed of conveyance has already been executed. (Para 8)

Case Laws Relied on and Referred to :-

1. AIR 1997 KERALA 301: Joseph & Anr. Vs. Joseph
2. AIR 1994 SC 1699 : Ramankutty Guptan Vs. Avara.

For Petitioner : Dwarika Prasad Mohanty
For Opp.Parties : None

JUDGMENT Heard & disposed of on : 24.04.2024

K.R. MOHAPATRA, J.

1. This matter is taken up through hybrid mode.

2. Order dated 10th July, 2006 (Annexure-1) passed by learned Civil Judge (Senior Division), 1st Court, Cuttack in T.S. No.382 of 1993 is under challenge in this writ petition, whereby an application filed by the Petitioner praying *inter alia* to direct the Defendants to effect delivery of possession of the suit property through process of Court, has been rejected.

3. Mr. Mohanty, learned counsel for the Petitioner submits that T.S. No.382 of 1993 was filed for declaration of title in respect of suit property and to direct the

Defendants to transfer the ownership of the suit land in favour of the Plaintiff along with other consequential reliefs. Although the prayer was made for declaration of title in respect of the suit property, but the suit is in fact for specific performance of contract, which was also observed by learned trial Court in its order dated 1st March, 1995 by which the suit was disposed of *ex parte. Ex Parte* decree was drawn up on 10th March, 1995.

4. Mr. Mohanty, learned counsel for the Petitioner drew attention of this Court to the opening lines of the *ex parte* order, which reads as under:

> *"Though the Plaintiff has filed the suit for declaration of his title in respect of the suit schedule land and for transfer of ownership by the defendants in favour of the plaintiff, it is a suit for specific performance of contract for execution of sale deed in favour of the Plaintiff by the defendants in respect of the suit schedule land……"*

Thus, learned trial Court accepting the suit to be one for specific performance of contract, disposed of the same vide *ex parte* judgment dated 1st March, 1995 (Annexure-2) with the following order:

> *"The suit is decreed ex parte against the defendants with costs. The defendants are directed….(torn) execute and register the sale deed in favour of the plaintiff on receipt of Rs.1,000/- from the plaintiff within two months hence, failing which the plaintiff may get the sale deed execute and register through the process of the court on depositing Rs.1,000/- on due notice to the defendants."*

4.1. Since the Defendant did not come forward to execute the sale deed in terms of the decree passed in the suit, the Plaintiff-Petitioner presented the sale deed along with challan of Rs.1,000/- for its registration. Accordingly, the sale deed was registered on 11th September, 1998 under Annexure-4. But, delivery of possession was not given to the Plaintiff-Petitioner. Hence, he filed an application under Section 22(3) of the Specific Relief Act, 1963 (for brevity 'the Act') in the same suit for delivery of possession. Learned trial Court in the impugned order under Annexure-1, refused to entertain the application on the ground that the ***ex parte*** decree was not a preliminary decree. Thus, institution of a final decree proceeding did not arise. It further held that direction for delivery of possession through the process of Court would amount to travel beyond the decree and thus, an application to draw a final decree would not be maintainable. In order to execute the decree, the Plaintiff is required to file an execution case. The Petitioner being aggrieved by the said order, has filed this writ petition.

5. Mr. Mohanty, learned counsel for the Plaintiff-Petitioner further submits that although the application was made under Section 22(3) of the Act, but for all practical purposes, it should have been construed to be a petition under Section 28(3) of the Act. Drawing attention to the provision under Section 28(3) of the Act, it is submitted that the Court, which passed a decree for specific performance of contract, does not loses its jurisdiction to direct for delivery of possession in a suit for specific performance of contract, if an application is filed in that respect. In support of his submission, Mr. Mohanty, learned counsel for the Petitioner relied

upon the case of ***Joseph and another –v- Joseph***, reported in AIR 1997 KERALA 301, in which at Paragraphs-7, it is held as under:

> *"7. The Supreme Court in Ramankutly Guptan v. Avara MANU/SC/1564/1994: (1994) 2 SCC 642 (AIR 1994 SC 1699), laid down that the Execution Court is not the "same Court" within the meaning of Section 28 of the Specific Relict' Act. The question that arose there was whether an application under Section 28 of the Specific Relief Act, 1963 should be filed on the original side or execution side. It was held that the Section indicates that it should be "in the same suit". It would obviously mean in the suit itself and not in the execution proceedings. It is equally settled law that after passing the decree for specific performance, the Court does not cease to have any jurisdiction. The Court retains control over the decree even after the decree has been passed. Earlier in the same case as reported in ILR (1993) Ker 197, this Court took the identical view while interpreting the expression "in the same suit" occurring in Sub-section (1) of Section 28 of the Specific Relief Act, 1963."*

5.1 In the case of ***Ramankutty Guptan –v- Avara***, reported in AIR 1994 SC 1699, Hon'ble Supreme Court has laid down as under:

> *"7. The question then emerges is whether it should be on the original side or execution side. Section indicates that it should be "in the same suit". It would obviously mean in the suit itself and not in the execution proceedings. It is equally settled law that after passing the decree for specific performance, the Court does not cease to have any jurisdiction. The court retains control over the decree even after the decree has been passed. It was open to the court to exercise the power under S. 28(1) of the Act either for extension of time or for rescinding the contract as claimed for. Since the execution application has been filed in the same court in which the original suit was filed, namely, the court of first instance, instead of treating the application on the execution side, it should have as well been numbered as an interlocutory application on the original side and disposed of according to law. In this view, we feel that the judgment of the Bombay High Court laid down the law correctly and that of the Andhra Pradesh High Court is not correct. The High Court, therefore, is not right in dismissing the application treating it to be on execution side, instead of transferring it on the original side for dealing with it according to law."*

5.2 He, therefore, submits that a separate execution case is not required to be filed seeking for delivery of possession of the suit land. An application under Section 28(3) would be maintainable in the same suit for delivery of possession of the property in a suit for specific performance of contract. He, therefore, prays for setting aside the impugned order under Annexure-1 and to direct learned trial Court to take steps for delivery of possession of the suit property to the Plaintiff-Petitioner.

6. None appears for the Defendants-Opposite Parties although they are represented through learned counsel.

7. Considering the submission made by Mr. Mohanty, learned counsel for the Petitioner and on perusal of record, it appears that the suit was disposed of vide *ex parte* order dated 1st March, 1995 and the *ex parte* decree was drawn up on 10th March, 1995 by learned Civil Judge (Senior Division), 1st Court, Cuttack in T.S. No. 382 of 1993 directing the Defendants to execute and register the sale deed in favour

of the Plaintiff on receipt of Rs.1,000/- from the Plaintiff within a period of two months failing which the Plaintiff-Petitioner was at liberty to get the sale deed executed and registered through the process of Court on depositing Rs.1,000/- on due notice to the Defendants. Accordingly, the Plaintiff stated to have approached the Defendants for execution of the sale deed by accepting Rs.1,000/-. Having failed in his attempt to get the sale deed executed and registered, the Plaintiff got the sale deed executed and registered through Court on deposit of Rs.1,000/-.

7.1. As the Plaintiff was not delivered with the possession, he filed an application in the disposed of suit under Section 22(3) of the Act seeking for delivery of possession. Learned trial Court holding that the Court is not in seisin of a final decree proceeding, dismissed the application with an observation that the Plaintiff was required to institute separate execution case for delivery of possession.

8. Law is no more *res integra* in the cases of ***Joseph and another*** (supra) and ***Ramankutty Guptan*** (supra) that an application for delivery of possession under Section 28(3) (b) of the Act would necessarily be filed in the same suit. It would obviously mean in the suit itself and not in an execution proceeding. Law is also equally clear that after passing of the decree for specific performance, the Court does not cease to have any jurisdiction. The Court retains the control over the decree even after the decree has been passed. Thus, learned trial Court was competent to exercise the power under Section 28(1) of the Act either for extension of time or for rescinding the contract or in particular cases, for delivery of possession, partition and separate possession of the property, if deed of conveyance has already been executed.

9. In view of the above, the impugned order under Annexure-1 is not sustainable and is accordingly set aside. Learned trial Court is directed to take steps for delivery of possession to the Plaintiff-Petitioner following due procedure of law.

10. With the aforesaid observation and direction, the writ petition is disposed of.

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2024 (II) ILR-CUT-139

K.R. MOHAPATRA, J.

CMP NOS.1626 & 1627 OF 2016

RABINDRA MOHARANA & ORS. ……Petitioners

-V-

SULOCHANA BEWA & ORS. ……Opp.Parties

(A) INDIAN SUCCESSION ACT, 1925 – Sections 222, 276 and 278 – Sadananda & Trailokya are appointed as executors of will – An application U/s. 278 was filed for grant of letter of administration by the executors – During pendency of the proceeding upon death of executor

No.1 his legal heirs were substituted – The learned trial court rejected the application for substitution of the legal heirs of deceased executor No.2 on the ground that since the probate proceeding was initiated at the instance of the executors, it would survive till the executors are alive – Whether the impugned order is sustainable? – Held, No – This is a proceeding for grant of letter of administration and not a probate proceeding. (Para 12)

(B) INDIAN SUCCESSION ACT, 1925 – Section 278 r/w Order XXII, Rule 3 of Civil Procedure Code, 1908 – Whether an application U/o XXII, Rule 3 of the code is maintainable in an application for grant of letter of administration of the will? – Held, Yes – The legal representative are competent to maintain and continue the proceeding U/s. 278 of the Act. (Para 11.3)

Case Laws Relied on and Referred to :-

1. AIR 1975 Madras 194 : Soundararaja Peter & Ors. Vs Florance Chellaih & Ors.
2. AIR 1963 Guj 32 : Jadeja Pravinsinhji Anandsinhji Vs Jadeja Mangalsinhji Shivsinhji & Ors.
3. AIR 1982 Guj 222 : Lallubhai Chhotabhai by L.Rs. & Ors. Vs Vithalbhai Parshottambhai.
4. AIR 1974 Orissa 130 : Dillip Kumar Mohapatra Vs. Subhadra & Ors.
5. 2015 SCC Online Ori 491: Pramodini Pattnaik (since dead) Vs. Smt.Jayashree Tarai &Anr.

For Petitioners : Mr. Bibekananda Bhuyan
For Opp.Parties : Mr. Surya Prasad Misra, Sr. Adv. & Ms. E. Agarwal

JUDGMENT Date of Judgment : 01.05.2024

K.R. MOHAPATRA, J.

1. This matter is taken up through hybrid mode.

2. A composite order dated 21st September, 2016 passed by learned Civil Judge (Senior Division), 1st Court, Cuttack in OS No.6 of 2015 is under challenge in both the CMPs, whereby two applications, one filed by the Petitioners on 12th May, 2016 for substitution of deceased Petitioner No.2, namely, Sadananda Maharana was dismissed and another petition dated 30th June, 2016 filed by Opposite Parties was allowed holding the proceeding to be not maintainable.

3. Since both the CMPs involve similar questions of facts and law, those are taken up together for the sake of convenience of discussion.

4. Facts in nutshell necessary for adjudication of these CMPs are that one Saria Bewa executed her last WILL on 15th December, 1984 in favour of one Trailokya Maharana and Sadananada Maharana, both are sons of Bhikari Maharana. After death of Saria Bewa, said Trailokya Maharana and Sadananda Maharana filed Misc. Case No.26 of 1992 before learned District Judge, Cuttack under Section 278 of the Indian Succession Act, 1925 (for brevity 'the Act') for grant of Letters of Administration. Upon receipt of summons, the Opposite Parties appeared. During pendency of the proceeding, Trailokya Maharana died on 12th December, 2002 and his legal heirs (LRs) were brought on record by substitution. Since the matter

became contentious, case record was transferred to learned Civil Judge (Senior Division), 1st Court, Cuttack to adjudicate the proceeding. Accordingly, it was registered as OS No.6 of 2015. During pendency of the proceeding, Sadananda Maharana died on 12th March, 2016. Thus, an application was filed on 12th May, 2016 under Order XXII Rule 3 CPC for substitution of deceased Sadananda Maharana. The said application was objected to by the Opposite Parties by filing objection. Likewise, the Opposite Parties also filed an application on 30th June, 2016 alleging that due to death of Trailokya and Sadananda, namely, both the executors of the WILL the Probate proceeding cannot survive and the same being not maintainable is liable to be dismissed. Learned trial Court heard both the applications and passed a composite order holding that in view of Section 222 of the Act, Probate can be granted only to an executor. Since the Probate proceeding was initiated at the instance of the executors so named in the WILL, it would survive till the executors are alive. The Probate proceeding is co-terminus with the death of the executors, as there would be no occasion to grant any Probate. In such situation, the Probate proceeding suffers a natural death. It is further observed that after being contentious, a Probate proceeding is tried like a suit, but that does not transform the proceeding into a suit under the Code of Civil Procedure, 1908 in view of Section 222 of the Act. Hence, learned trial Court dismissed the petition filed under Order XXII Rule 3 CPC for substitution of the LRs of deceased Sadananda and consequently allowed the petition filed by Opposite Parties holding that the Probate proceeding to be not maintainable. Being aggrieved, these CMPs have been filed.

5. Learned counsel for the parties do not dispute the aforesaid factual position.

6. Mr. Bhuyan, learned counsel for the Petitioners opened his argument submitting that learned trial Court proceeded on misconception that the proceeding has been filed to probate the WILL. But the proceeding was in fact filed for grant of Letters of Administration. Had it been filed for grant of Probate, it would have been terminated on the death of both the executors of the WILL in view of Section 222 of the Act. But in the instant case, the testatrix had not appointed any executor of the WILL. Being incognizant of the fact that Trailokya and Sadananda filed application under Section 278 of the Act for grant of Letters of Administration, learned trial Court misconstruing it to be a proceeding under Section 276 of the Act, passed the impugned order. Unlike a proceeding under Section 276 of the Act, substitution of the Petitioner is permissible in a proceeding under Section 278 of the Act. Section 222 of the Act only applies to the proceeding under Section 276 of the Act. It has no application to a proceeding for grant of letters of Administration under Section 278 of the Act. Thus, learned trial Court has erred in law in rejecting the petition filed under Order XXII Rule 3 CPC and holding the proceeding not maintainable after death of Trailokya and Sadananda.

6.1 Mr. Bhuyan, learned counsel for the Petitioners relied upon the case of ***Soundararaja Peter and others Vs Florance Chellaih and others***, reported in AIR 1975 Madras 194, wherein, it is held as under:-

"6. S.232 applies to a case where the testator has not appointed an executor. The Section states that where an executor has not been appointed under a will or the executor appointed is incapable of or has refused to act or has died before the testator or before proving the will, an universal or residuary legatee may be admitted to prove the will, and Letters of Administration with the will annexed may be granted to him of the estate. S. 235 provides that Letters of Administration with the will annexed shall not be granted to any legatee other than an universal or a residuary legatee, until a citation has been issued and published in the manner prescribed by the provisions of that Act. Mr. Parasaran contends that though Letters of Administration could be granted under S. 232 to an universal or a residuary legatee, the plaintiff not being an universal or a residuary legatee, is not entitled to the Letters of Administration under the said provision. It is also further pointed out that no citation having been issued or published in the manner prescribed by the Indian Succession Act, no Letters of Administration could be issued to the plaintiff even if she is treated as an universal or a residuary legatee in view of the prohibition contained in S. 233. It is true that the plaintiff is not an universal or a residuary legatee under the terms of the will Ex. A-1. She is one of the four legatees under the terms of the will Ex. A-1, and all the properties covered by the will have been bequeathed to them and there is no residue to be administered. We do not understand the provisions in S. 232 as enabling only a residuary or an universal legatee to prove the Will and claim Letters of Administration. S. 234 specifically provides that any legatee having a beneficial interest may also prove the will and seek a Letters of Administration. The plaintiff being a legatee under the will, and there being no universal or residuary legatee, the provisions of S. 234 will come into play. The plaintiff it therefore, entitled to prove the will and get Letters of Administration in relation to that will."

He, therefore, submits that when no executor has been appointed under the WILL, a proceeding under Section 278 of the Act is maintainable. He also relied upon the case of ***Jadeja Pravinsinhji Anandsinhji Vs Jadeja Mangalsinhji Shivsinhji and others***, reported in AIR 1963 Guj 32, wherein, it is held that even in a Probate proceeding under Section 276 of the Act, upon death of the executor, it can be converted to a proceeding under Section 278 of the Act for grant of Letters of Administration and be continued by the residual or universal legatee. He also relies on a decision in the case of ***Lallubhai Chhotabhai by L.Rs. and others Vs Vithalbhai Parshottambhai***, AIR 1982 Guj 222, wherein, it is held at para-16 as under:-

"16. In Dilip Kumar v. Subhadra, AIR 1974 Orissa 130 and Soundararaja Peter v. Florance Chellaihi, AIR 1975 Mad 194, the grant of letters of administration with the will annexed was found to be the proper remedy when it was found that probate could not be granted as no executor was appointed by the will. Under the circumstances having regard to the fact that we have found that the respondent is a universal legatee and in view of the fact that the finding with regard to the proof of the will is not in question, we are inclined to remand the matter to the District Court with a direction that letters of administration with the will annexed should be granted to the respondent as alternatively prayed by him."

He also placed reliance on the case of ***Dillip Kumar Mohapatra Vs. Subhadra and others***, reported AIR 1974 Orissa 130, wherein it is held as under :-

> *"10 Even on these findings the appellant would not be entitled to probate of the will. On examination of Ext. 1, we do not find that any executor had been appointed by the will. Section 222 of the Indian Succession Act provides:—.*
>
> *(1) Probate shall be granted only to an executor appointed by the will.*
>
> *(2) The appointment may be expressed or by necessary implication."*
>
> *We do not find any material in the will itself from which we can hold that an executor had been appointed by necessary implication. Mr. Pal relied upon Kamalamma v. Somasekharappa, AIR 1963 Mys 136; S. Venkatarama Iyer v. Sundarambal, AIR 1940 Bom 400; Arumilli Viramma v. Arumilli Seshamma, AIR 1931 Mad 343 in support of the contention that the appellant by necessary implication may be taken to have been appointed as the executor. We find nothing useful in the first two cases to support Mr. Pal's contention and the Madras case had a different set of facts on the basis of which the principle of appointment by implication was found applicable. Consequently, probate cannot be granted. On the other hand, it would be appropriate, on our finding regarding the will to grant letters of administration with the will annexed to the legatee as provided under Section 232 of the Succession Act."*

It is, therefore, contended that the nature and character of the proceeding has to be looked into while considering the application either for probate or grant of letters of administration. When no executor has been appointed, a Letters of Administration with the WILL can be granted to the residual or universal legatee, which includes its LRs. He, therefore, submits that the impugned order in rejecting the petition under Order XXII Rule 3 CPC as well as allowing the petition holding the proceeding itself to be not maintainable is illegal and unjustified. Hence, he prays for setting aside the impugned order and to remit the matter to substitute the LRs. of deceased Sadananda therein and continue with the proceeding for grant of letters of administration.

7. Mr. Mishra, learned Senior Advocate appearing for the contesting Opposite Parties defending the impugned order submitted that Trailokya and Sadananda were appointed as executors of the WILL. The contents of the WILL itself makes the same manifest. It has been stated in the WILL that upon death of the testatrix, Trailokya and Sadananda would probate the WILL to get the benefit out of it. In effect, Trailokya and Sadananda filed the proceeding for probate of the WILL as its executors. Trailokya died on 12th December, 2002 and his legal heirs were substituted in his place. During pendency of the proceeding before learned Civil Judge (Senior Division), 1st Court, Cuttack, Sadananda died on 12th March, 2016. Thus, both the executors of the WILL having died in the meantime, the legal heirs of Trailokya although substituted are not competent to continue the proceeding to get a Probate. In view of Section 222 of the Act, legal heirs of Sadananda cannot be substituted in his place, as the proceeding has already met its natural death and is no more available to be converted to a proceeding for grant of letters of administration. As such, learned trial Court has committed no error in dismissing the petition filed under Order XXII Rule 3 CPC for substitution of legal heirs of Sadananda. It is his submission that when the WILL itself gave authority to Trailokya and Sadananda to probate the WILL, a proceeding at their instance for grant of Letters ofAdministration is

not maintainable. Learned counsel for the Petitioners tried to mislead this Hon'ble Court by portraying the proceeding to be one for grant of letters of administration. Although the proceeding has been filed under Section 278 of the Act, but in effect it was a proceeding for grant of probate and has come to an end with death of both the executors. Thus, learned trial Court has not committed any error in dismissing the petition under Order XXII Rule 3 CPC and holding the proceeding no maintainable, allowing the prayer of Opposite Parties. He, therefore, submitted that both the CMPs being devoid of any merit should be dismissed.

7.1 In course of hearing, Mr. Mishra, learned Senior Advocate, however, submitted that the correct position of law has been laid down in the following case laws:-

i) ***Musammat Phekni Vs. Musammat Manki***, reported in AIR 1930 Patna 618;
ii) ***Smt. Sushilabai Vs. Govind Ganesh Khare***, reported in AIR 1958 MP 372;
iii) ***Jadeja Pravinsinhji Anandsinhji Vs. Jadeja Mangalsinhji Shivsinhji and others***, report in ARIR 1963 Guj 32;
iii) ***Govind M. Asrani Vs. Jairam Asrani and another***, reported in AIR 1963 Madras 456;
iv) ***Jogendra Prasad alias Bhola and others Vs. Kamlesh Kumar and others***, reported in AIR 2001 Pat 181;
v) ***Thrity Sam Shroff Vs. Shiraz Byramji Anklesaria***, reported in AIR 2007 Bom 103;

He, however, submitted that law is no more *res integra* that in view of Section 232 of the Act, if an executor dies before grant of Probate of the WILL, the residuary or universal legatee may continue the proceeding to grant letters of administration. The said aspect was not taken into consideration by learned trial Court while adjudicating the matter. He, therefore, submitted that interest of justice will be best served if learned trial Court gives a relook to the facts and circumstances of the case and adjudicate the matter afresh.

8. Heard learned counsel for the parties and perused the materials on record. The Act makes elaborate provisions for probate and/or grant of Letters of Administration with the WILL. On perusal of the document, namely, WILL at Flag-'C' of the brief, it is clear that the testatrix, namely, Saria Bewa made her last WILL in favour of Trailokya and Sadananda in respect of the properties more fully described therein indicating *inter alia* that they will take care of the testatrix during her life time and perform her obsequies and other rituals. After her death, they would get the probate of the WILL in competent Court of law. Accordingly, an application under Section 278 of the Act was filed before learned District Judge, Cuttack for grant of Letters of Administration, which was registered as Misc. Case No.26 of 1992. During pendency of the proceeding before learned District Judge, Cuttack, Trailokya Maharana died on 12th December, 2002 and his legal heirs were substituted. The proceeding on being contentious, was transferred to learned Civil Judge, Senior Division, 1st Court Cuttack for adjudication and is registered as OS No.6 of 2015. During pendency of the proceeding, Sadananda died on 12th March, 2016. Thus, an application was filed under Order XXII Rule 3 CPC for his

substitution. The Opposite Parties also filed an application to dismiss the proceeding being not maintainable on the ground that upon death of both the executors of the WILL, the proceeding has come to an end automatically in view of Section 222 of the Act. Both the applications were taken up and disposed of by a composite order, which is impugned in both the CMPs.

9. Upon hearing learned counsel for the parties, following issues cropped up for adjudication.

> *i) Whether OS No.6 of 2015 is a proceeding for grant of probate or grant of Letters of Administration?*
>
> *ii) Whether the proceeding survives after death of both the legatees, namely, Trailokya and Sadananda?*

10. The petition in Misc. Case No.26 of 1992 filed under Section 278 of the Act in the Court of learned District Judge, Cuttack with the following prayer:-

> *"The petitioners therefore pray that letters of administration of the Estate of Saria Bewa deceased with the Will annexed be granted to the petitioners;*
> *And for this act of kindness the petitioners as in duty bound shall ever pray."*

The contents of the petition filed by both the beneficiaries of the WILL as well as relief claimed therein clearly disclose that it was for grant of letters of administration and not for probate.

11. Section 222 of the Act has made it clear that a probate of WILL can be granted only to the executor appointed by the WILL. Sub-section (2) of Section 222 of the Act clarifies that the appointment of an executor may be in express terms or by necessary implication. In the instant case, the language of the WILL (at Flag-'C' of CMP No.1626 of 2016) clearly indicates that the testatrix expressly appointed Trailokya and Sadananda as executors to probate the WILL in competent Court of law. Thus, the submission of Mr. Bhuyan, learned counsel for the Petitioners that no executors were appointed by the WILL, is not correct. Upon death of Trailokya, his legal heirs have already been substituted. The impugned order came to be passed when learned trial Court dealt with an application under Order XXII Rule 3 CPC for substitution of deceased Sadananda. Although the WILL authorized Trailokya and Sadananda to move the competent Court of law for grant of probate, but an application under Section 278 for grant of letters of administration has been filed by both of them. Grant of probate under Section 276 of the Act should not be confused with grant of Letters of Administration. There cannot be any quarrel on the position of law that a Probate of the WILL can only be granted to an executor appointed by the said WILL, but the said principles is not applicable to an application for grant of Letters of Administration under Section 278 of the Act. For administration of the estate of the testator, a petition for grant of letters of administration with the WILL can be made even if no executor has been appointed.

11.1 Section 232 of the Act reads as under:-

> ***"232. Grant of administration to universal or residuary legatees.—When—***
> *(a) the deceased has made a will, but has not appointed an executor, or*
> *(b) the deceased has appointed an executor who is legally incapable or refuses to act, or who has died before the testator or before he has proved the will, or*
> *(c) the executor dies after having proved the will, but before he has administered all the estate of the deceased, an universal or a residuary legatee may be admitted to prove the will, and letters of administration with the will annexed may be granted to him of the whole estate, or of so much thereof as may be unadministered."*

The provision makes it abundantly clear that even a universal or residuary legatee may be admitted to prove the WILL and Letters of Administration with the WILL may be granted to him of the whole estate or of so much thereof as may be unadministered. Thus, in absence of an executor, a proceeding for grant of Letters of Administration can be maintained and continued by the universal or residuary legatee. The residuary legatee has been described under Section 102 of the Act. It reads as under:-

> *"102. Constitution of residuary legatee.—A residuary legatee may be constituted by any words that show an intention on the part of the testator that the person designated shall take the surplus or residue of his property."*

On the other hand, a universal legatee is one who, by virtue of the WILL is entitled to whole of the testator's property. Further, Section 234 of the Act makes it explicit that when there is no executor and no residuary legatee or representative of a residuary legatee or he declines or incapable to act, or cannot be found, the person(s) who would be entitled to the administration of the entire estate of the deceased, if he had died intestate, or any other legatee having a beneficial interest, or a creditor, may be admitted to prove the WIL, and Letters of Administration may be granted to him or them accordingly. Keeping in mind the aforesaid principles, the cases at hand require consideration.

11.2 The instant case being not case under Section 276 of the Act, as discussed earlier and the proceeding being under Section 278 of the Act, the restriction under Section 222 of the Act is not applicable. In view of the above, the proceeding does not come to an end on the death of the executors, as contended by Mr. Mishra, learned Senior Advocate for the contesting Opposite Parties. In the case of ***Jadeja Pravinsinhji Anandsinhji (supra)***, Gujarat High Cour reiterated the principles under Section 232 of the Act. In the case of ***Pramodini Pattnaik (since dead) Vs. Smt. Jayashree Tarai and another***, reported in 2015 SCC Online Ori 491, this Court discussing the provisions under Section 211 of the Act, held as under:-

> *"10. Section 211 thus postulates the executor or administrator, as the case may be, of a deceased person, is his 'legal representative' for all purposes with regard to property covered under the testament, i.e., the Will. However, Section 213 of the Act makes it clear that no right as executor or legatee can be established in any Court of justice unless a Court of competent jurisdiction in India grants probate of the Will under which the right is claimed by the executor or the legatee. Section 2(11) of the CPC defines 'legal representative' as follows:-*

> *"2(11) "Legal Representative" means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued;"*
>
> *11. It emanates from the definition that legal representative is a person, who in law represents the estate of a deceased person and includes any person who intermeddles with the estate of the deceased. From the provisions of law as discussed above, it is to be seen as to whether the petitioner, who is undisputedly the executor of the Will dated 24.10.2005, can be treated to be the legal representative of the sole deceased appellant. It leaves no room for doubt that the legal representative is only entitled to continue the suit or appeal, as the case may be, on the basis of the claim laid by the deceased plaintiff and/or appellant……"*

In the instant case, both Trailokya and Sadananda are the universal legatees. In view of the provisions of the Act and case law discussed above, it can be safely said that a legatee includes his/her legal representative also. Thus, applying the principles in the case of ***Pramodini Pattanaik (supra),*** the Petitioners being the legal representatives of Sadananda, are competent to maintain and continue the proceeding for grant of Letters of Administration including the legal heirs of Trailokya, who have already been substituted.

11.3 Although Mr. Mishra, learned Senior Advocate contended that Trailokya and Sadananda were granted authority to probate the WILL only, but law does not prohibit them to file an application under Section 278 of the Act for grant of Letters of Administration. Even in a proceeding under Section 276 of the Act for grant of probate, the Court is competent in the facts and circumstances of a particular case to grant Letters of Administration, as would be clear from the ratio in the case of ***Dillip Kumar Mohapatra (supra)***. In the said case law, this Court observing in the fact and circumstances of the said case that no Probate can be granted, held that it would be appropriate for the Court to grant Letters of Administration with the WILL annexed, to the legatee under Section 232 of the Act. Provisions under Order XXII CPC is not strictly applicable to the provisions under the Act. But the principles laid down therein has application to the principles enumerated therein may be followed to regularize and to continue the proceeding under the provisions under the Act. As discussed earlier, a legatee includes his or her legal representative also. Thus, learned trial Court committed an error in refusing to substitute the legal heirs of Saria Bewa.

12. In view of the above, this Court answering the issue No.(i) holds that the proceedings in OS No.6 of 2015 is a proceeding for grant of Letters of Administration and not a Probate proceeding. In answer to the issue No.(ii), this Court holds that the legal representatives of Sadananda so also Trailokya can maintain and continue the proceeding filed under Section 278 of the Act. Hence, the composite impugned order dismissing the application under Order XXII Rule 3 CPC as well as allowing the application filed by the Opposite Parties to dismiss the probate proceeding as not maintainable, is set aside.

12.1 OS No.6 of 2015 is restored to file and the matter is remitted to learned Civil Judge (Senior Division), 1st Court, Cuttack to adjudicate the matter in accordance with law by bringing on record the legal representatives of Sadananda.

13. Both the CMPs are allowed to the aforesaid extent. However, in the facts and circumstances, there shall be no order as to costs.

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2024 (II) ILR-CUT-148

B.P. ROUTRAY, J.

CRLA NO. 880 OF 2022

MOHAMMED MOQUIM ……Appellant

-V-

STATE OF ODISHA (VIGILANCE) ……Respondent

(A) INDIAN PENAL CODE, 1860 – Section 120A & Section 120B – Criminal conspiracy – How the criminal conspiracy can be satisfied? – Held, direct evidence in proof of a conspiracy is seldom available – It can be satisfied through circumstantial evidence with necessary implications – Case laws discussed.

(B) INDIAN PENAL CODE, 1860 – Sections 468, 471, 420 and 120B – The appellant applied with his signature in the capacity of Managing Director of M/S Metro Builders Pvt. Ltd for grant of loan by submitting forged, fabricated document – Whether a company could be prosecuted for the offences? – Held, Yes – If the person or group of persons who control the affairs of the company commit an offence with a criminal intent, their criminality can be imputed to the company as well as they are alter ego of the company. (Paras 28-30)

Case Laws Relied on and Referred to :-

1. (2009) 6 SCC 564 : Baldev Singh Vs. State of Punjab.
2. AIR 2003 SC 2748 : Ram Narayan Poply Vs- CBI.
3. (1996) 4 SCC 659 : State of Maharashtra Vs. Som Nath Thapa.
4. (2009) 8 SCC 751 : Mohd. Ibrahim Vs. State of Bhihar.
5. (2015) 4 SCC 609 : Sunil Bharati Mittal Vs. C.B.I.
6. (2019) 17 SCC 193 : Shiv Kumar Jatia Vs. State (NCT) of Delhi).

For Appellant : Mr.Pitambar Acharya, Sr. Advocate

For Respondent : Mr.S.Das, Sr. Standing Counsel (Vigilance)
Mr.S.K.Das, Standing Counsel (Vigilance)

JUDGMENT Date of Judgment :10.04.2024

B.P. ROUTRAY, J.

1. The Appellant has been convicted for commission of offences under Sections 468, 471, 420 and Section 120-B of the Indian Penal Code and sentenced to

undergo rigorous imprisonment for three years for each such offence along with payment of fine of Rs.50,000/-.

2. Appellant is the Managing Director of M/s. Metro Builders Pvt. Ltd. There were five accused persons and the present Appellant was Accused No.4. Accused No.1 (Vinod Kumar) was the Managing Director of Orissa Rural Housing Development Corporation (ORHDC) and Accused No.2 (Swosti Ranjan Mohapatra) was its Company Secretary. Accused No.3 was M/s. Metro Builders Pvt. Ltd. and Accused No.5 was the Director of M/s. Metro Builders Pvt. Ltd.

3. Prosecution case in brief is that ORHDC, incorporated on 19th August 1994 before the Registrar of Companies, is a Government owned Corporation and its objective was to act as the principal institution for financing, promoting and developing the rural housing and related activities. Accused No.1 & 2, who are the Managing Director and Company Secretary of ORHDC, while discharging their public duties as such, have illegally sanctioned and disbursed the loan amount of Rs.1.5 Crore to M/s. Metro Builders Pvt. Ltd. by abusing their position and without such financial power on their part and without keeping adequate security for the loan amount, and thereby caused wrongful financial loss to ORHDC. It is alleged that M/s. Metro Builders Pvt. Ltd. was a known defaulter to ORHDC as they had not repaid the previous loan amount of Rs.1 Crore taken for their project Metro City I. Present Appellant being its Managing Director managed to get further loan amount of Rs.1.5 Crore along with other co-accused (Piyushdhari Mohanty) in the guise of its new project Metro City II in conspiracy with Accused No.1 and 2, who are the officials of ORHDC. Out of said loan amount of Rs.1.5 Crore, Rs.50 lakhs was adjusted towards repayment of the previous loan of Rs.1 Crore. Further, the loan was disbursed in favour of the Appellant and his company without execution of any registered mortgage deed or tripartite agreement. It is alleged that though the loan of Rs.1.5 Crore was availed for the purpose of construction of apartment, the tripartite agreement between ORHDC, loanee builder and the flat owners was required to be executed. Further, the entire loan amount was disbursed on 28th August 2000 without the authority of the Board of Directors of ORHDC and without having requisite financial power by the Managing Director, ORHDC. The Managing Director, ORHDC did not have any financial power to sanction any loan amount, but only for the first time the Board of Directors authorized the Managing Director in its meeting dated 31st August 2000, i.e. three days after the sanction of alleged loan amount, to sanction the loan up to Rs.5,00,000/- only. So the Managing Director of ORHDC was not authorized to sanction any loan amount prior to 31st August 2000 that too to the extent of Rs.1.5 Crore. It is also alleged that the loan amount was sanctioned in favour of the Appellant and M/s. Metro Builders Pvt. Ltd. in conspiracy between all the accused persons and for that purpose many documents were forged by the Appellant and the rules have been violated. The Appellant managed to get further loan of Rs.1.5 Crore in the guise of the project Metro City II without paying the previous loan amount taken from ORHDC and by forging the

documents like fire certificate and other documents. Such forged documents have been used by the Appellant and other accused persons as genuine documents with knowledge and reason to believe the same as forged documents.

4. The Appellant denied the charge and pleaded innocence with false implication.

5. Learned trial court formulated five points for determination and in the context of present Appellant, it is important to determine that, whether he committed forgery? Secondly, whether the Appellant fraudulently and dishonestly used the document as genuine knowingly or having reason to believe the same to be forged documents, while getting sanction and disbursal of the loan amount from ORHDC ? Thirdly, whether forgery is committed with intention that the documents so forged would be used for cheating to ORHDC? Fourthly, whether to get sanction and disbursal of such loan amount from ORHDC, the Appellant had conspired with other accused persons?, Fifthly, whether the Appellant along with other co-accused persons has cheated and dishonestly induced the ORHDC to disburse such loan amount by acceptance of forged documents as genuine?

6. Prosecution in order to prove their case have examined seventeen witnesses and marked thirty seven documents as exhibits. On the other hand, the defence did not examine any witness and only marked the documents under Ext.A to S in support of its case.

7. The status of the Appellant as the Managing Director of M/s. Metro Builders Pvt. Ltd. is admitted. Similarly, the status of other accused persons as the M.D. and Company Secretary of ORHDC and Director of M/s. Metro Builders Pvt. Ltd. are also admitted. M/s. Metro Builders Pvt. Ltd. applied for the loan on 24th June 2000 and the amount was disbursed on 28th August 2000. The loan amount was to the tune of rupees one crore fifty lakhs. Prior to that, M/s. Metro Builders Pvt. Ltd. had also availed previous loans from ORHDC and it had not repaid the same entirely. There was outstanding amount of rupees fifty lakhs against M/s. Metro Builders Pvt. Ltd. and while sanctioning and disbursing present loan amount of Rs.1.5 crores, Rupees fifty lakhs was adjusted towards the outstanding of previous loan amount. Prosecution alleges that all the accused persons were in criminal conspiracy for grant of loan of such amount to the tune of Rs.1.5 crore in favour of M/s. Metro Builders Pvt. Ltd. and in execution of the agreement between them, such huge amount of loan was sanctioned and disbursed illegally by forging the documents and without keeping proper security and without verification of documents. In the process, the financial advisor, i.e. Executive Director (Finance) of ORHDC was kept out of the fray and the empanelled legal advisor of ORHDC was not consulted. M/s. Metro Builders Pvt. Ltd. being a loan defaulter to ORHDC is not eligible to get further loan and the loan was disbursed by submission of forged documents. Further, the loan was sanctioned and disbursed by accused no.1 without having any financial power on his part. For the purpose of loan, the Appellant submitted and used forged

estimate, forged permission and plan of BDA, forged fire prevention document and opinion of unauthorized Advocate (who is not an empanelled Lawyer of ORHDC).

8. The charges against the Appellant in substance is that, the Appellant being the M.D. of M/s. Metro Builders Pvt. Ltd. in criminal conspiracy with other accused persons has deceived and induced ORHDC to disburse loan amount of Rs.1.5 crores by cheating and using forged documents as genuine.

9. It is the allegation that during July and August, 2000, accused number 1 & 2 while discharging their public duties as the Managing Director and Company Secretary of ORHDC respectively, abused their official position and by making criminal conspiracy with present Appellant and other co-accused persons have illegally sanctioned and disbursed loan to the tune of Rs.1.5 crores to M/s. Metro Builders Pvt. Ltd. without any financial power on the part of accused no.1 and without keeping adequate security for the loan amount and thereby cheated ORHDC causing wrongful loss. The Appellant being the M.D. of M/s. Metro Builders Pvt. Ltd. deceived and cheated ORHDC in conspiracy with other accused persons to receive aforesaid loan amount of Rs.1.5 crores by using forged documents. No registered mortgage deed was executed nor any tripartite agreement was furnished to receive the loan amount and original documents were not submitted. The loan amount was also not repaid and on the date of registration of F.I.R. the outstanding amount was to the tune of Rs.168.47 lakhs which was enhanced to Rs.622.25 lakhs as on 30th October, 2007.

10. Mr. Acharya, learned senior counsel submits on behalf of the Appellant that mere inability to repay the loan amount cannot be treated as cheating and the same cannot give rise for criminal prosecution against the defaulter. It is further submitted that the allegations about forged estimate and plan has been disproved by the officials of BDA (Bhubaneswar Development Authority) and the allegations about submission of forged fire prevention certificate has not been substantiated through adequate evidence. He further submits that the Managing Director of a company cannot be held liable for the actions of the company unless sufficient evidences of his active role are there coupled with criminal intent.

11. Mr. Das, learned senior standing counsel submits on the other hand that, entire series of actions starting from application for loan coupled with the circumstances that the applicant was a loan defaulter and the sanctioning authority did not have any financial power to sanction such huge amount of loan, that too violating the procedures without keeping equitable mortgage against the loan amount and without keeping the original documents of property, do justify the criminal conspiracy by agreement between all the accused persons including the Appellant with intention to cheat the Corporation (ORHDC). The Appellant also used forged documents as genuine knowingly for getting the loan from ORHDC.

12. In the case at hand, as stated above, the status of the Appellant as the Managing Director of M/s. Metro Builders Pvt. Ltd., in whose favour the loan

amount was disbursed, remains admitted. The Appellant in his statement under Section 313 of the Cr.P.C. has admitted the same. Further, from the trend of cross-examination of prosecution witnesses it is seen that such position of the Appellant as M.D. of M/s. Metro Builders Pvt. Ltd. is never disputed.

13. So far as sanction and disbursal of loan amount in question in favour of M/s. Metro Builders Pvt. Ltd. is concerned, the same also remains admitted in the statement of the Appellant and other co-accused persons under Section 313 of the Cr.P.C. This aspect of disbursal of loan amount is never questioned by any of the accused persons. M/s. Metro Builders Pvt. Ltd. had applied for loan with the signature of the Appellant as its Managing Director and the loan file was processed in ORHDC. According to the evidence of P.W.9, the Financial Advisor-cum-Chief Accounts Officer, the Project Finance File (Ext.13) in respect of Metro City II of M/s. Metro Builders Pvt. Ltd. was initiated for sanction of loan amount of Rs.1.5 Crores. The file was processed by Accused No.2 and put up before the M.D. of ORHDC (Accused No.1), who sanctioned the loan vide order dated 5th July 2000. The loan amount was disbursed through different cheques enchased in favour of M/s. Metro Builders Pvt. Ltd. on different dates. The last phase of the loan was released on 28th August 2000. It is further stated by P.W.9 that though he did not have detail knowledge about outstanding amount of previous loan on M/s. Metro Builders Pvt. Ltd., but a sum of Rs.50 lakhs from the present loan amount was adjusted towards the outstanding of earlier loan. In his cross-examination, the Appellant did not dispute sanction and disbursal of aforesaid loan amount in favour of M/s. Metro Builders Pvt. Ltd. On the other hand, the Appellant had cross-examined this P.W.9 regarding the jurisdiction and competency of Accused No.1 to sanction the loan and his financial power to do so. The other accused persons including Accused No.1, who sanctioned the loan, also did not question anything to P.W.9 disputing disbursal of loan amount up-to the tune of Rs.1.5 Crores in favour of M/s. Metro Builders Pvt. Ltd.

14. In this case, the I.O. namely K.S.Balabantaray, who did major part of investigation, died during pendency of the trial. So he could not be examined as a witness in the trial. The subsequent I.O., who submitted the charge-sheet, has been examined as P.W.15. He has stated about the seizure of the file regarding processing of loan amount and other documents justifying the disbursal of such loan in favour of M/s. Metro Builders Pvt. Ltd. The note sheets of account statements for Metro City II project of M/s. Metro Builders Pvt. Ltd. has been marked under Ext.36. As per Ext.36, the outstanding as on 22nd December 2002 was Rs.1,29,68,909/-. Ext.37 is the accounts statement of loan, which shows outstanding of Rs.6,22,25,214/- as on 6th November 2007. Therefore, from analysis of the evidence of P.W.9, 15 and other witnesses as well as the statement of the Appellant and other accused persons recorded under Section 313 of the Cr.P.C., and from the trend of cross-examination of the witnesses, it is established that loan amount of Rs.1.5 Crores was sanctioned and disbursed in favour of M/s. Metro Builders Pvt. Ltd. being applied by it with

signature of the Appellant, and the same remained unpaid as on 6th November 2007 with outstanding amount of Rs.6,22,25,214/-.

15. Defence has not brought any evidence or material regarding repayment of loan amount after 6th November 2007. Prosecution also remained silent about the status of unpaid loan as on the date of completion of trial or thereafter. In the appeal before this court, neither party raises any submission regarding repayment of the loan amount subsequently or its status thereafter.

16. It is next to be seen if such loan amount was received by the Appellant as Managing Director of M/s.Metro Builders Pvt. Ltd. in fraudulent and dishonest manner by using forged documents to cheat ORHDC. It is borne from prosecution evidence that on the date of application for loan, M/s. Metro Builders Pvt. Ltd. was a known defaulter having heavy outstanding against him. Ext.32 is the certified note sheets relating to sanction and disbursal of previous project loan in respect of Metro City – I and as per the same, the outstanding dues as on 5th July 2000 over M/s. Metro Builders Pvt. Ltd. was Rs.1,34,44,390/-. It is the consistent evidence of P.W.9, the Financial Advisor of ORHDC that on the date of application, such huge amount of outstanding was there against M/s. Metro Builders Pvt. Ltd.

17. P.W.14 is the Secretary to Government in Housing and Urban Development Department and Chairman of ORHDC. He has stated in his evidence that, the MD of ORHDC had no financial power to sanction the loan prior to 31.08.2000. For the first time, power to sanction individual housing loan up-to rupees five lakhs was granted in favour of the MD of ORHDC (Accused No.1) in the 21st Board Meeting of ORHDC held on 31.08.2000. He has further stated that, there was no *post facto* approval of the loan sanctioned by the MD of ORHDC and there was absolutely no authorization given by the Board to the MD of ORHDC for sanctioning housing loan prior to 31.08.2000. The powers of the MD has been specifically mentioned in Article 131 (2) of the Articles of Association (Ext.B), which does not authorize the MD to sanction and disburse any loan. It is further stated by P.W.14 that, fiscal prudence requires specific power of an authority to grant, sanction and disburse loan. But here the MD of ORHDC (Accused No.1) did not have any such power to sanction and disburse loans prior to 31.08.2000. This evidence of P.W.14 could not be assailed in his cross-examination.

P.W.9 is the Financial Advisor-cum-Chief Accounts Officer of ORHDC. He has also stated in his evidence that, present loan was sanctioned by the MD beyond his authority and jurisdiction and the file was not processed through him (P.W.9). The loan sanction file (Ext.13) was directly processed by the Company Secretary (Accused No.2) and approved by Accused No.1 to sanction and disburse the loan amount. In the process, the financial advisor of the institution has been ignored and by-passed. So from analysis of the evidences of P.W.14, P.W.9 and Ext.B, it is clearly established that, the loan to the tune of Rs.1.5 crores was illegally sanctioned and disbursed in favour of M/s. Metro Builders Pvt. Ltd. violating procedural rules.

18. Prosecution alleges that, to get sanctioned and disbursal of such loan amount, present Appellant being the MD of M/s. Metro Builders Pvt. Ltd. had submitted certain forged documents such as, BDA Plan Approval Letter, Estimate and No Objection Certificate of the Fire Prevention Officer. The Appellant also used the legal opinion of an unauthorized Advocate in his support.

19. Coming to see the Plan Approval Letter of Bhubaneswar Development Authority (BDA), the relevant witnesses are P.W.1, 3, 7 & 8, who are the officials of BDA. P.W.1 is the Junior Assistant, who spoke about seizure of two files, P.W.3 is the Enforcement Officer, P.W.7 is the Assistant Town Planner and P.W.8 is the Planning Assistant of BDA.

P.W.3 has said that upon direction of higher authority he had made a confidential enquiry on the allegations against the then Assistant Town Planner namely, Sudhir Ranjan Mohanty in connection with the Building Plan Approval of M/s. Metro Builders Pvt. Ltd., and during enquiry it is found that, the then Town Planning Staff had fraudulently approved the 2nd phase construction plan (Metro City-II) in connivance with Metro Builders. P.W.7, who was the Assistant Town Planner, has said in his evidence that, the Appellant as the MD of M/s. Metro Builders Pvt. Ltd. submitted the application for approval of construction of residential apartment up-to sixth floor on 28.08.1998 along with necessary documents. The documents include Ext.C – the No Objection Certificate of Fire Prevention Officer and Ext.E – the Structural Safety Certificate. The plan was approved on 26th September, 1998 and the approval letter is marked under Ext.3/17.

20. According to the evidence of P.W.3, lots of irregularities were committed by the then Assistant Town Planner of BDA and Junior Town Planner in connivance with the applicant to get the Plan Approval Letter. It is true that the plan was approved by the Chairman of BDA, who is the competent authority and based on his approval order; the letter under Ext.3/17 was issued. The said plan approval letter was never recalled or cancelled by the BDA. At this stage, it is now important to look into the prosecution allegations about the No Objection Certificate (Ext.C). Prosecution alleges that, the No Objection Certificate (Fire Safety Certificate) with regard to prevention of fire as submitted by the Appellant to get the plan approved in favour of M/s. Metro Builders Pvt. Ltd. is a forged document. In this regard the evidence of P.W. 17 is pressed into. Said P.W.17 is the State Fire Prevention Officer and he has stated that no such "No Objection Certificate" was ever issued to the Advisor-cum-Planning Member of BDA relating to multi-storey building complex of Metro City. He has further stated that the 'No Objection Certificate' marked under Ext.C is a forged and fabricated document.

It needs to be mentioned here that Ext.C marked by the Appellant during cross-examination of P.W.7 is the purported letter of the Fire Prevention Officer, Odisha in letter no.216/FPW dated 23rd July 1998, addressed to the Advisor-cum-Planning Member of BDA relating to issue of NOC on fire safety point of the proposed building complex-Metro City. P.W.17 was working as the Fire Prevention

Officer, Odisha on 23rd July 1998 and he produced the copy of the dispatch register of his office from 21st to 30th July 1998 to justify that no such letter as per Ext.C was ever issued by their office. Rather letter no.216 was issued on 27th July 1998 and addressed to the Station Officer of Nilagiri Fire Station. Said P.W.17 has also clarified this in his letter No.6/FPW dated 5th August 2005 marked under Ext.30.

There has been an attempt made through cross-examination of said P.W.17 to say that Ext.C was issued by his predecessor namely, Biranchi Narayan Mohapatra. But this statement of P.W.17 made in his cross-examination is found unbelievable and appears to be a development. It is for the reason that, P.W.17 has not stated anything about issuance of Ext.C by his predecessor in his letter under Ext.30 nor had he stated anything about Biranchi Narayan Mohapatra in his statement made before the I.O. under Section 161 of the Cr.P.C. Further, it is mentioned by P.W.17 in his examination in chief that, there is one post of Fire Prevention Officer for the State of Odisha, who is only competent to issue 'No Objection Certificate' regarding fire safety, and he has said in his cross-examination that Biranchi Narayan Mohapatra was working as Fire Station Officer (not same as Fire Prevention Officer). Therefore, the evidence of P.W.17 as stated in his examination in chief remains firm and could not be demolished by the defence in the cross-examination. It is further noticed that, P.W.17 was examined in chief on 1st February 2019, when the Appellant did not cross-examine him and this witness was cross-examined by the Appellant and Accused No.5 on 9th July 2019. Thus, on analysis of the evidence of P.W.17 and the I.O. (P.W.15) as well as from the contents of the Ext.30 and Ext.C, it is established that Ext.C, which was submitted by the Appellant to BDA for approval of the plan, is a forged document.

Undoubtedly, 'No Objection Certificate' regarding fire safety is one of the essential documents required to be submitted for getting approval of the plan in respect of a multi-storey building complex. When the 'No Objection Certificate' under Ext.C is proved to be a forged document and utilized by the Appellant to get the plan approved by BDA, the consequent approval of the plan in plan approval letter under Ext.3/17 is proved to be the forged one also.

21. Regarding submission of the estimate, it is seen that P.W.16 is the Proprietor of 'Development Engineers', who has stated in his evidence that, the estimate submitted by M/s. Metro Builders Pvt. Ltd. and available in the project finance file under Ext.13 has not been issued by him. The signature appearing therein is not of him, and the seal and signature appearing in the so called certificate of 'Development Engineers' is forged. He has further stated that, the certificate under Ext.13/11 and the estimate under Ext.13/12 are forged documents. The defence has been failed to bring anything in his cross-examination to demolish his evidence except the statement that Ext.13/11 and Ext.13/12 could have been issued by any other official. A thorough analysis of the evidence of P.W.16 justifies the prosecution case that the certificate and estimate under Ext. 13/11 and Ext. 13/12 submitted by M/s. Metro Builders Pvt. Ltd. for sanction of loan, are forged documents. It is to be

mentioned here that, the defence does not dispute the authority of P.W.16 as the source and author of the documents under Ext.13/11 and Ext.13/12. When the authority of P.W.16 as the Proprietor of 'Development Engineers' is not disputed and P.W.16 denies his signature and seal on the document, no reason is left to deny the documents as forged.

22. The legal opinion used in the process of sanction of loan was given by an Advocate namely, Purna Chandra Rath (P.W.13). He is not the empanelled lawyer of ORHDC. One Shri Pratap Kumar Das was the sole legal retainer of ORHDC during the period 2000-01. It is not that the opinion of a legal expert not authorized by ORHDC was used for processing the file for sanction of the loan, but it is interesting to see the note sheet under Ext.13 where it is mentioned that "*the legal opinion obtained from our legal retainer opined that the land offered, is free from any litigation and is suitable to be taken as a mortgage as a security against the loan.*" Therefore, the use of legal opinion of P.W.13 stating that the same is the opinion of the legal retainer of ORHDC is itself illegal and cannot be treated as a safe and reliable document for the purpose of granting loan. Accordingly prosecution is found to have satisfied its case here also.

23. Apart from above, several other irregularities have been brought on record through prosecution evidence. First of all, no equitable mortgage in respect of the property has been created for the loan amount keeping the original title deeds. Secondly, against the valuation of the property at Rs.25 lakhs, loan of Rs.1.5 Crores was disbursed. Thirdly, not a single original document was kept in the file (Ext.13) before disbursal of the loan amount. P.W.9, who is the financial head of the Institution (ORHDC), has not been consulted nor the file was routed through him.

24. In order to satisfy the ingredients to constitute the offence of cheating, there should be fraudulent or dishonest inducement of the person deceived by the accused who intentionally induced him to deliver the property. It is needless to say that a person who dishonestly induced any person to deliver any property is liable for the offence of cheating. Having analyzed the evidences and the circumstances brought on record through evidence, it is seen that all the accused persons have acted in tandem with agreement between them to disburse the loan amount of Rs.1.5 Crores in favour of M/s. Metro Builders Pvt. Ltd. The offence of criminal conspiracy can be satisfied through circumstantial evidence with necessary implications. In ***Baldev Singh vs. State of Punjab, (2009) 6 SCC 564***, the Hon'ble Supreme Court has held as follows:-

> "**17.** Conspiracy is defined in Section 120-A IPC to mean:
>
> "120-A. *Definition of criminal conspiracy*.—When two or more persons agree to do, or cause to be done,—
>
> (1) an illegal act, or
>
> (2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy:

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

Explanation.—It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object."

An offence of conspiracy which is a separate and distinct offence, thus, would require the involvement of more than one person. Criminal conspiracy is an independent offence. It is punishable separately, its ingredients being:

(i) an agreement between two or more persons;
(ii) the agreement must relate to doing or causing to be done either
(a) an illegal act;
(b) an act which is not illegal in itself but is done by illegal means.

It is now, however, well settled that a conspiracy ordinarily is hatched in secrecy. The court for the purpose of arriving at a finding as to whether the said offence has been committed or not may take into consideration the circumstantial evidence. While however doing so, it must be borne in mind that meeting of the mind is essential; mere knowledge or discussion would not be sufficient.

18. Adverting to the said question once again, we may, however, notice that recently in *Yogesh v. State of Maharashtra* [(2008) 10 SCC 394 : (2009) 1 SCC (Cri) 51 : (2008) 6 Scale 469] a Division Bench of this Court held: (SCC p. 402, para 25)

"25. Thus, it is manifest that the meeting of minds of two or more persons for doing an illegal act or an act by illegal means is sine qua non of the criminal conspiracy but it may not be possible to prove the agreement between them by direct proof. Nevertheless, existence of the conspiracy and its objective can be inferred from the surrounding circumstances and the conduct of the accused. But the incriminating circumstances must form a chain of events from which a conclusion about the guilt of the accused could be drawn. It is well settled that an offence of conspiracy is a substantive offence and renders the mere agreement to commit an offence punishable, even if an offence does not take place pursuant to the illegal agreement."

19 . Yet again in *Nirmal Singh Kahlon v. State of Punjab* [(2009) 1 SCC 441 : (2009) 1 SCC (Cri) 523 : (2008) 14 Scale 639] this Court following *Ram Lal Narang v. State (Delhi Admn.)* [(1979) 2 SCC 322 : 1979 SCC (Cri) 479] held that a conspiracy may be a general one and a separate one meaning thereby a larger conspiracy and a smaller conspiracy which may develop in successive stages. For the aforementioned purpose, the conduct of the parties also assumes some relevance.

20. In *K.R. Purushothaman v. State of Kerala* [(2005) 12 SCC 631 : (2006) 1 SCC (Cri) 686] this Court held: (SCC pp. 636-38, paras 11 & 13)

"11. Section 120-A IPC defines 'criminal conspiracy'. According to this section when two or more persons agree to do, or cause to be done (i) an illegal act, or (ii) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy. In *Major E.G. Barsay v. State of Bombay* [AIR 1961 SC 1762 : (1962) 2 SCR 195] Subba Rao, J., speaking for the Court has said: (AIR p. 1778, para 31)

'31. … The gist of the offence is an agreement to break the law. The parties to such an agreement will be guilty of criminal conspiracy, though the illegal act agreed to be done has not been done. So too, it is not an ingredient of the offence that all the parties should agree to do a single illegal act. It may comprise the commission of a number of acts.'

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> 13. To constitute a conspiracy, meeting of minds of two or more persons for doing an illegal act or an act by illegal means is the first and primary condition and it is not necessary that all the conspirators must know each and every detail of the conspiracy. Neither is it necessary that every one of the conspirators takes active part in the commission of each and every conspiratorial act. The agreement amongst the conspirators can be inferred by necessary implication. In most of the cases, the conspiracies are proved by the circumstantial evidence, as the conspiracy is seldom an open affair. The existence of conspiracy and its objects are usually deduced from the circumstances of the case and the conduct of the accused involved in the conspiracy. While appreciating the evidence of the conspiracy, it is incumbent on the court to keep in mind the well-known rule governing circumstantial evidence viz. each and every incriminating circumstance must be clearly established by reliable evidence and the circumstances proved must form a chain of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn, and no other hypothesis against the guilt is possible. Criminal conspiracy is an independent offence in the Penal Code. The unlawful agreement is sine qua non for constituting offence under the Penal Code and not an accomplishment. Conspiracy consists of the scheme or adjustment between two or more persons which may be express or implied or partly express and partly implied. Mere knowledge, even discussion, of the plan would not per se constitute conspiracy. The offence of conspiracy shall continue till the termination of agreement."

25. Further, the Supreme Court has explained in ***Ram Narayan Poply Vs- CBI, AIR 2003 SC 2748***, that, "Privacy and secrecy are more characteristics of conspiracy, than of a loud discussion in an elevated place open to public view. Direct evidence in proof of a conspiracy is seldom available. Offence of conspiracy can be proved by either direct or circumstantial evidence. It is not always possible to give affirmative evidence about the date of the formation of the criminal conspiracy, about the persons who took part in the formation of the conspiracy, about the object, which the objectors set before themselves as the object of conspiracy, and about the matter in which the object of conspiracy is to be carried out, all this is necessarily a matter of inference."

26. In ***State of Maharashtra vrs. Som Nath Thapa, (1996) 4 SCC 659***, it is observed that, to establish a charge of conspiracy 'knowledge' about indulgence in either an illegal act or a legal act by illegal means is necessary. In some cases, intent of unlawful use being made of the goods or services in question may be inferred from the knowledge itself. This apart, the prosecution has not to establish that a particular unlawful use was intended, so long as the goods or service in question could not be put to any lawful use. Finally, when the ultimate offence consists of a chain of actions, it would not be necessary for the prosecution to establish, to bring home the charge of conspiracy, that each of the conspirators had the knowledge of what the collaborator would do, so long as it is known that the collaborator would put the goods or service to an unlawful use.

27. As discussed earlier, the documents under Ext.C, Ext.3/17, Ext.12/11 and Ext.13/12 are proved as forged documents. Section 464 of the IPC defines making a false document and Section 468 provides that whoever commits forgery intending that the documents shall be used for the purpose of cheating, shall be punished with

imprisonment of such description. Section 471 provides that whoever fraudulently and dishonestly uses as genuine knowingly or having reason to believe to be a forged document, shall be punished for such description. An analysis of Section 464, 468, 470 and 471 of the IPC makes it understand of making a false document by forgery. As per Section 463, whoever makes any false document intending to cause damage or injury to the public or to any person, or to cause any person to part with property, or with intent to committee fraud or that fraud may be committed, is said to have committed forgery.

The documents narrated above, have been used by the Appellant as the M.D. of M/s. Metro Builders Pvt. Ltd. to get the loan disbursed in favour of his company. Use of such forged documents coupled with the circumstances discussed earlier that how the loan was processed for disbursal are enough to attract the offences under Sections 468/471 along with the offence of cheating under Section 420 of the IPC. To constitute an offence of cheating under Section 415 of the IPC, it is required to be established that a person has been induced, either fraudulently or dishonestly, to deliver any property to any person. In ***Mohd. Ibrahim vrs. State of Bhihar, (2009) 8 SCC 751***, the Hon'ble Supreme Court has observed that, for the offence of cheating, there should not only be the cheating, but as a consequence of such cheating, the accused should also have dishonestly adduced the person deceived to delivery any property. In the present case, when the documents under Ext.C, 3/17, 13/11, 13/12 and other documents, are established as forged and have been used to process the loan in favour of the accused company, the dishonest and fraudulent intention of the Appellant as the M.D. of the company is clearly satisfied. Use of these forged documents have resulted disbursal of the loan of Rs.1.5 Crores in favour of the company.

28. In the case at hand, it is the Appellant, who applied with his signature in the capacity of M.D. of M/s. Metro Builders Pvt. Ltd. for grant of loan. He is the applicant also before the BDA in the same capacity to get the plan approval letter. The law has been well settled in plethora of decisions regarding liability of the Directors of a company in commission of offence by the company. In ***Sunil Bharati Mittal vs. C.B.I. (2015) 4 SCC 609***, the Supreme Court while considering the circumstances, when Director/Person in-Charge of the affairs of the company can also be prosecuted, have held that a corporate entity is an artificial person which acts through its Officers, Directors, Managing Directors, Chairman etc. and if such of a company commits an offence involving mens rea, it would normally be the intent and action of that individual who would act on behalf of the company. The relevant observations are as follows:

> "**39.** In *Iridium India [Iridium India Telecom Ltd. v. Motorola Inc.*, (2011) 1 SCC 74 : (2010) 3 SCC (Cri) 1201] , the aforesaid question fell directly for consideration, namely, whether a company could be prosecuted for an offence which requires mens rea and discussed this aspect at length, taking note of the law that prevails in America and England on this issue. For our benefit, we will reproduce paras 59-64 herein: (SCC pp. 98-100)

"59. The courts in England have emphatically rejected the notion that a body corporate could not commit a criminal offence which was an outcome of an act of will needing a particular state of mind. The aforesaid notion has been rejected by adopting the doctrine of attribution and imputation. In other words, the criminal intent of the 'alter ego' of the company/body corporate i.e. the person or group of persons that guide the business of the company would be imputed to the corporation.

60. It may be appropriate at this stage to notice the observations made by MacNaghten, J. in *Director of Public Prosecutions v. Kent and Sussex Contractors Ltd*. [1944 KB 146 : (1944) 1 All ER 119 (DC)] : (KB p. 156)

A body corporate is a "person" to whom, amongst the various attributes it may have, there should be imputed the attribute of a mind capable of knowing and forming an intention—indeed it is much too late in the day to suggest the contrary. It can only know or form an intention through its human agents, but circumstances may be such that the knowledge of the agent must be imputed to the body corporate. Counsel for the respondents says that, although a body corporate may be capable of having an intention, it is not capable of having a criminal intention. In this particular case the intention was the intention to deceive. If, as in this case, the responsible agent of a body corporate puts forward a document knowing it to be false and intending that it should deceive, I apprehend, according to the authorities that Viscount Caldecote, L.C.J., has cited, his knowledge and intention must be imputed to the body corporate.

61. The principle has been reiterated by Lord Denning in *Bolton (H.L.) (Engg.) Co. Ltd. v. T.J. Graham & Sons Ltd.* [(1957) 1 QB 159: (1956) 3 WLR 804: (1956) 3 All ER 624 (CA)] in the following words: (QB p. 172)

A company may in many ways be likened to a human body. They have a brain and a nerve centre which controls what they do. They also have hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are Directors and managers who represent the directing mind and will of the company, and control what they do. The state of mind of these managers is the state of mind of the company and is treated by the law as such. So you will find that in cases where the law requires personal fault as a condition of liability in tort, the fault of the manager will be the personal fault of the company. That is made clear in Lord Haldane's speech in *Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.* [1915 AC 705 : (1914-15) All ER Rep 280 (HL)] (AC at pp. 713 & 714). So also in the criminal law, in cases where the law requires a guilty mind as a condition of a criminal offence, the guilty mind of the Directors or the managers will render the company themselves guilty.

62. The aforesaid principle has been firmly established in England since the decision of the House of Lords in *Tesco Supermarkets Ltd. v. Nattrass* [1972 AC 153 : (1971) 2 WLR 1166 : (1971) 2 All ER 127 (HL)] . In stating the principle of corporate liability for criminal offences, Lord Reid made the following statement of law: (AC p. 170 E-G)

'I must start by considering the nature of the personality which by a fiction the law attributes to a corporation. A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these: it must act through living persons, though not always one or the same person. Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. There is no question of the company being vicariously liable. He is not acting as a servant,representative,

agent or delegate. He is an embodiment of the company or, one could say, he hears and speaks through the persona of the company, within his appropriate sphere, and his mind is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company. It must be a question of law whether, once the facts have been ascertained, a person in doing particular things is to be regarded as the company or merely as the company's servant or agent. In that case any liability of the company can only be a statutory or vicarious liability.'

63. From the above it becomes evident that a corporation is virtually in the same position as any individual and may be convicted of common law as well as statutory offences including those requiring mens rea. The criminal liability of a corporation would arise when an offence is committed in relation to the business of the corporation by a person or body of persons in control of its affairs. In such circumstances, it would be necessary to ascertain that the degree and control of the person or body of persons is so intense that a corporation may be said to think and act through the person or the body of persons. The position of law on this issue in Canada is almost the same. Mens rea is attributed to corporations on the principle of 'alter ego' of the company.

64. So far as India is concerned, the legal position has been clearly stated by the Constitution Bench judgment of this Court in *Standard Chartered Bank v. Directorate of Enforcement* [(2005) 4 SCC 530 : 2005 SCC (Cri) 961] . On a detailed consideration of the entire body of case laws in this country as well as other jurisdictions, it has been observed as follows: (SCC p. 541, para 6)

'6. There is no dispute that a company is liable to be prosecuted and punished for criminal offences. Although there are earlier authorities to the effect that corporations cannot commit a crime, the generally accepted modern rule is that except for such crimes as a corporation is held incapable of committing by reason of the fact that they involve personal malicious intent, a corporation may be subject to indictment or other criminal process, although the criminal act is committed through its agents.'"

40. It is abundantly clear from the above that the principle which is laid down is to the effect that the criminal intent of the "alter ego" of the company, that is the personal group of persons that guide the business of the company, would be imputed to the company/corporation. The legal proposition that is laid down in the aforesaid judgment in Iridium India case [Iridium India Telecom Ltd. v. Motorola Inc., (2011) 1 SCC 74 : (2010) 3 SCC (Cri) 1201] is that if the person or group of persons who control the affairs of the company commit an offence with a criminal intent, their criminality can be imputed to the company as well as they are "alter ego" of the company.

41. In the present case, however, this principle is applied in an exactly reverse scenario. Here, company is the accused person and the learned Special Magistrate has observed in the impugned order that since the appellants represent the directing mind and will of each company, their state of mind is the state of mind of the company and, therefore, on this premise, acts of the company are attributed and imputed to the appellants. It is difficult to accept it as the correct principle of law. As demonstrated hereinafter, this proposition would run contrary to the principle of vicarious liability detailing the circumstances under which a Director of a company can be held liable.

42. No doubt, a corporate entity is an artificial person which acts through its officers, Directors, Managing Director, Chairman, etc. If such a company commits an offence involving mens rea, it would normally be the intent and action of that individual who would act on behalf of the company. It would be more so, when the criminal act is that of conspiracy. However, at the same time, it is the cardinal principle of criminal jurisprudence that there is no vicarious liability unless the statute specifically provides so.

> **43.** Thus, an individual who has perpetrated the commission of an offence on behalf of a company can be made an accused, along with the company, if there is sufficient evidence of his active role coupled with criminal intent. Second situation in which he can be implicated is in those cases where the statutory regime itself attracts the doctrine of vicarious liability, by specifically incorporating such a provision.
>
> **44.** When the company is the offender, vicarious liability of the Directors cannot be imputed automatically, in the absence of any statutory provision to this effect. One such example is Section 141 of the Negotiable Instruments Act, 1881. In *Aneeta Hada [Aneeta Hada v. Godfather Travels & Tours (P) Ltd.*, (2012) 5 SCC 661: (2012) 3 SCC (Civ) 350: (2012) 3 SCC (Cri) 241], the Court noted that if a group of persons that guide the business of the company have the criminal intent, that would be imputed to the body corporate and it is in this backdrop, Section 141 of the Negotiable Instruments Act has to be understood. Such a position is, therefore, because of statutory intendment making it a deeming fiction. Here also, the principle of "alter ego", was applied only in one direction, namely, where a group of persons that guide the business had criminal intent, that is to be imputed to the body corporate and not the vice versa. Otherwise, there has to be a specific act attributed to the Director or any other person allegedly in control and management of the company, to the effect that such a person was responsible for the acts committed by or on behalf of the company."

29. Similarly, in ***Shiv Kumar Jatia vrs. State (NCT) of Delhi), (2019) 17 SCC 193***, it is held that,

> "21. By applying the ratio laid down by this Court in *Sunil Bharti Mittal [Sunil Bharti Mittal v. CBI*, (2015) 4 SCC 609: (2015) 2 SCC (Cri) 687] it is clear that an individual either as a Director or a Managing Director or Chairman of the company can be made an accused, along with the company, only if there is sufficient material to prove his active role coupled with the criminal intent. Further the criminal intent alleged must have direct nexus with the accused. Further in *Maksud Saiyed v. State of Gujarat [Maksud Saiyed v. State of Gujarat,* (2008) 5 SCC 668: (2008) 2 SCC (Cri) 692] this Court has examined the vicarious liability of Directors for the charges levelled against the Company. In the aforesaid judgment this Court has held that, the Penal Code does not contain any provision for attaching vicarious liability on the part of the Managing Director or the Directors of the Company, when the accused is a company. It is held that vicarious liability of the Managing Director and Director would arise provided any provision exists in that behalf in the statute. It is further held that statutes indisputably must provide fixing such vicarious liability. It is also held that, even for the said purpose, it is obligatory on the part of the complainant to make requisite allegations which would attract the provisions constituting vicarious liability."

30. When the Appellant is the undisputed Managing Director of M/s. Metro Builders Pvt. Ltd. and he has played his active role for getting the building plan approved and the loan amount was sanctioned in favour of the company on his application, the same coupled with the irregularities committed while sanctioning the loan, the criminal intent of the appellant is established having direct nexus with the offences committed. There are sufficient evidences available on record against the Appellant for his active role played in getting the loan sanctioned in favour of the company. In addition to this, it is seen from the loan file under Ext.13 that, the loan was sanctioned on the security of the personal of guarantee, indemnity and assurance of the present Appellant as the M.D. of M/s. Metro Builders Pvt. Ltd. It is

further indicated from the evidences that the Appellant along with other co-accused persons have intentionally and knowingly used series of forged documents, as discussed above, to get the loan sanctioned in favour of accused company without any justification. It is true that mere inability to repay the loan amount would not give rise to criminal prosecution. But here in the present case, fraudulent and dishonest intention of the Appellant as the M.D. of the accused company has been established through prosecution evidence to show his intention to get the loan sanctioned and such conduct of the Appellant from the very date of application for loan is clear on record to satisfy the existence of mens rea on his part. Considering all such materials and the evidences, coupled with the circumstances narrated above, it is held that the prosecution has successfully proved the charges against the Appellant. The findings of the learned trial court and the conviction are thus confirmed.

31. Keeping in view the extent of sentence and the nature of offences as well as the role played by the Appellant in committing the offences, no reason is found to interfere with the sentencing.

32. In the result, the appeal is dismissed. The bail bonds are cancelled. The LCR may be returned.

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2024 (II) ILR-CUT-163

Dr. S.K.PANIGRAHI, J.

ARBA NOS. 46, 47 & 48 OF 2014

DHANURDHAR CHAMPATIRAY ……Appellant(s)

-V-

UNION OF INDIA & ORS. ……Respondent(s)

ARBITRATION & CONCILIATION ACT, 1996 – Section 34 – Whether the District Judge by applying power under this section can partially set aside the certain claims in the arbitral awards? – Held, Yes – However under this section the courts do not sit in appeal as merits of the dispute are not to be adjudicated, and therefore, while partially setting aside the award, courts must refrain from going into the substance of dispute – Thus under section 34 of the Act the courts must not interfere with interest or compensation awarded by the tribunal as the same could amount to modification of the award.

Case Laws Relied on and Referred to :-

1. (2022) 4 SCC 116 : UHL Power Company Ltd. v. State of Himachal Pradesh.
2. O.M.P.(COMM) 95/2023, I.A. 4057/2023 (Stay), I.A. 5361/2023 and O.M.P. (COMM) 106/2023, dtd. 21 August 2023 : NHAI vs. Trichy Thanjavur Expressway Ltd.

For Appellant(s) : Mr. A. Sanganeria.
For Respondent(s) : Mr. Debasis Tripathy, CGC, Mr. S.S. Kashyap, CGC

JUDGMENT Date of Hearing: 11.10.2023 : Date of Judgment : 08.02.2024

Dr. S.K. PANIGRAHI, J.

1. The Respondent No.2 had awarded the construction work "Construction of 18 Nos. Type-III Postal Staff Quarters at Gada Gopinath Prasad, Bhubaneshwar" to the Appellant with respect to three separate sections of work. Accordingly, three separate agreements were signed i.e. Agreement No.23/CDC of 1998-99, Agreement No.20/CDC of 1994/95 and Agreement No.79/CDC of 1997-98. Considering that the parties to the proceedings are the same and the aforementioned three arbitration proceedings arise out of the same facts, this Court has decided to club the said cases together for proper adjudication.

2. These Appeals under Section 37(1)(b) of the Arbitration and Conciliation Act, 1996 ("A&C Act") have been filed against the order dated 14.07.2014 passed by the Learned District Judge, Cuttack in Arbitration Petition Nos.193, 194 and 195 of 2008 setting aside certain claims in the Arbitral award dated 20.06.2008 under Section 34 of the Arbitration and Conciliation Act which is illegal, bad in law due to non-application of mind, perverse and contrary to the settled position of law.

I. FACTUAL MATRIX OF THE CASE:

3. The respondent no.2 awarded the construction work "Construction of 18 Nos. Type-III Postal Staff Quarters at Gada Gopinath Prasad, Bhubaneshwar (different set of work in three different agreements)" to the appellant vide Agreement No. 23/CDC of 1998-99, Agreement No.20/CDC of 1994/95 and Agreement No.79/CDC of 1997-98.

4. In course of execution of the contract, there were deviation in quantities and execution of extra items, as required by the respondent no.1 as per site conditions and the same were executed by the appellant to the satisfaction of the respondent No.1.

5. There was no final settlement of account and dispute having arisen, the appellant invoked arbitration clause, i.e., clause 25 of the agreement and approached the respondent no.2 to nominate an Arbitrator and since respondent no.2 failed to appointing an Arbitrator, the appellant found no other alternative than to approach the Chief Justice of Orissa High Court in an application under Section 11 of the Arbitration and Conciliation Act, 1996 in ARBP No.20 of 2003 and the Chief Justice of Orissa High Court vide order dated 21.01.2004 appointed Barrister Shri Gobind Das, as the sole Arbitrator to adjudicate the claims and dispute between the parties.

6. After appointment of Barrister Sri Gobind Das as the sole arbitrator, the sole arbitrator proceeded in the arbitral proceeding and directed both the parties to file their respective claim, counter, counter claim and reply to the same and also the documents to be adduced in evidence. including the evidence of the witnesses, if they desired so, and accordingly both parties filed their respective statement of

claim, counter statement, documents and also proved the documents by way of evidence and submitted their written note of argument and also by oral arguments and after being fully satisfied to the satisfaction of both the parties, the arbitrator passed an award on 20.06.2008 with detailed reasoning given in the award.

7. The arbitrator while passing his award with detailed reasoning and dealing with all the documents, pleadings and position of law, passed the award by rejecting most of the items of claim and allowing some of the items of claim.

8. The award of the arbitrator was challenged by the respondents in an application under Section 34(2) of the Arbitration and Conciliation Act, 1996 before the learned District Judge, Cuttack in ARBP No. 193, 194 and 195 of 2008.

9. The appellant has alleged that the learned District Judge while considering the application under section 34 (2) of the Arbitration and Conciliation Act, 1996, not only has gone too far by assessing the award like an appellate court, but also scanned the reasonables of the reasons given by the Arbitrator in an arbitrary manner and set aside some of the items of claim awarded by the arbitrator in his judgment dated 14.07.2014.

10. Aggrieved by the aforementioned judgment, the appellant has preferred the appeal under Section 37 of the Arbitration and Conciliation Act, 1996 on the grounds that the aforementioned judgement is illegal, arbitrary, perverse, contrary to the provisions of contract, outcome of non-application of mind, contrary to the settled principles of law and opposed to Public Policy of India.

II. APPELLANT'S SUBMISSIONS (Common Submissions in the three Arbitration proceedings):

11. It is submitted that the setting aside of some of the claims, as awarded by the arbitrator, by the learned court below is illegal, improper, baseless, contrary to the settled position of law, as required under section 34(2) of the Arbitration and Conciliation Act and such judgment in respect of setting aside some of the items of claims awarded by the Arbitrator with the decision by striking out the claims awarded is not tenable in law.

12. It is submitted that the learned court below have no authority and jurisdiction to sit in appeal like appellate court in respect of the reasoned and detailed award passed by the Arbitrator.

13. It is submitted that that reasonable of the reasons given by the Arbitrator cannot be reassessed nor can be re-determined by the learned court below in an application under Section 34(2) of the Act, because the scope under section 34(2) of the Act is limited and there is no violation of Public Policy of India in any manner.

14. It is further submitted that the Arbitrator having considered the pleadings and documents and evidence led by the parties by way of affidavit in course of the arbitral proceedings and having appreciated and re-appreciated the facts and documents and position of law passed an award by allowing some of the items of

claims and by rejecting most of the items of claim in his detailed and reasoned award. However, the learned court below cannot sit over the reasoning of the Arbitral award as an Appellate body and interpret the clauses of agreement under the purview of Section 34(2) of the Act.

III. APPELLANT'S SUBMISSIONS (ARBA No. 46 of 2014):

15. It is submitted that in respect of the claim item no.8 the Arbitrator gave detailed reasoning in his award while determining the award amount by rejecting the same from the claim amount as claimed by the appellant. The details of the reasoning of the Arbitrator are quoted below:

> *"**Claim Item No.8:-** Compensation on account of losses suffered due to wastage and wash out of materials, tools and plants and inconsumables due to the devastation super cyclone and ceaseless rains in October 1999- Rs. 1,03,466.00.*
>
> *This heading includes items like cement, A.C. Sheet, Purline (Salwood) and Brick work top of A.C. Sheet which is mentioned at page 82 of part-II of claim statement. There are two clauses in the contract which are material for the purpose i.e. clause 6 of the additional condition and clause 6 of additional special condition in the agreement and casts burden for protection of materials from destruction by any unnatural cause like flood, rain snow fall or any other natural cause. Clause- 6 of the additional special condition of the Agreement reads as follows:-*
>
> *"The Contractor shall construct suitable godown at site of work for storing the materials safe against damage from Sun, Rain, Fire theft etc. He shall also employ necessary watch and ward for the purpose."*
>
> *The presumption under these two clauses is that the damage will not occur in case the contractor takes appropriate remedial measures. The Contractor's version is that whatever natural precautionary measures will be taken these damages or at least some of them could not be prevented at all even after taking all precaution in this regard. This is denied by the Department and it is suggested that with pre-condition the damages would occur in case no steps were undertaken by the contractor. The innuendo is that the contractor has not taken all steps to prevent such a situation. The contractor suggests that it is unforeseen and therefore no precaution could have been taken in this regard. In such situation cement, which is in essence perishable, has been lost to the Department. Therefore, certain measures have been indicated in the Agreement to stop the process of destruction. It is the obligation of the contractor to maintain the watch and ward to look after safety of the goods particularly when it is perishable in the sense that the utility will be lost. Therefore, in all respect, it should not be allowed to deteriorate. Therefore, it is inevitable that contractor should have taken precaution for preserving cement and its utility.*
>
> *The fact and figures about quantity of material have been summarized at as Exhibit C/2 in statement of fact (Part-1) of the Claimant. The cost of cement at the appropriate time is about Rs.73,600.00, in all probability if any of the goods enumerated in this claim item could not satisfy the criteria of such goods as are like to be damaged.*
>
> *Therefore, I estimate the cost of goods like cement worth Rs.36,800.00 i.e. half of the claimed amount, payable to the Contractor in this claim."*

16. It is submitted that the learned District Judge while assessing the award have gone beyond the scope of interference and scanned the reasoning of the Arbitrator

and struck down this claim and such interference in the reasoning of the Arbitrator by the learned court below by sitting in appeal over the award of the Arbitrator is illegal, arbitrary, irrational, perverse and the same is liable to be quashed.

17. It is submitted that the award of the Arbitrator being proper, based on proper reasoning by allowing some of the items of claim and rejecting some of the items of the claim, the same cannot be interfered with.

IV. APPELLANT'S SUBMISSIONS (ARBA No. 47 of 2014):

18. It is submitted that in respect of the claim item no.8 the Arbitrator gave detailed reasoning in his award while determining the award amount by rejecting the same from the claim amount as claimed by the appellant. The details of the reasoning of the Arbitrator are quoted below:

> *"**Claim Item No.8:** The amount payable to claimant on account of wages paid to idie workers during the period suspension of the job from time to time for reasons solely attributable to the Department- Rs.5,46,000.00.*
>
> *The claimant has claimed under this head Rs.5,46,000.00. No payment has been made on this head by the Department/Respondent. The claimant has given details of labourers engaged when the work was stopped. Consequently some people were out of job. Copies of the wage sheets have been filed vide pages 63 to 198 on part-II of the claim statement. Now the question is how far these documents can be relied upon in the arbitration proceeding. The Arbitrator has to base such estimate on conjectures. It cannot be denied totally as to why the statement will not be relied upon. It is correct to say that it is the human nature having an eye to earn money out of this transaction. The claim is exaggerated. Thus it will be a task to separate chaps from the grains.*
>
> *The department in their objection has pointed out various probabilities and possibilities of erroneous computation of this figure. They have pointed out to the provision of CPWD Contractor's Labour Regulation Para 4(xi) and clause 19 D of the agreement. The further allegation of the Department is that the Contractor has never submitted any statement in compliance with Clause 19D of the agreement (at page 91 of the agreement/internal page 25), in as much as he has not furnished the entire list of the persons employed for all these days. However as asserted by the claimant, the claim has to be reduced to some extent as his faults were for 1056 days delays out of 2311 days of total delay. Therefore, the contractor is entitled to get compensation for days on which the work was possible but was not done. Thus, I hold the possible delay for 1255 days but not for the entire period of 2311 days. Therefore, I hold the compensation for the delay of 1255 days by the Department but not the entire period of 2311 days as claimed by the claimant.*
>
> *Therefore, I award compensation at the rate of Rs.360.00 per day ie. average of daily expenditure towards wages paid to the idle labour for 1255 days i.e. Rs.4,51,800.00."*

19. However, the learned District Judge enlarged the scope and have not taken into consideration while judging the award of the Arbitrator in respect of the said item of claim that the appellant, as claimant, having filed the copies of the wage-sheet and the same has been dealt by the Arbitrator and the same were never disputed by the respondents in course of arbitral proceeding before the Arbitrator regarding the genuineness of the same and such finding of the learned court below

while striking out the said claim is illegal, improper, baseless and beyond the scope of interference and such interference by the learned court below by striking out the said claim from the award of the Arbitrator is not tenable in law and as such the judgment of the learned court below is liable to be set aside.

20. Additionally, similar view was taken with respect to Claim Item no.10.

> *"**Claim Item No. 10:-** Compensation towards extra cost incurred on account of replacement of the original scaffolding work erected externally for the work being damaged and worn out due to detention in work by one additional rainy season attributable to the for reasons Department.- Rs.54,600.00.*
>
> *The claim on this head is Rs.54,600/-. The claim arises due to the fact that after rainy season is over when the scaffolding etc. has suffered natural decay, the same is to be compensated by the Department.*
>
> *The core objection is to be that the scaffolding material should have been steel tube or rolled steel not by bamboos which will inter-alia face deterioration. The objective is not to allow deterioration for which steel tube is to be used in the scaffolding*
>
> *In this claim the Contractor has requested to the Department/Respondent to pay for the scaffolding which in his opinion is a substitute for iron and steel scaffolding. It is made out of bamboo but the specification did not permit the contractor to use the bamboos at any stage of the work. Therefore, I deduct half of the claim admissible i.e. Rs. 27,300.00. The balance of Rs.27.300.00 is payable to the claimant in this claim."*

21. In this regard, in the award of the Arbitrator so far relating to claim item no.11 the Arbitrator has taken into consideration, the evidence and documents filed by the parties being proved in course of arbitral proceeding and while passing the award in respect of the said item of claim as given the detailed reasoning in his award. The finding, and scanning of the reasoning of the Arbitrator by the learned court below in its judgment while striking out the claim item no.10 is illegal, improper and the same is liable to be set aside.

> *"**Claim Item No.11:** As it seems from the records, the amount of profit would have been earned by the contractor for undertaking the work@ 15% of contract amount i.e. 15% of Rs.55,66,131.00 in 18 months. Accordingly, he would have received Rs.8,34,919.00 in 18 months. Thus his monthly earning should have been Rs. 46,384.00 as claimed.*
>
> *The Contractor, however, was given three alternatives in letter dated 21.10.1993 (Exhibit R/1) to the following effect.*
>
> *(i) Keeping on executing the work, in anticipation of the payment as and when situation improves*
> *(ii) Suspend the work till funds are available and the Department is in a position to clear the dues as well make payments, commensurate with further work.*
> *(iii) Request for closure of the contract.*
>
> *The Contractor has chosen option No.(ii) (R/3). Thus he cannot blame others for executing the work on this condition. Moreover there is no term in the contract for giving such alternative to the Contractor concern. It was a matter of grace to the Contractor that he has submitted to execute the work to the condition of future payability whenever funds are available. The delay has been caused for 1255 days which has been admitted by the Department.*

Thus in any case the Contractor will be entitled on the ground of business logs to the extent of 1255 days and not for the whole period. The total claim under this head is Rs.34,32,416.00. Out of this gross amount, the contractor at the most will be entitled to some compensation on account of business loss. The period stipulated earlier on the basis of agreement for completion of work is within 18 months. Had the work been completed within the stipulated period 18 months, he could have earned nearly Rs.5,56,000.00 i.e. 10% of the tendered amount. Thus he could have earned Rs.30,880.00 per month. Now since the work has been prolonged for 77 months, he is entitled for business loss. The delays have been caused by both the parties ie. 42 months by the Respondent and 35 months by the claimant. Therefore the total business loss would come to nearly Rs.12,96,960.00 (Rs.30,880.00 x 42 months). Instead of 10% business loss, I grant 5% i.e. Rs.6,48,480.00 (half of Rs. 12,96,960.00) say Rs.6,50,000.00 in this claim."

22. However, the learned court below has struck down the said awarded claim in an arbitrary manner by enlarging the scope of interference in his judgment and such interference in the reasoning of the Arbitrator is not tenable in law and the same is liable to be quashed.

23. It is submitted that the learned District Judge while assessing the award have gone beyond the scope of interference and scanned the reasoning of the Arbitrator and struck down these claims and such interference in the reasoning of the Arbitrator by the learned court below by sitting in appeal over the award of the Arbitrator is illegal, arbitrary, irrational, perverse and the same is liable to be quashed.

V. APPELLANT'S SUBMISSIONS (ARBA No. 48 of 2014):

24. It is submitted that, in respect of the claim item no. E the Arbitrator gave detailed reasoning in his award while determining the award amount by rejecting the same from the claim amount as claimed by the appellant. The details of the reasoning of the Arbitrator are quoted below:

*"**Claim Item No.E:** Compensation on account of wages paid to idle workers during the period of suspension of the job from time to time for reasons solely attributable to the Department-Rs.1,35,000.00.The date stipulated for completion of works relating to External Water supply, S.W. Line, open surface drain, septic tank and soak pit shall be 3 months from the date of commencement according to work order dated 20.3.1998 issued by the Executive Engineer [C] vide (R/1].*

Even though it has been said that no worker has under taken any work during the prolongation period, some work is bound to be taken up. However, imminently it may be I have intend to fix the date of delay. The Department says that there are 211 days delays on their prt and the claimant is responsible for 1221 days delay. The stipulated time is 3(three) months.

The claimant has claimed under this head Rs.1,35,000.00. No payment has been made on this head by the Department/Respondent. The claimant has given details of labourers engaged when the work we stopped. Consequently some people were out of job. Copies of the wage sheets have been filed vide pages 95 to 185 on part-II of the claim statement. Now the question is how far these documents can be relied upon in the arbitration proceeding. The Arbitrator has to base such estimate on conjectures. It cannot be denied totally as to why the statement will not be relied upon. It is correct to say that it is the

human nature having an eye to earn money out of this transaction. The claim is exaggerated. Thus it will be a task to separate Chaps from the grains.

The department in their objection has pointed out various probabilities and possibilities of erroneous computation of this figure. They have pointed out to the provision of CPWD Contractor's Labour Regulation Para 4 (xi) and clause 19 D of the agreement. The further allegation of the Department is that the Contractor has never submitted any statement in compliance with Clause 19D of the agreement lat page 91 of the agreement/internal page 25), in as much as he has not furnished the entire list of the parsons employed for all these days. However ɞa asserted by the claimant, the claim has to be reduced to some extent as his fault were for 1221 days delay out of 1432 days of total delay. Therefore, the contractor is entitled to get compensation for days on which the work was possible but was not done. Thus, I hold the work was possible for 211 days but not for the entire period of 1432 days.

Therefore, I award compensation at the rate of Rs.195/- per day i.e. average of daily expenditure towards wages paid to the idle labour for 211 days ie. 41,145.00 basing on the detailed calculation at page 95 to 185 of Part-II of the Claim Statement of facts."

25. It is submitted that the learned court below, has struck down the said awarded claim in an arbitrary manner by enlarging the scope of interference in his judgment and such interference in the reasoning of the Arbitrator is not tenable in law and the same is table to be quashed.

26. Additionally, in respect of Claim Item No.H, the Arbitrator has given the detailed reasoning in his award in the following manner.

*"**Claim Item No.H:** Compensation on account of losses suffered due to wastage and wash out of materials, tools and plants and unconsumables due to the devastation super cyclone and ceaseless rains in October 1999- Rs.7,21,212.00.*

This heading includes 20 items like cement, S.C.I. Pipes, G.I. Pipe, full way valve etc. which is mentioned at page 1999 of part-11 of claim statement. There are two clauses in the contract which are material for the purpose ie, clause 6 of the additional condition and clause 6 of additional special condition in the agreement and casts burden for protection of materials from destruction by any unnatural cause like flood, rain snow fall or any other natural cause. Clause- 6 of the additional special condition of the Agreement reads as follows:-

"The Contractor shall construct suitable godown at site of work for storing the materials safe against damage from Sun, Rain, Fire theft etc. He shall also employ necessary watch and ward for the purpose."

The presumption under these two clauses is that the damage will not occur in case the contractor takes appropriate remedial measures. The Contractor's version is that whatever natural precautionary measures will be taken these damages or at least some of them could not be prevented at all even after taking all precaution in this regard. This is denied by the Department and it is suggested that with pre-condition the damages would occur in case no steps were undertaken by the contractor. The innuendo is that the contractor has not taken all steps to prevent such a situation. The contractor suggests that it is unforeseen and therefore no precaution could have been taken in this regard. In such situation cement, which is in essence perishable, has been lost to the Department. Therefore, certain measures have been indicated in the Agreement to stop the process of destruction. It is the obligation of the contractor to maintain the watch

> *and ward to look after safety of the goods particularly when it is perishable in the sense that the utility will be lost. Therefore, in all respect, it should not be allowed to deteriorate. Therefore, it is inevitable that contractor should have taken precaution for preserving cement and its utility. The fact and figures about quantity of material have been summarized at as Ext.C/2 in statement of fact (Part-1) of the Claimant. The cost of cement at the appropriate time is about Rs.73,600.00, in all probability if any of the goods enumerated in this claim item could not satisfy the criteria of such goods as are like to be damaged.*
>
> *Therefore, I estimate the cost of goods like cement worth Rs.36,800.00 i.e. half of the claimed amount, payable to the Contractor in this claim."*

27. However, the learned District Judge while assessing the award have gone beyond the scope of interference and scanned the reasoning of the Arbitrator and struck down this claim and such interference in the reasoning of the Arbitrator by the learned court below by sitting in appeal over the award of the Arbitrator is illegal, arbitrary, irrational, perverse and the same is liable to be quashed.

VI. ISSUES FOR CONSIDERATION:

28. This Court has heard the counsels for both the parties at length, and also perused the material available on record. This Court believes that there are four issues for the adjudication of the dispute at hand:

> A. Whether section 34 of the A&C Act allows the District Judge to partially set aside certain claims in the Arbitral Award?
>
> B. Whether it was well reasoned for the District Judge, Cuttack to partially set aside the certain claims in the Arbitral Award in ARBP No. 193 of 2008?
>
> C. Whether it was well reasoned for the District Judge, Cuttack to partially set aside the certain claims in the Arbitral Award in ARBP No. 194 of 2008?
>
> D. Whether it was well reasoned for the District Judge, Cuttack to partially set aside the certain claims in the Arbitral Award in ARBP No. 195 of 2008?

VII. ISSUE A: Whether Section 34 of the A&C Act allows the District Judge to partially set aside certain claims in the Arbitral Award?

29. It is similarly fairly well settled law that the jurisdiction of the Court under Section 34 of the A&C Act is narrow and limited. In the Supreme Court's judgment in **UHL Power Company Ltd. v. State of Himachal Pradesh**,[1] wherein it was observed that:

> *"16. As it is, the jurisdiction conferred on courts under Section 34 of the Arbitration Act is fairly narrow, when it comes to the scope of an appeal under Section 37 of the Arbitration Act, the jurisdiction of an appellate court in examining an order, setting aside or refusing to set aside an award, is all the more circumscribed."*

30. The express language of Section 34(1) of the Act provides for recourse to courts for setting aside an arbitral award in accordance with sub-section (2) and sub-section (3) of the Act. While sub-section (2) provides for grounds for setting aside

1. **(2022) 4 SCC 116**

an arbitral award, sub-section (3) provides the timeline within which an application for setting aside of the award must be made. Sub-section (4) of Section 34 of the Act provides a discretionary power to the courts to adjourn the proceedings and remand the matter to the tribunal for either resuming proceedings or eliminating the grounds for setting aside the arbitral award, provided an application to that effect is made by either of the parties.

31. On a reading of these provisions, it is clear that an application made under Section 34 of the Act can have two possible outcomes -i) the court may set aside the arbitral award; or ii) adjourn the proceeding and remand the matter back to the arbitral tribunal. In case of the former, it is settled that parties are relegated to their original position and the dispute between the parties, or the portions of it which has been set aside, can be decided afresh before a new tribunal. However, in the latter scenario, for the purposes of Section 34(4), the matter is remanded back to the same tribunal which passed the arbitral award in the first place.

32. The Delhi High Court, in its recent judgement of ***NHAI vs. Trichy Thanjavur Expressway Ltd.***[2], has added depth to the ongoing discourse on the extent of the court's power to set aside arbitral awards under Section 34 of the Arbitration and Conciliation Act, 1996. The Delhi High Court held:

> *"**K.** The expression ―modify would clearly mean a variation or modulation of the ultimate relief that may be accorded by an AT. However, when a Section 34 Court were to consider exercising a power to partially set aside, it would clearly not amount to a modification or variation of the award. It would be confined to an offending part of the award coming to be annulled and set aside. It is this distinction between a modification of an award and its partial setting aside that must be borne in mind.*
>
> ***L.** The power to partially sever an offending part of the award would ultimately depend on whether the said decision is independent and distinct and whether an annulment of that part would not disturb or impact any other finding or declaration that may have been returned by the AT. The question of severability would have to be decided bearing in mind whether the claims are interconnected or so intertwined that one cannot be segregated from the other. This for the obvious reason that if the part which is sought to be set aside is not found to stand independently, it would be legally impermissible to partially set aside the award. A partial setting aside should not lead to a component of the award being rendered vulnerable or unsustainable. It is only when the award relates to a claim which is found to stand on its own and its setting aside would not have a cascading impact that the Court could consider adopting the aforesaid mode.*
>
> ***M.** The Court is thus of the firm opinion that the power to set aside an award in part would have to abide by the considerations aforenoted mindful of the imperatives of walking a line which would not dislodge or disturb another part of the award. However as long as the part which is proposed to be annulled is independent and stands unattached to any other part of the award and it could be validly incised without affecting the other components of the award, the recourse to partial setting aside would be valid and justified.*

2. O.M.P. (COMM) 95/2023, I.A. 4057/2023 (Stay), I.A. 5361/2023 and O.M.P. (COMM) 106/2023, dated 21 August 2023

> ***N.*** *From the contemporaneous material as well as the decisions rendered on the subject, it is manifest that once the Court has been moved by way of an application referable to Section 34(4), it must, at least prima facie, be satisfied that the award suffers from a defect which is curable and thus the ends of justice warranting the AT being accorded an opportunity to take appropriate measures to eliminate the spectre of the award itself be coming to be set aside. The necessity of the Court being satisfied in the first instance flows from the provision adopting the phrase "the Court may where it is appropriate....".*
>
> ***O.*** *However, as had been explained by the Supreme Court in Dyna Technologies as well as I-Pay Clearing Services, the suspension of the setting aside proceedings and the remit to the AT in the meanwhile stands restricted to an opportunity being accorded to it to attend to curable defects only. The said provision clearly appears to be guided by the intent of the Legislature to stave off the possibility of an award coming to be set aside even though it may suffer from a defect or mistake which is remediable."*

33. The Court held that an award involves decisions made in relation to multiple claims. If a claim isn't subservient, meaning it's not "entwined or interdependent upon another", the decision made by the Arbitral Tribunal on that claim is its own separate award. While the final award might cover numerous claims, each decision on an individual claim shall be treated as a distinct award. The Court acknowledged that this understanding stems from the Arbitral Tribunal's authority to issue not only a final award but also interim awards for different claims during the arbitration. Therefore, when an award is perceived as made up of separate components, each with its own independent significance, the Court held that there shouldn't be any obstacle to applying the principle of separability to partially annul or set aside an award. This authority to "set aside" an award in part thus qualifies as a valid use of jurisdiction under Section 34 of the Act.

34. Therefore, the District Judge has been conferred powers under Section 34 of A&C Act to partially set aside a claim in an Arbitral Award. However, under Section 34 of the Act, courts do not sit in appeal[3] as merits of the dispute are not to be adjudicated[4], and therefore, while partially setting aside the award, courts must refrain from going into the substance of the dispute. Thus, under Section 34 of the Act the courts must not interfere with interest or compensation awarded by the tribunal as the same could amount to modification of the award.

VIII. ISSUE B: Whether it was well reasoned for the District Judge, Cuttack to partially set aside the certain claims in the Arbitral Award in ARBP No. 193 of 2008?

35. As per claim no.8, the claimant had claimed compensation of Rs. 1,03,446/-, on account of loss suffered due to wastage and wash out of materials, tools and appliances and inconsumable due to devastation of super cyclone of October 1999. The Arbitrator has allowed Rs.36,800/- i.e. half of the claimed amount, in respect of the damage of cement. This is contrary to the agreement of the contract. Clause-6 of the addl. special conditions of the agreement, which has been reflected by the Arbitrator reads as follows:-

"The Contractor shall construct suitable godown at site of work for storing the materials safe against damage from Sun, Rain, Fire theft etc. He shall also employ necessary watch and ward for the purpose."

36. There is no specific clause in the agreement to give compensation on account of any natural calamity. However, on the other hand, there is specific clause to show that, the Contractor is to store the materials safely. Hence the awarding of compensation towards damage of cement is against the specific terms of contract. This Court accedes to the submission of the District Judge, Cuttack that the Arbitrator cannot travel beyond the agreement between the parties, he can only interpret the agreement, but in the instant case the Arbitrator has passed order beyond the scope of the agreement, and therefore, amount of Rs.36,800/- awarded in claim no.8 is liable to be struck down.

37. Similarly, in Claim no.11, the contractor has claimed Rs.8,59,090/- towards compensation for business loss in the extended period of 45 months. There was stipulation in the agreement to complete the work in a period of 1 (one) month, but in the instant case there was delay of 43.5 months on the part of the contractor and there was only negligible delay of 2.7 months on the part of the department. There is no clause in the agreement to allow compensation for loss of business. In this background awarding of compensation for loss of business or profit is against the specific terms of contract, and therefore, the award of Rs.26,062/- towards business loss cannot be up held and liable to be struck down.

38. Therefore, this Court is of the opinion that the District judge, Cuttack has rightfully set aside the particular claims considering that the said claims were awarded without any clause in the agreement to support them.

IX. ISSUE C: Whether it was well reasoned for the District Judge, Cuttack to partially set aside the certain claims in the Arbitral Award in ARBP No. 194 of 2008?

39. In Claim No.10, the claimant had claimed compensation of Rs.54,600/- towards extra cast incurred on account of replacement of the original scaffolding work erected externally, which was damaged and worn out due to additional rainy seasons, risks attributable to the department. The entire agreement does not show any clause to give compensation towards this type of extra cost. Besides this there is nothing to show that only due to the fault of the department there was prolongation of the work by one additional rainy season, and therefore, awarding of Rs.27,300/- on this score is against the terms of agreement and liable to be struck down.

40. In Claim No.11, the claimant has claimed Rs.34,32,447/- towards compensation for business loss in the extended period of 74 months. There was stipulation in the agreement to complete the work in a period of 18 (eighteen) months. There was no agreement between the parties that, compensation will be paid for loss of business. On the other hand, the delay was occurred due to the latches of both the sides and rather more latches on the part of the claimant contractor then the

department, and therefore, awarding of compensation for loss of business or profit is against the terms of agreement and liable to be struck down.

41. As per claim Nos. 13,14, the claimant had claimed compensation of Rs. 18,48,596/-, on account of loss suffered due to wastage and wash out of materials, tools and appliances and inconsumable due to devastation of super cyclone of October 1999. The Arbitrator has allowed Rs.2,00,000/- in respect of the damage of cement, A.C.sheets and G.I.sheets. This is contrary to the agreement of the contract. Clause-6 of the addl. special conditions of the agreement, which has been reflected by the Arbitrator reads as follows:-

> *"The Contractor shall construct suitable godown at site of work for storing the materials safe against damage from Sun, Rain, Fire theft etc. He shall also employ necessary watch and ward for the purpose."*

42. There is no specific clause in the agreement to give compensation on account of any natural calamity. But, on the other hand, there is specific clause to show that, the Contractor is to store the materials safely. Hence the awarding of compensation towards damage is against the specific terms of contract. As held previously, the Arbitrator cannot travel beyond the agreement between the parties, he can only interpret the agreement, but in the instant case the Arbitrator has passed order scope of the agreement, and therefore, beyond the amount of Rs.2,00,000/- awarded in claims no.13,14 are liable to be struck down.

X. ISSUE D: Whether it was well reasoned for the District Judge, Cuttack to partially set aside the certain claims in the Arbitral Award in ARBP No. 195 of 2008?

43. In Claim No.E, the claimant had claimed Rs.1,35,000/- towards wages paid to manual workers during the period of suspension of the job from time to time for reasons solely attributable to the Department. The Arbitrator has allowed compensation of Rs.41,145/- estimating the delay, expenditure of wages at Rs. 195/- and multiplying the same by 211, on the ground that, the work was delayed for 211 days attributable to the department, it is seen that, the arbitrator himself has observed that, though the work was stipulated to be completed in 3 (three) months period, but the claimant himself is responsible for delay of 1221 days. So, in comparison to the number of days of delay occurred due to the fault of the claimant, the delay attributable to the department is very less, which has been estimated at 211 days by the arbitrator. Besides this, the arbitrator himself has observed that, the delay expenditure towards wages is to be estimated on conjectures. On the other hand, the department has taken stand that, though as per clause 19 of the terms of agreement the contractor had to submit the statement of labourers employed but he had not supplied the same. Clause 19-D reads as follows:

> *"CLAUSE 19D. The contractor shall submit, by the 4th and 19th of every month to the Engineer-in-charge a true statement showing, in respect of the second, half of the preceding month and the current month respectively:-*

(1) the number of labourers employed by him on the work,
(2) their working hours,
(3) the wages paid to them.

(4) the accidents that occurred during the said fortnight showing the circumstances under which they happened and the extent of damage and injury caused by them, and

(5) the number of female workers which have been allowed Maternity benefit according to Clause 191 and the amount paid to them.

Failing which the contractor shall be liable to pay to Government a sum not exceeding Rs.50 for each default or materially incorreci statement. The decision of the Divisional Officer shall be final in deducting from any bill due to the contractor the amount levied as fine."

44. In absence of furnishing such statement, there is gross violation of clause-19-D of the agreement. So, the award made in claim No.E is against the term of the contract and blatantly illegal and also liable to be struck down.

45. As per Claim No.H, the claimant had claimed compensation of Rs.7,21,212/, on account of loss suffered due to wastage and wash out of materials, tools and appliances and inconsumable due to devastation of super cyclone of October 1999. The Arbitrator has allowed Rs.36,800/- i.e. half of the claimed amount, in respect of the damage of cement. This is contrary to the agreement of the contract. Clause-6 of the addl. special conditions of the agreement, which has been reflected by the Arbitrator reads as follows:-

"The Contractor shall construct suitable godown at site of work for storing the materials safe against damage from Sun, Rain, Fire theft etc. He shall also employ necessary watch and ward for the purpose"

46. There is no specific clause in the agreement to give compensation on account of any natural calamity But, on the other hand, there is specific clause to show that, the Contractor is to store the materials safely. Hence the awarding of compensation towards damage of cement is against the specific terms of contract. The Arbitrator cannot travel beyond the agreement between the parties, he can only interpret the agreement, but in the instant case the Arbitrator has passed order beyond the scope of the agreement, and therefore, amount of Rs.36,800/- awarded in Claim no.H is liable to be struck down.

47. In claim no.M, the contractor has claimed Rs.8,72,000/- but the arbitrator has allowed Rs.67,500/- towards compensation for business loss in the extended period of 45 months. There was stipulation in the agreement to complete the work in a period of 3 (three) months. The major part of the delay has been caused due to fault of the claimant. There is no clause in the agreement to allow compensation for loss of business, and therefore, awarding compensation for loss of business or profit is against the agreement of the contract and cannot be upheld and liable to be struck down.

XI. CONCLUSION:

48. Therefore, in light of the discussion above, keeping the settled principles of law in mind and for the reasons given above, this Court is of the considered view that the impugned order warrants no interference under Section 37 of the A & C Act.

49. This Court therefore does not see merit in the contention that the Learned District Judge did not apply its mind to the facts of the matter presented before it. The Learned District Judge perused the award, heard the parties and assessed their contentions. The judicial approach having been adopted, in the absence of any arbitrariness, capriciousness or whims, this Court is compelled to negative this ardent submission of the Appellant.

50. The challenge in all these ARBAs is hereby dismissed.

51. Accordingly, these ARBAs are dismissed. No order as to cost.

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2024 (II) ILR-CUT-177

Dr. S.K.PANIGRAHI, J.

W.P.(C) NO.6962 OF 2015

EXECUTIVE ENGINEER (ELECTRICAL), SOUTH ELECTRICAL DIVISION, SOUTHCO, GANJAM ……Petitioner(s)

-V-

PERMANENT LOK ADALAT (PUS), GANJAM. ……Opp.Party(s)

PERMANENT LOK ADALAT – Power – Whether the permanent Lok Adalat is competent to adjudicate any dispute with regard to assessment made under Electricity Act, where sections 126 & 127 of the Act constitute the complete code in itself and complete remedy is available under the Act? – Held, No.

Case Laws Relied on and Referred to :-

1. (2012) 2 SCC 108 : Executive Engineer, Southern Electricity Supply Company of Orissa Limited (SOUTHCO) and Anr. v. Sri Seetaram Rice Mill.
2. 2020 SCC OnLine Del 675 : Tata Power Delhi Distribution Limited v. Rampal.
3. 2022 SCC OnLine Bom 103 : Maharashtra State Electricity Distribution Company Ltd. through Additional Executive Engineer v. Badrinath Pema Rathod.

For Petitioner(s) : Mr. Prasanta Kumar Tripathy.
For Opp.Party(s) : Mr. Ch. Satyajit Mishra, AGA

JUDGMENT Date of Hearing : 15.02.2024 : Date of Judgment : 28.03.2024

Dr. S.K. PANIGRAHI, J.

1. The present Writ Petition has been filed by the Petitioner challenging the order dated 04.04.2015 passed by the Permanent Lok Adalat (O.P. No.1/PLA) directing to restore power supply to the unit of the Opp. Party No.2 vide Consumer

No. MIND-1692(HT) without claiming reconnection charges and without directing payment of arrear dues lying against the consumer on the ground that the Permanent Lok Adalat lacks jurisdiction in this matter which is *sub-judice* in an appropriate authority under Electricity Act.

I. CASE OF THE PROSECUTION:

2. Succinctly put, the case of the prosecution is as follows:

(i). E.Dilip Kumar Patra ("O.P.No.2") is having a crosser unit at Bhismagiri, which comes under Ganjam South Electrical Division. He has taken power supply to the said crosser unit for a contract demand of 31 KW and was categorized under the Medium Industry Tariff category vide Consumer No. MIND-1692(HT).

(ii). At the time of giving power supply the consumer acknowledged to take power supply on LT metering arrangement as the HT metering unit was not available. As per the provisions of the distribution code and agreement, if the consumer takes power supply on LT metering he is liable to pay transformer loss.

(iii). On the basis of the said arrangement power supply was given to the OP No.2 after executing agreement during August, 2007. Inadvertently though the energy bills are submitted regularly, the consumer was not charged with the transformer loss.

(iv). A verification was made in the premises of the consumer during April-2014. During such verification it was seen that though the consumer is availing HT supply, metering is being done on LT side without charging the transformer loss.

(v). After receipt of the said report, since the consumer was availing power supply in the LT side of the transformer, the consumer has been charged with the transformer loss to the tune of Rs.1,59,195/- calculated for the period dated 28.7.2007 (the date of. Supply) to April-2014 and the said amount was added in the energy bill for the month of May 2014.

(vi). Challenging the said transformer loss to the tune of Rs.1,59,195/-, the OP. No.2 filed a complaint before the Grievance Redressal Forum, Berhampur, which was registered as Complaint Case No.449/2014,. After hearing, the GRF by judgment dated 07.02.2015 disposed of the matter directing the consumer to pay the amount.

(vii). Challenging the said judgment/order passed by the Grievance Redressal Forum, the OP No.2 approached the Ombudsman No.-II, Bhubaneswar. The said case was registered as OM-2 (S) 07/2015. The Ombudsman issued a notice to the petitioner to file objection and directed that no coercive action shall be taken till decision of the main case. The said communication of the Ombudsman was received on 07.04.2015.

(viii). For non-payment of the current dues i.e. of January and February-2015 and the outstanding dues, a notice was given under Section 56(1) of the Electricity Act for disconnection of power supply. After expiry of the period when the consumer failed to make payment of dues, power supply was disconnected from 31.3.2015.

(ix). When the matter is pending before the Ombudsman, a forum constituted under Section 42(6) of the Electricity Act to adjudicate the grievances of the consumer; the OP No.2 approached the Permanent Lok Adalat, Ganjam with the prayer to restore power supply to the Stone Crosser Unit without any reconnection charges

and to pay compensation of Rs.40,000/- for non-supplying electricity to the consumer for a period of four days and Rs.60,000/- towards damages, mental agony and cost of litigation of Rs.10,000.

(x). After receipt of the complaint from OP No.2, the Permanent Lok Adalat registered PLA Case No.118/2015 and passed the ex-party interim order dated 04.04.2015 directing to restore power supply to the Stone Crosser Unit without claiming reconnection charges.

(xi). The present writ petition has been filed challenging the said interim order passed by the Permanent Lok Adalat.

II. SUBMISSIONS :

A. ***On behalf of the Petitioner*:**

3. Learned counsel appearing on behalf of the petitioner urged the following submissions:

(i). The order passed by the Permanent Lok Adalat directing to restore power supply without claiming the energy charges/arrear energy charges to the tune of Rs. 2,06,994/- (calculated up to Feb 2015) and without directing to pay the reconnection charges is illegal, arbitrary.

(ii). Without giving an opportunity of hearing to the petitioner , The Permanent Lok Aadalat passed the order to restore power supply without payment of reconnection charges and without directing to pay the arrear outstanding dues, for which power supply has been disconnected after giving due notice.

(iii). Section 22.C(1) of the Legal Services Authorities Act, provides that any party to a dispute may, before the dispute is brought before any Court, make an application to the Permanent Lok Adalat for settlement of dispute. In the present case the OP No.2 the consumer raised the dispute before the Grievance Redressal Forum after getting notice for payment of the arrear dues as well as the transformer loss. The consumer also approached the Ombudsman when he lost the case before the G.R.F. The consumer has admitted the said fact in his petition before the Permanent Lok Adalat.

(iv). When the matter is already pending before the G.R.F: and the Ombudsman the impugned application and the resultant order of the Permanent Lok Adalat is not maintainable.

(v). When the G.R.F. has already directed that the consumer is liable to pay the transformer loss and the consumer has also defaulted in making payment of the energy charges, the petitioner had no option except to give notice as per the provisions of the Electricity Act for payment of the dues and disconnected power supply for such non-payment.

(vi). The petitioner has not committed any illegality or irregularity in giving notice and in disconnection of the: power supply for non-payment of the outstanding dues.

(vii). The OP No.2 is an HT consumer and huge amount is outstanding against the consumer. Though the consumer is availing power supply but he is not not making payment of the outstanding dues. The dues are being charged as per the terms of the agreement and tariff applicable. Unless the payments are made the petitioner organization, who is getting power supply from GRIDCO shall not be able to pay the

dues of GRIDCO. Hence, the order passed by the Permanent Lok Adalat deserves to be set aside.

B. <u>On behalf of the Opp. Party/ State</u>

4. Per Contra, Mr. Ch. Satyajit Mishra, learned Additional Government Advocate appearing on behalf of the State, urged the following submissions:

(i). The order has been passed as the Permanent Lok Adalat is a Tribunal and has the trappings of the Court.

(ii). The order passed by the learned Permanent Lok Adalat is well within its jurisdiction, the petitioner company has not complied with the provisions enumerated in Section 126 and 127 of the Electricity Act 2003.

III. COURT'S ANALYSIS AND REASONS:

5. For decision of this case, Section 126, 127 and 145 of the Electricity Act, 2003 are relevant and they are reproduced herein:-

*"**Section 126. Assessment**.–*

*(1) If on an inspection of any place or premises or after inspection of the equipments, gadgets, machines, devices found connected or used, or after inspection of records maintained by any person, the assessing officer comes to the conclusion that such person is indulging in **unauthorised use of electricity**, he shall provisionally assess to the best of his judgment the electricity charges payable by such person or by any other person benefited by such use.*

(2) The order of provisional assessment shall be served upon the person in occupation or possession or in charge of the place or premises in such manner as may be prescribed.

(3) The person, on whom an order has been served under sub-section (2), shall be entitled to file objections, if any, against the provisional assessment before the assessing officer, who shall, after affording a reasonable opportunity of hearing to such person, pass a final order of assessment within thirty days from the date of service of such order of provisional assessment, of the electricity charges payable by such person.

(4) Any person served with the order of provisional assessment may, accept such assessment and deposit the assessed amount with the licensee within seven days of service of such provisional assessment order upon him:

(5) If the assessing officer reaches to the conclusion that unauthorised use of electricity has taken place, the assessment shall be made for the entire period during which such unauthorised use of electricity has taken place and if, however, the period during which such unauthorised use of electricity has taken place cannot be ascertained, such period shall be limited to a period of twelve months immediately preceding the date of inspection.(6) The assessment under this section shall be made at a rate equal to twice the tariff rates applicable for the relevant category of services specified in sub-section (5). (Emphasis Supplied)

Section 127. Appeal to Appellate Authority.–

(1) Any person aggrieved by the final order made under section 126 may, within thirty days of the said order, prefer an appeal in such form, verified in such manner and be accompanied by such fee as may be specified by the State Commission, to an appellate authority as may be prescribed.

(2) No appeal against an order of assessment under sub-section (1) shall be entertained unless an amount equal to half of the assessed amount is deposited in cash or by way of bank draft with the licensee and documentary evidence of such deposit has been enclosed along with the appeal.
(3) The appellate authority referred to in sub-section (1) shall dispose of the appeal after hearing the parties and pass appropriate order and send copy of the order to the assessing officer and the appellant.
(4) The order of the appellate authority referred to in sub-section (1) passed under sub-section (3) shall be final.
(5) No appeal shall lie to the appellate authority referred to in sub-section (1) against the final order made with the consent of the parties.
(6) When a person defaults in making payment of assessed amount, he, in addition to the assessed amount shall be liable to pay, on the expiry of thirty days from the date of order of assessment, an amount of interest at the rate of sixteen per cent. per annum compounded every six months.

Section 145. Civil courts not to have jurisdiction.–
No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which an assessing officer referred to in section 126 or an appellate authority referred to in section 127 or the adjudicating officer appointed under this Act is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act."

6. The Supreme Court examined the aforementioned provisions of the Electricity Act in ***Executive Engineer, Southern Electricity Supply Company of Orissa Limited (SOUTHCO) and Anr. v. Sri Seetaram Rice Mill.***[1] The Court held that the provisions of Sections 126 and 127 of the Act, read together, constitute a complete code in themselves covering all relevant considerations for passing of an order of assessment. The relevant excerpts are produced hereinbelow:

"16. First and foremost, we have to examine how provisions like Section 126 of the 2003 Act should be construed. From the objects and reasons stated by us in the beginning of this judgment, it is clear that "revenue focus" was one of the principal considerations that weighed with the legislature while enacting this law. The regulatory regime under the 2003 Act empowers the Commission to frame the tariff, which shall be the very basis for raising a demand upon a consumer, depending upon the category to which such consumer belongs and the purpose for which the power is sanctioned to such consumer. We are not prepared to accept the contention on behalf of the respondent that the provisions of Section 126 of the 2003 Act have to be given a strict and textual construction to the extent that they have to be read exhaustively in absolute terms.
……
24. Upon their plain reading, the marked differences in the contents of sections 126 and 135 of the 2003 Act are obvious.
They are distinct and different provisions which operate in different fields and have no common premise in law. We have already noticed that sections 126 and 127 of the 2003 Act read together constitute a complete code in themselves covering all relevant considerations for passing of an order of assessment in cases which do not fall under section 135 of the 2003 Act.
……

1. (2012) 2 SCC 108

37. Whenever the assessing officer arrives at the conclusion that unauthorised use of electricity has taken place, the assessment shall be made for the entire period during which such unauthorised use of electricity has taken place and if such period cannot be ascertained, it shall be limited to a period of 12 months immediately preceding the date of inspection and the assessment shall be made at the rate equal to twice the tariff applicable for the relevant category of service specified under these provisions. This computation has to be taken in terms of Sections 126(5), 126(6) and 127 of the 2003 Act. The complete procedure is provided under these sections. Right from the initiation of the proceedings till preferring of an appeal against the final order of assessment and termination thereof, as such, it is a complete code in itself."

7. In ***Tata Power Delhi Distribution Limited v. Rampal,***[2] the High Court of Delhi spoke about the jurisdiction of the Permanent Lok Adalat vis-à-vis Section 126 and 145 of the Electricity Act:

"*30. Besides, the provisions of section 145 of the Electricity Act also stand in the way of the forum having entertained the dispute. Since the case at hand relates to misuse of electricity, it is covered under section 126 of the Electricity Act. The dispute is therefore amenable to determination by the assessing officer under section 126, by the appellate authority under section 127 and by the adjudicating officer under section 143 of the Electricity Act, by reason of which even the jurisdiction of Civil Court was barred under section 145. So the Presiding Officer could not have entertained the dispute and no injunction could have been granted.*

……

34. In view of the above discussion this court is of the opinion that :

……..

d. Fourthly, since the statute provides the mechanism to address the dispute at hand under the scheme of section 126 and 127 of the Electricity Act, a Lok Adalat could not have entered upon any form of adjudication of the dispute and could not have granted interim relief."

8. From the aforementioned cases, it is clear that the Permanent Lok Adalat ought not to have taken cognizance of the complaint when the purported case was already pending in the Ombudsman II; out of the framework of the Electricity Act.

9. Moreover, the aforementioned directive in the award is flawed for two reasons. Firstly, the Permanent Lok Adalat has neglected to carry out conciliation proceedings, which it is obligated to conduct. It is only at the conclusion of such proceedings, if the parties reach a settlement resolving the dispute, that the Permanent Lok Adalat is empowered to issue an award. Secondly, in instances where the parties are unable to reach an agreement through conciliation, the Permanent Lok Adalat is then required to adjudicate the dispute, provided that the dispute does not pertain to any criminal offence.

10. In ***Maharashtra State Electricity Distribution Company Ltd. through Additional Executive Engineer v. Badrinath Pema Rathod,***[3] the Bombay High Court has held that the primary role of the Permanent Lok Adalat is to settle dispute

2. 2020 SCC OnLine Del 675 **3. 2022 SCC OnLine Bom 103**

through conciliatory methods and in case the conciliation fails, then it is not within the power of the Permanent Lok Adalat to adjudicate the matter on merits:

> *"15. In the light of the aforesaid statutory scheme, when the application preferred by the respondent before the Permanent Lok Adalat related to an incident, which resulted in registration of an offence in the Electricity Act, the Permanent Lok Adalat had entertained the dispute for the purpose of conciliation and settlement, but did not attempt any conciliation and in it's absence, proceeded to adjudicate the dispute, despite a bar being imposed under sub-section (8) of Section 22 (C). The Permanent Lok Adalat has, thus, clearly fallen into an error in adjudicating the dispute instituted by the applicant on it's merits, when it could not effect the conciliation/settlement between the parties. The said order, therefore, cannot be sustained."*

11. After going through the law laid down by the Supreme Court and various High Courts, it is quite vivid that the provisions contemplated under Sections 126 and 127 of the Electricity Act constitute a complete code in itself and there is remedy of appeal against the final assessment order. The order of the Permanent Lok Adalat is, thus, an outlier in the established scheme of things of the Electricity Act.

IV. CONCLUSION:

12. The Permanent Lok Adalat is not competent to maintain an application under Section 22 of Legal Services Authorities Act, 1987 against the pendency of the grievance redressal in the Ombudsman II under Sections 126 and Section 127 of the Electricity Act.

13. For the foregoing reasons, the impugned order dated 04.04.2015 passed by the Permanent Lok Adalat is not sustainable. Therefore, the present Writ Petition is allowed and the impugned order passed by the Permanent Lok Adalat in Consumer No.MIND-1692(HT) is set aside.

14. The Opposite Party No.2 shall first wait for the order of Ombudsman II and after that, be at liberty to prefer appeal in accordance with Section 127 of the Act, 2003 before the competent authority.

15. With the aforesaid observation/s, this Writ Petition stands disposed of. No cost(s).

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2024 (II) ILR-CUT-183

MISS SAVITRI RATHO, J.

BLAPL NO. 12122 OF 2023

TAPAS RANJAN SIKA ……Petitioner

-V-

STATE OF ODISHA ……Opp.Party

INDIAN PENAL CODE, 1860 – Sections 107, 306 – On account of constant taunt of petitioner and his conduct, the deceased committed suicide – Whether such conduct of the petitioner amounts to 'instigation' so as to make out the offence under 306 of the IPC against him? – Held, Yes – Discussed with reference to case laws.

Case Laws Relied on and Referred to :-

1. (2019) 10 SCC 188 : State of West Bengal vs. Indrajit Kundu & Ors.
2. 1995 Supp. (3) SCC 438 : Swamy Prahaladdas vs. State of M.P.
3. 1995 Supp (3) SCC 438 : Swamy Prahaladdas vs. State of M.P. & Anr.
4. 2009 AIR SCW 7070: 2010 (1) SCC 707 : Amalendu Pal @ Jhantu vs. State of West Bengal.
5. (2017) 1 SCC 433 : Gurcharan Singh vs. State of Punjab.
6. (2009) 16 SCC 605 Crl.A.No.2181 of 2009 11 : Chitresh Kumar Chopra vs. State (NCT) of Delhi 66.

For Petitioner : Mr. A.K. Mahakur
For Opp.Party : Mr. S.S. Pradhan, A.G.A.

JUDGMENT Date of Judgment : 31.01.2024

SAVITRI RATHO, J.

This is an application under Section 439 of Cr. P.C. for grant of bail to the Petitioner in connection with Larambha P.S. Case No.67 of 2023 corresponding to G.R. Case No. 300 of 2023 pending in the Court of the learned S.D.J.M., Patnagarh registered for commission of offences punishable under Sections 498-A/ 302/ 34 IPC against the petitioner, his parents and his elder sister. Chargesheet dated 26.08.2023 has been submitted only against the petitioner for commission of offence punishable under Section 498-A and Section 306 IPC.

2. The prayer for bail of the Petitioner has been rejected by the Additional Sessions Judge, Patnagarh on 04.09.2023 in BLAPL No. 175 of 2023.

3. The prosecution case in brief is that the Petitioner and the deceased, namely, Supriya Suna were in a love relationship and they got married in the year 2020 and were blessed with a son. The Petitioner did not have any permanent source of income for which, there was constant quarrel between him and the deceased. As the Petitioner was not taking up any job and was not maintaining the deceased and her son, the deceased had to depend on the mercy of others for her survival. So she used to constantly ask the Petitioner to take up some employment. Instead of doing so, he would taunt her saying that he cannot maintain her and she should die. Not being able to withstand the constant humiliation and taunts of the Petitioner and having no other option, the deceased committed suicide by hanging herself from a tree on 30.04.2023.

4. Mr. A.K. Mahakur, learned counsel for the Petitioner submits that the petitioner is in custody since 02.05.2023 and false allegations have been made against him. Even accepting the allegation against him to be true, even if he told the deceased to go and die and consequently she committed suicide, it would not

constitute an offence under Section 306 of the IPC. In support of his submission, he placed reliance on the decisions of the Supreme Court of India in ***State of West Bengal vs. Indrajit Kundu and others : (2019) 10 SCC 188*** and ***Swamy Prahaladdas vs. State of M.P: 1995 Supp. (3) SCC 438***.

5. Mr. S.S. Pradhan, learned Addl. Govt. Advocate opposes the prayer for bail stating that the victim was under serious stress on account of the misbehavior of the Petitioner, who did nothing to maintain her and her son. Whenever the deceased used to ask him to take up a job to maintain his family, the Petitioner would taunt here saying that he could not maintain her and so she should die. The attitude and taunts of the Petitioner did not leave the deceased with any alternative but to commit suicide, for which, the offence under Section 306 of IPC is made out against him. As he is squarely responsible for the death of the deceased, he does not deserve to be released on bail. He also submits that charge sheet has been submitted under Section 306 of the IPC and in the post mortem examination report, apart from the ligature mark on her neck, there is an injury under the medial aspect of her left arm below the axila.

6. Section 107 of IPC is extracted below:

> *"**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 wilful misrepresentation, or by wilful 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.*
>
> *Illustration*
>
> *A, a public officer, is authorised by a warrant from a Court of Justice to apprehend Z. B, knowing that fact and also that C is not Z, wilfully represents to A that C is Z, and thereby intentionally causes A to apprehend C. Here B abets by instigation the apprehension of C.*
>
> *Explanation 2.—Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act."*

7. Section 306 of IPC is extracted below:

> *"**306. Abetment of suicide**.—If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."*

8. From a careful reading of the two provisions, it is apparent that abetment of commission of suicide punishable under Section 306 of the IPC. For making a person liable for the offence, it has to be established that such person abetted the commission of suicide by some act or conduct and that this act contains any of the three ingredients enumerated under Section 107 of the IPC which are as follows : (i)

the said accused has instigated the person to commit suicide, or (ii) must have engaged with one or more persons in any conspiracy for seeking that the deceased commits suicide or (iii) he must intentionally aid by any act or illegal omission, of the commission of suicide by the deceased.

9. The Supreme Court in the case of ***Indrajit Kundu (supra)*** has held as follows:

> *"2. By the impugned order, the respondents-accused were discharged of the charge framed against them under Section 306 read with Section 34 of Indian Penal Code. The victim, daughter of the de facto complainant was a painter and artist. To improve her proficiency in English, first respondent was appointed as her English teacher. Respondent Nos. 2 and 3 are his parents. There developed intimacy between the victim and first respondent – Indrajit in course of coaching. It is the allegation of the complainant that as the deceased victim and first respondent had decided to marry, to finalise the proposal of marriage the victim had gone to the house of first respondent on 05.03.2004. It is alleged that when the victim went to the house of first respondent, respondent Nos. 2 and 3 who are the parents of the first respondent came out to raise shouts and addressed the victim as a call-girl. The words uttered by respondent Nos. 2 and 3, as per the de facto complainant are "you are a call-girl, why my son would marry you, we would give our son in marriage elsewhere". It is alleged in the complaint that at that time, first respondent did not protest against the version of his parents and his daughter returned home and became mentally perturbed. On 06.03.2004 at about 1.00 p.m. the victim had committed suicide."*
>
> *xxx xxx xxx*
>
> *"11. From the material placed on record, it is clear that respondents are sought to be proceeded for charge under Section 306/34 mainly relying on the suicide letters written by the deceased girl and the statements recorded during the investigation. Even according to the case of de facto complainant, respondent Nos. 2 and 3 who are parents of first respondent shouted at the deceased girl calling her a call-girl. This happened on 05.03.2004 and the deceased girl committed suicide on 06.03.2004. By considering the material placed on record, we are also of the view that the present case does ot present any picture of abetment allegedly committed by respondents. The suicide committed by the victim cannot be said to be the result of any action on part of respondents nor can it be said that commission of suicide by the victim was the only course open to her due to action of the respondents. There was no goading or solicitation or insinuation by any of the respondents to the victim to commit suicide. In the case of* ***Swamy Prahaladdas vs. State of M.P. and Anr.1995 Supp (3) SCC 438****, this Court while considering utterances like "to go and die" during the quarrel between husband and wife, uttered by husband held that utterances of such words are not direct cause for committing suicide. In such circumstances, in the aforesaid judgment this Court held that Sessions Judge erred in summoning the appellant to face the trial and quashed the proceedings."*

In the case of ***Swamy Prahaladdas (supra)***, the appellant had been summoned to face trial alongwith the co accused. The appellant and the deceased were the paramours of the co-accused - a married woman. All three had a quarrel one morning while having morning tea where the appellant allegedly remarked to the deceased that he should go and die. The deceased went home in a dejected mood and committed suicide. The woman had been committed to the Court of Session to

stand trial. At the time of framing of charge, the trial court was of the opinion that the appellant should also face charge for the words uttered by him. The Supreme Court held that the remark was casual in nature and often mentioned by people in the heat of the moment. It was not stated with the requisite mens rea and it cannot be said that the remark was the direct reason for the deceased committing suicide. The Supreme Court held that the appellant was not required to face the charge and allowed the appeal. (It was not a case of quarrel between husband and wife and the deceased was not the husband of the woman nor was the entire proceedings quashed).

In the case of ***Amalendu Pal @ Jhantu vs. State of West Bengal: 2009 AIR SCW 7070: 2010 (1) SCC 707***, the Supreme Court has held as under :-

> *"12. Thus, this Court has consistently taken the view that before holding an accused guilty of an offence under Section 306 IPC, the court must scrupulously examine the facts and circumstances of the case and also assess the evidence adduced before it in order to find out whether the cruelty and harassment meted out to the victim had left the victim with no other alternative but to put an end to her life. It is also to be borne in mind that in cases of alleged abetment of suicide there must be proof of direct or indirect acts of incitement to the commission of suicide. Merely on the allegation of harassment without there being any positive action proximate to the time of occurrence on the part of the accused which led or compelled the person to commit suicide, conviction in terms of Section 306 IPC is not sustainable.*
>
> *13. In order to bring a case within the purview of Section 306 IPC there must be a case of suicide and in the commission of the said offence, the person who is said to have abetted the commission of suicide must have played an active role by an act of instigation or by doing certain act to facilitate the commission of suicide. Therefore, the act of abetment by the person charged with the said offence must be proved and established by the prosecution before he could be convicted under Section 306 IPC."*

In ***Gurcharan Singh vs. State of Punjab :(2017) 1 SCC 433***, the Supreme Court has held as follows :

> *"21. It is thus manifest that the offence punishable is one of abetment of the commission of suicide by any person, predicating existence of a live link or nexus between the two, abetment being the propelling causative factor. The basic ingredients of this provision are suicidal death and the abetment thereof. To constitute abetment, the intention and involvement of the accused to aid or instigate the commission of suicide is imperative. Any severance or absence of any of this constituents would militate against this indictment. Remoteness of the culpable acts or omissions rooted in the intention of the accused to actualize the suicide would fall short as well of the offence of abetment essential to attract the punitive mandate of Section 306 IPC. Contiguity, continuity, culpability and complicity of the indictable acts or omission are the concomitant indices of abetment. Section 306 IPC, thus criminalises the sustained incitement for suicide."*

In the case of ***Chitresh Kumar Chopra vs. State (NCT) of Delhi 66 (2009) 16 SCC 605 Crl.A.No.2181 of 2009 11***, the Supreme Court has held that where the accused by his acts or by a continued course of conduct creates such circumstances that the deceased was left with no other option except to commit suicide, an "instigation" may be inferred. Whether such inference of instigation can be drawn

depends on the facts and circumstances of the case and no straitjacket formula can be laid down.

10. In the instant case, harassment - taunts and comments alleged were not stray incidents, but they were a constant feature. On account of the constant taunts of the petitioner and his conduct, the deceased was left with no other option but to commit suicide leaving behind her son. Prima facie, such conduct of the petitioner amounts to "instigation" so as to make out the offence under Section 306 of the IPC against him.

11. In view of the above discussion, I do not consider this to be fit case to release the petitioner on bail at this stage and reject the prayer for bail.

12. The bail application is accordingly dismissed.

13. It is open to the petitioner to move for bail afresh in case there is delay in conclusion of the trial.

14. No observation in this judgment should influence the trial court in any manner as they have been made for the sole purpose of deciding this bail application.

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2024 (II) ILR-CUT-188

MISS. SAVITRI RATHO, J.

BLAPL NO. 11162 OF 2023

BHAGABAN GOLORY ……Petitioner

-V-

STATE OF ODISHA ……Opp.Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 439 r/w Section 37 of the NDPS Act – Offence under section 20(b)(ii)(c) of the Act – There is no material to implicate the petitioner – The petitioner has no criminal antecedents – Whether the petitioner is entitled to bail inspite of the bar U/s. 37 of the Act? – Held, Yes.

Case Laws Relied on and Referred to :-

1. 2020 Vol.80 OCR SC 641 : Tofan Singh vs. State of Tamil Nadu.
2. 2022 SCC Online SC 891 : Narcotics Control Bureau vs. Mohit Agarwal.

For Petitioner : Mr. Pranab Kumar Das

For Opp.Party : Mr. S.S, Pradhan, A.G.A.

ORDER Date of Order : 29.02.2024

SAVITRI RATHO, J.

1. This is an application under Section 439 of Cr.P.C. for grant of bail to the petitioner in connection with Chitrokonda P.S. Case No. 67 of 2020 corresponding

to T.R. Case No. 64 of 2020(B) pending in the Court of the learned Sessions Judge-cum-Special Judge, Malkangiri under Section 20(b)(ii)(C) of the NDPS Act.

2. This application has been listed before me as BLAPL No. 2548 of 2021 filed by co accused Bata Chinabai has been disposed of by me on 03.03.2022.

3. The prayer of the petitioner has been rejected on 11.09.2023 by the learned Special Judge, Malkangiri.

4. The prosecution allegation in brief is that on the date of occurrence on the basis of prior information the police stopped one motorcycle and one tractor coming from Burudiput side towards Kankaraipada maintaining a distance of about 100 meters among them. On seeing the police the occupants of the motorcycle and the tractor ran away and one of the occupants namely Bata Sinabai was arrested from the nearby jungle and 1168 kgs of ganja was recovered from the tractor. He told the police that the ganja belonged to one Arjun Hantal who was coming on the motorcycle alongwith Shyama Muduli and that the present petitioner was the driver of the tractor and the other accused persons were occupants of the tractor.

5. Chargesheet dated 25.01.2021 has been filed against seven persons - Bata Sinabai, Shyama Muduli, Hari Pangi, Dambaru Khilla, Paturu Kotaya, Arjun Hantal, Nanda Khilla, Samara Nayak @ Pangi and the petitioner Bhagaban Golory, under Section -20 (b) (ii) C / Section 27 A of the NDPS Act showing all the accused persons except Bata Sinabai as absconders and NBW was issued against them. The case was split up against Bata Sinabai and trial commenced against him. The petitioner was arrested on 18.07.2023.

6. I have heard Mr. P.K. Das, learned counsel for the petitioner and Mr. S.S. Pradhan, learned Addl. Government Advocate for the State and perused the case diary.

7. Mr. P.K. Das, learned counsel for the petitioner has submitted that the petitioner has no criminal antecedents and is in custody since 18.07.2023. He has no connection with the ganja and the sole basis of his implication is the statement of the co-accused Bata Sinabai. He submits that since statement of the co- accused is the sole basis of his implication in the case and nothing incriminating has been seized from him or at his instance, he stands on the same footing as co-accused Samara Nayak @ Pangi who has been granted bail by order dated 12.09.2023 passed in BLAPL No. 5051 of 2023. He has relied on the decision of the Supreme Court in the case of ***Tofan Singh vs. State of Tamil Nadu*** reported in ***2020 Vol.80 OCR SC 641*** in support of his submission.

8. Mr. S.S. Pradhan, learned Addl. Government Advocate for the State opposes the prayer for bail stating that the petitioner is the driver of the tractor and on the date of occurrence he fled from the spot on seeing the police and was arrested on 18.07.2023 on the basis of NBW. As a huge quantity of ganja has been seized, Section 37 of the NDPS Act will be a bar for releasing him on bail. He further

submits that the petitioner avoided arrest for almost three years for which the trial had to be split up against him. It would therefore be difficult to ensure his presence during the trial if he is released on bail. He relies on the decision of the Apex Court in the case of ***Narcotics Control Bureau vs. Mohit Agarwal*** reported in ***2022 SCC Online SC 891*** to oppose the prayer for bail.

9. The Supreme Court in the case of ***Mohit Aggarwal (supra)*** has held as follows:-

> *"16. Coming back to the facts of the instant case, the learned Single Judge of the High Court cannot be faulted for holding that the appellant- NCB could not have relied on the confessional statements of the respondent and the other co-accused recorded under Section 67 of the NDPS Act in the light of law laid down by a Three Judges Bench of this Court in* ***Tofan Singh*** *(supra), wherein as per the majority decision, a confessional statement recorded under Section 67 of the NDPS Act has been held to be inadmissible in the trial of an offence under the NDPS Act. Therefore, the admissions made by the respondent while in custody to the effect that he had illegally traded in narcotic drugs, will have to be kept aside. However, this was not the only material that the appellant-NCB had relied on to oppose the bail application filed by the respondent. The appellant-NCB had specifically stated that it was the disclosures made by the respondent that had led the NCB team to arrive at and raid the godown of the co-accused, Promod Jaipuria which resulted in the recovery of a large haul of different psychotropic substances in the form of tablets, injections and syrups. Counsel for the appellant-NCB had also pointed out that it was the respondent who had disclosed the address and location of the co-accused, Promod Jaipuria who was arrested later on and the CDR details of the mobile phones of all co- accused including the respondent herein showed that they were in touch with each other.*
>
> *17. Even dehors the confessional statement of the respondent and the other co-accused recorded under Section 67 of the NDPS Act, which were subsequently retracted by them, the other circumstantial evidence brought on record by the appellant-NCB ought to have dissuaded the High Court from exercising its discretion in favour of the respondent and concluding that there were reasonable grounds to justify that he was not guilty of such an offence under the NDPS Act. We are not persuaded by the submission made by learned counsel for the respondent and the observation made in the impugned order that since nothing was found from the possession of the respondent, he is not guilty of the offence for which he has been charged. Such an assumption would be premature at this stage.*

The Supreme Court in the case of ***Tofan Singh*** (Supra) answered the reference as follows:

> *"(i) That the officers who are invested with powers under section 53 of the NDPS Act are "police officers" within the meaning of section 25 of the Evidence Act, as a result of which any confessional statement made to them would be barred under the provisions of section 25 of the Evidence Act, and cannot be taken into account in order to convict an accused under the NDPS Act.*
>
> *(ii) That a statement recorded under section 67 of the NDPS Act cannot be used as a confessional statement in the trial of an offence under the NDPS Act."*

10. In the present case other than the statement of the co accused Bata Chinabai, there is no other material to implicate the petitioner and as he has no

criminal antecedents, I am of the view that Section 37 of the NDPS Act will not be a bar for consideration of his prayer for bail.

11. Considering the nature of materials collected against the petitioner, the period spent by him in custody and the decisions of the Supreme Court referred to above and release of co-accused Samara Nayak @ Pangi on bail, I am inclined to allow the prayer for bail of the petitioner.

12. The petitioner- Bhagaban Golory shall be released on bail on such terms and conditions as may be fixed by the learned Court below in seisin over the matter subject to verification that he has no criminal antecedents, including the following conditions:

(i) He will not indulge in any criminal activity while on bail.
(ii) He will not threaten or try to influence prosecution witnesses while on bail.
(iii) He will report before the Chitrokonda Police Station once in a week on every Sunday between 3.00 p.m. to 5.00 p.m. till conclusion of trial.
(iv) He will remain present on each date fixed for trial.
(v) He will not leave Malkangiri district without prior permission to the learned trial Court.

13. Violation of any condition will entail in cancellation of bail.

14. The BLAPL is accordingly disposed of.

15. The learned trial court should not be influenced by any observation in this order as they have been made for the purpose of consideration of the prayer for bail.

16. Urgent certified copy of this order be granted on proper application.

17. A copy of this order be supplied to Mr. S.S.Pradhan, learned Addl. Government Advocate for onward transmission to the Chitrokonda Police Station to enable him to take steps for recall of this order in case of violation of any condition.

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2024 (II) ILR-CUT-191

M.S. SAHOO, J.

W.P.(C) NO.15026 OF 2014

BANSIDHAR MANDAL & ORS. ……Petitioners

-V-

STATE OF ODISHA & ORS. ……Opp.Parties

CONSTITUTION OF INDIA, 1950 – Article 166 r/w Rules of the Orissa Government Rules of Business – When an order issued by the Secretary-in-Charge of the Government, Department can be treated as an order of Government – Explained with reference to case laws.

Case Laws Relied on and Referred to :-

1. (2011) 8 SCC 670 : State of Uttaranchal v. Sunil Kumar Vaish.
2. 2022 SCC OnLine SC 1118 : Mahadeo & Ors. v. Sovan Devi and Ors.
3. AIR 1952 SC 16 : 1951 SCC 1088 : Commissioner of Police v. Gordhan Das Bhanji.
4. (1978) 1 SCC 405 : Mohinder Singh Gill v. Chief Election Commission.
5. (2021) 6 SCC 707 : AIR 2021 SC 753 : Opto Circuits (India) Ltd. v. Axis Bank.
6. AIR 2009 SC 904 : (2009)1 SCC 180 : Sethi Auto Service Station v. Delhi Development Authority.
7. (2003) 5 SCC 413 : Laxminarayan R. Bhattad v. State of Maharashtra.
8. (1968) 3 SCR 251 : AIR 1968 SC 1232 : Municipal Corporation of Delhi v. Birla Cotton Spinning & Weaving Mills.

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

For Opp.parties : Mr. Nikhil Pratap, ASC

JUDGMENT Date of Hearing : 20.12.2023 : Date of Judgment : 10.04.2024

M.S. SAHOO, J.

The Petition

The petitioners, continuing as the teaching staff of an Upper Primary (Middle English) School situated at Patia, Bhubaneswar in the district of Khurda have filed the writ petition challenging the order dated 30.06.2014 (Annexure-19 to the writ petition) by which the earlier orders of the Government of Odisha, Department of School & Mass Education dated 07.02.2013 and 19.03.2013 (Annexure-17 series) for taking over the management of Shikharchandi Upper Primary (Middle English) School, Bhubaneswar were cancelled.

Facts urged in the writ petition

2. In 1990 Sikharchandi U.P.(M.E) School was established. On 25.03.1994 the Managing Committee of the School requested the Bhubaneswar Municipal Corporation to take over the School.

The Bhubaneswar Municipal Corporation decided to take over the management of the School and accordingly passed various resolutions starting with resolution dated 31.03.1995 and thereafter some resolutions till 31.07.200.

On 13.11.2000, the Chief Executive Officer informed the Government about taking over the management of the petitioners' school by the Bhubaneswar Municipal Corporation. An amount of Rs.4.00 lakhs was sanctioned in favour of the petitioners' school by the Corporation for the year 2001-2002.

On 23.01.2003, an advertisement was issued by the Government to open new primary and Upper Primary Schools. On 30.07.2008 the State Government decided to take over the School and include it under the Sarva Sikshya Abhiyan (hereinafter for short SSA) Scheme and declare the school as Project Primary School.

On 21.08.2008 the Managing Committee of the School passed a resolution to hand over the School building, management, staff (petitioners) to the District Project Coordinator, Odisha Primary Education Programme Authority (OPEPA),

Khurda (opposite party no.5). On 16.02.2008 the untrained teachers were directed by opposite party no.1 to avail in-service training and acquire the teacher training qualification.

2.1 On 23.12.2008 the petitioners along with other employees made a representation for taking over the management of the petitioner's school and since no action was taken, some of the employees/teachers of the School approached this Court by filing W.P.(C) No.17411 of 2008. The said writ petition was disposed of by order dated 20.02.2009, wherein, the petitioners were directed to file representations before the Director, OPEPA within six weeks with all relevant documents and upon receipt of such representations the opposite party was directed to pass necessary orders within four months. The relevant portion of the said order dated 20.02.2009 is reproduced herein :

> *"After hearing learned counsel for the petitioners and learned counsel for the opposite parties this Court feels that if in fact Sikharchandi U.P.(M.E) School which is existing since 1990 has been taken over by OPEPA and the said school can cater the education need of slum area, there is no necessity for establishing a new Primary School. On the other hand, if the school is not in a position to cater the educational need of the slum area and has not been taken over by OPEPA, it would be open to the authorities to pass such orders as felt necessary. That apart, the grievance of the petitioners involves disputed questions of fact, which cannot be effectually adjudicated under writ jurisdiction. This Court, therefore, disposes of the writ petition giving liberty to the petitioners to file representations before the Director, OPEPA-opposite party no.3 within a period of six weeks hence enclosing all relevant documents along with staff position, date of establishment of the school and the order of taking over the School under Sarva Sikhya Abhijan by OPEPA if such representations are filed the said opposite party shall apply his mind and if satisfied that the School is existing and has approved and qualified staff and the same can cater the educational need of slum area, shall pass necessary orders within four months from the date of filing of the representations by the petitioners."*

2.2 Pursuant to the order passed by this Court the opposite party no.2 directed the District Project Co-ordinator, OPEPA to conduct a joint enquiry and take necessary action in accordance to the report of the Joint enquiry and the decision taken in the committee meeting.

2.3 On 04.06.2011 the District Inspector of Schools, Bhubaneswar issued a letter for consideration for absorption of the petitioners as 'Sikshya Sahayak'. On 06.09.2011 the High Power Committee after due deliberation and consideration pursuant to the order of the High Court recommended to take over the management of the petitioners' school with observation to absorb the teachers as Sikshya Sahayak w.e.f. 30.07.2008, i.e., the date of declaration of the School as Project primary school (Annexure-16).

On 07.02.2013 (Annexure-17 series) the Govt. in the Department communicated decision to take over the management of the petitioner's school and declare the said School as Project Upper Primary School under SSA. Subsequently

another letter was issued on 19.03.2013 wherein the school was declared as Project Upper Primary School under SSA w.e.f. 30.07.2008 (Annexure-17 series).

2.4 On 14.05.2013 decision was taken by the Government to absorb the teachers then working in the petitioners' Institution as Sikshya Sahayak (Trained and Untrained) and two Untrained Teacher were allowed to undergo in service teachers' training in year 2013-14.

On 25.11.2013 as per report of the Joint Enquiry conducted by the opposite parties, the trained teachers of the Sikharchandi UP (ME) School were recommended to be absorbed as Sikshya Sahayaks and the untrained teacher were to be absorbed after acquiring the training qualification within three years.

2.5 Somehow the matter was set for reconsideration and on 14.02.2014 the High Power Committee constituted by the Govt again recommended for absorption of trained teachers of the petitioners' school as Sikshya Sahayaks w.e.f. 30.07.2008 and the untrained teachers as Sikshya Sahayaks after acquiring teachers' training qualification by 01.04.2015.

2.6 On 30.06.2014 while the matter stood thus the opposite party no.1 passed an order 'recalling' earlier orders dated 07.02.2013 and 19.03.2013 purportedly on the basis of the decision passed in Civil Appeal No.2104 of 2004 (Director, Elementary Education & Another v. Dibakar Pradhan (Annexure-19).

2.7 Earlier on 27.02.2007 in the case of a similar school, i.e., Gopabandhu Primary School at Bharatpur, Khurda, the State Government had not only to taken over the school but also allowed the existing staff to continue as Sikshya Sahayaks (Annexure-20).

Pleadings on behalf of O.Ps.

3. With regard to the facts urged in the writ petition and noted above, there has been no controversy and the counter of the State-Opp. Parties does not deny the aforesaid facts. Therefore, to avoid repetition, the factual averments/assertions made in the counter affidavit of the State are not repeated.

4. In response to the writ petition, the opposite party no.4-Collector-cum-C.E.O. Zillaparishad, Khordha and opposite party no.5-District Project Coordinator, Sarba Sikshya Abhiyan, Bhubaneswar, Dist-Khordha have filed their counter affidavit dated 12.11.2015; in response to the counter by the opposite party nos.4 & 5 rejoinder has been filed on behalf of the petitioners by affidavit dated 25.02.2019; the opposite party no.1 Govt. have filed counter represented through the Secretary to Department of School and Mass Education dated 21.10.2019; in response to the said counter by opposite party no.1 rejoinder on behalf of the petitioners have been filed by rejoinder affidavit dated 28.02.2020; further affidavit on behalf of the petitioners has been filed dated 20.09.2021.

5. In the present proceeding, after hearing the learned Senior Counsel and the learned counsel for the State in the matter, by order dated 29.03.2022 this Court observed the following :

> *"1. This matter is taken up through hybrid mode.*
> *2. The matter was heard at some length. Learned senior counsel appearing for the petitioners made submissions regarding the annexures 16, 17 & 18 to the writ petition as well as Annexure-23 (page-125) of the affidavit on behalf of the petitioner.*
> *3. It is submitted by learned senior counsel that the order dated 30.6.2014 (Annexure-19) impugned before this Court is not in consonance of the earlier decision of the Govt. regarding taking over the U.P.(M.E.) School.*
> *4. It is submitted that the last paragraph of the order impugned is not in sync with the earlier observation made in paragraphs 1 to 4 as the order dated 30.06.2014 does not take into consideration the fact that the Govt. had already taken over the U.P.(M.E.) School earlier.*
> *5. Learned Standing Counsel at the outset had prayed for time to go through the brief as the pleadings are complete.*
> *It is observed that learned Standing Counsel shall obtain any further instruction in the matter so as to apprise this Court.*
> *7. Urgent certified copy of the order be granted as per Rules.*
> *8. As prayed for, list on 29.4.2022.*
> *9. The order be uploaded in the Court's website."*

Pursuant to the said order dated 29.03.2022 additional affidavit dated 25.07.2022 has been filed on behalf of opposite party no.1-State represented through the Secretary Department of School and Mass Education.

Further, additional affidavit has been filed on behalf of the opposite party no.1 by affidavit dated 22.08.2022.

Apart from the aforesaid pleadings which are on record, chart containing chronological dates with events and written notes of submissions have been filed on behalf of the petitioners. The opposite parties have filed their notes of submissions through the learned Additional Standing Counsel.

6. Mr. B.Routray, learned Senior Counsel was heard at length for the petitioners and in response the learned Additional Standing Counsel Mr. Pratap made his submissions in detail on behalf of the opposite party State.

This Court has gone through the pleadings, the chronological chart of events and notes of submissions filed by the parties.

Submissions on behalf of the petitioners

7. Learned Senior Counsel for the petitioners submits that giving effect to the orders dated 07.02.2013 and 19.03.2013 of the State Government, the opposite party no.5 directed Block Resource Cluster Centre Coordinator (BRCC) and Sub Inspector (S.I.) of School, SSA, Khordha for admission of untrained Elementary School Teachers like Bharati Sahoo (petitioner no.6) and Prasanna Kumar Routray (Petitioner no.7) in first year of Diploma in Elementary Education (D.El.Ed) Course through, Distance Education Programme (D.E.P.) for the Sessions 2013-2014, to

provide inservice training. Much thereafter, the impugned order dated 30.06.2014 was passed by the then Secretary wherein the earlier orders dated 07.02.2013 and 19.03.2013 were cancelled without taking into consideration the earlier decision and consequential orders of the State Government giving effect to the decisions dated 07.02.2013 and 19.03.2013.

The impugned order is not in consonance with the earlier decision of the Government for taking over the petitioners' school, one U.P.(M.E.) School namely Orient Colliery M.E. School and Gopabandhu Primary School at Bharatpur, Khurda; therefore the action of the Government vis-‡-vis the present petitioners (Staff of Sikharchandi UP(ME) School) is discriminatory as there is no intelligible differentia between the employees of Orient Colliery M.E. School and Gopabandhu Primary School on one hand and Sikharchandi UP(ME) School on the other, to be treated differently.

7.1 It is further submitted by the learned Senior Counsel for the petitioners that the letter dated 07.02.2013 as well as 19.03.2013 is not just mere communication rather the same is communication of conscious decision of the State Government in the department of School and Mass Education taken pursuant to the order passed by this Court in W.P.(C) No.17411 of 2008, also keeping in view the recommendation of the committee duly constituted for consideration of various aspects regarding taking over of the management of the petitioners' school.

7.2 It is submitted that decision as contained in/ communicated by letters date 07.02.2013 and 19.02.2013, is in consonance with the Govt. of Oisha Rules of Business. 7.3 It is contended that basing on the inputs regarding possible discrepancies after taking over the School, the School and Mass Education Department decided to reconsider the proposal for taking over the Shikarchandi U.P.(M.E.) School. Accordingly, on 14.2.2014 meeting of the reconstituted committee was convened, wherein, the said committee after due & detailed deliberation, again recommended for taking over of Shikarchandi U.P.(M.E.) School by the Government.

Submissions on behalf of the opposite parties

8. Since the facts remain uncontroverted, the opposite parties have raised only the legal contentions against the prayer made in the writ petition which are as follows :

> *A noting or a decision in a file only gets culminated into an order affecting the rights of a party when it is expressed in the name of the Governor and authenticated in the manner provided under Article 166 (2). The decision of the S & M.E Department vide its letter/office order No.3326/SME dated 07.02.2013 does not culminate into order affecting rights of the petitioner, as it is without consultation with the Finance Department under Rule 10 of the Orissa Government Rules of Business made under Article 166 of the Constitution of India.*

8.1 Rule 10 of the Orissa Government Rules of Business Made Under Article 166 of the Constitution of India stipulates that no department shall without previous consultation of the Finance Department authorize any order which will affect finances of the State. The said Rule is extracted herein below :

> *"10.(1) No department shall without previous consultation with the Finance Department authorize any orders (other than orders pursuant to any general delegations made by the Finance Department) which either immediately or by their repercussions will affect the finances of the State or which in particular, either -*
> *a. relate to the number or grading or cadres of posts or the emoluments or other conditions of service or post; or*
> *b. involve any grant of land or assignment of revenue or concession, grant lease or licence of mineral or forest rights or a right to water-power or any easement or privilege in respect of such concession; or*
> *c. in any way involve any relinquishment of revenue.*
> *(2) No proposal which requires previous consultation with the Finance Department under sub-rule(1) of this rule but in which the Finance Department has not concurred, may be proceeded with unless a decision to that effect has been taken by the cabinet."*
>
> (Emphasis supplied in original by the OPs)

8.2 It is submitted that the decision of the S&ME Department vide its letter/office order no.3326/SME dated 07.02.2013 affects the finances of the State and directly relates to number of posts of service. As such the decision is clearly governed by Rule 10 of the Rules of Business. The decision in letter/office order no.3326/SME dated 07.02.2013 was not proceeded by any consultation with the Finance Department as required under Rule-10(1) of the Rules of Business.

8.3 The decision in letter/office order no.3326/SME dated 07.02.2013 not proceeded by "*a decision to that effect by the Cabinet*." A Cabinet as defined under Rule-4 of the Orissa Government Rules of Business means "the Committee of the Council of Ministers specified in Rule 4- A". Rule-4A "shall be a Committee of the Council of Ministers to be called the Cabinet which shall consist of the Ministers". The Cabinet, therefore, refers to the entire Committee of Council of Ministers and not to an individual Minister, that too a Minister of State.

8.4 The decision of the Government in its letter/office order no.3326/SME dated 07.2.2013 has not complied and is not in accordance with Rule 10 of the Rules of Business. Resultantly, it has not been sanctified and acted upon by issuing an order in accordance with Articles 166 of the Constitution. Therefore, the said decision does not get culminated into an order affecting right of the parties.

8.5 It is contended, as is settled law, the decision in letter/office order no.3326/SME dated 07.02.2013 can always be reviewed/reversed/overruled or overturned and the government has no legal impediment in doing so. The petitioner cannot pray that the Hon'ble Court must take cognizance of the earlier noting or decision for exercise of the power of judicial review.

8.6 The decision of the S&ME Department vide its order no.13985/SME dated 30.06.2014 would not culminate into rights for the petitioner as it has not been

effected in terms of Rule-10 of the Orissa Government Rules of Business under Article 166 by consulting the Finance Department.

8.7 It is submitted that on 08.08.2013 the Minister of State, S&ME Department directed that Finance Department shall be consulted by recording the following in the file's note sheet :

> *"... 2 Let the matter be examined once again by the committee formed earlier in obedience to the direction of the Hon'ble High Court in W.P.(C) No.17411/08...*
> *3. Views of Finance Department and Law Department be obtained"* [Emphasis Supplied]

It is contended when the Finance Department was consulted on 03.04.2014, it did not grant its approval for the takeover of the Shikharchandi U.P.(M.E.) School.

Decision making process culminated into the Order No.13985/SME dated 30.06.2014 that is impugned and as such, the said order is in accordance with the Rule 10 of Article 166 of the Constitution and culminates into an order affecting rights of the petitioner.

The provisions of the Constitution of India and the relevant Acts and Rules

9. **Article 166** of the Constitution of India which has a direct bearing on the issues raised for adjudication is reproduced below :

> *"Conduct of business of the Government of a State-*
> *(1) All executive action of the Government of a State shall be expressed to be taken in the name of the Governor.*
> *(2) Orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in rules to be made by the Governor, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor.*
> *(3) The Governor shall make rules for the more convenient transaction of the business of the Government of the State, and for the allocation among Ministers of the said business in so far as it is not business with respect to which the Governor is by or under this Constitution required to act in his discretion." (Underlined to Supply Emphasis)*

Clause-3 of the Article 166 enables the Governor to make Rules of the Government and for allocation of business of the Government amongst the Ministers. The Odisha Government Rules of Business (hereinafter OGRB) has been made under Article 166 of the Constitution of India.

10. **The relevant Rules of the Orissa Government Rules of Business** made **under Article 166** of the Constitution of India, are reproduced herein for reference :

> ***"4.*** *The business of the Government shall be transacted in the departments specified in the First Schedule and shall be classified and distributed between those departments and their branches as laid down therein.*
> ***4A.*** *There shall be a Committee of the Council of Ministers to be called the Cabinet which shall consist of the Ministers. Except when the Council of Ministers meets on any occasion, all matters referred to in the Second Schedule shall ordinarily be considered at a meeting of the Cabinet :*

Provided that a Minister of State or a Deputy Minister may attend the meeting of the Cabinet when requested to do so, either when a subject with which he is concerned is under discussion or otherwise :

Provided further that a Minister of State-in-charge of a department where there is no Minister in-charge of that department, shall attend the meeting of a Cabinet where at a subject with which he is concerned is fixed or taken up for consideration.

***5.** The Governor shall, on the advice of the Chief Minister, allot the business of the Government by assigning one or more departments to the charge of a Minister or of a Minister of State :*

Provided that different branches of a department or different subject under a branch may be assigned to the charge of different Minister or Ministers of State :

***6.** Each department of the Secretariat shall consist of a Secretary to Government who shall be the official head of that department and of such other officers and staff subordinate to him as the State Government may determine : Provided that more than one department may be placed in charge of the same Secretary : Provided further that different branches of a department may be placed in charge of different Secretaries.*

***7.** The Council shall be collectively responsible for all executive orders issued in the name of the Governor in accordance with these rules whether such orders are authorised by an individual Minister or Minister of State on a matter appertaining his port folio or as a result of discussion at a meeting of the Council or of the Cabinet or howsoever otherwise.*

9. (1) Without prejudice to the provisions of Rule 7 the Minister in-charge or the Minister of State in-charge of a Department or a branch or branches thereof shall be primarily responsible for the disposal of business appertaining that department or branch.

(2) Every Minister, every Minister of State, every Deputy Minister and every Secretary shall transmit to the Chief Minister all such information with respect to the business of the Government as the Chief Minister may from time to time require to be transmitted to him.

xxx xxx xxx

***10.** (1) No department shall without previous consultation with the Finance Department authorise any orders (other than orders pursuant to any general delegations made by the Finance Department) which either immediately or by their repercussions, will affect the finances of the State or which in particular, either-*

(a) relate to the number or gradings or cadres of post or the emoluments or other conditions of service or post; or

***11.** All orders or instruments made or executed by order or on behalf of the Government of Orissa shall be expressed to be made by or by order of or executed in the name of the Governor of Orissa. [Underlined to supply emphasis]*

11. First Schedule of OGRB

Allocation of business amongst departments
[Vide Rule 4]
VIA SCHOOL AND MASS EDUCATION DEPARTMENT

1.	Awards	**Union Subjects**
		1. National Award to Teachers 2. National Programme for Nutritional support to Primary Education

2.	Primary Education	**State Subjects**
		1. Primary Education & Early Childhood Care & Education including Primary Schools and Upper Primary Schools. 2. Paper Cell
3.	Secondary Education	**State Subjects**
		1. Secondary Education including Secondary Schools. 2. Special Education 3. Minority Community Education. 4. District Selection Boards. 5. Board of Secondary Education. 6. Text Book Press. 7. English Language Teaching Institute. 8. Libraries (Schools).
4.	Teachers' Training	**State Subjects**
		1. Teacher Education and Training including Teachers' Training Colleges and Teachers' Training Schools. 2. State Council of Educational Research and Training. 3. All Teachers Training Programmes including Institute of Advanced Studies in Education, Colleges of Teacher Education and District Institute of Education and Training. 4. State Institute of Educational Technology.
5.	Mass and Adult Education	**State Subjects**
		1. Non-Formal Education. 2. Mass Education including Education. 3. State Resource Centre and District Resource Unit.
6.	General	**State Subjects**
		1. Control of all officers and staff serving under the Department of School. 2. Administrative charge of all buildings under the control of the Department of School and Mass Education. 3. Grant of rent-free quarters to officers under the control of the Department. 4. All Acts, Rules and Regulations concerning the subjects dealt with in the Department of School and Mass Education. 5. Junior Red Cross. 6. Scouts and Guides.
7.	Higher Secondary Education	**State Subjects**
		1. Higher Secondary Education including +2 Colleges and Higher Secondary Schools.

[Emphasis Supplied]

12. "***SECOND SCHEDULE***

[See Rule 8 (1)]

1. Proposals for the appointment or removal of the Advocate-General or for determining or varying the remuneration payable to him.

2. Proposal to summon, prorogue or dissolve the Legislature of the State.

3. Proposals for legislation, including the issue of an Ordinance under Article 213 or the making of Regulation under paragraph 5 (2) of the Fifth Schedule to the Constitution.

4. Decision on questions arising as to whether a Member of the Legislative Assembly of the State has become subject to any disqualification under Article 191 and any proposals to refer such questions for the Election Commission, any proposal to recover to waive recovery of the penalty due under Article 193.

5. [* *]*

6. Proposals for the imposition of a new tax of any change in the method of assessment or the pitch of any existing tax, land revenue or irrigation rates for the raising of loans on the security of the general revenues of the State.

7. Any proposal which affects the finances of the State which has not the consent of the Finance Minister.

8. Any proposal for reappropriation to which the consent of the Finance Minister is required has been withheld.

9. The annual financial statements to be laid before the Legislature and demands for supplementary, additional or excess grants.

10. The annual audit review of the finances of the State and the report of the Public Accounts Committee.

11. Proposals involving any important change of policy of practice or important changes in the Administrative system.

12. Reports of Committee of enquiry appointed by Government on their own initiative or in pursuance of a resolution passed by the Orissa Legislative Assembly.

13. Proposals for the making or amending of rules regulating the recruitment and the conditions of service of -

(a) persons appointed to the Secretariat staff of the Assembly;

(b) officers and servants of the High Court;

(c) persons appointed to the public services and posts in connection with the affairs of the State.

14. Proposals for the making or amending of rules under Article 234.

15. Proposals for the issue of a notification under Article 237.

16. Any proposal involving appointment and any action for the dismissal, removal or suspension of a member of the Public Service Commission.

17. Proposals for making or amending regulations under Article 318 or under the proviso to Clause (3) of Article 320.

18. Report of the Public Service Commission on its work and any action proposed to be taken with reference thereto.

[19. Proposal involving the alienation (temporarily or permanently), abandonment or reduction of revenue, or sale, grant or lease of Government property exceeding rupees one lakh in value, except when such alienation, abandonment, reduction, sale, grant or lease is in accordance with the rules or a general scheme already approved by the Cabinet.]

20. [ ]

21. Proposals involving any important alteration, in tee conditions of the members of any All-India Service or the State Service or in the method of recruitment to the Service or post to which appointment is made by the Government.
22. Proposals for appointments inconsistent with the recommendation of the Public Service Commission.
23. [ ]
24. Cases which affect or are likely to affect the good Government of scheduled areas.
25. Proposals that adversely affect the operation of any policy laid down by the Central Government.
26. Grant of laws of major forest produce and sal seed, kendu leaf and bamboo to private parties in all cases except those settled in public auction.
27. [ ]
28. Cases required by the Chief Minister to be brought before the Cabinet.
29. All cases of initial sanction and renewal and extension of Government guarantees for loans of Public Sector Undertakings/Urban Local Bodies/Cooperative Institutions and Companies etc with prior concurrence of Finance Department.
30. "For all Non-plan and State Plan Schemes with financial outlay above Rs. 250 crores and revised cost estimates of projects/schemes with original outlay above Rs.250 crores under State Plan and above Rs.100 crores under Non-Plan Schemes arising dur to changes in statutory levies, exchange rate variations, price escalation within the approved project time cycle as well as the cases involving further cost increase (excluding the change due to statutory levies, exchange rate variations and price escalation within the approved project time cycle.)"

By order of the Governor
Sd/
Chief Secretary to Government"

13. Instructions regarding the Business of the Government issued under Rule 14 of the Rules made under Article 166 of the constitution of India has been issued by the Governor. The applicable instructions are quoted herein :

In exercise of the powers conferred on him by rule 14 of the Orissa Government Rules of Business made by him under Article 166 of the Constitution of India the Governor of Orissa is pleased to issue the following instructions for the more convenient transactions of the business of the Government of Orissa, namely :

PART-I
Definitions
1. In these instructions, unless the context otherwise requires,
(i-A) "Cabinet" shall have the same meaning as defined in Rule 2 of the Rules of Business.
(iv) "Minister-in-charge, "Minister of State-in-charge" of "Deputy Minister-in-charge" means respectively the Minister, the Minister of State or the Deputy Minister appointed by the Governor to be in charge of the Department of the Government or Branch thereof to which the case belongs."

In exercise of the powers conferred on the Governor by Rule 14 of the Rules. He has been pleased to issue the instructions for the more convenient transaction of the business of Government of Odisha. The **Instructions** comprises of the 7 Parts.

As per Instruction 2 contained in Part 1, a case shall be deemed to belong to a Dept. to which under the Schedule of the Rules the subject matter thereof pertains or is mainly related to. Further if any question arises regarding the Dept. to which a case belongs,

the decision of the Minister in charge of the Dept. Concerned shall be final. If the Ministers in charge after discussion are unable to agree as to the Dept. to which the case belongs, the Chief Minister shall decide the question.

Case Law cited at the Bar

14. The learned Additional Standing Counsel for the State has referred to the following decisions as far as the submissions of the State on the questions of law are concerned :

In ***State of Uttaranchal v. Sunil Kumar Vaish : (2011) 8 SCC 670, affirmed in Mahadeo & others v. Sovan Devi and others, 2022 SCC OnLine SC 1118*** (Para-15) encapsulates the law :

> *"24. A noting recorded in the file is merely a noting simpliciter and nothing more. It merely represents expression of opinion by the particular individual. By no stretch of imagination, such noting can be treated as a decision of the Government. Even if the competent authority records its opinion in the file on the merits of the matter under consideration, the same cannot be termed as a decision of the Government unless it is sanctified and acted upon by issuing an order in accordance with Articles 77(1) and (2) or Articles 166 (1) and (2). The noting in the file or even a decision gets culminated into an order affecting right of the parties only when it is expressed in the name of the President or the Governor, as the case may be, and authenticated in the manner provided in Article 77(2) or Article 166 (2). A noting or even a decision recorded in the file can always be reviewed/reversed/overruled or overturned and the court cannot take cognizance of the earlier noting or decision for exercise of the power of judicial review.*
>
> *(See State of Punjab v.Sodhi Sukhdev Singh AIR 1061 SC 493 Bachhitar Singh v. State of Punjab, AIR 1963 SC 395, State of Bihar v. Kripalu Shankar (1987) 3 SCC 34, Rajasthan Housing Board v. Shri Kishan (1993) 2 SCC 84, Sethi Auto Service Station v. DDA (2009) 1 SCC 180 and Shanti Sports Club v. Union of India (2009) 15 SCC 705)*

The learned ASC also relies on the judgment rendered by the Hon'ble Supreme Court in ***Mahadeo and others v. Sovan Devi and others : 2022 SCC Online SC 1118.***

Analysis and Conclusion

15. The law has been well settled for the last so many years that when an order is passed in exercise of a statutory power on certain grounds, its validity must be judged by the reasons mentioned in the orders. Those reasons cannot be supplemented by other reasons through an affidavit or otherwise. Were this not so, an order otherwise bad in law at the very outset may get validated through additional grounds later brought out in the form of an affidavit.

This principle of law laid down in ***Commissioner of Police v. Gordhan Das Bhanji : AIR 1952 SC 16 : 1951 SCC 1088 &*** again in ***Mohinder Singh Gill v. Chief Election Commission : (1978) 1 SCC 405*** has been reiterated by the Supreme Court on several occasions in several decisions, running like a golden thread in different contexts. One such recent decision being ***Opto Circuits (India) Ltd. v. Axis Bank : (2021) 6 SCC 707 : AIR 2021 SC 753*** (Para-12 of SCC) :

> ***12.*** *The action sought to be sustained should be with reference to the contents of the impugned order/communication and the same cannot be justified by improving the same through the contention raised in the objection statement or affidavit filed before the Court. This has been succinctly laid down by this Court in* ***Mohinder Singh Gill v. Chief Election Commr. [Mohinder Singh Gill v. Chief Election Commr., (1978) 1 SCC 405]*** *as follows : (SCC p. 417, para 8)*
>
> *"8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, gets validated by additional grounds later brought out. We may here draw attention to the observations of Bose, J. in* ***Gordhandas Bhanji [Commr. of Police v. Gordhandas Bhanji, 1951 SCC 1088] : (SCC p. 1095, para 9)***
>
> *'9. ...public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.'*
>
> *Orders are not like old wine becoming better as they grow older."*
>
> *In fact, in the instant case such contention of having exercised power under Section 102 CrPC has not been put forth even in the counter-affidavit, either in this appeal or before the High Court and has only been the attempted ingenuity of the learned Additional Solicitor General. Such contention, therefore, cannot be accepted. In fact, in the objection statement filed before the High Court much emphasis has been laid on the power available under the PMLA and the same being exercised though without specifically referring to the power available under Section 17 of the PMLA.*

Records of the Government

16. To test merits of the contention raised on behalf of State-O.Ps as noted above, in terms of the principles laid in ***Mohinder Singh Gill (supra)*** and ***Gordhandas Bhanji (supra)*** reiterated in ***Opto Circuits (supra)*** the original records of the Government, where the matter has been dealt and decisions have been taken as contained in the office file 'No.I-SME-G-98/12' were produced by the Government for perusal of this Court.

17. In view of the rival contentions raised at the bar pertaining to the three 'decisions taken by the Government' in School & Mass Education Department, by orders dated 07.02.2013, 19.03.2013 and 30.06.2014, in considered opinion of this Court the following questions have arisen to be answered by this Court :

> (i) Whether in terms of Government Odisha Rules of Business the orders dated 07.02.2013 and 19.03.2013 of the State Government can be termed/treated; as orders of the Govt, thereby the consequences thereof have to follow;
>
> (ii) Whether the order dated 29.01.2013 of the Minister of State (Independent Charge) heading the Department of School & Mass Education is to be treated as orders of the Government;

(iii) Whether the said orders being orders of the Government confer any rights on the petitioners;

(iv) Whether in terms of the Govt. Rules of Business the order dated 30.06.2014 issued by the Secretary-in-charge of the Government Department can be treated as a order of Government;

(v) If the order dated 30.06.2014 by the Secretary to the Govt is treated as the order of the Government, by the said order, can the earlier order of the Govt. dated 29.01.2013 and letters dated 07.02.2013 and 19.03.2013 could have been recalled and a fresh order could have been passed ?

18. Applying the principles laid down in ***Gordhandas Bhanji*** (supra) the notes/writings in the file produced by the Government are reproduced and considered following the norms judicial review.

18.1 The note-sheet dated 10.12.2010 at page-6 of the Government in the Department of School and Mass Education bearing No.I-SME-G-98/12 indicates the following :

"Government in School & Mass Education Department had constituted a committee headed by State Project Director, OPEPA vide Government office order no.22218 dated 14.11.2008 to examine the viability of private managed primary schools to declare as Project Primary School and furnish their recommendation to Government for consideration of the proposal."

18.2 The note-sheet at page-8 of the said file bearing No.I-SME-G-98/12 indicates the following :

"Kind orders of Commissioner cum Secretary at P 7/N. Copy of the proceedings of the committee meeting to examine the viability of Private Managed Primary Schools to be declared as Project Primary Schools held on 02.12.2010 is kept at P-81/C."

The present case of the petitioner, regarding declaration of Sikharchandi U.P.(M.E.) School as Project Upper Primary School is to be examined afresh. The said school has not been included in the list, which were examined earlier by the committee, so the Member Convener of the committee i.e., Deputy Director (Planning), Directorate of Elementary Education, Orissa may be requested to place the matter before the committee to decide the claim of the petitioner, as per the orders of the Hon'ble High Court dated 20.2.2009 in W.P.(C) No.17411/2008 (P 74-73/C)"

18.3 The note-sheet at page-9 of the said file bearing No.I-SME-G-98/12 indicates the following :

"Page-87-86/ may please be seen. The Director Elementary Education has not gone through Govt. letter at page-85/C and orders of Commissioner-cum Secretary P-8/N marked A. the D.EE(A) has been requested at P-85/C to convene the meeting of the Committee constituted by Govt. in L No.22218/SMS dated 14.11.2008 to decide claim of the petitioner pursuant to the orders of Hon'ble High Court. But the DEE(A) has not implemented the order dated 22.1.2011 and only forwarded the report of DIS BBSR. Hence, the DEE(S) may please be requested to place the matter before the committee and furnish the decision of committee and Govt. for consideration."

18.4 The note-sheet at page-10 of the said file bearing No.I-SME-G-98/12 indicates the following :

"Endorsement from the pre-page.

As per the kind orders of Commissioner-cum Secretary at page-8/N, the case of the Sikharchandi U.P.(ME) School is to be placed before the committee to examine the viability to declare as project UP(ME) School.

Hence, the Dis. El. Est.(O) may be requested to place the matter before the committee to decide the claim."

18.5 The note-sheet at page-11 of the said file bearing No.I-SME-G-98/12 indicates the following :

LNo-13063 dated 24.09.11 from DEE(O)

LNo-13064 dated 24.09.11 from DEE(O)

Page-108-89/C may please be seen. The committee meeting held on 6.09.11 in the office chamber of State Project Director, OPEPA under the Chairmanship of SPD, OPEPA to decide the claim of the petitioner pursuant to the order dated 20.02.09 passed in WP(C) No.17411 of 2008 filed by Bansidhar Mandal and others and order dated 24.12.2010 passed in W.P.(C) No.13874/9 filed by Lilupama Behera and others Sikharachandi UP (ME) School.

The Dy. Director (Planning) has intimated to the committee that the School is functioning from the year 1990. Subsequently OPEPA has opened a new primary school from the year 2008. The school is running in its own building on Govt. land plot no.311 khata no.516 and with 7 rooms and one office room. The DIS Bhubaneswar has intimated that no other U.P. School is running within the vicinity of 3 Kms. The following four trained and three untrained teachers are working in the said school.

(1)Bansidhar Mandal, B.A. BED.
(2)Kumudini Panda, B.A.BED
(3)Sridhar Behera IACT
(4)Kashinath Sahoo, B.A.BED
(5)Lilupama Behera, H.Sc.
(6)Prasanna Ku. Routray, +2 Sc.
(7)Smt. Bharat Sahoo, M.A.

The committee suggested decided for absorption of four trained teachers as Shikhya Sahayak and 3 untrained teachers as Ganasikhyak w.e.f. 30.07.2008, i.e., the date of declaration of the school as project pry. School under kind orders of Govt. through law officer in pursuant to the order dated 20.02.2009 and dated 24.12.2010 and GRC no.62/738."

18.6 The note-sheet at page-15 of the said file bearing No.I-SME-G-98/12 indicates the following :

"Discussed with the Addl. Secretary

This matter relates to comply with the order dated 20.02.2009 of the Hon'ble High Court passed in W.P.(C) No.17411/2008 (Flag-A) (P 74-73/C). As per the order, the opposite party shall dispose of the representation and pass necessary orders for taking over the school under SSA, if they satisfied that, the school is existing and has approved and qualified staff and the same can cater the educational need of slum area.

Pursuant to the orders of the Hon'ble High Court dated 20.02.2009, the order of the Hon'ble High Court was placed before the committee for consideration, headed by Sri K.G. Mohapatra, IAS, SPD, OPEPA with the Sri I.C. Barda, Additional Secretary, S&ME Deptt., Sri S.K.Sahu, under Secretary, Finance Department and Deputy Director,

[Emphasis Supplied]

Planning, DEE. Proceeding of the meeting dated 06.09.2011 may please be seen at P 107-106/C. As per the recommendation of the committee, four trained teachers are to be absorbed as Sikshya Sahayak and three untrained teachers as Gana Sikshyaka w.e.f 30.07.2008, i.e., the date of declaration of the school as Project Primary School. In view of the above recommendation of the committee, ***kind Govt. orders may be obtained****.*
For kind orders." [Emphasis supplied]

18.7 *"Proceedings of the Committee Meeting for Taking over of the Management of Sikharchandi UP (ME) School, a Privately managed School under BMC*

A meeting of the Committee constituted vide Government Order No.14389/SME dated 27.07.2011 to decide the claim of the petitioner in pursuant to the order dated 20.02.2009 passed in W.P.(C) No.17411/08 Bansidhar Mandal and others and order dated 24.12.2010 passed in WP (C) No.14874/09 Lilupama Behera & others, Sikharchandi UP (ME) School was convened on 06.09.2011 at 4.30 P.M. in the Office Chamber of the State Project Director, OPEPA. The following Members/officers were present in the meeting.

1	*SriKrishnaGopalMohapatra, StateProject"Director, OPEPA.*	*Chairman*
2.	*Sri I.C. Barda, Additional Secretary to Govt., School and Mass Education Department*	*Member*
3.	*Sri S.K.Sahu Under Secretary to Government, Finance Department.*	*Member*
4.	*Smt. Soudamini Dash, Deputy Director (Planning) Directorate of Elementary Education, Orissa*	*Convenor*

xxx xxx xxx

Smt. Soudamini Dash, Deputy Director (Planning), Directorate of Elementary Education presented all relevant records before the committee. It is revealed from records that the school is functioning from the year 1990.

Subsequently, OPEPA has opened a new primary school with the existing infrastructure and student strength of that school from the year 2008 vide letter no.3420 dated 30.07.2008 of DPC, Kordha.

The School is running in its own building, standing on Government land plot no.311, khata no.616 and consists of 7 class rooms and one office room from the report of the District Inspector of Schools, Bhubaneswar it is revealed that no other UP School is running within a vicinity of 03 kms. Following four trained & three untrained teachers are working in the said school.

- *Banshidhar Mandal, BA B.Ed 01.07.1990*
- *Kumudini Panda, BA, B.Ed 01.07.1990*
- *Sridhar Behera, IA, CT 01.07.1990*
- *Kashinath Sahoo, BA,BED 31.08.1990*
- *Lilupama Behera, HSC 01.07.1993*
- *Prasanna Kumar Routray +2 Sc 01.09.2006*
- *Smt. Bharati Sahoo, M.A. 01.09.2006*

Since all of them are continuing for last several years, the committee decided to recommend to Govt. the name of above four trained teachers for their absorption as Shikshya Sahayak, and the name of three untrained teachers for their absorption as Ganasikhyak with effect from 30.07.2008, i.e., the date of declaration of the school as project primary school.

Sd/- Krishna Gopal Mohapatra,
State Project Director, OPEPA"

*In view of the recommendation of the Committee kind **Government** orders may be obtained. [Emphasis Supplied]*

19. The Government of Odisha in the Department of School & Mass Education issued a questionnaire by letter No. 19187 dated 23.07.2012 to the State Project Director OPEPA, Bhubaneswar. The contents of the said questionnaire is reproduced herein :

(1) Whether Sikharchandi U.P.(ME) School is a Private School ?
(2) What is the policy regarding taking over such Schools under SSA ?
(P.125 of the communications contained in the original Government file No.I-SME-G-98/12).

In response to the said questionnaire by the Government of Odisha, Primary Education Programme Authority by No. 9584 dated 18.10.2012 provided the following instructions (Pages 130-132 of the original Government file No.I-SME-G-98/12) :

P. 130

"Government of Odisha
School & Mass Education Department No. I SME-G-98/2012 24253/ SME Dt. 22.09.12
From
Sri I.C.Barda, OAS (SS),
Special Secretary to Government
To
The S.P.D. OPEPA, Odisha, Bhubaneswar.

Sub : Taking over the Management of Sikharchandi U.P.(M.E.) School to declare as Project School W.P.(C) No. 17411/08, No. 1387/09-Bansidhar Mandal & Others.

Sir,

I am directed to invite a reference to your letter No.7497/Estt./12 dt.18.8.12 on the subject noted above and to say that required information as called for in Govt. letter No. 19187/SME, dt.23.7.12 has not been incorporated in your letter under reference.

You are therefore requested to furnish the required information to Government early."

P.131

The required information asked by Govt. vide letter No. 19187, dt. 23.07.2012 is given below :

1. Yes, Sikharchandi UP (ME) School is a private school. The proposal for taking over the management of Sikharchandi UP (ME) School has been placed before the committee meeting dtd. 06.09.2011 and the proceedings of the meeting has been sent to Addl. Secretary to Govt., S & ME Deptt. Vide DEE letter No. 13063, dt. 24.09.2011 for necessary action.

2. Taking over of Sikharchandi UP (ME) School is the policy decision of the Govt. The framework for implementation, Sarva Sikshya Abhijan, MHRD, Department of School Education and Literacy, Govt. of India Para 2.5 Enabling provisions under SSA to universalize norms providing for new Primary and Upper Primary School within the area of limits of neighbourhood as laid down by the State Govt. under State RTE Rule. All new Schools opened under SSA will be provided requisite School infrastructure,

teachers and teaching learning equipment as mandated under the schedule to the RTE Act. The State RCFCE Rule Part-IV Para 6(1) (b) speaks : -In respect of children in classes – VI-VIII a school shall be established within a walking distance of 3 km. of neighbourhood.

The committee meeting for taking over management of Sikharchandi UP (ME) School observed that no other UP School is running within a vicinity of 3 kms. The school is running in its own building consisting of 7 Class-rooms and one office room.

20. P.132 of the file relating to communication/correspondence of the file indicates the following :

ODISHA PRIMARY EDUCATION PROGRAMME AUTHORITY
"SHIKSHA SOUDHA", UNIT-V, BHUBANESWAR-751001
SHRI UMAKANTA TRIPATHY, OAS(S)
Additional Director (General)
No. 9584/Estt/12

To

The Special Secretary to Govt.
Deptt of S & ME, Odisha

Sub: Taking over the Management of Sikharchandi UP. (ME) School to declare as Project School. W.P.(C) NO. 17411/08 - Bansidhar Mandal & others.

Ref : Your office letter No. 19187, dtd.23.07.2012 & No. 24253, dtd. 22.09.2012

Sir,

In inviting a reference to the subject cited above, I am to enclose herewith the information as provided by the Access Section for your kind perusal."

20.1 The notes at pages 35, 36 & 37 of the Govt. file contain the following :

Page-35

Commissioner-cum-Secretary

Preceding notes explain.

The Hon'ble High Court in order dt.20.02.2009 directed the SPD, OPEPA to examine and pass appropriate orders for taking over the Sikharchandi U.P. (M.E.) School under Sarva Sikhya Abhiyan (SSA) by OPEPA, if the school is existing and qualified staffs and catering the educational need of slum area.

The Committee, headed by SPD, OPEPA and Additional Secretary, S&ME Deptt. and representative of Finance Department, in their meeting dt.06.09.2011 (P 107-106/C) have recommended this Deptt. for taking over the school under Sarva Sikhya Abhiyan (SSA) as a Project Upper Primary Schools. The trained teachers are to be absorbed as Sikshya Sahayaks and untrained teachers as Gana Sikshyakas.

As per the report, there is no U.P. School within a radius of 3 kilometers. The SPD. OPEPA has already declared the said school as Project U.P. Schools with the existing infrastructure and student strength of the school from 30.07.2008.

Previously, one Gopabandhu Primary School, Bharatpur, Bhubaneswar (slum area), has been taken over by Govt. under SSA Scheme and only the trained teachers were absorbed as Sikshya Sahayaks (- 133/C).

To comply with the orders of the Hon'ble High Court dt. 20.02.2009, in W.P.(C) No.17411/2008, as the Sikharchandi U.P. (M.E.) School is catering the educational need of the slum area and there is no School within the radius of 3 K.M., the

recommendation of the Committee dt.06.09.2011 may be accepted, subject to condition that, only trained teachers of the Sikharchandi U.P. (M.E.) School may be taken into consideration for absorption as Sikshya Sahayaks and the untrained teachers, after acquiring training qualification through distance mode within three years, their cases may be considered for absorption as Sikshya Sahayaks.

For orders.

Sd/-30.11.2012
Commissioner-cum-Secretary
(Signature & Seal of
Commissioner-cum-Secretary to Govt. School & Mass Education Deptt.)

Page-36 of Notes
***Minister**, S & ME*
As proposed.

Sd/-21.01.2013
(Signature & Seal of
the Minister of State (Independent Charge)
School & Mass Education Odisha)
[Underlined to supply to supply emphasis]

Page-37 of Notes
Govt. Orders at pre page.
DFA
Sd/-S.O.
02.02.2013
S.O.
As proposed.
DFA
04.02.2013
Under/Secy.
Notes above.
As proposed.
DFA
05.02.2013
Addl. Secy.
Sd/-
06.02.2013
L.No.3326 dated 07.02.2013 to SPD OPEPA

[Underlined to supply Emphasis]

Again the Committee having same composition but different officers by designation being Members of the Committee on 14.12.2014 reiterated the recommendation as contained in pages 166-165 of the communications contained in the Govt. file.

21. In ***Sethi Auto Service Station v. Delhi Development Authority AIR 2009 SC 904 : (2009)1 SCC 180*** (at paragraph-14 of SCC) it was held :

"14. It is trite to state that notings in a departmental file do not have the sanction of law to be an effective order. A noting by an officer is an expression of his viewpoint on the subject. It is no more than an opinion by an officer for internal use and consideration of the other officials of the department and for the benefit of the final decision-making

authority. Needless to add that internal notings are not meant for outside exposure. Notings in the file culminate into an executable order, affecting the rights of the parties, only when it reaches the final decision making authority in the department, gets his approval and the final order is communicated to the person concerned."

[underlined to supply emphasis]

To the like effect are the observations of the Supreme Court in ***Laxminarayan R. Bhattad v. State of Maharashtra : (2003) 5 SCC 413***, wherein it was said that a right created under an order of a statutory authority must be communicated to the person concerned so as to confer an enforceable right.

22. For convenience of reference the contents of the letters dated 07.02.2013 and 19.03.2013 (Annexures-17 series to the writ petition) are reproduced herein :

"Government of Odisha
Department of School & Mass Education
No.I-SME/G-98/2012-3326/SME,Dt.7.2.13

From
Sri R.N. Nayak, OAS (SAG),
Addl. Secretary to Govt.

To
The SPD, OPEPA,
Bhubaneswar

Sub: Taking over the management of Shikharchandi U.P. (M.E.) School, Bhubaneswar, to declare as Project Upper Primary School under SSA.

Sir,

I am directed to say that, pursuant to the order dt.20.2.2009 of the Hon'ble High Court in W.P.(C) No.17411/2008, on the above subject, and to say that, Government in School and Mass Education Department, after careful consideration of the recommendation of the Committee meeting held on 06.09.2011, have decided to take over the management of Shikharchandi U.P. (M.E.) School, Bhubaneswar to declare as Project Upper Primary School under Serva Sikhya Abhijan (SSA) with the following conditions:

1. The Trained Teachers of the Shikharchandi U.P. (M.E.) School shall be absorbed a Sikshya Sahayaks.
2. The untrained teachers, after acquiring training qualification through distance mode within three years, may be considered for absorption as Sikshya Sahayaks.

Yours faithfully,
Sd/-Illegible
6.2.2013
Addl. Secretary to Govt.

Memo No.3327/S&ME, Dt.07.02.13

Copy forwarded to Director, Elementary Education, Odisha/Director, TE & SCERT, Bhubaneswar/Collector-cum-Chairman, SSA, Khordha/DPC, SSA, Khordha/D.I.of Schools, Bhubaneswar/Sri Bansidhar Mandal, Teacher, Sikharchandi U.P. (M.E.) School, At-Sikharchandi Nagar, Bhubaneswar/Sr. Standing Counsel, S & ME Cell, Cuttack for information and necessary action.

Sd/-Illegible
6.2.2013
Addl. Secretary to Govt."

[Empahasis supplied]

22.1 *"Government of Odisha*
Department of School & Mass Education
No.7230/SME, Dt.19-3-13
I-SME (G)-98/2012

From
Sri R.N. Nayak, OAS (SAG)
Addl. Secretary to Government

To
The SPD, OPEPA, Odisha, Bhubaneswar

Sub:- Taking over the management of Shikharchandi UP (ME) School, Bhubaneswar to declare as Project Upper Primary School under SSA

Sri,

In continuation to this Department Letter No.3326, dt.07.02.2013 on the subject cited above, I am directed to say that the date of taken over of the management of Shikharchandi UP (ME) School, Bhubaneswar to declare as Project Upper Primary School under SSA may be effected from 30.07.2008 & the un-trained teachers may be treated as un-trained Sikhya Sahayak and after acquiring training qualification through distance mode within 3 years they may be considered for absorption as Sikhya Sahayak.

Yours Faithfully,
Sd/-Illegible
18.3.2013
Addl. Secretary to Government

Memo. No.7231 SME, Dt.19.3.13
Copy forwarded to Director Elementary Education Odisha/Director, TE & SCERT, Bhubaneswar/Collector-cum-Chairman, SSA Khurda/DPC, SSA, Khurdha/DIS Bhubaneswar/Sri Bansidhar Mandal, Teacher, Sikharchandi UP (ME) School, At-Sikharchandi Nagar, Bhubaneswar/Sr. Standing Counsel, S & ME Cell, Cuttack, for information and necessary action w.r.t. this Department Memo No.3327, dt.07.02.2013.

Sd/-Illegible
18.3.2013
Addl. Secretary to Government"
[Emphasis supplied]

23. Applying the principles laid down in ***Sethi Auto Service*** (*supra*) (paragraph-14 of SCC) the notes in the file culminated in an executable order affecting rights of the parties after the Minister (Independent Charge) who is the final decision making authority in the Department, gave his approval by his order dated 21.01.2013 and final order got communicated by letter no.3326 dated 07.02.2013 to Special Project Director, OPEPA with Memo No.3327 dated 07.02.2013 to petitioner No.1 and letter No. 7230 dated 19.03.2013 with Memo No.7231 dated 19.03.2013 (Annexure-17 series) to the petitioner No.1 Sri Bainshidhar Mandal.

The reasons those can be culled out and are also evident in the detailed notes made in the file, finally that of the Commissioner-cum-Secretary justifying the decision to accept recommendations of the Committee to the Govt., to take over the Sikharchandi U.P.(M.E.) School under 'Sarva Sikshya Abhiyan' as a project Upper Primary School, to absorb trained teachers as 'Sikshya Sahayaks' and untrained teachers as 'Gana Sikshyakas' can be summerised as follows :

(i) It is a policy decision of the Government in the framework for implementation of 'Sarva Sikshya Abhiyan' (SSA) Ministry of Human Resource Development, Department of School Education and Literacy, Government of India. Para-2.5, under SSA providing for new Primary and Upper Primary School within the area of and limits of neighbourhood;

(ii) Policy as laid down by the State Government under State Right to Education Rules. The State RCFCE Rules Part-IV para-6(1)(b) provides : in respect of children in classes-VI-VIII a school shall be established within a walking distance of 3 kms of neighbourhood;

(iii) No U.P. School is running within 3 kms of the Sikharchandi U.P. (M.E) School. The School is running in its own building of seven Class rooms and one Office room, catering to the students of slum area;

(iv) The OPEPA has already declared the school as project U.P. School with the existing infrastructure and student strength w.e.f. 30.07.2008;

(v) Previously Gopabandhu Primary School, Bharatpur, Bhubaneswar (slum area) has been taken over by Govt. under SSA Scheme and only the trained teachers of the said school were absorbed as Sikshya Sahayaks;

(vi) The trained teachers working in the Sikharchandhi U.P. (M.E.) School are to be absorbed as 'Sikshya Sahayaks' and untrained teachers shall acquire training by Distance Education within three years and till then will work as 'Gana Sikhasyaks'.

In considered opinion of this Court all the above reasons are relevant and valid for consideration of the issue of taking over of the U.P. (M.E.) School by the Government.

24. In ***Municipal Corporation of Delhi v. Birla Cotton Spinning & Weaving Mills (1968) 3 SCR 251 : AIR 1968 SC 1232***, the Supreme Court answered the common questions relating to the constitutionality of delegation of taxing powers to Municipal Corporations and the effect of Validation Act, passed by Parliament in connection with tax on the consumption and sale of electricity levied by M.C.D. One of the contentions raised before Supreme Court in the challenge to imposition of tax was that sanction by the Government was not in accordance with the provisions of the Constitution. The Supreme Court negatived the said contention by considering the facts of that case, as observed in ***paragraph-40*** of the ***SCR***, which is quoted herein :

> ***"40.*** *Then it is urged that the sanction by the Government was not in accordance with the provisions of the Constitution and that in this case the sanction was given by the Deputy Secretary to the Government who obviously had no authority to do so. We are of opinion that there is no force in this contention. The order conveying sanction specifically says that "the Central Government hereby sanctions the resolution passed by the Municipal Corporation of Delhi under sub-section (1) of Section 150". It is true that the order is signed by the Deputy Secretary but that does not mean that it was the Deputy Secretary who sanctioned the rates. It is also true that the words "by the order of the Central Government" or "by the order of the President" are not there above the signature of the Deputy Secretary and the authentication therefore is not quite in accordance with the provisions of Article 77 of the Constitution, but that deficiency has been made up by the affidavit filed on behalf of the Central Government in which it is stated that the resolution was approved by the then Deputy Home Minister and the*

Minister in the Ministry of Home Affairs to whom the work relating to the Corporation was assigned by the Home Minister. Reliance in this connection was placed on the Government of India (Allocation of Business) Rules, 1961, passed on January 14, 1961 to the effect that "in relation to the business allotted to a Minister, another Minister or Deputy Minister may be associated to perform such functions as may be assigned to him". That in our opinion clearly means that a Cabinet Minister may be assisted in the performance of functions allotted to him by another Minister or Deputy Minister. It is not necessary where business has been assigned by a Cabinet Minister to a Minister or a Deputy Minister that the matter should be put before the Cabinet Minister also after the Minister or the Deputy Minister has approved of it in accordance with the assignment made in his favour. We are therefore of the opinion that the sanction has been given by the Central Government as required by the Act." [Emphasis supplied]

25. In considered opinion of this Court, read along with the Article 166 of the Constitution, the OGRB Rules 4A, 5, 7, 9 (1), First Schedule of the OGRB; entries 2, 3, 4 of Table VI(A), and the instructions issued by the Governor para 1.IV would, lead to an irresistible conclusion that the 'Business of Govt.' regarding the petitioners' claim pertains to the department of School and Mass Education, i.e., in-charge of the Minister of State (independent charge), department of School and Mass Education, it was placed before him for obtaining 'Govt. Orders' and he dealt with it by passing order dated 29.01.2023. Therefore, it has to be held that said decision of the Minister was the decision and order of the State Government. Significantly, the communication to the petitioners, by letters dated 07.03.2013 and the subsequent communication by letter dated 19.03.2013 to the other authorities were ordered in the file by referring to the decision of the Minister as 'Government Order' and issued with the letter head of the Government in the School and Mass Education Department (Annexure-17 Series).

26. It is further noticed that the order dated 07.02.2013 as well as the order dated 19.03.2013 were in fact pursuant to the decision of the committee formed by the Government for the purpose headed by the Special Project Director, Odisha Primary Education Programme Authority (SPD, OPEPA), having other members such as Additional Secretary, School and Mass Education Department the representative of the Finance Department (Under Secretary to Government) and Deputy Director (Planning), Directorate of Elementary Education, Odisha. Therefore, the contention that the Finance Department was not consulted is found and held to be not correct.

27. By applying the tests laid down in ***Municipal Corporation of Delhi*** (*supra*), it has to be held that the orders dated 07.02.2013 and 19.03.2013 are Government orders having been given assent by the Minister-in-charge on 29.01.2013. The subsequent order dated 30.06.2014 having not been assented to by the Minister-in-charge in a similar manner can not be held to be an order of the Government.

If the principles enunciated in ***State of Uttaranchal*** (*supra*), relied upon by O.P.-State are applied, the order dated 30.06.2014 is to be treated/held as noting in the file. By applying the said test the earlier orders dated 07.02.2013 and 19.03.2013

are to be said to have been issued in accordance with Articles 166 (1) and (2). As already indicated, it is evident that no order by Government, supported by reasons, modifying the decision of the Government order dated 29.01.2013 was ever made after communication of the Government order dated 29.01.2013 to petitioners, other stakeholders and various Government authorities. Therefore, the subsequent 'reconsideration' stated in the file and initiated with notes of an Officer, the notings of the Minister following the notes of the officer cannot be held to be order of the Government.

28. As per instruction-2 contained in part-1 of the instructions issued by the Governor being empowered by Rule-14 of the OGRB, the functions of the Government in the Department of School & Mass Education had been allocated by the Governor to the Minister of State (Independent Charge). The first schedule of the OGRB, made vide Rule-4 provides allocation of business of Govt. regarding Primary Education, Secondary Education including Secondary Schools, Teacher Education & Training, all Teachers' Training Programmes, Control of all officer and staff served under the Department of School to the SME Department.

Significantly, the OGRB Rules 8(1) and Rule 4A provide that the matter(s) involving the present lis belong to the First Schedule and is not ordinarily required to be considered at a meeting of a Cabinet. The Rule-5 of the OGRB, 1956 further clarifies that the business of the Government in the Department of School & Mass Education has been assigned by the Governor on the advice of the Chief Minister to the charge of a Minister of State. Therefore, as per the principles laid down in ***Municipal Corporation of Delhi*** (supra) the order of the Minister dated 29.01.2013 is Government Order and not a noting in the file as argued by opposite parties.

29. Rule-9 (1) of the OGRB provides that the Minister of State in-charge of a Department or a branch or branches thereof shall be primarily responsible for the disposal of business appertaining that department or branch.

As noted above, the allocation of business amongst the School and Mass Education Department comes within the 'First Schedule' of OGRB and Rule-4 of the OGRB provides that the business of the School and Mass Education Department shall be transacted in the Department. Primary Education finds place in Table-VI-A of First Schedule, the relevant entries are 2, 3, 4 and 6. It is also noticed that none of those entries such as 2, 3, 4 and 6 find place in the 'Second Schedule' of OGRB nor any matter similar to those entries are there in 'Second Schedule' of the OGRB.

Therefore, the contention of the OPs that the matter was required to be placed for decision of the 'Cabinet' has to be rejected as per the provisions of OGRB which prescribes matters in the 'Second Schedule' are to be placed before Cabinet. As indicated and quoted above, the Governor under Rule-14 of the OGRB has issued instructions for more convenient transaction of the business of the Government of Odisha. Part-1 para-1.IV of the said instructions provides that the Minister of State in-charge appointed by the Governor is to be in-charge of the Department of Government or branch thereof to which the case belongs.

30. In the case at hand, the Commissioner-cum Secretary to the Government, Department of School & Mass Education along with his detailed notes dated 30.11.2012 placed the matter before the Minister in charge of the Department for orders, referring to the preceding notes of the Special Secretary dated 29.11.2012. The notes of the Commissioner-cum Secretary dated 30.11.2012 those were laid, culminated in the order of the Minister of State (Independent Charge), School & Mass, Odisha by order dated 29th January, 2013 of the Minister approving the same '***as proposed***' (by the Commissioner-cum-Secretary). In terms of the specific provisions of OGRB read with the Rules made by the Governor as quoted above the order of the Minister resulted in the Govt. order.

The Section Officer referred to the order of the Minister as '*Govt. Orders at pre-page*' in note sheet : dated 2.2.2013. The said notes of the Section Officer referring the '*Govt. orders*' were routed through the Under Secretary and resulted in issuance of letter No. 3326 dated 07.02.2013 by the Govt. in the SME Department to the Special Project Director, OPEPA. Letter No. 3326 dated 07.02.2013 was further followed by/led to the letter No. 7230 dated 19.03.2013 (Annexure-17) issued by Govt. of Odisha, Department of School & Mass Education in continuation of the earlier letter No. 3326 dated 7.2.2013. In considered opinion of this Court the decision of the Minister dated 29.01.2013, followed by the orders/communication dated 07.02.2013 and 19.03.2013 satisfy the tests laid down in ***Municipal Corporation of Delhi*** (*supra*) as well as ***Sethi Auto Services*** (*supra*) and also enunciated in ***State of Uttaranchal*** (*supra*).

31. Concededly the subsequent notes/opinion written by the Minister-in-charge dated 06.08.2013 was a reiteration of the earlier notes of the officers to the effect that the matter has to be examined once again by the committee formed earlier. As indicated in the note sheet at page-6 of the Govt. file the Committee headed by the State Project Director, OPEPA vide Office Order no.22218 dated 14.11.2008 was assigned to consider the case of the petitioner. The said aspect has been noted by order of this Court dated 14.12.2023.

32. The learned counsel for the petitioner as well as learned counsel for the State have also agreed regarding the formation of the Committee by letter no.22218 dated 14.11.2008 which is reproduced herein :

"GOVERNMENT OF ORISSA
SCHOOL & MASS EDUCATON DEPARTMENT
No.22218/ SME., Dt. 14.11.08
IISME-OC-2/08

OFFICE ORDER

In pursuance of the orders No.9 dt. 10.11.07 of Hon'ble High Court of Orissa passed in OJC No.3846/2000 and orders No.3 dtd.30.7.08 passed in WP(C) No.7592/03 govt. after careful consideration have been pleased to constitute a committee with following members to examine the viability of private managed primary schools to declare as Project Primary School and furnish their recommendation to Govt. within one month from the date of issue of the order for consideration of the proposal.

1. Commissioner-cum-SPD, OPEPA - Chairman
2. Additional Secretary to Govt. S & ME Deptt. - Member
3. Deputy Secretary to Govt. Finance Deptt. - Member
4. Deputy Director, Elementary Education - Member Convener

By order of Governor
Deputy Secretary to Govt.

Memo No. / dt.14.11.08

Copy forwarded to Officers Concerned/Commissioner-cum SPD, OPEPA/P.S. to Addl. Secretary, S & ME Deptt./P.S. to Principal Secretary, Finance Deptt. for information and necessary action.

Deputy Secretary to Govt.

Memo No._____ /dt.14.11.08

Copy forwarded to Director, Elementary Education, Orissa Deptt. for information and necessary action. He is requested to provide all required information/document to the Committee within the stipulated period.

Deputy Secretary to Govt."

Significantly enough, the Committee after detailed deliberation as indicated above decided for absorption of the seven petitioners in the writ petition i.e. four trained teachers as 'Sikshasahayak' and three untrained teachers as 'Ganasikshyaka' with effect from 30.07.2008. Subsequently another Committee having different persons as members by their posts held/designation also made the similar recommendation in favour of the petitioners.

33. On perusal of the original files and also indicated in the counter filed by the State, it is noticed that before the purported 'reconsideration' by the Government starting with a note of the Section Officer dated 16.03.2013 and 15.07.2013, there has been no decision of the Government to 'reconsider' the earlier decision post Government order dated 29.01.2013 that was communicated by letter dated 07.02.2013 and 19.03.2013. What could be the reason for such reconsideration has not been stated in the relevant portion of the file nor it is indicated that any decision has been taken by the Govt. to reconsider. Rather no discernible reason has been shown to be available to take a view opposite to that of the earlier Government Order with the reasons well discussed and elaborated in the file notings as summed up in paragraph-23 above.

From perusal of the series of notings in the file, starting from the Section Officer to that of the Commissioner-cum-Secretary dated 29.05.2014 upto referral of the matter to the Finance Department and the opinion dated 04.06.2014 (Page-63 of file) no discernable objective reason is evident anywhere, which also includes the note of the Minister dated 06.08.2013 which is reproduced below (at page-45 of the note sheet) :

"The District Administration/D.P.C., Khurda be asked to maintain status-quo in this aspect.
2. Let the matter be examined once again by the Committee formed earlier in obedience to the direction of the Hon'ble High Court in W.P.(C) No.17411/08, Banshidhar Mandal

& others and order dated 24.12.2010 passed in W.P.(C) No.13874/09 Lilupama Behera & others.

3. Views of Finance Department and Law Department be obtained.

Sd/-
06.08.2013.
Seal of the Minister of State
(Independent Charge)
School & Mass Education, Odisha."

34. Applying the tests laid down in ***Gordhan Das Bhanji*** (*supra*), and ***Mohinder Singh Gill*** (*supra*) reiterated in ***Opto Circuits*** (*supra*), supplementary/ subseqeunt reasons those may have been furnished before this Court for so called 'reconsideration' would not come to aid of sustaining the 'reconsideration' and the purported 'reconsideration' is held to be bad in law and set aside.

35. In view of the above discussions, the impugned order dated 30.06.2014 by the Commissioner-cum Secretary is held not validly passed and the order is set aside. As a consequence thereof, the orders dated 07.02.2013 and 19.03.2013 (quoted supra) are held to be valid and operative for all purposes. The entitlements that would accrue to the petitioners as consequences of the orders dated 07.02.2013 and 19.03.2013, the further benefits that are to follow are to be determined by the appropriate authority forthwith. The monetary benefits are to be calculated and the current benefits are to be granted within eight weeks. The arrears of admissible monetary benefits, if any, that would be due in terms of the orders dated 07.02.2013 and 19.03.2013 are to be calculated by the appropriate authority and released to the petitioners within a period of eight weeks after release of the current dues. In case of any delay in payment of the dues/arrears that would be admissible to the petitioners in terms of the Government orders dated 07.02.2013 and 19.03.2013, the amount shall carry an interest payable to the petitioners by the Govt. at rate of 7% per annum, for the period beyond the time specified and directed above.

36. The writ petition is allowed with the above observations and directions. However, in the facts and circumstances of the case there shall be no order as to costs.

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2024 (II) ILR-CUT-218

R.K. PATTANAIK, J.

W.P.(C) NO.8006 OF 2017

M/s. B.R. SPONGE (P) LTD. ……Petitioner

-V-

MICRO SMALL ENTREPRENEUR FACILITATION COUNCIL, CUTTACK & ANR. ……Opp.Parties

(A) MICRO, SMALL AND MEDIUM ENTERPRISES DEVELOPMENT ACT, 2006 – Sections 18, 19 – The Council (O.P.No.1) did not refer the

parties for a proper conciliation despite the statutory mandate prescribed U/s. 18 of the Act – No reference was made, no conciliator was appointed, and the parties were merely directed to make an amicable settlement – Effect of – Held, the Opp.Party No.1/Council *prima facie* did not follow the procedure U/s. 18 of the MSMED Act – Hence, impugned order set aside.

(B) CONSTITUTION OF INDIA, 1950 – Article 226 r/w Section 19 of MSMED Act – Petitioner preferred to file writ petition challenging the order of Council/Opp.Party No.1 inspite of having statutory remedy U/s. 19 of the Act – Whether the writ petition is maintainable? – Law on the issue of maintainability of writ petition having the alternate remedy – Explained with reference to case laws. (Para 15)

Case Laws Relied on and Referred to :-

1. 2021 SCC Online SC 439 : Silpi Industries Etc. Vrs. Kerala State Road Transport Corporation & Anr.
2. 2022 SCC Online SC 355 : Vaishno Enterprises Vrs. Hamilton Medical AG & Anr.
3. 2022 SCC Online SC 1198 : Nitesh Estates Ltd. Vrs. Micro & Small Enterprises Facilitation Council of Haryana & Ors.
4. MANU/OR/0313/2022:2022(I) OLR 1046 : Bridge & Roof Company (India) Ltd. Vrs. State of Odisha & Ors.
5. 2023 SCC Online Orissa 5234 : M/s. Orissa Coal Chem. Pvt. Ltd. Vrs. M/s. NALCO & Ors.
6. 2021 SCC Online SC1257: Jharkhand Urja Vikas Nigam Ltd.Vrs. State of Rajasthan & Ors.
7. MANU/OR/0286/2023: AIR 2023 Ori 112 : Sri Mahavir Ferro Alloys Pvt. Ltd. Vrs. Passary Minerals Ltd. & Ors.
8. (2021)6 SCC 771: Radha Krishan Industries Vrs. State of Himachal Pradesh & Ors.

For Petitioner : Mr. Sumit Lal.
For Opp.Parties : Mr. P.K. Nayak

JUDGMENT Date of Judgment : 06.05.2024

R.K. PATTANAIK, J.

1. Instant writ petition is at the behest of the petitioner challenging the correctness, legality and judicial propriety of the impugned order dated 30th December, 2016 (Annexure-17A) and all such consequential orders including the proceeding in connection with MSEFC Case No.27 of 2014 seeking its quashment on the grounds stated.

2. The petitioner is a private limited company so also opposite party No.2 incorporated under the Companies Act, whereas, opposite party No.1 is the Micro and Small Enterprises Facilitation Council (in short 'the Council') constituted as per the provisions of the Micro Small and Medium Enterprises Development Act, 2006 (hereinafter referred to as 'the MSMED Act') to conciliate and arbitrate upon payment disputes in respect of small and medium scale industries. In fact, the petitioner has questioned the impugned order dated 30th December, 2016 notwithstanding existence of alternate remedy in view of Section 19 of the MSMED Act.

3. As made for reveal from the record, the dispute was referred to at the instance of opposite party No.2, whereafter, according to the petitioner, opposite party No.1 in complete departure to the statutory provisions of the Arbitration and Conciliation Act and the MSMED Act passed the order dated 30th December, 2016 in MSEFC Case No.27 of 2014 which is therefore not legally tenable, hence, to be set aside with the entire proceeding quashed. According to the petitioner, opposite party No.2 instituted a suit for recovery of the amount alleged to be due in C.S. No.397 of 2010 payable along with interest at the rate of 21% per annum, however, the learned Civil Judge, Senior Division, Rourkela dismissed it on 7th April, 2014 by order under Annexure-3 on the premise that the statutory remedy under Section 19 of the MSMED Act is to be availed of. Furthermore, as per the pleading, while denying the liability, the petitioner advanced a plea that opposite party No.2 is not a supplier within the scope and meaning of the MSMED Act since for a reference under Section 18, such is a pre-condition. In other words, as per the petitioner, a Memorandum under Section 8 of the MSMED Act since was filed on 18th January, 2010, whereas, the supply of iron ores by opposite party No.2 is of the year 2009, the reference could not have been entertained by opposite party No.1 and hence, it has resulted in a jurisdictional wrong and therefore, the writ petition is maintainable even if an alternate statutory remedy is available. The further contention of the petitioner is that the impugned order dated 30th December, 2016 is not sustainable in law also for the fact that opposite party No.1 has not proceeded with the reference in accordance with law, inasmuch as, the MSMED Act stipulates that before any such decree or award, the council is to exercise jurisdiction for a conciliation between the parties, an exercise which has not been undertaken in the case. With the above grounds, the order under challenge and also the whole of the proceeding in MSEFC Case No.27 of 2014 is sought to be quashed by the petitioners.

4. Heard Mr. Lal, learned counsel for the petitioner, learned counsel for the State and Mr. Naik, learned counsel for opposite party No.2.

5. Mr. Lal, learned counsel for the petitioner would submit that the impugned order dated 30th December, 2016 by opposite party No.1 is without jurisdiction and as such a nullity and therefore, the same is liable to be quashed since the reference under Section 18 of the MSMED Act to be not maintainable and furthermore, there has been non-adherence to the mandatory procedure prescribed under sub-section (3) of Section 18 thereof. Referring to Section 2(n) of the MSMED Act which defines a 'supplier' in relation to a micro or small enterprise, Mr. Lal submits that the Act came into existence w.e.f. 16th June, 2006 and opposite party No.2 claimed to have registered itself thereunder on 1st November, 2003 which is apparently fallacious and at best it can be said that the establishment commenced manufacturing activity on and from said date. Further by referring to Annexure-2, Mr. Lal submits that it shows opposite party No.2 to have been issued with the Entrepreneurs' Memorandum on 18th January, 2010 under Section 8(1) of MSMED Act. By contending that opposite party No. 2 admittedly supplied iron ores on 30th

April, 2009 and 19th December, 2009 which is much before its registration under the MSMED Act, it cannot therefore be termed as a 'supplier' and hence, the proceeding before opposite party No.1 was not maintainable, a plea which was not duly taken cognizance of, hence, has resulted in passing of the impugned order exercising jurisdiction in a perfunctory manner. While advancing such an argument, Mr. Lal refers to the decision in **Silpi Industries Etc. Vrs. Kerala State Road Transport Corporation and Another 2021 SCC Online SC 439** and the following decisions, such as, **Vaishno Enterprises Vrs. Hamilton Medical AG and Another 2022 SCC Online SC 355**; **Nitesh Estates Ltd. Vrs. Micro and Small Enterprises Facilitation Council of Haryana and Others 2022 SCC Online SC 1198** and **Bridge and Roof Company (India) Ltd. Vrs. State of Odisha and Others MANU/OR/0313/ 2022:2022(I) OLR 1046**, wherein, the MSEFC proceeding was quashed. The second limb of argument of Mr. Lal is that there has been no mandatory compliance of Section 18 of the MSMED Act by opposite party No.1 as no attempt was made for conciliation as per the provisions of the Arbitration and Conciliation Act since the Act prescribes that when conciliation fails and stands terminated, the dispute between the parties to be resolved by arbitration. According to Mr. Lal, since no such procedure was adopted as the MSMED Act mandates conciliation as per Section(s) 65 to 81 of the Arbitration and Conciliation Act, the award by opposite party No.1 with a direction for payment of outstanding dues with interest is not tenable in law. In support of such contention, Mr. Lal refers to a decision of this Court in **M/s. Orissa Coal Chem. Pvt. Ltd. Vrs. M/s. NALCO and Others 2023 SCC Online Orissa 5234** and also **Jharkhand Urja Vikas Nigam Limited Vrs. State of Rajasthan and Others 2021 SCC Online SC 1257** besides **Sri Mahavir Ferro Alloys Pvt. Ltd. Vrs. Passary Minerals Ltd. and Others MANU/OR/0286/2023: AIR 2023 Ori 112 and M/s. Feedback Infra Pvt. Ltd. Vrs. MSEFC and Others** decided by the Madras High Court on 29th September, 2023. Mr. Lal submits that the order under challenge is no award in the eye of law. On the point of alternate remedy under the MSMED Act, Mr. Lal cited the following decisions, such as, **M/s Magadh Sugar and Energy Limited Vrs. State of Bihar and others** (Civil Appeal No. 5728 of 2021 disposed of on 24th September, 2021); **Radha Krishan Industries Vrs. State of Himachal Pradesh and Others (2021)6 SCC 771 and State of Uttar Pradesh and Another Vrs. Ehsan and Another** (Civil Appeal No.5721 of 2023 decided on 13th October 2023) and contends that there is no bar to entertain the writ petition even if the impugned order may be challenged under Section 34 of the Arbitration and Conciliation Act since the award is without jurisdiction and a nullity.

6. On the contrary, Mr. Naik placed reliance on a decision of the Apex Court in the Case of **M/s. India Glycols Limited and Another Vrs. Micro and Small Enterprises Facilitation Council Medchal-Malkajgiri and Others** decided on 6th November, 2023 in Civil Appeal No.7491 of 2023 and submits that the writ petition is not maintainable in view of the alternate remedy under Section 34 of the Arbitration and Conciliation Act. An order of this Court dated 26th April, 2017 in W.P.(C) No. 20768 of 2016 is referred to whereby a similar view was expressed on

the maintainability of the writ petition in view of remedy under the Arbitration Conciliation Act referring to Section 19 of the MSMED Act and the conditions stipulated therein in relation to deposit of 75% of the impugned award. Mr. Naik finally submits that any such award by opposite party No.1 cannot be challenged in view of the rigour of law as there is a bar to entertain any such challenge by any Court except by invoking Section 34 of the Arbitration and Conciliation Act. A decision of the Delhi High Court in case of **State Trading Corporation of India Limited Vrs. Micro and Small Enterprises Facilitation Council Delhi and Another** decided on 8th February, 2024 in LPA No.91 of 2024 and connected matters is cited by Mr. Naik while advancing the plea that the impugned decision of opposite party No.1 cannot be a subject of challenge while exercising writ jurisdiction.

7. In fact, opposite party No.2 instituted the suit in C.S. No.397 of 2010 against the petitioner and another which was, however, disposed of by Judgment dated 16th May, 2014 by the court of learned Civil Judge (Senior Division), Rourkela. In fact, the suit was dismissed primarily on the ground that the court does not have the jurisdiction to entertain the same in view of the statutory remedy available to opposite party No.2. The said suit was filed by opposite party No.2 for a money decree of Rs.16,20,374/- along with future and pendentelite interest to be realized from the petitioner. The learned Civil Judge (Senior Division), Rourkela though considered all the issues formulated, however, dismissed the suit as not maintainable in view of the bar under the MSMED Act. As it is made to understand, opposite party No.2, thereafter, approached the Council with a reference and the same has been disposed of with an award dated 30.12.2016 with a direction to the petitioner to pay the principal amount with interest followed by compound interest till its realization.

8. The petitioner since was non-suited by the Civil Court, hence, approached the Council. Ironically, the maintainability of reference is questioned by the petitioner on the premise that the petitioner to be not a 'supplier' under the MSMED Act since it was issued with the Entrepreneurs' Memorandum as per Section 8(1) of the Act on 18th January, 2010. Considering the rival contentions of the parties, the following issues emerge for a decision by the Court, such as, (i) whether, in the facts and circumstances of the case, reference under Section 18 of the MSMED Act is maintainable when the petitioner is alleged not to be a supplier under the Act by the time of supply of iron ores? (ii) whether the Council exercised jurisdiction under Section 18 of the MSMED Act with conciliation and arbitration on receiving reference in terms of Section 18 thereof? and lastly (iii) whether the reference before opposite party No.1 and impugned decision thereafter can be a subject of challenge before this Court as an alternate remedy by way of appeal is available to the petitioner?

9. As per Section 18 of the MSMED Act, any party to a dispute may with regard to amount due and payable under Section 17 may make a reference to the

Micro and Small Enterprises Facilitation Council in view of sub-section 1 thereof. On receipt of such a reference under Sub-Section (1); the Council shall either itself conduct conciliation or seek the assistance of any institution or centre providing alternate dispute resolution to be held as per the provisions of the Arbitration and Conciliation Act as if the conciliation was initiated under part III of the said Act. If any such conciliation fails after it has been undertaken as per sub-section (2) of Section 18 MSMED Act and it stands terminated without any settlement between the parties, the Council shall take up the dispute for arbitration or may refer it to any institution or centre for such arbitration and for the said purpose, again provisions of the Arbitration and Conciliation Act would apply as if an arbitration was in pursuance of an arbitration agreement referred to in Section 7(I) of the said Act. Such reference as per sub-section (5) shall be decided within 90 days from the date of receiving it. In view of the aforesaid provisions of the MSMED Act, a scheme for conciliation and arbitration is in place, an exercise which may be undertaken by the Council itself or the same can be accomplished through such other institution or centre. The council or the institution or centre providing alternate dispute resolution services shall have the jurisdiction to act as an Arbitrator or Conciliator in a dispute between the supplier located within its jurisdiction and a buyer located anywhere in India in view of Section 18(4) of the MSMED Act.

10. According to Mr. Lal, opposite party No.1 did not follow the procedure as per Section 18 of the MSMED Act. It is alleged that neither conciliation nor arbitration was ever held or sincerely attempted rather the parties were left in lurch. It is alleged that the Council left it to the parties to reach at a settlement. Referring to order of opposite party No.1 as at Annexure-8 and onwards, Mr. Lal submits that amicable settlement was merely suggested to the parties with an intimation about the same in writing to be furnished within 15 days and in case, no communication was received within such time, the award to be passed for payment of the outstanding due with interest as per the MSMED Act. Such an order was passed by opposite party No.1 on 20th February, 2016 at Annexure-11, referring to which, Mr. Lal would further submit that apart from above, the approach of the Council is not to be in consonance with Section 18 of the MSMED Act.

11. Admittedly, opposite party No.1 held hearings on number of dates as revealed from the record but the question is, whether, any such conciliation was ever attempted and on its failure, followed by an action to arbitrate the dispute between the parties? As per MSMED Act, the Council is to take up the reference and proceed to hear the dispute between the parties, in course of which, it is to undertake conciliation and thereafter, to arbitrate as per Section 18 of the Act. On perusal of the series of orders prior to the date of award, the Court does not find any such sincere effort to have been put forth by the Council towards conciliation and arbitration which is envisaged in Section of 18 of the MSMED Act. Rather the Court finds that the parties were informed to go for an amicable settlement and finally, considering the pleadings on record, opposite party No.1 passed the award. Even

after conciliation fails, the Council does have the power to arbitrate the dispute between the parties and in the present case, there has been no real attempt so to say. In such view of the matter, when the record reveals absence of any conciliation between the parties having taken place at the behest of the Council and absence of any such attempt for arbitration, as the orders of the proceeding in MSEFC Case No.27 of 2014 tell-tale the manner in which it was conducted, the Court has no other option except to form an opinion that the statutory formalities necessary in view of Section 18 of the MSMED Act have not been complied with instead opposite party No.1 passed the award. Before reaching at such a conclusion, it is apposite to reproduce the relevant extracts of the decision in **M/s Orissa Coal Chem. Pvt. Ltd**. (supra) which is as follows:

> "25. The MSMED Act provided for the establishment of MSME Facilitation Councils as the one-stop shop for resolution of disputes under the MSMED Act. Section 18 of the MSMED Act reads as:
>
> XXX XXX XXX
>
> 26. It flows from a bare perusal of the above that there is a two tiered dispute resolution system provided in the MSMED Act itself for facilitating the promotion and development, and enhancing the competitiveness of micro, small and medium enterprises and for matters connected therewith or incidental thereto.
>
> XXX XXX XXX
>
> 30. The MSMED Act, 2006, *ab incunabulis*, had grown from the need for a comprehensive legislation to provide an appropriate legal framework and extend statutory support to the micro and small enterprises to enable them to develop and grow into medium ones. As noted above, the MSMED Act lays down a two tiered system for dispute resolution. Only if the conciliation initiated under Section 18 (2) is not successful then without any such settlement between the parties, the Facilitation Council under Section 18 (3) is to either itself take up the dispute for arbitration or refer to it any institution or center providing alternate dispute resolution services for such arbitration. Thereon, the provisions of the A&C Act are made applicable to the dispute as if the arbitration so commenced was in pursuance of an arbitration agreement."

12. This Court in the aforesaid case took cognizance of the fact that the Council did not refer the parties for a proper conciliation despite the statutory mandate prescribed under Section 18 of the MSMED Act and it was held therein that no reference was made; no Conciliator was appointed; and the parties were merely directed to make an amicable settlement while dealing with appeals filed under Section 37 of the Arbitration and Conciliation Act. In the case at hand, opposite party No.1 perhaps in a similar manner did not exercise the jurisdiction as per Section 18 of the MSMED Act, neither considered conciliation by itself or appointed a Conciliator for the said purpose leave alone arbitrating the dispute and as earlier stated informed the parties to go for an amicable settlement. If such is the situation, the Court is of the humble view that the contention of Mr. Lal, learned counsel for the petitioner on the point has a substantial force.

13. With respect to the claim of the petitioner that opposite party No.2 not to be a 'supplier', such a question was not raised before the Council. The said contention

is based on Annexure-2, namely, Entrepreneurs' Memorandum issued by the District Industries Centre, Rourkela under Section 8(1) of the MSMED Act. The date of issuance of such Memorandum is placed reliance on by the petitioner while claiming that opposite party No.2 cannot be held as a 'supplier' by the time of supply of the iron ores. It is pleaded that opposite party No.2 can at best be said to have commenced the manufacturing activity w.e.f. 1.11.2003, however, was issued with the Memorandum on 18th January, 2010. Such a claim of petitioner is strongly objected to by Mr. Naik, learned counsel for opposite party No.2. If the contention of the petitioner is accepted, opposite party No.2 may not be held as a supplier under the MSMED Act. To be a supplier, an Entrepreneurs' Memorandum is to be issued by the concerned authority and in the instant case, the same is claimed to have been issued to opposite party No.2 in the year 2010 admittedly later to the supply of iron ores to the petitioner.

14. The dispute under reference is maintainable and can be entertained by the Council provided it is at the instance of one of the parties to it. If any such reference is by a supplier, he must have been issued with an Entrepreneurs' Memorandum under the MSMED Act. As such the said question was not raised earlier and not even in the suit and since the Court has arrived at a conclusion that opposite party No.1 prima facie did not follow the procedure under Section 18 of the MSMED Act, the aforesaid question may be directed to be examined. In other words, the Court is inclined and in favour of a hearing on the said aspects.

15. Such a remand is permissible provided it is further concluded by the Court that the writ petition is maintainable despite a statutory remedy available to the petitioner. It is submitted by Mr. Lal, learned counsel for the petitioner that the impugned award dated 30th December, 2016 runs contrary to the MSMED Act and provisions of the Arbitration and Conciliation Act, hence, a nullity and has referred to the decision in **Jharkhand Urja Vikas Nigam Limited** (supra). It is settled position of law that existence of an alternate remedy is not always a bar to maintain a writ petition where (i) such writ petition is filed for enforcement of a fundamental right guaranteed under the Constitution of India; (ii) there has been violation of principles of natural justice (iii) the order or proceeding to be fully without jurisdiction; or (iv) the vires of a legislation is challenged. In Ehsan (supra), the Apex Court while dealing with the question of alternate remedy was pleased to observe as hereunder:

> "We are conscious of the law that existence of an alternative remedy is not an absolute bar on exercise of writ jurisdiction. More so, when a writ petition has been entertained, parties have exchanged their pleadings/ affidavits and the matter has remained pending for long. In such a situation there must be a sincere effort to decide the matter on merits and not relegate the petitioner to the alternative remedy unless there are compelling reasons for doing so. One such compelling reason may arise where there is a serious dispute between the parties on a question of fact and materials/evidences available on record are insufficient/ inconclusive to enable the Court to come to a definite conclusion."

16. It is pleaded by Mr. Lal that a similar view has been expressed by Supreme Court in **M/s Magadh Sugar and Energy Limited** and **Radha Krishan Industries** (supra). Of course, the matter has remained pending before this Court since 2017 and Mr. Lal, learned counsel for the petitioner submits that the writ petition should be disposed of on merit and not to relegate the parties to the alternate remedy more so when opposite party No.1 has not followed the mandate of the MSMED Act with conciliation and arbitration in view of Section 18 thereof, hence, the award dated 30th December, 2016 shall have to be held as without jurisdiction. A question of jurisdiction of the Council was never a subject matter of debate. Such a question can be considered by the Authority under the MSMED Act. According to Mr. Naik, learned counsel for opposite party No.2, the aforesaid question may be examined in appeal filed against the award under Section 19 of the MSMED Act. As earlier discussed, existence of an alternate remedy does not stand as a bar in certain situations, one of being absence of jurisdiction. If there is a statutory bar either impliedly or by express words, jurisdiction is ousted and in such a case, any such order or award would be wholly without jurisdiction. However, a distinction shall have to be made, where jurisdiction lies with the Authority but the same is wrongly exercised or invoked not according to the prescribed procedure. In such a case, it is not to be held that there is lack of jurisdiction. By following a procedure which is not in consonance with the statutory mandate, an order or award does not become a nullity. As earlier stated, to hold a decision as without jurisdiction, it must have been barred either expressly or such exclusion may have to be inferred by necessary implication. A question of jurisdiction may be examined by the very Authority which passed the order or entertained the proceeding. In the case at hand, statute provides the authority to a Council. The irony is that there has been a round of litigation between the parties before a civil court but then the suit was held to be not maintainable. In case, opposite party No.2 is not considered as a 'supplier' under the MSMED Act, opposite party No.1, in such a situation, cannot have the jurisdiction to adjudicate the dispute. As earlier mentioned, the question of having jurisdiction with the Council was not raised or has ever been examined. Of course, the Court does not have the comfort to go through the pleadings of the parties filed before opposite party No.1. Even a question of jurisdiction as it hits to the root of the case can be raised, entertained and examined by the Authority itself created under the statute. The Court is quite conscious of the fact that the matter is pending for long. At this juncture, it would certainly cause inconvenience particularly to opposite party No.2, who is demanding payment of dues from the petitioner. Having gone through the decisions cited at the Bar, the Court is of the humble view that the question, whether, opposite party No.2 is a supplier under the MSMED Act is required to be examined in first place by considering the materials on record with an opportunity of hearing to the parties. Merely by referring to Annexure-2 without more, it would not be wise and proper to arrive at a decision, whether, opposite party No.2 fits in as a supplier within the scope and ambit of the MSMED Act. If opposite party No.2 is ultimately held as not a supplier, in such an event, opposite party No.1

cannot usurp the jurisdiction. Since the very authority or jurisdiction of the Council is questioned by the petitioner, notwithstanding any such delay or that the same was not raised earlier, it shall have to be decided providing both the sides an opportunity to defend.

17. The Court is not oblivious of the settled legal position as highlighted upon in **M/s. India Glycols Ltd**. (supra) and other decisions referred to by Mr. Naik, learned counsel for opposite party No.2 which is to the effect that a party to a dispute cannot be allowed to bypass the statutory mandate under Section 19 of the MSMED Act. At times, in order to avoid payment of statutory deposit of 75% of the amount in terms of the decree or award, such a course is adopted. A dispute which is maintainable but the order or award is challenged on some pretext or other, which may be examined by the authority under the MSMED Act with an appeal filed, any such recourse approaching this Court invoking writ jurisdiction is certainly not to be entertained as in such a case, conduct of the party may be suspected for evading to pay the statutory deposit. However, in a particular case, where on the point of jurisdiction and with other grounds, an order or award is challenged not by filing an appeal under Section 19 of the MSMED Act but by knocking the doors of a writ court, irrespective of any delay or earlier round of litigation, the same has to be looked into instead of rejecting it on the premise of an alternate remedy available. So, therefore, in the instant case, a decision is required to be in place, as to if the Council can entertain the dispute accepting opposite party No.2 as a supplier within the meaning of Section 2(n) of the MSMED Act and then only, it shall have the jurisdiction and hence, the matter needs a remand. In case opposite party No.1 holds itself having jurisdiction may also consider conciliation and arbitration, which does not seem to have been sincerely attempted as per the statutory requirement. Of course, all such questions could have been a subject of deliberation in appeal but in the peculiar facts and circumstances of the case, the Court is inclined to set at right the question of jurisdiction with a decision by opposite party No.1 followed by an exercise to ensure conciliation and arbitration as per the procedure prescribed under law provided such authority lies with it on a satisfaction that opposite party No.2 is a supplier within the ambit of the MSMED Act. In case, opposite party No.1 found not to have the jurisdiction for opposite party No.2 not being a supplier, the remedy shall lie before the civil court, unfortunately, as in the present case, the suit filed by opposite party No.2 was dismissed for having the statutory alternative, which is now being questioned alleging that the Entrepreneurs' Memorandum was issued after the supply of iron ores to the petitioner. Taking a wholesome approach and instead of further delay leaving the matter to be examined in appeal and for the fact that the jurisdiction of opposite party No.1 depends on a decision, whether, opposite party No.2 is a supplier or otherwise and for the reason that there has been no serious attempt towards conciliation and arbitration in view of Section 18(2) of the MSMED Act, the Court considers it proper to remand the matter for a decision afresh, which would rather serve the purpose and meet the ends of justice.

18. Hence, it is ordered.

19. In the result, the writ petition stands disposed of with a direction to opposite party No.1 to entertain the matter and adjudicate on the point of jurisdiction and thereafter, to do the needful keeping in view the statutory mandate and then, dispose it of at the earliest preferably within a period of four weeks from the date of receipt of a copy of this order after providing an opportunity of hearing to the parties. It is directed that such disposal shall be accomplished within the above stipulated period keeping in view the observations and directions issued. As a necessary corollary, the impugned order under Annexure-17A is hereby set aside, in the peculiar facts and circumstances of the case, with the matter in connection with MSEFC Case No.27 of 2014 restored to the file of opposite party No.1 for being disposed of according to law.

20. In the circumstances, however, there is no order as to costs.

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2024 (II) ILR-CUT-228

SASHIKANTA MISHRA, J.

W.P.(C) NO. 7566 OF 2011

KUSUMA HIKAKA ……Petitioner

-V-

COLLECTOR, KORAPUT & ORS. ……Opp.Parties

INTERPRETATION OF STATUTE – Principle with respect to retrospective or prospective application of any administrative order or executive order – Enumerated with reference to case laws.

Case Laws Relied on and Referred to :-

1. (2015) 1 SCC 1: Commissioner of Income Tax (Central)-1, New Delhi vs. Vatika Township Private Limited.
2. (1972) 4 SCC 765 : Ex-major N.C.Singhal v. Director general, Armed forces Medical Service & Anr.
3. (1994) 1 SCC 437 : Govind Prasad v. R.G.Prasad & Ors.
4. (1984) 3 SCC 281: Ex-Capt. K.C.Arora & Anr v. State of Haryana & Ors.
5. (2013) 4 SCC 465 : Ayaaubkhan Noorkhan Pathan v. State of Maharashtra.

For Petitioner : Mr. J.K. Khuntia
For Opp.Parties : Mr. A.R.Dash, A.G.A.

JUDGMENT Date of Judgment : 18.03.2024

SASHIKANTA MISHRA, J.

The petitioner has approached this court seeking following relief:

"It is therefore, prayed that this Hon'ble Court may graciously be pleased to admit the writ application and issue Rule NISI calling upon the opposite parties to show cause as to why the impugned order dated 10.12.2010 under Annnexure-7 shall not be quashed and if the Opp.Parties fail to show cause or show insufficient cause this Hon'ble Court

may issue a writ of certiorari in quashing the impugned order dated 10.12.2010 passed by the Opp.Party No.2 under Annexure-7.

And further be pleased to pass any other writ/writs, order/orders as this Hon'ble Court may deem fit and proper in this case".

The facts of the case, briefly stated are that an advertisement was published by the Chief District Project Officer, Laxmipur, Koraput on 30.01.2009 inviting applications from eligible candidates for engagement as Anganwadi workers of the different Anganwadi centres. The petitioner submitted her application for engagement as Anganwadi Worker of Singaram Anganwadi Centre. In the selection process 66 candidates in all were selected for different Anganwadi Centres with the petitioner being selected for Singaram Centre as per selection list published on 22.06.2009. The petitioner received an order of engagement issued by the Child Development Project Officer on 22.06.2009 pursuant to which she joined in the centre on 25.06.2009. While the petitioner was working as such, she received a notice issued by the Sub-Collector, Koraput (Opposite Party No.2) asking her to appear before him in an appeal preferred by one Kausalya Sahu (private Opposite Party No.4). It came to light that said appeal was filed pursuant to direction of this Court in W.P.(C). No. 3102 of 2009.

2. The petitioner duly appeared before the Sub-Collector, through her counsel and filed a detailed counter stating all the relevant facts. She took a specific stand that she, being a scheduled tribe candidate, was rightly preferred over other candidates but the Opposite Party No.4 was a General category candidate. It was further stated that Opposite Party No.4 was not an applicant pursuant to the advertisement nor had submitted any objection to the selection list within the stipulated time and therefore, she had no locus standi to challenge the engagement of the petitioner.

3. The Sub-Collector, vide order dated 10.12.2010, copy enclosed as Annexure-7 and which is impugned, took note of the facts of the case and held that the engagement of the petitioner was in violation of the Government guidelines as also the instructions of D.S.W.O, Koraput in his letter dated 21.08.2009. As such, the Sub-Collector declared the engagement of the petitioner as null and void with further direction to the Child Development Project Officer, to issue engagement order in favour of the present Opposite Party No.4.

4. Heard Mr. J.K.Khuntia, learned counsel for the petitioner and Mr. A.R.Dash, learned Additional Government Advocate for the State. Be it noted that notice of the writ application was duly served on Opposite Party No. 4, as evident from the service return along with the A.D. There was however, no appearance from her side.

5. Mr. J.K.Khuntia would argue that the reasoning adopted by the Sub-Collector to hold the engagement of the petitioner as null and void is entirely unsustainable in the eye of law inasmuch as the petitioner was engaged prior to

issuance of the Government guidelines dated 21.08.2009. Mr. Khuntia would further argue that there can be no retrospective application of the guidelines issued by the Government subsequent to the engagement of the petitioner. He further argues, the private Opposite Party No.4 could not have been permitted to question the engagement of the petitioner as she was not an applicant in pursuance of the advertisement.

6. Mr. Dash, learned Additional Government Advocate, submits, with reference to the counter affidavit filed on behalf of Opposite Party Nos. 2 and 3, that the Government guidelines dated 21.08.2009 mandate that a Mini Anganwadi Worker is entitled to be appointed as Anganwadi Worker of the same centre consequent upon upgradation of the centre. In the instant case, even though the private Opposite Party No. 4 was not an applicant pursuant to the advertisement yet she had long experience of 8 years as Mini Anganwadi Worker in the same centre which was taken into account by the Child Development Project Officer while issuing order of engagement in her favour, on 20.04.2011 in obedience to the order passed by the Sub-Collector.

7. The factual aspects of this case are not disputed inasmuch as the petitioner had applied pursuant to an advertisement dated 30.01.2019 for engagement as Anganwadi Worker in Singaram Anganwadi Centre. She was also a selected candidate. It is borne out from the counter filed by the petitioner before the Sub-Collector (copy enclosed as Annexure-7) that there were five applicants for Singaram Centre out of whom the petitioner was selected by the selection committee being found to be most suitable. As such, she was issued with an order of engagement by the Child Development Project Officer on 22.06.2009 pursuant to which she joined on 25.06.2009.

8. The Government, vide circular dated 02.05.2007, issued a set of revised guidelines for selection of Anganwadi Workers. It is not in dispute that the petitioner fulfilled all the criteria for engagement as laid in the aforesaid guidelines. It appears that the Government partially modified the guidelines, dated 02.05.2007, in its letter dated 21.08.2009, wherein para 5 of said guidelines was altered as follows:

> "**Para-5(a)** A Balwadi worker can be engaged as Anganwadi worker provided that she had worked as Balwadi workers in that particular village.
>
> A Balwadi worker not having matriculation qualification can be engaged as Aganwadi worker, based on an undertaking that she will pass the matriculation examination within 03 years of her engagement."
>
> "**Para-5 (b)** Mini Anganwadi workers having one years experience with requisite qualification shall be appointed as Anganwadi worker for that Centre. Mini Anganwadi workers without having Matriculation qualification can be engaged as Anganwadi worker based on an undertaking that they will do so within a period of three years."

By a further letter, dated 25.08.2009, the DSWO, Koraput directed all the Child Development Project Officers to fill up the post of AWW of mini AWC as per the revised/modified guidelines.

9. As already stated, by such time, the petitioner had already been selected and engaged as Anganwadi Worker. There is nothing in the circular dated 21.08.2009 to show that the modifications introduced were to have retrospective effect. It is well settled that unless specifically provided, a statutory rule or notification would have prospective operation only. In the instant case, the guidelines, dated 02.05.2007, and the modified guidelines dated 21.08.2009 are undoubtedly executive instructions but then the same principle as is applicable to legislative enactments or statutory notifications can be applied. In the case of **Commissioner of Income Tax (Central)-1, New Delhi vs. Vatika Township Private Limited**[1], the following observations are noteworthy:

> *"**General principles concerning retrospectivity.***
>
> ***27.** A legislation, be it a statutory Act or a statutory rule or a statutory notification, may physically consists of words printed on papers. However, conceptually it is a great deal more than an ordinary prose. There is a special peculiarity in the mode of verbal communication by legislation. Legislation is not just a series of statements, such as one finds in a work of fiction/non-fiction or even in a judgment of a court of law. There is a technique required to draft legislation as well as to understand legislation. Former technique is known as legislative drafting and latter one is to be found in the various principles of "interpretation of statutes". Vis-à-vis ordinary prose, legislation differs in its provenance, layout and features as also in the implication as to its meaning that arise by presumptions as to the intent of the maker thereof.*
>
> ***28.** Of the various rules guiding how legislation has to be interpreted, one established rule is that unless a contrary appears, legislation is presumed not to be intended to have a retrospective operation. The idea behind the rule is that a current law should govern current activities. Law passed today cannot apply to the events of the past. If we do something today, we do it keeping in view the law of today and in force and not tomorrow's backward adjustment of it. Our belief in the nature of the law is founded on the bedrock that every human being is entitled to arrange his affairs by relying on the existing law and should not find that his plans have been retrospectively upset. This principle of law is known as lex prospicit non respicit: law looks forward not backward. As was observed in Phillips v.Eyre, a retrospective legislation is contrary to the general principle that legislation by which the conduct of mankind is to be regulated when introduced for the first time to deal with future acts ought not to change the character of past transactions carried on upon the faith of the then existing law".*

10. Further the law with respect to retrospective or prospective application of any administrative order or executive orders has been enumerated in the case of **Ex-major N.C.Singhal v. Director general, Armed forces Medical Service & Anr**[2] :

> ***6.** The appellant submitted that his conditions of service were governed by the Army Instruction I/S of 1954 and according to para 13 thereof, the whole of his previous full pay commissioned service must count for pay, and that Army Instruction 176 which came into force with retrospective effect from October 26, 1962, in the case of A.M.C. Reserve Officers called to colour service during emergency in the matter of ante-date, for promotion, T.A., leave and pay, cannot affect his condition of service which were governed in this behalf by para 13 of Army Instruction I/S of 1954.*

1. (2015) 1 SCC 1 **2. (1972) 4 SCC 765**

> ***7.*** *We think that the appellant's conditions of service were governed by para 13 of Army Instruction I/S of 1954 and his previous full pay commissioned service should be taken in the matter of 'ante-date' for the purpose of his pay. The condition of service in this regard was not liable to be altered or modified to the prejudice of the appellant by a subsequent administrative instruction which was given retrospective effect from October 26, 1962.*

In the case of **Govind Prasad v. R.G.Prasad & Ors**[3] ,the Supreme Court held as follows:

> *"**11.** Para 3 of the memorandum gives deeming effect — from July 1, 1978 — to the provisions in paras 1 and 2 of the memorandum. It is settled law that an executive order of the Government cannot be made operative with retrospective effect. It is, thus, clear that the memorandum contained various proposals which were to be incorporated in the statutory rules."*

Further, in the case of **Ex-Capt. K.C.Arora & Anr v. State of Haryana & Ors**[4] it was held as follows:

> *"**15.** It may be pointed out at the very outset that the Parliament as also the State Legislature have plenary powers to legislate within the field of legislation committed to them and subject to certain constitutional restrictions they can legislate prospectively as well as retrospectively. It is, however, a cardinal principle of construction that every statute is prima facie prospective unless it is expressly or by necessary implication made to have retrospective effect. But the rule in general is applicable where the object of the statute is to affect the vested rights or to impose new burden or to impair existing obligations. Unless there are words in the statute sufficient to show the intention of the Legislature to effect existing rights, it is deemed to be prospective only. Provisions which touch a right in existence at the passing of the statute are not to be applied retrospectively in the absence of express enactment or necessary intendment."*

11. It is thus obvious that the Government, by issuing the modified guidelines could not have intended to take away the benefit already conferred on persons by the earlier guidelines. Had such been the intention, it would obviously have been indicated specifically. The Sub-Collector, while adjudicating the appeal, appears to have lost sight of this fundamental aspect and therefore, the impugned order must be held to have been based on an erroneous conception regarding applicability of the guidelines dated 21.08.2009 and thus, cannot be sustained in the eye of law.

12. Another aspect that strikes to the mind is the locus standi of the private Opposite Party in preferring the appeal before the Sub-Collector. It is true, this Court had granted her such liberty in the earlier writ application but then no finding was rendered with regard to the question of locus, which may be deemed to have been kept open. There is no dispute that Opposite Party No.4 was never an applicant pursuant to the advertisement dated 30.01.2009. She did not submit any objection after publication of the selection list. She also never challenged the advertisement. It is only after the revised guidelines dated 21.08.2009 were issued by the Government that she readied herself for the battle but by then, the petitioner had already been

3. (1994) 1 SCC 437 **4. (1984) 3 SCC 281**

engaged after following a due selection procedure. The Sub-collector failed to consider that the Opposite Party No. 4 was a rank outsider and therefore, could not have validly questioned the selection process as per the revised provision since modified para 5 (b) was not in existence at the time of selection and engagement of the petitioner.

In the case of **Ayaaubkhan Noorkhan Pathan v. State of Maharashtra**[5], the Supreme Court observed as follows:

> *"**Person aggrieved***
> ***9.** It is a settled legal proposition that a stranger cannot be permitted to meddle in any proceeding, unless he satisfies the authority/court that he falls within the category of aggrieved persons. Only a person who has suffered, or suffers from legal injury can challenge the act/action/order, etc. in a court of law. A writ petition under Article 226 of the Constitution is maintainable either for the purpose of enforcing a statutory or legal right, or when there is a complaint by the appellant that there has been a breach of statutory duty on the part of the authorities. Therefore, there must be a judicially enforceable right available for enforcement, on the basis of which writ jurisdiction is resorted to. The Court can, of course, enforce the performance of a statutory duty by a public body, using its writ jurisdiction at the behest of a person, provided that such person satisfies the Court that he has a legal right to insist on such performance. The existence of such right is a condition precedent for invoking the writ jurisdiction of the courts. It is implicit in the exercise of such extraordinary jurisdiction that the relief prayed for must be one to enforce a legal right. In fact, the existence of such right is the foundation of the exercise of the said jurisdiction by the Court. The legal right that can be enforced must ordinarily be the right of the appellant himself, who complains of infraction of such right and approaches the Court for relief as regards the same. [Vide State of Orissa v. Madan Gopal Rungta [1951 SCC 1024 : AIR 1952 SC 12] , Saghir Ahmad v. State of U.P. [AIR 1954 SC 728], Calcutta Gas Co. (Proprietary) Ltd. v. State of W.B. [AIR 1962 SC 1044], Rajendra Singh v. State of M.P. [(1996) 5 SCC 460 : AIR 1996 SC 2736] and Tamilnad Mercantile Bank Shareholders Welfare Assn. (2) v. S.C. Sekar [(2009) 2 SCC 784]."*

The Opposite Party No.4 claims a right basing only on the modified guidelines issued on 21.08.2009, which were not in existence at the relevant time. Needless to say she had no vested right under the prevailing guidelines so as to maintain the appeal.

13. Perusal of the impugned order reveals that the Sub-Collector has referred to several other aspects such as the apparent incongruity in the tour diary of the Child Development Project Officer which supposedly shows her as absent on the date of selection. Firstly, such an allegation does not appear to have been levelled against the Child Development Project Officer by any person including the Opposite Party No. 4 and therefore, it amounts to making out an altogether third case by the Sub-Collector himself, which is not permissible in law. Secondly, mere entry in the tour diary could not have been treated as conclusive proof of the absence of the Child Development Project Officer at the selection committee meeting on the date in

5. (2013) 4 SCC 465

question. The finding of the Sub-Collector, therefore, on this score also cannot be sustained.

14. Thus, from the conspectus of the analysis of facts and law and the contentions raised before this Court, it is evident that the petitioner was validly selected and engaged as Anganwadi Worker for the centre in question. Such selection was in consonance with the prevailing guidelines issued by the Government on 02.05.2007. The objection raised to her engagement by Opposite Party No. 4 being entirely based on the modified guidelines dated 21.08.2009, which were not in operation at the relevant time, has therefore, no legs to stand. The Sub-Collector having utterly failed to consider the above aspects while adjudicating the appeal, the impugned order becomes liable for interference.

15. In the result, the writ application is allowed. The impugned order, dated 10.12.2010 (Annexure-7), is hereby quashed.

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2024 (II) ILR-CUT-234

SASHIKANTA MISHRA, J.

W.P(C) NO. 3135 OF 2014

SURAVI BISI ……Petitioner

-V-

SUB-COLLECTOR, SONEPUR & ORS. ……Opp.Parties

CONSTITUTION OF INDIA, 1950 – Article 226 – Writ of certiorari – The state commission for persons with disabilities passed an order in favour of Opp.Party No.3 which would have an adverse effect on livelihood of petitioner – The petitioner was not made party before the commission – Whether a writ of certiorari is maintainable to quash the impugned order in the instance of petitioner? – Held, Yes – Reason indicated with reference to case laws.

Case Laws Relied on and Referred to :-

1. AIR 1955 SC 233 : Hari Vishnu versus Ahmed Ishaque.
2. WPC (OAC) No. 304 of 2018 : Santosh Kumar Padhi vs. State of Odisha

For Petitioner : M/s. H.S.Mishra, A.K.Mishra, A.Parida, K.Badhai.

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

JUDGMENT Date of Judgment : 28.03.2024

SASHIKANTA MISHRA, J.

Apprehending that she may be disengaged from the post of Anganwadi Worker on the basis of a judgment passed by State Commission for Persons with Disabilities on 15.01.2014, the petitioner has filed this writ application seeking the following relief:

"The petitioner above named therefore prays that, in the facts and circumstances stated above, this Hon'ble Court may be pleased to admit the writ petition. Call for the records from the opp. parties to show cause as to why the application shall not be allowed. If they fail to show cause or the causes shown are found to be insufficient in law as well as in the facts and circumstances of the case, this Hon'ble Court may be pleased to allow this application prohibition/injuncting the opp. party Nos. 1 and 2 not to remove the petitioner from her post in pursuance to the order passed by the Opp. Party No.4 vide judgment dated 15.01.2014 in SCPD Case No. 326 of 2013 by further restraining not to appoint opp. party No.3 in place of the petitioner by issuing appropriate writ or writs, particularly the writ of prohibitory;

And further this Hon'ble Court may be pleased to call upon the opp. party No. 4 to produce the judgment dated 15.01.2014 passed in SCPD Case No. 326 of 2013 and quash the same by issuing appropriate writ or writs, particularly writ of mandamus or any other direction considered fit and proper be passed; and allow the writ petition with exemplary cost in favour of the petitioner;

And for which act of kindness, the petitioner as in duty bound shall every pray."

2. Facts of the case are that an advertisement was issued on 28.05.2013 by the CDPO, Sonepur (Opposite Party No. 2) inviting applications from eligible persons for appointment as Anganwadi worker in the Additional Anganwadi centre at Haladipali in the district of Sonepur. The petitioner was one of the applicants along with Opposite Party No.3. The Selection Committee under the Chairmanship of the Sub Collector, Sonepur in its meeting held on 01.08.2013, considered the applications submitted by the candidates and found the petitioner suitable for being engaged. The opposite party No.3 not having complied with the condition of submitting residential certificate was declared ineligible. On 03.08.2013, order of engagement was issued in favour of the petitioner, pursuant to which she joined on 06/08/2013. She underwent Job Course training at Barapalli from 25.11.2013 to 26.12.2013. While working as such she was shocked to come across a news-item published in newspaper 'Prameya' on 14.02.2014 stating that the State Commission for Persons with Disabilities (SCPD), Opposite Party No.4, had directed engagement of the Opposite Party No.3 as Anganwadi Worker in the centre in question. Since the petitioner was not a party to the proceeding before the SCPD nor had received any notice of the same, she approached the office of SCPD with her husband and lawyer to obtain a certified copy of the judgment. The office of SCPD refused to grant any copy of the judgment to her. Under such circumstances, she was constrained to approach this Court in the present writ application with the aforementioned prayer but without enclosing the judgment dated 15.01.2014 of SCPD. During pendency of the writ application however, by way of an additional affidavit, the petitioner filed a copy of the judgment passed by the SCPD which was taken on record.

3. Counter affidavit has been filed by opposite party Nos. 1 and 2 wherein it is stated that pursuant to the advertisement, three candidates including the Petitioner and Opposite Party No.3 submitted their applications but at the time of scrutiny only the petitioner and the opposite party No.3 were present. Though opposite party No. 3

secured the highest mark but she did not produce the residential certificate which is required for scrutiny as per the advertisement. As such, her application was rejected and the petitioner was selected as she had produced all the relevant documents. It is further stated that the petitioner has been working in the post till today. Further, the opposite party Nos. 1 and 2 are bound by the order passed by the SCPD unless the same is interfered with by any higher Court.

4. The private opposite party No.3 has also filed a counter, stating that she had secured the highest mark, being 67.3 %, whereas the petitioner secured 49.8%. Her residential certificate was issued on 20.10.2009 which was produced by her but was not accepted by the selection committee as it had been issued beyond six months from the date of the advertisement. According to the opposite party No.3 it was done deliberately by the authorities only to deprive her from being engaged in the post. It is further stated that she had produced a fresh residential certificate dated 12.06.2013 on the date of scrutiny by the selection committee but the same was not taken into consideration. Therefore, she being a physically disabled candidate approached the SCPD seeking relief.

5. Heard Mr. H. S. Mishra, learned counsel for the petitioner and Mr. S. N. Patanaik, learned Additional Government Advocate for the State and Mr. S. Mishra learned counsel for the private opposite party No.3.

6. A plea of the maintainability of the writ application having been raised, it would be proper to consider the same at the outset.

In this context, Mr.S.Mishra would argue that the writ application is premature and in any case, not maintainable as no order of disengagement has been issued by the authorities against the petitioner as yet. The writ application has been filed on an apprehended cause of action which is not permissible. Moreover, the original copy of the judgment passed by the SCPD has not been enclosed to the writ application for which the prayer for its quashment cannot be considered.

7. In response, Mr. H.S. Mishra would argue that the petitioner was not a party to the proceeding before the SCPD and no notice of the proceeding had been issued to her. She came to know about the judgment from the news-item published in the newspaper. Since the order of the SCPD would have an adverse effect on her livelihood and as she, despite best efforts, could not obtain the copy of the judgment, had no other option than to approach this Court seeking necessary protection by way of a writ of prohibition against her disengagement. In any case, she has filed copy of the judgment during the pendency of the writ application which is on record. Mr. Mishra further argues that from the stand taken by opposite party Nos. 1 and 2 in their counter affidavit that they are bound by the judgment of SCPD, the apprehension of the petitioner becomes fully justified. But for the interim order passed by this Court she would have been disengaged.

8. Upon going the averments made in the writ application along with the documents enclosed thereto and on hearing the parties it becomes evident that what

the petitioner is essentially asking for in this writ application is issuance of a writ of certiorari against the judgment of the SCPD seeking quashment of the same. It is the specific case of the petitioner that firstly, the SCPD had no jurisdiction to entertain the complaint filed by the opposite party No. 3 and secondly, the principles of natural justice were not followed at all. The distinction between a writ of prohibition and writ of certiorari has been delineated by the Supreme Court in the case of ***Hari Vishnu versus Ahmed Ishaque***[1] in the following words:

> *"They are used at different stages of the proceedings. When an inferior court takes up for hearing a matter over which it has no jurisdiction, the person against whom the proceedings are taken can move the superior court for a writ of prohibition…On the other hand, if the court hears that cause or matter and gives a decision, the party aggrieved would have to move the superior court for a writ of certiorari…it might happen that in a proceeding before the inferior court a decision might have been passed, which does not completely dispose of the matter, in which case it might be necessary to apply both for certiorari and prohibition – certiorari for quashing what has been decided, and prohibition for arresting the further continuance of the proceeding…But if the proceedings have terminated then it is too late to issue prohibition and certiorari for quashing is the proper remedy to resort to. Broadly speaking and apart from the cases of the kind referred to above, a writ of prohibition will lie when the proceedings are to any extent pending, and a writ of certiorari for quashing after they have terminated in a final decision."*

Since in the instant case, the proceeding before the SCPD is no longer pending having culminated in the impugned judgment, it must be held that the petitioner's prayer is actually for issuance of a writ of certiorari and not prohibition.

9. As to the objection of the private opposite party relating to premature motion by the petitioner on an apprehended cause of action it can be easily discerned that the main grievance of the petitioner is against the judgment of the SCPD. The threat of disengagement which looms large on her actually emanates from the said judgment and not otherwise. The State opposite parties have said so in their counter to the effect that the judgment of SCPD is binding on them. This implies, as long as the judgment remains operative its consequence, that is, disengagement of the petitioner cannot be negated. So, it is not actually a case of apprehended cause of action but a direct challenge to the judgment of SCPD and challenge to the order of disengagement that may be passed basing thereon is merely consequential. This Court is therefore, of the considered view that the objection to maintainability of the writ application as raised by the private opposite party has no legs to stand and that the writ application is maintainable.

10. Having held the writ application as maintainable, this Court would now proceed to consider the merits of the case. The facts are not disputed inasmuch as the opposite party No.3 had secured the highest marks but was not selected as she had not submitted the residence certificate as required. The advertisement, copy of which is enclosed as Annexure-1, was issued on the basis of Govt. notifications

1. AIR 1955 SC 233

dated 02.05.2007, 07.09.2007, 24.12.2008 and 07.01.2009. By means of these notifications, the Government has, from time to time issued guidelines governing the selection and engagement of Anganwadi workers, Mini Anganwadi Workers, helpers etc. The relevant notification containing the revised guidelines was issued on 02.05.2007 Clause-I of which mandates that the applicant must be permanent resident of the service area of the Anganwadi centre/Mini Anganwadi Centre/ Additional Anganwadi Centre. Clause-IV under the heading "Procedure" in the guidelines provides that any candidate being aggrieved by the decision of the selection committee may prefer appeal before the Additional District Magistrate of the district. Thus, on the face of it, if the opposite party No.3 had any reason to feel aggrieved by the decision taken by the selection committee to reject her candidature, she should have preferred appeal before the Additional District Magistrate. She however, chose to approach the State Commission for Persons with Disability (SCPD) apparently as she is a physically disabled candidate.

11. The question is, whether any right of the opposite party No.3, was infringed in the instant case.

Reference to the copy of the meeting of the selection committee enclosed as Annexure-2 reveals that 5 points were awarded to opposite party No.3 on the ground of her physical disability. Thus, her right to be given weightage on account of her physical disability was recognized and given due regard. What she appears to be aggrieved of is non-consideration of her residential certificate by the Selection Committee. But as is seen from the records, the opposite party No. 3 submitted a residential certificate dtd. 20.10.2009 along with her application and again a certificate dtd. 12.06.2013 at the time of selection. Thus as on the date of advertisement or even on the last date of submission of application she did not have a residential certificate as per the requirement of the advertisement. The certificate submitted by her was four years old. She did obtain another certificate but only during the selection procedure, which obviously could not have been considered. She was therefore, clearly not eligible despite having secured the highest marks. There was thus no error or infirmity in the decision taken by the selection committee. This aspect does not appear to have been considered in the correct perspective by the SCPD for which the impugned judgment becomes vulnerable.

12. Further, reading of the judgment of SCPD shows that the petitioner was not heard. In the counter filed by the State, the stand taken by the petitioner that she had not been served any notice by the SCPD has not been specifically denied. Thus, the judgment of SCPD becomes vulnerable also for non-adherence to the principles of nature justice and therefore, cannot be treated as binding on the petitioner.

13. Even otherwise, this Court finds that a stand has been taken by the opposite party Nos. 1 and 2 in the counter is that they are bound by the judgment of the SCPD. Reference to Section 81 of the 2016 Act would however indicate otherwise and is quoted herein below:

> ***81. Action by appropriate authorities on recommendation of State Commissioner.***— *Whenever the State Commissioner makes a recommendation to an authority in pursuance of clause (b) of section 80, that authority shall take necessary action on it, and inform the State Commissioner of the action taken within three months from the date of receipt of the recommendation:*
>
> *Provided that where an authority does not accept a recommendation, it shall convey reasons for non-acceptance to the State Commissioner for Persons with Disabilities within the period of three months, and shall also inform the aggrieved person."*

The proviso to Section 81, quoted above, clearly shows that the concerned authority, in this case the CDPO Sonepur, has the discretion to either accept or not accept the recommendation made by the SCPD. In a similar case, that is the case of ***Santosh Kumar Padhi vs. State of Odisha***[2], this Court held as follows:

> *"15. From a conjoint reading of the aforequoted provisions and particularly the proviso to Section 81 of the Act, it is clear that the recommendation of the Opposite Party No.2 is not mandatory but only advisory in nature. Therefore, for the Opposite Party authorities to contend that they had acted in pursuance of the order passed by the Opposite Party No.2 cannot be accepted. Rather, it shows a complete non-application of mind by the authority to the facts and circumstances of the case. In short, the recommendation was accepted mechanically."*

The stand taken by the opposite party Nos. 1 and 2 as referred above is entirely misconceived and contrary to the statutory provisions.

14. Thus from the conspectus of the analysis of the facts and law and the discussion made hereinbefore, this Court is left with little doubt that the impugned judgment dtd. 15.01.2014 passed by the SCPD cannot be sustained in the eye of law and hence, warrants interference.

15. In the result, the writ application is allowed. The impugned judgment dtd. 15.01.2014 passed by SCPD in SCPD Case No. 326 of 2013 is hereby set aside. There shall be no order as to costs.

2. WPC (OAC) No. 304 of 2018

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2024 (II) ILR-CUT-239

SASHIKANTA MISHRA, J.

ABLAPL NO. 11777 OF 2023 WITH BATCHES
(ABLAPL NOS. 13978 & 13980 OF 2023)

SANJAY KUMAR SARANGI ……Petitioner(s)

-V-

STATE OF ODISHA & ANR. ……Opp.Parties

CODE OF CRIMINAL PROCEDURE, 1973 – Section 438 – Whether the petitioners being already in custody albeit in connection with different cases can file the applications for anticipatory bail? – Held, Yes – There

is no statutory bar for an accused in custody in connection with a case to pray for grant of anticipatory bail in another case registered against him. (Para 16)

Case Laws Relied on and Referred to :-
1. 2021 SCC Online Bom 5276 : Alnesh Akil Somjee vs. State of Maharasthra.
2. 2023 SCC Online Bom 2394 : Amar S. Mulchandani vs. State of Maharasthra.
3. (1980) 2 SCC 565 : Gurbaksh Singh Sibbia vs. State of Punjab.
4. (2018) 7 SCC 731 : Sushila Aggarwal v State (NCT of Delhi).
5. 2021 SCC Online Raj 1654 : Sunil Kallami vs. State of Rajsthan.
6. 2022 SCC online ALL 832 : Rajesh Kumar Sharma vs. CBI.
7. (2021) 4 SCC 1 : Tofan Singh versus State of Tamil Nadu.

For Petitioner(s) : Mr. S.K.Mohapatra & L.Achari (in ABLAPL NO.11777/2023)
Mr. D.Panda with M/s. A.Mohanty, P.Patnaik, J.Sahoo (in ABLAPL NO.13978/2023)
Mr. S.C.Mohapatra, Sr. Adv. with M/s. A.Mohanty, P.Patnaik & J.Sahoo (in ABLAPL NO.13980/2023)

For Opp.Parties : Mr. S.K. Mishra, ASC
M/s. S.N.Mishra & K.Panda.

JUDGMENT Date of Judgment :10.04.2024

SASHIKANTA MISHRA, J.

These applications for anticipatory bail involve the following question of law:-

> Whether an application for anticipatory bail is maintainable at the instance of a person who is already in custody in connection with a different case.

This Court has extensively heard Mr. Soura Chandra Mohapatra, learned Senior counsel assisted by Mr. S. Kanungo, learned counsel for the petitioner in ABLAPL No. 11777 of 2023, Mr. Debasis Panda, learned counsel for the petitioner in ABLAPL No. 13978 of 2023 and Mr. Abhas Mohanty, learned counsel appearing for the petitioner in ABLAPL No. 13980 of 2023. This Court has also heard Mr. Sangram Keshari Mishra, learned Additional Standing counsel for the State.

2. Reference to certain relevant facts of these cases would be in order at the outset.

The petitioner in ABLAPL No. 11777 of 2023, is apprehending arrest in connection with EOW P.S. Case No. 07 of 21.02.2023, under Section 419/420/467/ 468/ 471/120 B of IPC. He is in custody since 04.09.2023 in connection with Special Crime Unit P.S. Case No. 3, dated 10.08.2023, under Sections 419/420/465/467/ 468/471/120 B of IPC.

The petitioner in ABLAPL No. 13978 of 2023, is apprehending arrest in connection with Kalimela P.S. Case No. 208 of 2023 under Section 20(b)(ii)(c)/27(a)/29 of NDPS Act r/w Section 353/186/341/506 of IPC. He is already in custody since 30.08.2023 in connection with Kalimella P.S. Case No. 216/30.08.2023.

The petitioner in ABLAPL No. 13980 of 2023, is apprehending arrest in connection with Kalimella P.S. Case No. 212 of 2023 under Section 20 (b)(ii)(c)/25(1)(a)/27(a) and 29 of NDPS Act. He is in custody since 30.08.2023 in connection with Kalimella P.S. Case No. 216 dated 30.08.2023.

3. The question, whether the petitioners being already in custody albeit in connection with different cases can maintain the applications for anticipatory bail has been raised at the threshold by the Court. The parties have addressed the Court on said question making extensive arguments. Mr. S.C.Mohapatra, learned Senior counsel, leading the arguments on behalf of all the petitioners, has primarily argued that liberty being one of the most cherished objects of the Constitution as guaranteed under Article 21 of Constitution has to be protected at all costs. Only because the petitioner is already in custody, it does not mean that he cannot seek to protect his liberty in connection with another case registered against him. Tracing the legislative history of the provision under Section 438 of Cr.P.C., Mr. Mohapatra would argue that such provision was not there in the Code of the Criminal Procedure, 1889. It was made part of Code of Criminal Procedure, 1973 with the specific intention to protect the liberty of a person, who may be subjected to undue harassment or humiliation being taken into custody unnecessarily. The provision confers wide powers on the Court of Session and the High Court to protect the liberty of a person and such power is not curtailed or limited in any manner, save and except in the manner provided in the provision itself. Mr. Mohapatra further submits that save any exceptions contained in other statutes, like SC & ST (POA) Act etc. a person accused of any other offence is entitled to seek protection from the arbitrary exercise of the power of arrest by the police.

4. Per contra, Mr S.K.Mishra, referring to the language employed in Section 438 of Cr.P.C. would contend that the power to protect a person in the event of his arrest obviously cannot be invoked in a case where a person has already been arrested though in connection with another offence. He submits that the order under Section 438 comes into operation only when a person is arrested. In such event, he is released on bail. But when a person is already in custody in connection with another case, he obviously cannot be arrested again or taken into custody. He can only be remanded on the order of the concerned Court. Mr. Mishra concludes his arguments by submitting that the power under Section 438 cannot therefore, be invoked to stop an accused in custody from being remanded in connection with a case on the orders of this Court.

5. Both sides have relied upon several judgments in support of their respective contentions. Mr. Mohapatra has relied upon the judgment of the Bombay High Court in the case of ***Alnesh Akil Somjee vs. State of Maharasthra***[1], and the case of ***Amar S. Mulchandani vs. State of Maharasthra***[2]. Mr. Mohapatra has also relied upon the

1. **2021 SCC Online Bom 5276**
2. **2023 SCC Online Bom 2394**

oft-quoted judgment of the Supreme Court in the case of ***Gurbaksh Singh Sibbia vs. State of*** **Punjab**[3] and ***Sushila Aggarwal v State (NCT of Delhi)***[4] . On the other hand Mr. S.K.Mishra has relied upon the judgment of the Rajasthan High Court in the case of ***Sunil Kallami vs. State of Rajsthan***[5] and judgment of the Allahabad High Court in the case of ***Rajesh Kumar Sharma vs. CBI***[6] .

6. It is seen that the High Courts of Rajasthan and Allahabad have taken the view that a person already in custody cannot seek anticipatory bail in connection with another case. In the case of ***Sunil Kallami*** *(Supra)* a learned Single Judge of the Rajasthan High Court took note of the celebrated judgment of the Supreme Court in the case of ***Gurbaksh Singh Sibbia*** and the scope of exercise of powers under Section 438 of Cr.P.C. The learned Single Judge further took note of the relevant provisions relating to arrest and held that "*Upon reading Section 46 Cr.P.C.(supra), it is apparent that arrest would mean actually touch or confine the body of the person to custody of the police officer. Section 167 of Cr.P.C. lays down that the custody may be given to the police for the purpose of investigation (called as remand) or be sent to jail (called as judicial custody). Thus the essential part of arrest in placing the corpus, body of the person in custody of the police authorities whether of a police station or before him or in a concerned jail*". Having held as such, the learned single Judge held as follows:

> *"19. The natural corollary is therefore that a person who is already in custody cannot have reasons to believe that he shall be arrested as he stands already arrested. In view thereof, the precondition of bail application to be moved under Section 438 Cr.P.C. i.e. reasons to believe that he may be arrested" do not survive since a person is already arrested in another case and is in custody whether before the police or in jail."*

The learned Single Judge thereafter, referred to the observation of the Supreme Court in the case of ***Narinderjit Singh Sahni*** *(supra)* and ultimately held as follows.

> *"24. However, keeping in view observations in Narinderjit Singh Sahni, (supra) and considering that the purpose of preventive arrest by a direction of the court on an application under Section 438 Cr.P.C. would be an order in vacuum. As a person is already in custody with the police this Court is of the view that such an anticipatory bail application under Section 438 Cr.P.C. would not lie and would be nothing but travesty of justice in allowing anticipatory bail to such an accused who is already in custody.*
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> *25. Examining the issue from another angle if such an application is held to be maintainable the result would be that if an accused is arrested say for an offence committed of abduction and another case is registered against him for having committed murder and third case is- registered against him for having stolen the car which was used for abduction in a different police station and the said accused is granted anticipatory bail in respect to the offence of stealing of the car or in respect to the offence of having committed murder the concerned Police Investigating Agency where FIRs have been registered would be prevented from conducting individual investigation and making recoveries as anticipatory bail once granted would continue to operate*

3. (1980) 2 SCC 565 4. (2018) 7 SCC 731 5. 2021 SCC Online Raj 1654
6. 2022 SCC online ALL 832

without limitation as laid down by the Apex Court in Sushila Aggarwal, (supra). The concept of anticipatory bail, as envisaged under-Section 438 Cr.P.C. would stand frustrated. The provisions of grant of anticipatory bail are essentially to prevent the concerned person from litigation initiated with the object of injuring and humiliating the applicant by haying him so arrested and for a person who stands already arrested, such a factor does not remain available.

26. In view of above discussion, this Court holds that the anticipatory bail would not lie and would not be maintainable if a person is already arrested and is in custody of police or judicial custody in relation to another criminal case which may be for similar offence or for different offences."

The aforesaid judgment of the Rajasthan High Court was followed in toto by the Allahabad High Court in the case of ***Rajesh Kumar Sharma*** (*supra*).

7. It is apposite at this stage to refer to the judgment of the Supreme Court in the case of ***Narinderjit Singh Sahni*** (*supra*) wherein taking note of the fact that the writ petitioners were already in custody being arrested in connection with cases involving cognizable offences, the Supreme Court held as follows:

"51. On the score of anticipatory bail, it is trite knowledge that Section 438 CrPC is made applicable only in the event of there being an apprehension of arrest. The petitioners in the writ petitions herein are all inside the prison bars upon arrest against all cognizable offences, and in the wake of the aforesaid question relieving the petitioners from unnecessary disgrace and harassment would not arise."

8. As against the judgments cited in the preceding paragraphs holding the view that the anticipatory bail application in such a situation is not maintainable, the Single Judge of Bombay High Court in the case of ***Alnesh Akil Somjee*** (*supra*) relied upon the following observations of the Constitution Bench judgment of the Supreme Court in the case of ***Sushila Agrawal*** (*supra*), and held as follows:

"9. The Hon'ble Apex Court in the case of Sushila A Aggarwal (supra), while dealing with the scope of Section 438 of the Cr. P.C. has followed the decision in the case of Shri. Gurbaksh Singh Sibbia v. State of Punjab and regarding the bar or restriction on the exercise of power to grant anticipatory bail, the Hon'ble Apex Court has held as follows:

"62…….In this background, it is important to notice that the only bar, or restriction, imposed by Parliament upon the exercise of the power (to grant anticipatory bail) is by way of a positive restriction i.e. in the case where accused are alleged to have committed offences punishable under Section 376 (3) or Section 376-AB or Section 376-DA or Section 376-DB of the Penal Code. In other words, Parliament has now denied jurisdiction of the courts (i.e. Court of Session and High Courts) from granting anticipatory bail to those accused of such offences. The amendment [Code of Criminal Procedure Amendment Act, 2018 introduced Section 438(4)] reads as follows:

"438. (4) Nothing in this section shall apply to any case involving the arrest of any person on accusation of having committed an offence under sub-section (3) of Section 376 or Section 376-AB or Section 376-DA or Section 376-DB of the Penal Code, 1860".

63. Clearly, therefore, where Parliament wished to exclude or restrict the power of courts, under Section 438 of the Code, it did so in categorical terms. Parliament's

omission to restrict the right of citizens, accused of other offences from the right to seek anticipatory bail, necessarily leads one to assume that neither a blanket restriction can be read into by this Court, nor can inflexible guidelines in the exercise of discretion, be insisted upon-that would amount to judicial legislation"."

Having referred to the observations of the Supreme Court as above, the learned Single Judge of the Bombay High Court thereafter held:

"15. In my considered opinion, there was no proper interpretation of Section 438 of the Cr. P.C. at the hands of learned Additional Sessions Judge. Accused has every right, even if he is arrested in number of cases, to move in each of offence registered against him irrespective of the fact that he is already in custody but for different offence, for the reason that the application (s) will have to be heard and decided on merits independent of another crime in which he is already in custody.

16. One cannot and must not venture, under the garb of interpretation, to substantiate its own meaning than the plain and simple particular though provided by statute. What has not been said cannot be inferred unless the provision itself gives room for speculation. If the purpose behind the intendment is discernible sans obscurity and ambiguity, there is no place for supposition."

9. Before proceeding to analyse the judgments quoted above, this court would prefer to make an independent study of the problem with reference to the statute. At the outset this Court would remind itself of the salutary principle that liberty is one of the most cherished objects of our constitution as guaranteed under Article 21. As has been argued by learned Senior counsel, there was no provision in the old Code (Cr.P.C. 1889) conferring power on the Court to grant pre-arrest bail. Such power was conferred only in the new Code (Cr.P.C.1973). Section 438 (1), which is relevant, reads as follows;

"(1) Where any person has reason to believe that he may be arrested on accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section that in the event of such arrest he shall be released on bail; and that Court may, after taking into consideration, inter-alia, the following factors, namely—

1. the nature and gravity of the accusation;

2. the antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;

3. the possibility of the applicant to flee from justice; and.

4. where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested, either reject the application forthwith or issue an interim order for the grant of anticipatory bail;

Provided that, where the High Court or, as the case may be, the Court of Session, has not passed any interim order under this Sub-Section or has rejected the application for grant of anticipatory bail, it shall be open to an officer in-charge of a police station to arrest, without warrant the applicant on the basis of the accusation apprehended in such application."

The legislative intent behind the enactment of the above provision as can be culled out from the language employed therein is, to protect a person from the ignominy of being arrested and thereby being subjected to undue humiliation and

loss of dignity. This is all the more necessary when a person is sought to be implicated on false accusations.

10. Whether such power can be curbed, curtailed or limited in any manner was also considered by the Supreme Court in ***Gurbaksh Singh Sibbia*** (*supra*) as well as ***Sushila Agarwal*** (*supra*). In ***Sushila Agarwal*** (*supra*), the following observations made in Gurbaksh Singh Sibbia were quoted with approval:

> "***38***. *The Supreme Court further clarified that it was impermissible to import restrictions which were not found in the phraseology of Section 438 to whittle down the discretion advisedly vested by the Parliament in the High Court and Court of Session, premised on the guarantee of personal liberty under Article 21 of the Constitution of India. The observations in paragraphs 53, 56, 63 and 69 read as under:*
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> ……
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> *"53. It is quite evident, therefore, that the pre-dominant thinking of the larger, Constitution Bench, in Sibbia (supra), was that given the premium and the value that the Constitution and Article 21 placed on liberty-and given that a tendency was noticed, of harassment - at times by unwarranted arrests, the provision for anticipatory bail was made. It was not hedged with any conditions or limitations-either as to its duration, or as to the kind of alleged offences that an applicant was accused of having committed. The courts had the discretion to impose such limitations (like co-operation with investigation, not tampering with evidence, not leaving the country etc) as were reasonable and necessary in the peculiar circumstances of a given case. However, there was no invariable or inflexible rule that the applicant had to make out a special case, or that the relief was to be of limited duration, in a point of time, or was unavailable for any particular class of offences.*
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> *56. The reason for enactment of Section 438 in the Code was Parliamentary acceptance of the crucial underpinning of personal liberty in a free and democratic country. Parliament wished to foster respect for personal liberty and accord primacy to a fundamental tenet of criminal jurisprudence, that everyone is presumed to be innocent till he or she is found guilty. Life and liberty are the cherished attributes of every individual. The urge for freedom is natural to each human being. Section 438 is a procedural provision concerned with the personal liberty of each individual, who is entitled to the benefit of the presumption of innocence. As denial of bail amounts to deprivation of personal liberty, the court should lean against the imposition of unnecessary restrictions on the scope of Section 438, especially when not imposed by the legislature.*
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> ……
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> *63. Clearly, therefore, where the Parliament wished to exclude or restrict the power of courts, under Seciton 438 of the Code, it did so in categorical terms. Parliament's omission to restrict the right of citizens, accused of other offences from the right to seek anticipatory bail, necessarily leads one to assume that neither a blanket restriction can be read into by this court, nor can inflexible guidelines in the exercise of discretion, be insisted upon-that would amount to judicial legislation.*
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> ……..
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> *69. It is important to notice, here that there is nothing in the provisions of Section 438 which suggests that Parliament intended to restrict its operation, either as regards the time period, or in terms of the nature of the offences in respect of which, an applicant had to be denied bail, or which special considerations were to apply. In this context, it is*

relevant to recollect that the court would avoid imposing restrictions or conditions in a provision in the absence of an apparent or manifest absurdity, flowing from the plain and literal interpretation of the statute (Ref Chandra Mohan v. State of Uttar Pradesh[10]).”

Thus, the position that emerges is, the power under Section 438 of Cr. P.C. cannot be whittled down or curbed, save and except as provided under Sub-Section 4 thereof which is quoted herein below:

“(4) Nothing in this section shall apply to any case involving the arrest of any person on accusation of having committed an offence under sub-section (3) of section 376 or section 376AB or section 376DA or section 376DB of the Indian Penal Code”

11. As has been argued by learned Senior counsel, there are restrictions with regard to exercise of the power under Section 438 in some statutes like Section 18 of the SC and ST Act etc. Thus, save and except under the conditions mentioned above, the power under Section 438 cannot be curtailed.

12. Whether such power would extend to a person already in custody is now to be examined. In the present context, custody would mean judicial custody consequent upon arrest and under orders of the Court. It has been argued that such a person, against whom another case is registered, cannot obviously be rearrested as there is no provision for re-arrest under the Code of Criminal Procedure. In case of such a person, the Investigating Agency/prosecution, if it feels necessary for the purpose of investigation can only seek an order of remand from the court and in such event, it would get the liberty of interrogating him in connection with the case or of taking further steps in investigation like discovery of material evidence on his statement etc as contemplated under Section 27 of the Indian Evidence Act. Learned State counsel Mr. Mishra, has argued that the order of remand cannot be equated with arrest and there cannot be any apprehension of arrest on the part of the accused to invoke the power under Section 438 of Cr.P.C.

In view of the argument as above, it would be profitable to refer to the relevant provisions of the Code relating to Arrest, as mentioned under Chapter-V titled ‘Arrest of Persons’ containing Sections 41 to 60 A. Section 41 reads as follows;

“41.When police officer may arrest without warrant – (1) Any police officer may without an order from a Magistrate and without a warrant, arrest any person;

1. who has been concerned in any cognizable offence, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been so concerned; or

2. who has in his possession without lawful excuse, the burden of proving which excuse shall lie on such person, any implement of house-breaking; or

3. who has been proclaimed as an offender either under this Code or by order of the State Government; or

4. in whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing; or

5. who obstructs a police officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody; or
6. who is reasonable suspected of being a deserter from any of the Armed Forces of the Union; or
7. who has been concerned in, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been concerned in, any act committed at any place out of India which, if committed in India, would have been punishable as an offence, and for which he is, under any law relating to extradition, or otherwise, liable to be apprehended or detained in custody in India; or
8. who, being a released convict, commits a breach of any rule made under Sub-Section (5) of section 356; or
9. for whose arrest any requisition, whether written or oral, has been received from another police officer, provided that the requisition specifies the person to be arrested and the offence or other cause for which the arrest is to be made and it appears therefrom that the person might lawfully be arrested without a warrant by the officer who issued the requisition.
(2)Any officer in charge of a police station may, in like manner, arrest or cause to be arrested any person, belonging to one or more of the categories of person specified in section 109 or section110.

Section 46 of the Code reads as follows:

"46.Arrest how made-(1)In making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action.
(2)If such person forcibly resists the endeavour to arrest him, or attempts to evade the arrest, such police officer or other person may use all means necessary to effect the arrest.
(3)Nothing in this section gives a right to cause the death of a person who is not accused of an offence punishable with death or with imprisonment for life.
(4)Save in exceptional circumstances, no women shall be arrested after sunset and before sunrise, and where such exceptional circumstances exist, the woman police officer shall, by making a written report, obtain the prior permission of the Judicial Magistrate of the first class within whose local jurisdiction the offence is committed or the arrest is to be made."

Section 60 A of the Code reads as follows:

"60A. Arrest to be made strictly according to the Code
No arrest shall be made except in accordance with the provisions of this Code or any other law for the time being in force providing for arrest"

Thus, arrest means physical confinement of a person with or without the order of the Court. What is remand? Remand is governed under Section 167(2) of Cr.P.C. which is quoted herein below:

"(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction;

Provided that—
1. the Magistrate may authorise the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding—
1. ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;
2. sixty days, where the investigation relates to any other offence, and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this Sub-Section shall be deemed to be to released under the provisions of Chapter XXXIII for the purposes of that Chapter;
2. no Magistrate shall authorise detention in any custody under this section unless the accused is produced before him;
3. no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorize detention in the custody of the police."

But then, this provision is applicable to a case where the accused is already arrested and charge-sheet has not been filed. There is no specific provision in the code governing a situation where a person is required to be arrested/remanded in connection with a new case when he is already in custody in connection with another case. As has already been stated, in such a situation he can only be remanded in connection with the new case on the order of the Court. Can the order of the remand in such a situation be equated with an act of arrest? Had the accused not been in custody it would be open to police to arrest him following the procedure laid down in Chapter V referred above. Since he is already arrested and in custody, he can only be taken on remand for the purpose of investigation, if required. Thus, but for his detention in connection with another case, he would have been arrested in connection with the new case if the investigation agency so wanted. Now, what is the purpose and effect of remand? In ordinary circumstances, when a person is arrested he is subjected to investigation as provided in the relevant provisions of the Code such as Sections 160/161/162 and Section 27 of the Indian Evidence Act. In other words, the purpose of remand as in case of arrest is to collect evidence during investigation. It basically amounts to the same thing. The question that falls for consideration in such a situation is, whether an order under Section 438 of Cr.P.C. can be issued in relation to an order of remand. In case of arrest, such an order would be to release him but in case of remand can such an order be passed?

13. To illustrate, a person is in custody in connection with a case and a new case is registered against him for commission of some other offence. Two recourses are available to the police in such a situation - firstly to seek an order of remand from the Court if the presence of the accused is required for investigation or secondly, to arrest him, as and when he is released from custody in connection with the previous case. It is only in the second scenario that an order of anticipatory bail can become effective because only then can he be 'arrested'. It is trite law that the distinction between an order in case of custody bail and anticipatory bail is that the former is

passed when the accused is already arrested and in custody and operates as soon as it is passed (subject to submission of bail bonds etc), while the latter operates at a future time - when the person not being in custody, is arrested. This, according to the considered view of this Court, is the crux of the issue. To amplify, since an order granting anticipatory bail becomes effective only when the person is arrested and as it is not possible to arrest a person already in custody, it follows that when, on being released from custody in the former case, he is sought to be arrested in the new case, there is no reason why he shall be restrained from moving the Court beforehand to arm himself with necessary protection in the form of anticipatory bail to protect himself from such a situation. If such an order is passed by the Court in his favour, it shall become effective if and when he is arrested as normally happens. The only catch is, he cannot be arrested as long as he is in custody in the first- mentioned case. So, his right to obtain an order in the new case beforehand that can be effective only upon his release from the first-mentioned case cannot be denied under the scheme of the Code.

14. Another aspect must also be taken into consideration – when a person is in custody in connection with a case and a new case gets registered against him, it is, for all practical purposes a separate case altogether. This implies all rights conferred by the statute on the accused consequent upon registration of a case against him as well as the investigating agency are independently protected. There is no provision in the Code that takes away the right of the accused to seek his liberty or of the investigating agency to investigate into the case only because he is in custody in another case. As already stated, the accused can exercise his right of moving the court for anticipatory bail which would of course be effective only upon his release from the earlier case and in the event of his arrest in the subsequent case. Similarly, the right of the investigating agency to investigate/interrogate in the subsequent case can be exercised by seeking remand of the accused from the court in the subsequent case. Both these scenarios are not mutually exclusive and can operate at their respective and appropriate times. The investigating agency, if it feels necessary for the purpose of interrogation/investigation can seek remand of the accused whilst he is in custody in connection with the previous case and if such prayer is allowed, the accused can no longer pray for grant of anticipatory bail as then he would be technically in custody in connection with the subsequent case also. Then, he can only seek regular or custody bail. It is also to be considered that if the prosecution has the power to register a case against a person who is in custody in connection with another case how can the accused be deprived of his right to seek protection of his liberty in such case? This would militate against the very principle underlying Article 21 of the Constitution as also Section 438 of the Code.

15. This takes the court to the reasoning adopted by the learned single judge of Rajasthan High Court in the case of ***Sunil Kallami (supra)*** that "*….the concerned Police Investigating Agency where FIRs have been registered would be prevented from conducting individual investigation and making recoveries as anticipatory bail once*

granted would continue to operate without limitation as laid down by the Apex Court in Sushila Aggarwal, (supra)…."

With great respect, this Court is unable to persuade itself to agree with the above-quoted reasoning in view of the fact that grant of anticipatory bail does not and cannot grant the accused a licence to avoid investigation or clothe him with any immunity there-from. In fact, sub-section (2) of Section 438 holds the answer to this question as follows:

> (2) When the High Court or the Court of Session makes a direction under sub-section (1), it may include such conditions in such directions in the light of the facts of the particular case, as it may think fit, including –
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> (i) a condition that the person shall make himself available for interrogation by a police officer as and when required;
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> xxxxxxxxxxxxxxx

It is needless to mention that an order under sub-section (1) can be passed only upon hearing the Public Prosecutor. Hence, the prosecution can always insist upon inclusion of such a condition by the court in the order grating anticipatory bail. And in so far as 'recoveries' are concerned, as already stated, it is always open to the investigating agency to pray for remand of the accused, as long as he is in custody, for such purpose and an order granting anticipatory bail has not been passed.

Since these aspects have not been taken into consideration by the Rajasthan and Allahabad High Courts in the cases cited *supra*, this Court is unable to agree with the views expressed therein. This Court rather feels persuaded to agree with the reasoning adopted by the Bombay High Court in the case of ***Alnesh Akil Somjee (supra)*** and ***Amar S Mulachandani (supra)***.

16. In the case of ***Narinderjit Singh Sahni*** (*supra*) the Supreme Court, in a writ application filed under Article 32 was considering the pleas of several petitioners who, despite being granted bail in one case were continued to be detained on the strength of production warrants issued in several other cases registered against them in different police stations across the country. This, according to the petitioners, was infraction of Article 21, which the Supreme Court did not accept. It was under such fact-situation that it was held that they being in custody cannot pray for anticipatory bail. The Court was persuaded to hold thus more so in the absence of any proof of infraction of Article 21.

The facts of the cases at hand are however entirely different. Firstly, there is nothing on record to show nor stated by the State Counsel that any production warrant has been issued against the petitioners in the subsequent cases. Secondly, despite making the observation as referred above, the Supreme Court was not seized with the specific question of maintainability of anticipatory bail application by an accused already in custody. In the humble opinion of this Court, therefore, the decision in ***Narinderjit Singh Sahni*** can be distinguished from the facts of the cases at hand.

16. From a conspectus of the analysis made hereinbefore thus, this Court holds as follows:

> *(i) There is no statutory bar for an accused in custody in connection with a case to pray for grant of anticipatory bail in another case registered against him;*
> *(ii) Anticipatory bail, if granted, shall however be effective only if he is arrested in connection with the subsequent case consequent upon his release from custody in the previous case;*
> *(iii) The investigating agency, if it feels necessary for the purpose of interrogation/ investigation can seek remand of the accused whilst he is in custody in connection with the previous case and in which no order granting anticipatory bail has yet been passed. If such order granting remand is passed, it would no longer be open to the accused to seek anticipatory bail but he can seek regular bail.*

17. In the cases at hand, the prosecution has not sought for nor obtained any order from the Court for remand of the petitioners in the subsequent cases registered against them. Thus, this Court holds that the Anticipatory Bail applications are maintainable. Having held so, this Court shall now examine the merits of the same.

18. As already stated, the petitioner in ABLAPL No. 11777 of 2023 is apprehending arrest in connection with EOW P.S. Case No. 07 of 21.02.2023, under Section 419/420/467/468/471/120 B of IPC. He is in custody since 04.09.2023 in connection with Special Crime Unit P.S. Case No. 3, dated 10.08.2023, under Sections 419/420/465/467/468/471/120B of IPC. It has been alleged that the informant, who is the owner of a plot of land came to know while surfing the Bhulekh portal of Govt. of Odisha on the internet that a ROR had been issued in respect of the said land in favour of one Rajendra Kumar Sahu. This was done behind his back for which he lodged the FIR. During investigation it came to light that someone had impersonated him and managed to sell the land and register the sale-deed in the office of the Sub-Registrar thereby committing fraud. In so far as the petitioner is concerned, he is a Section Officer in the office of the Sub-Registrar and claims that he could not have had any personal knowledge about the so-called impersonation and had acted bonafide on the basis of documents produced at the time of registration of the deed. Other officers including the Sub-Registrar had also verified and scrutinized all documents and being satisfied that they were in order, registered the deed. So, the petitioner cannot be singled out and blamed for the entire occurrence.

19. Learned State Counsel opposed the prayer for bail by submitting that the petitioner is a habitual offender and is already in custody in a case involving cheating and forgery. Moreover taking note of his involvement the concerned authorities have placed him under suspension from service. He, therefore, deserves no leniency.

20. Having considered the nature of the accusations, rival submissions and materials available in the case record, this Court finds that the petitioner is in fact, in custody in a case involving similar offences such as, Sections 419/420/465/467/468/

471/120-B IPC. However, nothing has been brought on record by the State to suggest that his custodial interrogation in the subsequent case is necessary. It has also not been shown as to the extent of financial gain made by the petitioner in the alleged occurrence, if at all. Under such circumstances, having him arrested in connection with the subsequent case appears unnecessary. I am, therefore, inclined to allow the prayer for bail. It is directed that in the event of arrest the petitioner shall be released on bail by the arresting officer on such terms and conditions as he may deem fit and proper to impose including the condition that he shall make himself available for investigation as and when required by the investigating officer and render full cooperation to him. ABLAPL No. 11777 of 2023 is therefore, allowed.

21. The petitioner in ABLAPL No. 13978 of 2023, is apprehending arrest in connection with Kalimela P.S. Case No. 208 of 2023 under Section 20(b)(ii)(c)/ 27(a)/29 of NDPS Act r/w Section 353/186/341/506 of IPC. He is already in custody since 30.08.2023 in connection with Kalimella P.S. Case No. 216/30.08.2023. It is alleged that on 26.08.2023 upon receiving reliable information about purchase and dumping of contraband Ganja by the petitioner, the SI of Kalimela PS rushed to the spot where he found a lady guarding the contraband there. On seeing the police she tried to escape and also attempted to assault the police staff by brandishing an axe but was ultimately apprehended. On interrogation, she disclosed the name of the petitioner as being the financier and dealer in the contraband who had obtained the same from Kalimela area for the purpose of sale. She further disclosed that the petitioner and his associates had gone towards Kalimela side to arrange vehicles for transportation of the contraband. In the raid Ganja weighing 300 kgs were found and seized.

Learned counsel for the petitioner submits that there is absolutely no proof of the petitioner's presence at the spot at the relevant time or of possessing the contraband. Even as per the prosecution case, the involvement of the petitioner is sought to be proved through the confession of the co-accused, which is not admissible.

22. Learned State Counsel opposes the prayer for bail by submitting that the petitioner being a regular trader in contraband is involved in the occurrence in question as it is difficult to believe that a lady would be dealing with such trade without help. In these circumstances, her confessional statement cannot be ignored.

23. This Court finds from a reading of the FIR that there is absolutely no mention of the petitioner having been present at the spot. It is also the prosecution case that the contraband was seized from the exclusive and conscious possession of the lady co-accused Gangi Madkami @ Kasalamma @ Kaslur @ Kasla Madhi and nothing was seized from the petitioner. There is no other evidence, save and except the confessional statement of co-accused Gangi to show that the petitioner had procured the Ganja, packed it, dumped it at the spot and was preparing to transport it

for sale. It is needless to mention that the confession of a co-accused is not admissible evidence. Thus, this Court finds that prima facie, there is no admissible evidence to show the complicity of the petitioner. The ratio laid down in the case of ***Tofan Singh versus State of Tamil Nadu***[7] would squarely apply to the facts of the present case.

24. In the above circumstances, there is no reason why the petitioner shall suffer the ignominy of incarceration. This Court is therefore, inclined to allow the prayer of the petitioner. It is directed that in the event of arrest the petitioner shall be released on bail by the arresting officer on such terms and conditions as he may deem fit and proper including the condition that he shall appear before the IIC of Kalimela Police Station on every Sunday at 10.00 am till submission of charge-sheet and further, he shall appear before the Court in seisin of the matter personally on each date of posting of the case without seeking representation.

25. The petitioner in ABLAPL No. 13980 of 2023, is apprehending arrest in connection with Kalimela P.S. Case No. 212 of 2023 under Section 20 (b)(ii)(c)/ 25(1)(a)/27(a) and 29 of NDPS Act. He is in custody since 30.08.2023 in connection with Kalimela P.S. Case No. 216 dated 30.08.2023. It is alleged that when the SI of Kalimela police station was performing patrolling duty in the night of 27.08.2023 with his staff, they noticed a person standing with several plastic bags on the roadside. On seeing the police the person started running away towards the jungle but he was nabbed by the police staff. He was found with a gun (SMBL) in his hand which was taken away from him. On interrogation he admitted that he was guarding the bags in which Ganja were kept and further disclosed that the Ganja had been procured by him from the petitioner. A total quantity of 1050 kgs of Ganja was found inside the bags and seized.

Learned counsel for the petitioner submits that there is absolutely no proof of the petitioner's presence at the spot at the relevant time or of possessing the contraband. Even as per the prosecution case, the involvement of the petitioner is sought to be proved through the confession of the co-accused, which is not admissible.

26. Learned State Counsel opposes the prayer for bail by submitting that the petitioner being a regular trader in contraband is involved in the occurrence in question. Moreover huge quantity of contraband was seized for which the bar under Section 37 would come into play. In these circumstances, even the confessional statement of the co-accused cannot be ignored.

27. This Court finds from a reading of the FIR that there is absolutely no mention of the petitioner having been present at the spot. It is also the prosecution case that the contraband was seized from the exclusive and conscious possession of the co-accused Gopal Pal and nothing was seized from the petitioner. There is no other evidence, save and except the confessional statement of co-accused Gopal to

7. (2021) 4 SCC 1

show that he had procured the Ganja from the petitioner. In the case of ***Tofan Singh versus State of Tamil Nadu (supra)*** the Supreme Court held that in case of a person implicated on the statement of a co-accused the bar under Section 37 would not apply. It is needless to mention that the confession of a co-accused is not admissible evidence. Thus, this Court finds that prima facie, there is no admissible evidence to show the complicity of the petitioner. The ratio laid down in the case of ***Tofan Singh (supra)*** would squarely apply to the facts of the present case.

28. In the above circumstances, there is no reason why the petitioner shall suffer the ignominy of incarceration. This Court is therefore, inclined to allow the prayer of the petitioner. It is directed that in the event of arrest the petitioner shall be released on bail by the arresting officer on such terms and conditions as he may deem fit and proper including the condition that he shall appear before the IIC of Kalimela Police Station on every Sunday at 10.00 am till submission of charge-sheet and further, he shall appear before the Court in seisin of the matter personally on each date of posting of the case without seeking representation.

29. In the result, all the three anticipatory bail applications are disposed of in terms of the directions issued herein before.

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2024 (II) ILR-CUT-254

A.K. MOHAPATRA, J.

CRLMC NO. 2459 OF 2022

LALITA MOHAN DAS ……Petitioner

-V-

ASSISTANT DIRECTOR, E.D. ……Opp.Party

PREVENTION OF MONEY LAUNDERING ACT, 2002 – Section 45 r/w Section 205 of the Code of Criminal Procedure – The petitioner/accused filed an application U/s. 205 Cr.PC to dispense with his personal attendance before the Court – The learned Special Court rejected the application taking into consideration of Section 45 of the Act – Whether application U/s. 205 of code is maintainable in spite of the bar U/s. 45 of 2002 Act? – Held, Yes – If for sufficient and cogent reasons the petitioner is unable to appear before the Trial Court, he can always make an application through his advocate for grant of exemption from personal appearance. (Paras 15 -18)

Case Laws Relied on and Referred to :-

1. CRLMC No.2940 of 2022 : Chintan Joshi vs. Niranjan Behera.
2. (2001) 7 SCC 401 : Bhaskar Industries Ltd. vs. Bhiwani Denim & Apparels Ltd.

For Petitioner : Mr. M.M. Pattanayak.
For Opp. Party : Mr. Bibekananda Nayak, Special Counsel for E.D.

JUDGMENT Date of Hearing : 22.02.2024 : Date of Judgment : 26.04.2024

A.K. MOHAPATRA, J.

1. The present application has been filed by the Petitioner by invoking the inherent power of this Court under Section 482 Cr.P.C. to quash the impugned order dated 16.08.2022 under Annexure-2 to the application whereby the learned Sessions Judge-cum-Special Judge under PMLA Act, Khurda at Bhubaneswar has declined to allow exemption from personal attendance of the Petitioner by rejecting the application filed by the Petitioner under Section 205 Cr.P.C. in PMLA Case No.32 of 2017.

2. Heard Mr. M.M. Pattanayak, learned counsel for the petitioner as well as Mr. Bibekananda Naik, learned counsel appearing for the Enforcement Directorate. Perused the application under Section 482 Cr.P.C. as well as materials placed on record by both sides for perusal of this Court.

3. The factual background leading to filing of the present case, in short, is that the Petitioner while continuing as Executive Engineer, RWS&S Division, Bhubaneswar during the year 2009 was entangled in Bhubaneswar Vigilance P.S. Case bearing F.I.R. No.28 dated 20.08.2009 under Section 13/2 read with Section 13 (1) (e) of the P.C. Act, 1988. A charge sheet was submitted against the Petitioner vide C.S. No.27 dated 31.12.2015 after lapse of more than 6 years of the institution of the vigilance case. On the basis of the aforesaid vigilance F.I.R., the case was registered by the Enforcement Directorate at Bhubaneswar bearing E.C.I.R. No.18 dated 27.10.2010 against the present Petitioner.

4. The aforesaid vigilance case was registered as T.R. No.39 of 2016 before the learned Special Judge, Bhubaneswar which was eventually transferred to the Special Judge, Special Court, Bhubaneswar. Pursuant to the summons issued by the aforesaid Court, the Petitioner along with his wife appeared in T.R. Case No.5/38 of 2017/16 and they were released on bail on their appearance before the trial court. The aforesaid Special Court was established and functioning under Section 21 of the Odisha Special Court Act, 2006 which provides that the said act is in addition to any other law for the time being in force.

5. On the basis of the aforesaid Vigilance Case, PMLA Case No.32 of 2017 was registered and the same is pending before the Sessions Judge, Special Court, Khurda at Bhubaneswar under PMLA Act, 2002 even 7 years after the F.I.R. was lodged by the Vigilance Police. Finally, cognizance was taken on 21.09.2017. Pursuant to the summons issued by the Sessions Judge, Bhubaneswar the petitioner appeared before the said Court. Initially, the Petitioner filed an application challenging the maintainability of the PMLA Case, however, the same was rejected by the learned Court below vide order dated 09.04.2018. While rejecting the prayer of the Petitioner, the learned Trial Court has also directed the Petitioner to appear before the Court and fixed the date of appearance to 30.04.2018.

6. While the matter stood thus, Assistant Director, E.D. lodged a complaint before the learned Adjudicating Authority, New Delhi under the PMLA Act, 2002. Pursuant to the summons by the Adjudicating Authority the Petitioner appeared before the learned Adjudicating Authority. The said case was disposed of on 11.07.2017. Against order dated 11.07.2017, the Petitioner preferred an appeal bearing PMLA Appeal No.1879/2017 before the learned Appellate Tribunal under the PMLA Act, New Delhi and it is stated that the said appeal is still pending for final adjudication.

7. Learned counsel for the Petitioner submitted that the Opposite Parties have not independently inquired into the allegation. On the contrary, they have lodged the complaint on the basis of the Vigilance Dept. F.I.R. and the charge sheet and accordingly the proceeding was initiated under Section 5 of the PMLA Act before the Adjudicating Authority. Learned counsel for the Petitioner submitted that in T.R. Case No.5/38 of 2017/2016, arising out of the above noted vigilance case which is pending before the Special Judge, Special Court, Bhubaneswar, the petitioner has been released on bail. However, since the trial was not taking place on regular basis, the Petitioner moved an application under Section 205 Cr.P.C. to dispense with his personal appearance before the said Court. Such application under Section 205 Cr.P.C. having been rejected by the learned Trial Court vide order dated 16.08.2022 with a direction to the petitioner to appear on 07.09.2022, the Petitioner has approached this Court by filing the present application under Section 482 Cr.P.C. with a prayer to quash order dated 16.08.2022 under Annexure-2 to the present application.

8. At the outset, learned counsel for the Petitioner referred to the provision of Section 205 Cr.P.C. He further contended that all criminal trials are to be conducted by following the procedure as prescribed in the Code of Criminal Procedure. Be it a general Penal statute or any special penal statute, the trial has to take place by following the procedure or law as prescribed in the Code of Criminal procedure. In such view of the matter, learned counsel for the petitioner submitted that there being no prohibition in the PMLA Act with regard to applicability of Section 205 Cr.P.C. and in the absence of any other bar in law with regard to applicability of the Section 205 Cr.P.C. to the trials under the PMLA Act, the learned Court below should have accepted the application filed by the Petitioner under Section 205 of the Cr.P.C. and accordingly keeping in view the fact that the case is lingering for more than a decade, the learned Trial Court should have extended the benefit of Section 205 Cr.P.C. to the Petitioner by allowing his application.

9. In course of his argument, learned counsel for the Petitioner by referring to the impugned order dated 16.08.2022 submitted before this Court that the learned Trial Court has dealt with the application under Section 205 Cr.P.C. in a mechanical manner. He further contended that while considering the application under Section 205 Cr.P.C., the learned Trial Court has referred to Section 45 of PMLA Act and has observed that keeping guard on release of the accused persons involved in such

nature of offences and further keeping in view the gravity of the offences alleged and the nature of allegations made against the Petitioner and further keeping in view the restrictive provisions of the Act incorporated to secure the attendance of accused persons, the learned Trial Court has finally rejected the application of the Petitioner under Section 205 Cr.P.C. While challenging the aforesaid rejection order dated 16.08.2022 passed by the Sessions Judge-cum-Special Judge Khurda at BBSR learned counsel for the Petitioner submitted that Section 45 of the PMLA Act has no applicability to an application under Section 205 Cr.P.C. Therefore, it was contended that placing reliance on Section 45 of PMLA Act while considering the application of the Petitioner under Section 205 Cr.P.C. is completely misconceived.

10. In course of his argument, learned counsel for the Petitioner referred to the judgment of this Court rendered by the Coordinate Bench in ***Chintan Joshi vs. Niranjan Behera*** in ***CRLMC No.2940 of 2022*** disposed of on ***11.04.2023***. By referring to the aforesaid judgment, learned counsel for the Petitioner submitted that the aforesaid case was instituted before this Court on being aggrieved by the order passed by the learned Trial Court dated 16.08.2022 thereby rejecting the petition filed under Section 205 Cr.P.C. thereunder seeking for dispensation of the personal appearance of the accused. The above noted case was registered for commission of an offence under the PMLA Act and the Investigating Agency, i.e. Enforcement Directorate (E.D.) had filed ECIR dated 14.06.2018 against the Petitioner. During trial of the said case, an application was moved by the Accused-Petitioner who had been summoned by the Court to appear before it under Section 205 Cr.P.C. Such an application was filed on the ground that the Petitioner is the only son of his ailing old parents, who are undergoing treatments for various ailments and that no prejudice would be caused to the prosecution if the trial is carried on in the absence of the accused and while the accused is being represented by his lawyer. The learned Trial Court rejected such application by referring to the provisions contained in Section 45 of the PMLA Act, 2002.

11. During hearing of the aforesaid matter, learned counsel appearing for the Petitioner in that case argued that Section 45 of the PMLA Act would not be attracted to the facts of that case and that the learned Trial Court had committed an illegality by rejecting the application under Section 205 Cr.P.C. by relying on the provisions of Section 45 of the PMLA Act. It was also argued that proceeds of crime involved in the aforesaid case is less than Rs.1 crore, the rigors of the provisions contained in Section 45 of the PMLA Act would not apply to the facts of that case.

12. Mr. G. Agarwal, learned Special Counsel appearing for the E.D. in the above noted case, objected to the contentions raised by the learned counsel appearing for the Petitioner. He further contended that irrespective of the amount of the proceeds of crime involved in the case, the learned Trial Court considering the seriousness and gravity of the offence and that such offence would have a direct impact on the economy of the country has rightly rejected the application of the Petitioner in the above noted case which was filed under Section 205 Cr.P.C. It was

also contended that Section 205 Cr.P.C. cannot be used as a substitute for bail and that the exemption from personal appearance is not a vested right conferred on the accused. A similar argument was also advanced by Mr. Agarwal in the present case.

13. The Coordinate Bench then proceeded to examine the provisions contained in Section 45 of the PMLA Act. Then the Coordinate Bench has recorded the relevant portion of the allegation made against present Petitioner in the complaint filed by the Assistant Director (PMLA), Bhubaneswar. Furthermore, the amount involved i.e. Rs.3,19,100/- has been emphasized by the Coordinate Bench. In the ultimate analysis, the learned Coordinate Bench referring to the judgment in ***Bhaskar Industries Ltd. vs. Bhiwani Denim & Apparels Ltd.*** reported in ***(2001) 7 SCC 401*** came to a conclusion that the discretion conferred by Section 205 Cr.P.C. on the Court is to be used only in rare cases where personal appearance of the accused would cause great hardship on him. In other words, if the accused is residing at a far off place or has any physical ailment or is otherwise indisposed, the prayer for exemption from personal attendance can be favourably considered. Having said that, learned Coordinate Bench has cautioned that the discretion is not to be exercised in a routine manner or on the mere asking of the accused-Petitioner.

14. Finally, the learned Coordinate Bench in the above referred case of *Chintan Joshi* (supra) observed that the Petitioner failed to substantiate his claim that his old parents are ailing and no documents to that effect was filed. Further, taking into consideration the age of the Petitioner i.e. 38 years and that he is a his resident of Bhubaneswar, came to a conclusion that attending the Court can by no stretch of imagination be treated as causing undue hardship to the accused-Petitioner. Accordingly, learned Coordinate Bench found no infirmity in the order passed by the learned Trial Court and as such, the application filed by the accused-petitioner challenging the rejection of 205 petition vide order dated 16.08.2022 was dismissed.

15. It is relevant to mention here that after rejection of the application of the accused-Petitioner in the above noted case, the Petitioner, namely, *Chintan Joshi* approached the Hon'ble Supreme Court by filing an appeal bearing SLP (C) No.8917 of 2023. The Hon'ble Supreme Court vide order dated 04.08.2023 while disposing of the aforesaid SLP has categorically held as follows:-

> *"Heard the learned counsel appearing for the Petitioner.*
>
> *The blanket exemption as prayed by the petitioner cannot be granted under Section 205 of the Code of Criminal Procedure, 1973. However, if for sufficient and cogent reasons, the petitioner is unable to appear before the Trial Court, he can always make an application through his advocate for grant of exemption from personal appearance.*
>
> *We are sure if such an application is made, the concerned Court will consider it on its own merits in accordance with law notwithstanding the impugned orders.*
>
> *The Special Leave Petition in disposed of accordingly.*
> *Pending applications, if any, also stand disposed of."*

16. The factual background involved in the above noted case of *Chintan Joshi* is almost identical to the facts of the present case. The allegation made and the offences alleged are almost similar. Thus, this Court has no hesitation in coming to a conclusion that although an application under Section 205 Cr.P.C. is maintainable in a case involving offences under the PMLA Act, 2002 and the bar under Section 45 would not be attracted to such an application, however, while exercising the discretion conferred upon the Court by Section 205 Cr.P.C., the Trial Court has to take a decision with lot of circumspection and caution. Particularly, while considering such application, the learned Trial Court is to satisfy itself with regard to availability of sufficient and cogent reasons and inability of the Petitioner to appear before the Trial Court. The learned Trial Court, in such eventuality, is duty bound to consider such application on its own merit and in accordance with law. That is, if the Trial Court is satisfied with regard to the sufficiency and cogentness of the reasons cited by the Petitioner and the grounds taken by the Petitioner expressing his inability to appear before the Trial Court and to pass an order strictly in accordance with law and basing on the materials placed on record from both sides. Therefore, from the reading of the order passed by the Hon'ble Apex Court in *Chintan Joshi'*s case, it is cleared that the Bar under Section 45 of the PMLA Act, 2002 shall not stand in the way of the Trial Court while considering an application under Section 205 Cr.P.C. filed by the accused-petitioner.

17. Reverting back to the facts of the present case and on a plain reading of the complaint, it appears that the alleged amount involved in the present crime is Rs.35 lakhs. Therefore, the same is admittedly less than Rs.1 crore. In the present case, the accused-Petitioner filed an application under Section 205 Cr.P.C. to dispense with his personal attendance before the Court. It has been stated that the accused-Petitioner is now posted at Berhampur Muncipal Corporation in Ganjam district under deputation in Foreign Service terms and conditions for which he is unable to appear before the Trial Court at Bhubaneswar in Khurda district on each date of posting. Learned Trial Court while passing the impugned rejection order dated 16.08.2022 has been swayed away by the provisions contained in PMLA Act, 2002 and that the offence of money laundering is an economic offence, which impacts the national economy and security as a whole. Further, he has taken into consideration Section 45 of the PMLA Act. Finally, considering the gravity of the offences committed and the restrictive provisions of the Act in the shape of Section 45 and to secure the attendance of the accused persons, the application filed by the Petitioner has been rejected.

18. On a careful consideration analysis of the judgment delivered by the Coordinate Bench in *Chintan Joshi*'s case as well as the observation of the Hon'ble Supreme Court in appeal against the order passed in *Chintan Joshi*'s case, further keeping in view the provisions contained in Section 205 Cr.P.C., this Court is of the considered view that the impugned order passed by the learned Trial Court is unsustainable in law. Accordingly, the same is hereby set aside. Further, the matter

is remanded back to the Court of Sessions Judge-cum-Special Judge, Khurda at Bhubaneswar to consider the application afresh by taking into consideration the grounds raised by the Petitioner in his application and in the light of the discussion made hereinabove particularly keeping in view the observation of the Hon'ble Supreme Court in *Chintan Joshi*'s case which has been quoted hereinabove. On production of a copy of this judgment by the Petitioner, the learned Trial Court shall do well to dispose of the application filed by the Petitioner under Section 205 Cr.P.C. as directed hereinabove within a period of six weeks from the date of communication of a certified copy of this judgment.

19. With the aforesaid observations/directions, the CRLMC application stands disposed of.

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2024 (II) ILR-CUT-260

A.K. MOHAPATRA, J.

W.P.(C) NO. 9003 OF 2024

Dr. MANORANJAN MALLIK ……Petitioner

-V-

STATE OF ODISHA & ORS. ……Opp.Parties

ODISHA CIVIL SERVICES (PENSION) RULE, 1992 – Rule 42 – The petitioner after completion of 26 yrs of unblemish service has given a notice under Rule 42(1) for voluntary retirement – The government rejected the application on the ground of larger public interest and owing to the dearth of faculties in the Government Medical College and Hospital and PG institutes of the state – Whether such rejection is sustainable? – Held, no, such a ground of rejection not available to Opp.Parties in view of specific provisions contained in Rule, 42, hence illegal.

Case Laws Relied on and Referred to :-
1. (2018) 17 SCC 578 : State of Uttar Pradesh and Ors. Vs . Achal Singh.
2. (1999) 4 SCC 293 : State of Haryana & Ors. Vs. S.K. Singhal.

For Petitioner : Mr. Budhadev Routray, Sr. Adv. & Mr. A.K.Biswal.
For Opp. Parties : Mr. S.Das, A.G.A.

JUDGMENT Date of Hearing & Judgment : 06.05.2024

A.K. MOHAPATRA, J.

1. The above noted writ application has been filed by the petitioner assailing the order dated 16.03.2024 communicated to the Petitioner vide letter dated 20.03.2024 under Annexure-8 to the writ application issued by the Opposite Party No.1. By virtue of the impugned rejection order under Annexure-8, the Opposite Party No.1 has rejected the application of the Petitioner seeking voluntary retirement

from government service. The impugned rejection order under Annexure-8 has been challenged in the present writ application mainly on the ground that such rejection by the Opposite Party No.1 is contrary to the provisions contained Rule-42 of the Odisha Pension Rules, 1992 specifically Rule-42. Moreover, the impugned rejection order has already been challenged on the ground that the same not only arbitrary and illegal, but also discriminatory inasmuch as the State Government in the recent past has accepted many such application seeking voluntary retirements whereas, in the case of the Petitioner, the prayer for voluntary retirement has been rejected on untenable grounds.

2. The factual background leading to filing of the present writ application, in brief, is that the Petitioner was initially appointed and joined as Assistant Surgeon on 10.07.1997 and accordingly, was posted at Padiabeda PHC (N) in the district of Mayurbhanj. While continuing in service, the Petitioner completed his post graduation, upon completion of which, the Petitioner was posted as a Lecturer at MKCG Medical College, Berhampur on 09.01.2001 and was performing his duties in such medical college up to 22.06.2005. During his service career, the Petitioner was posted at and discharged his duties as Assistant Professor and Associate Professor in S.C.B. Medical College, Cuttack and V.S.S. Medical College and Hospital, Burla. Finally, the Petitioner was promoted and posted as Professor on 15.03.2022 at Sahid Laxman Nayak Medical College & Hospital (SLNMCH), Koraput and is continuing as such till date. The Petitioner has rendered 26 years of valuable service to the patients in the State of Odisha while serving at different medical colleges in the State. On the basis of the official record and the service book, the Petitioner is due to retire from service on 30.04.2034.

3. While the Petitioner was continuing as Professor of Orthopedics at SLNMCH, Koraput, he submitted an application on 14.11.2023 to the Opposite Party No.1. In the said application, the Petitioner has sought for voluntary retirement from service, in terms of the Rule-42 of OCS (Pension) Rules, 1992. In his application seeking voluntary retirement, the Petitioner had taken a ground that he wants to work for the society, particularly for the tribal section of the society and to improve their education and for the overall upliftment of their living standards. He has also expressed his desire to participate in the ensuing Assembly elections and to contest such election for being elected to the Odisha Legislative Assembly from Udala Constituency of Mayurbhanj District. The Dean and Principal of SLNMCH, Koraput forwarded the application of the Petitioner to the Director of Medical Education and Training (D.M.E.T.), Odisha and, to the State Govt. i.e. Opposite Party No.1.

4. On receipt of the application submitted by the Petitioner the State Government obtained the requisite vigilance clearance. Furthermore, along with the application of the Petitioner, the Dean and Principal of the Medical College had also forwarded the service particulars of the Petitioner on 29.11.2023. It appears, by the time the application was submitted by the Petitioner, the petitioner had completed 26

years 4 months 20 days of service. On 08.02.2024, the Petitioner received a communication from the Additional Secretary to Govt. in Health and Family Welfare Dept. stating therein that the application of the Petitioner seeking voluntary retirement has been rejected by the Govt. in the larger public interest and owing to the dearth of faculties in the Govt. Medical College and Hospital and PG Institutes of the State.

5. After rejection of the first application of the Petitioner seeking voluntary retirement from service, the Petitioner submitted another application on 15.02.2024 with a request to allow him to take voluntary retirement from service. The second application was also forwarded to the Opposite Party No.1 by the Opposite party No.3 on 15.02.2024. In the second application, the Petitioner has stated that his two sons are studying in Cuttack, while his mother is suffering from heart problem and that his wife is inflicted with chronic arthritis, and, there is nobody, besides him, to look after his ailing family members and his children. As such, a request was made to the Govt. to accept the VRS (Voluntary Retirement from Service) application submitted by the Petitioner. While the second application was pending before the Govt., the Petitioner approached this Court by filing W.P.(C) No.3975 of 2024 thereby challenging the order dated 08.02.2024, wherein the first application for voluntary retirement was rejected. During the pendency of the aforesaid writ application, a second application for voluntary retirement was made by the Petitioner on 15.02.2024.

6. This Court after hearing the learned counsels for the parties, vide order dated 26.02.2024, disposed of the above noted writ application by directing the Opposite Party No.2 to consider and dispose of the application of the Petitioner dated 15.02.2024 within a period of 10 days from the date of the order. The order dated 26.02.2024 was subsequently modified whereby the Opposite Party No.1 was directed to consider and dispose of the second application for voluntary retirement filed on 15.02.2024, vide order dated 06.03.2024.

7. After disposal of the above noted writ application, the Petitioner again approached the Opposite Party No.1 for taking an early decision on his application as the dates for filing nomination paper for the ensuing assembly elections was getting closer. While the matter stood thus, the Opposite Party No.1, pursuant to the order passed by this Court in the earlier writ application, considered the application of the Petitioner once again rejected the application of the Petitioner vide order dated 16.03.2024, which was communicated to the Petitioner on 20.03.2024. It appears from the record that the subsequent application has been rejected on identical grounds that were taken while rejecting the first application of the Petitioner. The rejection order dated 16.03.2024, which was communicated to the Petitioner vide letter dated 20.03.2024, reached the Petitioner on 08.04.2024. Since there was a delay in communicating the order on the part of the Govt., the Petitioner filed another VRS application on 27.03.2024. However, since the order dated 16.03.2024 reached the Petitioner on 08.04.2024, the Petitioner immediately withdrew the

application dated 27.03.2024. Thereafter, the present writ application has been filed challenging the rejection order dated 16.03.2024.

8. Heard Shri Budhadev Routray, learned Senior Counsel along with Mr. Anjan Kumar Biswal, learned counsel for the Petitioner and Mr. Saswat Das, learned Additional Government Advocate for the State-Opposite Parties. Perused the writ application as well as documents annexed thereto and the PWC dated 04.05.2024 submitted by the learned Additional Government Advocate before this Court for consideration.

9. Mr. Routray, learned Senior Counsel appearing for the Petitioner at the outset submitted that the grounds taken in the rejection are untenable in the eye of law. He further contended that the application seeking voluntary retirement from service is governed by the provisions contained in Rule-42 of the Odisha Pension Rules, 1992. Further. referring to Rule-42(1), learned Senior Counsel submitted that the Government servant acquires eligibility to make an application before the Govt. seeking voluntary retirement from service after completion of twenty years of qualifying service. So far the present Petitioner is concerned, it was submitted before this Court that he has rendered more than 26 years of unblemished service to the public as a doctor in various medical colleges of the State. Therefore, the Petitioner is eligible to make an application seeking voluntary retirement from service. By referring to Rule-42, learned Senior Counsel for the Petitioner further contended that the only eligibility criteria for being eligible to submit an application seeking voluntary retirement is the qualifying service of 20 years by the government servant seeking VRS. It was also contended that government servant who is seeking voluntary retirement from service is required to give a notice to the Government/ Appointing Authority of not less than three months in writing. Additionally, it was submitted that Rule 42(2) provides that the notice of voluntary retirement given under sub-rule 1 shall require acceptance by the Appointing Authority.

10. Most importantly, learned Senior Counsel for the Petitioner referring to the Note appended to Rule-42(2), contended that the acceptance under Rule-42(2) may be generally given in all cases by the Appointing Authority. Therefore, it was submitted that no specific ground is provided on which an application can be made by the government servant seeking voluntary retirement from service. The only requirement as per Rule-42 is that the Government servant must have completed 20 years of qualifying service and that he must have given a notice of not less than three months in writing to his/ her Appointing Authority. Therefore, it was argued that an application seeking voluntary retirement can be made on any grounds subject to the aforesaid twin condition as prescribed under Rule-42 of the OCS (Pension) Rules. Besides the aforesaid twin grounds, there is no other requirement prescribed under Rule-42 which governs the subject of voluntary retirement from service by a Government servant.

11. Learned Senior Counsel appearing for the petitioner has laid much emphasis on the Note appended to Rule-42(2). Therefore, this Court feels that the aforesaid note requires a thorough scrutiny by this Court and the same is quoted hereinbelow:-

> **42. Voluntary Retirement on completion of 20 years Qualifying Service-** (1) At any time after a Government servant has completed twenty years qualifying service, he may, by giving notice of not less than three months in writing to the appointing authority, retire from service.
>
> (2) The notice of voluntary retirement given under sub-rule (1) shall require acceptance by the appointing authority.
>
> ***Note****-Such acceptance may be generally given in all cases except those (a) in which disciplinary proceedings are pending or contemplated against the Government servant concerned for the imposition of a major penalty and the disciplinary authority, having regard to the circumstances of the case, is of the view that the imposition of the penalty of removal or dismissal from service would be warranted in the case or (b) in which prosecution is contemplated or have launched in a Court of Law against the Government servant concerned. If it is proposed to accept the notice of voluntary retirement in such cases, approval of the Government should be obtained:*
>
> 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 that of expiry of the said period.

12. Upon a cursory look at the Note appended to Rule-42(2), this Court observed that it has been specifically provided that the acceptance under Rule-42(2) may be generally given in all cases except in the following cases:-

> a) in which Disciplinary Proceeding are pending or contemplated against the government servant concerned for the imposition of a major penalty and the Disciplinary Authority, having regard to the circumstances of the case, is of the view that the imposition of the penalty of removal or dismissal from service would be warranted in the case, or
>
> b) in the prosecution is contemplated or have been launched in a Court of Law against the Government servant concerned.

13. A conjoint reading of sub-rule (1) and sub-rule (2) of Rule-42, as well as the Note appended to sub-rule 2 clearly provides that a government servant, on completion of 20 years of qualifying service, becomes eligible to apply for voluntary retirement from service. However, such government servant has to give a notice of not less than three months in writing to the Appointing Authority. Furthermore, the notice given by the Government servant requires acceptance by the Appointing Authority under sub Rule-2. The Note appended to sub-Rule 2 although may not overwrite the substantive provision contained in sub-rule 2, however, the same is indicative in nature. Such Note clearly provides that the acceptance contemplated under sub-Rule 2 may be given generally in all cases i.e. the acceptance of VRS is a Rule and the rejection is an exception. Additionally, certain exceptions under which the VRS application may be refused have also been indicated in the Note appended to sub-Rule 2. Ergo, while considering the case of the Petitioner, this Court is required to examine the case of the Petitioner by applying the aforesaid analysis of law and the provisions contained in Rule-42 of the OCS (Pension) Rules, 1992.

14. Learned Senior Counsel for the Petitioner, by referring to the aforesaid Rule-42 of the Odisha Pension Rules, again contended before this Court that the petitioner has completed 20 years of qualifying service which is required to be eligible to make an application as provided under Rule-42(1) of the OCS (Pension) Rules. He further contended that as required under Rule-42(1), the Petitioner had also given a notice of three months expressing his desire to take voluntary retirement from government service. He further demonstrated that such request of the Petitioner under Rule-42 has been duly forwarded to the Appointing Authority for its approval/ acceptance.

15. Learned Senior Counsel for the Petitioner further contended that the problem in the present matter the Appointing Authority's end when, the application of the Petitioner was rejected by citing the reason as dearth of doctors in the Govt. Medical colleges in the State of Odisha. He further contended that on both the occasions the Appointing Authority took the very same ground, i.e., dearth of govt. doctors in the State of Odisha and public interest involved, in not accepting the VRS application of the Petitioner. It was emphatically argued by Mr. Routray, learned Senior Counsel for the Petitioner that the grounds taken in the rejection order are not legal. In the said context, he also referred Rule-42 and submitted that the Note appended Rule-42(2) specifies the grounds upon which an application for VRS could be rejected by the Appointing Authority. In the aforesaid context, it was submitted before this Court that none of the exceptions as provided in the Note appended to Rule-42(2) are applicable to the facts of the Petitioner's case.

16. In course of his argument, learned Senior Counsel appearing on behalf of the Petitioner strenuously contended that the Petitioner has a unblemished service career as a doctor in the State of Odisha and he has been discharging his duties to the best of his ability in the various medical colleges in the State of Odisha. During his service career, no Disciplinary Proceeding whatsoever was initiated against the present Petitioner. It was submitted by learned Senior Counsel that at no point of time any prosecution has been contemplated by the Appointing Authority or has been launched in any Court of Law against the present petitioner. Therefore, the two exceptions as indicated in the note are not applicable to the facts of the Petitioner's case. Moreover, the grounds taken in the rejection order do not find place anywhere in Rule-42, which is the only provision that governs the subject to voluntary retirement from service by any Govt. servant. In view of the aforesaid factual position, learned Senior Counsel submitted that the application of the Petitioner has either been rejected mechanically or the Appointing Authority has rejected the same with an ulterior motive of not allowing the Petitioner to contest the ensuing Assembly election from Udala Constituency in the district of Mayurbhanj. He further submitted that such conduct of the Opposite Parties has deprived the Petitioner of an opportunity to serve the people of his locality and to represent them in the Odisha Legislative Assembly. It was also argued that the people of the locality are mostly tribal people belonging to SC and ST community. Therefore, a qualified

person like the Petitioner who is well acquainted with their problems should not be deprived from contesting the election and serving the people of said community. Learned Senior Counsel in course of his argument also cited the political allegiance of the Petitioner and submitted that since the Petitioner is likely to get a ticket from a National Party to contest the election, the Petitioner has been victimized and all attempts are being made to ensure that the Petitioner does not get an opportunity to contest the election. It was also argued that the petitioner by virtue of his good social work and public contacts is very popular in the locality, therefore, there exists a fair chance of success for the Petitioner in the event he gets an opportunity to contest such election. However, on consideration of such statement, this Court found that the same is hypothetical and there are no materials on record to support such contentions of learned Senior Counsel for the Petitioner. In any case, this Court is required to examine the whole issue from the point of view of the rules that govern the subject matter of dispute in the present case.

17. Learned Additional Government Advocate on the other hand filed a copy of the PWC of the Opposite Party No.1 along with a cover letter dated 04.05.2024. By referring to the above noted PWC, learned Additional Government Advocate submitted that the Petitioner submitted his VRS application on 15.02.2024 on the ground that he has to take care of his family owing to the ground of illness of his mother and wife. The PWC further reveals that the Opposite Party No.1 after careful examination of the application has been pleased to reject the same on the ground of acute shortage of faculties in the Govt. Medical colleges and hospitals in the State. They have also cited that due to such acute shortage of faculties, the Govt. of Odisha, H & FW Dept. is unable to meet the minimum standard requirement as prescribed by the National Medical Commission for the Govt. Medical colleges. Since, the VRS application is based on the personal grounds, the Opposite Party No.1 has rejected the same by proclaiming that the personal inconvenience of the Govt. servant is not larger than public interest involved in not accepting such VRS.

18. In the PWC it has also been stated that a Committee has been constituted by the H & FW Dept., vide order dated 11.08.2023, under the Chairmanship of the Special Secretary to Govt., H & F.W. Dept. to consider the applications for voluntary retirement/ resignations of medical officers of OMES Cadre. The PWC further reveals that the application of the Petitioner dated 14.11.2023 was placed before such committee. The committee, after taking into consideration the ground taken by the Petitioner that he wants to participate in the Assembly election in 2024 as MLA from Udala Constituency in Mayurbhanj district, in the meeting held on 25.01.2024, recommended to not consider the case of the petitioner since there is an acute shortage of faculties in the Govt. Medical Colleges of the State. Furthermore, in the PWC, emphasis has been led on the element of public interest involved in not accepting the VRS application of the Petitioner and the fact that there is a dearth of faculties in Govt. medical colleges and hospitals in the State.

19. On a careful reading of the PWC submitted before this Court by the learned Additional Government Advocate, this Court is of the observation that the Opposite Parties have emphasized the public interest involved in not accepting the VRS application in different paragraphs of the PWC. On a careful reading of PWC, this Court found that, in sum and substance, the PWC depicts that the decision taken by the committee to not accept the application of the Petitioner seeking voluntary retirement is based on the ground of acute shortage of faculties in the State and the duty of the Govt. to fulfill the minimum prescribed standard requirement of the National Medical Commission.

20. In course of his argument, learned Additional Government Advocate referred to the judgment of the Hon'ble Supreme Court in the ***State of Uttar Pradesh and ors. vs. Achal Singh*** reported in ***(2018) 17 SCC 578***. In course of his argument, learned Additional Government Advocate places specific reference to para-36, 37, 41, 42 and 43 of the judgment. By referring to the above noted judgment, of the Hon'ble Supreme Court, learned Additional Government Advocate submitted that in an identical case (referred above) of the State of Uttar Pradesh, the Govt. declined to accept the voluntary retirement application of the doctor on the ground of public interest and the Hon'ble Supreme Court has upheld the decision of the State and has specifically held that it cannot be said that the State has committed an illegality or its decision suffers from any arbitrariness. By referring to the aforesaid judgment, learned Additional Government Advocate further contended that a Govt. servant's right to retire under part-III of the Constitution cannot be placed higher than the supreme right under the Constitution i.e. the is right to life of the citizens residing in the State. He further contended that the right of the Govt. servant is to be interpreted along with the right of the State Govt. under part-IV of the Constitution. Further, he specifically referred to Article-47, in part-IV of the Constitution to emphasize that the Govt. has to make an endeavor under the said Article to look after the provisions for raising the level of health and nutrition of the people in the state. It was argued that the right enshrined under Article-19 (1) (g) of the Constitution of India is subject to the interest of the general public, thus, such right can only be exercised as per the rules and not otherwise. Furthermore, referring to para-41 of the aforesaid judgment, learned Additional Government Advocate submitted that since there is a scarcity of doctors in the State, the petitioner cannot resort to the ground of claiming equality with other similarly placed doctors whose application for voluntary retirement have been approved by the State Govt. in the recent past. It was also argued that there is no concept of negative equality in law, especially against the larger interest of the public and, in case such a plea is allowed, none may be left to serve the public at large. On the aforesaid grounds, learned Additional Govt. Advocate contended that the prayer of the Petitioner seeking voluntary retirement from Govt. service is unsustainable in law and, the Opposite Parties have not committed any illegality in rejecting the prayer of the Petitioner for voluntary retirement from service. In such view of the matter, learned Additional

Govt. Advocate submitted that the present writ application is devoid of merit and accordingly, the same should be dismissed at the threshold.

21. Having regard to the submissions made by learned Senior Counsel for the Petitioner as well as learned Additional Govt. Advocate and, on a careful scrutiny of the materials placed before this Court, it is observed that this Court is required to examine the impugned rejection order in the light of the provisions contained in Rule-42 of the Odisha Pension Rules, 1992. So far the factual matrix involved in the present writ application is concerned, i.e. the date of joining of the petitioner, the number of years of service rendered by the petitioner etc., the same is not disputed by either side. While considering the case of the Petitioner, this Court by applying the provisions contained in Rule-42, which is the only provision that governs the subject of voluntary retirement from Govt. service, observes that the aforesaid rule provides that any govt. servant who has completed 20 years of qualifying service is eligible to submit an application for taking voluntary retirement from service. Moreover, while submitting such application the Govt. servant is required to give a notice of not less than three months to the Appointing Authority. It is not disputed by either side that the Petitioner is having eligibility to make such an application, given that he has completed 26 years of service and, that he had given a notice as required under Rule-42 (1) of the OCS (Pension) Rules, 1992.

22. With regard to the grounds for seeking voluntary retirement under Rule-42, this Court is of the observation that Rule-42 of the OCS (Pension) Rules, 1992 does not specify the ground on which an application can or cannot be made by the govt. servant to the Appointing Authority for seeking voluntary retirement. Therefore, this Court has no hesitation in coming to a conclusion that the provision contained in Rule-42 (1) is an open provision subject to condition that the Govt. servant seeking voluntary retirement must have completed 20 years of qualifying service and must have given a notice of not less than three months to the Appointing Authority. Although, it is pertinent to mention that the minimum period of notice required can be waived by the Appointing Authority subject to the provisions contained in other sub-Sections of Rule-42. Since the same is not the subject matter of dispute in the present writ application, this Court is not dealing with such aspects in the present case.

23. Coming back to the facts of the present case, this Court observes that the Petitioner has minimum qualifying service period required for making an application for voluntary retirement. Further, it appears that he had given a notice of not less than three months to the Appointing Authority as required under Rule-42 (1) of the OCS (Pension) Rules, 1992. However, voluntary retirement is subject to the acceptance of the same by the Appointing Authority. At this juncture, this Court would like to refer to the Note which has been quoted in the preceding paragraphs. The Note appended to Rule-42(2) provides that generally the application seeking voluntary retirement by any Govt. employee may be accepted by the Appointing

Authority. However, two exceptions have been specifically carved out under which the Appointing Authority is under no legal obligation to accept the voluntary retirement of the Govt. servant generally. Those two exceptions have also been specifically referred to in the preceding paragraphs.

24. On a careful consideration of the factual background of the Petitioner's case and on the basis of the materials placed before this court, further taking into consideration the PWC filed by the Opposite Party No.1, this Court is of the considered view that the Opposite Party No.1 while rejecting the application of the petitioner has not taken the ground of pendency Disciplinary Proceeding or any prosecution having been contemplated or having been launched against the Petitioner. Therefore, the two exceptions carved out in the note to the general rule of accepting the VRS, subject to the satisfaction of the twin conditions laid down in Rule-42, do not apply to the facts of the present petitioner's case. Therefore, the case of the Petitioner does not fall within the exceptions as carved out in the note. As such, this Court has no hesitation in coming to a conclusion that the case of the Petitioner would be governed by the general principle as laid down in Rule-42, and as a result, such VRS application of the petitioner may be accepted generally.

25. With regard to the judgment relied upon by the learned Additional Govt. Advocate reported in ***(2018) 17 SCC 578***, this Court on a careful reading of the said judgment observes that the main question that fell for consideration before the Hon'ble Supreme Court in the above-mentioned judgment was as to whether under Rule-56 of the U. P. Fundamental Rules, an employee has an unfettered right to seek voluntary retirement by serving a notice of three months to the State Govt. or whether the State Govt. under the explanation attached to Rule-56 of the U. P. Fundamental Rules, is authorized to decline the prayer for voluntary retirement, under Clause-(c) of Rule-56 of the said rules, in the public interest. On a careful reading of the above-mentioned judgment, this Court observes that the judgment rendered by the Hon'ble Supreme Court in ***Achal Singh***'s case (supra) stands on a different background than the case of the present Petitioner. So far ***Achal Singh***'s case is concerned, the Hon'ble Supreme Court was examining Clause-(c) of Rule-56 of the Fundamental Rules applicable to the employees of the State of Uttar Pradesh. The said Clause-(c) of Rule-56 confers a right on the appointing authority to require any government servant to retire after attaining the age of fifty years by giving a notice of three months, and a right on the government servant to voluntarily retire after attaining the age of 45 years or on completion of a qualifying service period of 20 years, by giving a notice of three months to the appointing authority. However, the explanation appended to the Rule-56 of Fundamental Rules of State of Uttar Pradesh provides that the decision of the Appointing Authority under clause-(c) shall be taken if it appears to the said authority to be in public interest. Moreover, the explanation (2) to Rule-56 of the U. P. Fundamental Rules further defines the materials that are to be taken into consideration by the Appointing Authority in order to determine whether the voluntary retirement under Rule-56(c) is in public interest.

In the case of ***Achal Singh***, the Hon'ble Supreme Court on a detailed analysis of the Fundamental Rules made for U.P. State Govt. employees has categorically held that the State Govt. has the power to decline the prayer for voluntary retirement considering the public interest as provided in the rules, especially in the context of the public interest as provided in the explanation to Rule-56 of the U.P. Fundamental Rules, the Hon'ble Supreme Court has also referred to Article-47 and 51 (a) of the Constitution of India. On a careful analysis of the aforesaid judgment, this Court further observed that in para-42 of the above-mentioned judgment the Hon'ble Supreme Court while referring to some of the earlier judgments of the Hon'ble Supreme Court has categorically observed that it would depend upon the scheme of the rules as to whether the application for voluntary retirement is to be accepted or not by the Appointing Authority. It has also been observed that each and every judgment has to be considered in the light of the provisions which came up for consideration and question it has decided, language employed in the rules, and it cannot be said to be of general application as already observed by the Hon'ble Supreme Court in the case of ***State of Haryana & ors. vs. S.K. Singhal*** reported in ***(1999) 4 SCC 293***. Therefore, the case of the Petitioner in the present case is to be considered in the light of the provisions contained in Rule-42 of the OCS (Pension) Rules, 1992. As such, this Court has no hesitation to come to a conclusion that the judgment in ***Achal Singh***'s case, which has been heavily relied upon by the learned Additional Govt. Advocate, is not applicable to the facts of the present case as the same was considered and decided while interpreting Rule-56(C) of the Fundamental Rules meant for U.P. State Govt. employees and the explanation appended.

26. In view of the aforesaid analysis of law as well as keeping in view the factual matrix involved in the present writ application, this Court is of the considered view that Rule-42 of the OCS (Pension) Rules, 1992 does not specifically provide any ground on which an application seeking voluntary retirement from govt. service can be made by any of the govt. servant. Moreover, in view of the Note appended to Rule-42 (2) such application seeking for VRS is to be accepted generally and the exception to such general provision has also been provided in the Note appended to the said Rule. So far the present petitioner is concerned, there is no dispute that the Petitioner complies with the minimum requirement for making such application and he has followed the procedure of giving a notice of not less than three months. Therefore, the Opposite Parties are not within their authority in rejecting the application of the Petitioner seeking VRS on the ground of dearth of faculties in the medical colleges in the State of Odisha and the ground of public interest involved in the present case. Moreover, such a ground is not available to the Opposite Parties in view of the specific provisions contained in Rule-42. In such view of the matter, this Court has no hesitation in coming to a conclusion that the Opposite Parties have committed an illegality in rejecting the application of the Petitioner seeking VRS from service. On such grounds, the writ application filed by the Petitioner is bound to succeed. Accordingly, the impugned

order under Annexure-8 dated 16.03.2024 is hereby quashed. Further, the Opposite Party No.1 is directed to accept the VRS of the Petitioner with effect from the date of expiry of the three months' notice period calculated from the date of his initial application, which was admittedly submitted on 14.11.2023. In other words, the relationship of the employer and employee of the Petitioner with the Govt. of Odisha shall come to an end on completion of three months' notice period with effect from the date 14.02.2024. Moreover, it is made clear that if the Petitioner is continuing in service and discharging his duties, he shall be paid his salary and other emoluments up to the period for which he has rendered his services. However, for all practical purposes, the relationship of the employer and employee shall come to an end w.e.f. 14.02.2024. Accordingly, the Opposite Parties are directed to process the claim of the petitioner for grant of retiral dues as well as pensionary benefits as is due and admissible to the petitioner in the light of the aforesaid observation within a period of three months from the date of communication of a certified copy of this judgment.

27. With the aforesaid observation/direction, the writ petition stands allowed. However, there shall be no order as to cost.

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2024 (II) ILR-CUT-271

V. NARASINGH, J.

W.P.(C) NO. 31785 OF 2011

SUNENA PRASAD SHARMA & ANR. ……Petitioners

-V-

MANAGING DIRECTOR, ORISSA FOREST DEVELOPMENT CORPORATION LTD., BBSR ……Opp.Party

SERVICE LAW – Disciplinary proceeding – Imposition of punishment which is not in terms of the Service Rules – The disciplinary authority passed the impugned order of termination from service and treating the period of absence as "no work no pay" which dehors the purview of "Penalty" as prescribed under Rule 121 of chapter VIII of Orissa Forest Development Corporation Rules – Effect of – Held, the impugned order of punishment cannot be construed to be as punishment within the frame work of law. (Paras 37-39)

Case Laws Relied on and Referred to :-

1. (2011) 10 SCC 249 : State Bank of India vs. Ram Lal Bhaskar & Anr.
2. AIR 1963 SC 1723 : State of Andhra Pradesh & Ors. vs. S. Sree Rama Rao.
3. 2023 SCC OnLine SC 1064 : State Bank of India vs. A.G.D. Reddy.
4. 2012 (5) SCC 242: AIR 2012 SC 2840 : Vijay Singh V. State of U.P. & Ors.

For Petitioners : Mr. S. Mohanty

For Opp.Party : Mr. S.K. Pattnaik, Sr. Advocate

JUDGMENT Date of Final Hearing :10.01.2024 : Date of Judgment : 15.04.2024

V. NARASINGH, J.

1. The widow and son of deceased employee (Field Asst. under the OFDC) being substituted assail the order of termination and the order of Appellate Authority of the ex-employee at Annexure-6 & 9 respectively.

2. The facts, germane for just adjudication of this Writ Petition, are stated below:

Claim of the Petitioner

The Petitioner No.1 is the widow of deceased employee who served under Odisha Forest Development Corporation Ltd. (OFDC) on being appointed as a mate on 01.08.1980. During his service period he was promoted to the post of Field Asst. on 08.02.2000. While continuing in the promotional post of Field Asst. in the office of Divisional Manager, Rourkela (C) Division he was transferred to Sambalpur(KL) Division as per order dtd.10.07.2003 being a regular post holder under OFDC Ltd. However on being not relieved from the post and as the transfer order dated 10.07.2003 was not made effective the deceased employee continued to remain in the said station and applied for voluntary retirement. Since there was a delay in consideration of the same the deceased employee sent a leave application on 26.09.2003 to the DM, Rourkela Division and to go on leave and requested to give him voluntary retirement in terms of the Scheme for Voluntary Retirement.

3. Neither the deceased employee was allowed to go on leave nor his request for voluntary retirement under the Scheme in force was considered rather he was issued with a notice to file show cause and to explain his absence from duty since 26.09.2003. He submitted his reply as per his letter dated 15.01.2004 in order to justify that his leave is not unauthorized.

4. Without considering such properly reasoned representation/reply to show cause the authority initiated a Disciplinary Proceeding against the deceased Petitioner on 03.04.2004 on the following allegations;

(i) disobedience of order of higher authority,
(ii) unauthorized absence from duty,
(iii) negligence in duty,
(iv) misconduct.

5. The delinquent (since deceased) submitted his statement of defence denying the charges levelled against him. The Sub-Divisional Manager, Maneswar(C) Sub-Division was appointed as Inquiring Officer to conduct the enquiry And, he completed the enquiry in one day i.e. 22.08.2006 and submitted the enquiry report dated 02.11.2006 to the Disciplinary Authority.

6. The Disciplinary Authority straight way acted upon the enquiry report and issued a punishment order dt.15.03.2008 by imposing the penalty of termination from service of the husband of Petitioner No.1 and treating the period of absence

from duty from 26.09.2003 till the date of punishment order as "no work no pay" treating it as unauthorized absence.

7. The deceased employee had earlier approached this Court challenging the order of termination by filing a Writ Petition bearing W.P.(C) No.3157 of 2011 which was disposed of by order dated 28.02.2011 directing the authorities to consider and dispose of the appeal.

8. Accordingly, husband of Petitioner No.1 preferred an appeal before the Appellate Authority not only to interfere with the order of punishment but also with the Departmental Proceeding. However the Appellate Authority rejected the same vide his order dated 29.08.2011.

9. Being aggrieved with the order of punishment dated 15.03.2008 and rejection of the appeal dated 24.08.2011 at Annexure-6 & 9 respectively, the husband of Petitioner No.1 filed this W.P.(C) inter alia on grounds of procedural irregularity, violation of principle of natural justice.

10. It is further contended that in absence of any provision under the statute (Orissa Forest Corporation Service Rules, 1986) in force and which admittedly governs the service condition of the delinquent permitting the Inquiry Officer to suggest the punishment in the present case, the Enquiry Officer not only conducted the enquiry in a perfunctory manner but also suggested for removal of the Petitioner from service. Though the Enquiry Officer arrived at the findings that the statement of the delinquent is false, yet reason for arriving at such finding is conspicuously absent.

11. The entire conclusion derived by the inquiring officer is based on surmises and conjecture without any reasonable basis. Though, the Marshaling Officer stated about the refusal of VRS application, it never saw the light of the day.

12. Accordingly, the Petitioner prayed to set aside the order of termination dated 15.03.2008 based on such perfunctory enquiry and the rejection of appeal by order dated 24.08.2011 vide Annexure- 6 & 9 respectively but also prayed for reinstatement in service with full back wages as much as to issue appropriate direction for acceptance of the VRS application by granting him all other consequential benefits.

13. When the order of termination under challenge in the above noted Writ Petition was subjudice the original Writ Petitioner – the delinquent expired and his wife and son were substituted by order dated 07.07.2022 as the widow would get pension, gratuity, leave dues and other financial benefits in case the order of termination is quashed and the service benefits of the deceased employee is restored.

Counter

14. Challenging the aforesaid stand of the Petitioner, the Opposite Parties had filed a detailed counter denying the allegations. It was stated by the Opposite Parties

that deceased employee worked as Field Assistant under Rourkela Division of the OFDC Ltd. from 01.01.1980 for almost 23 years in one Division.

15. Considering the same, the General Manager, Sambalpur (C) Zone which covers Rourkela Division of the Corporation made a general chain of transfer of the Field Assistants involving around 88 Field Assistants' transfer including the Petitioner. Wherein the Petitioner was transferred form Rourkela (C) Division to Sambalpur (KL) Division.

16. Instead of complying with such direction of the authorities and joining in his post, the Petitioner submitted an application for voluntary retirement on 16.08.2003 which was forwarded by the competent authority on 01.09.2003. The VRS scheme was no more in force w.e.f. 31.12.2002 and therefore, the request of the Petitioner for his voluntarily retirement under the VRS scheme could not be accepted.

17. Thereafter, the Petitioner was relieved from his previous post on 26.09.2003 but without joining in the new place the Petitioner submitted a leave application on 26.09.2003 to the authority of the previous station. Accordingly, the Petitioner was directed to submit his leave application if any before the Sambalpur (KL) Division as per letter dated 10.10.2003 wherein it was also indicated about non-acceptance of his VR application in view of such scheme having been wound up w.e.f. 31.12.2002.

18. The Petitioner neither submitted any leave application before the Sambalpur(KL) Division nor he reported his duty in the division where he has been posted.

19. Accordingly, a show cause explanation was issued by the Divisional Manager, Sambalpur (KL) Division to explain his absence since 26.09.2003. The Petitioner reiterating the sole stand of applying under VRS responded to such letter and justified his not joining at Sambalpur.

20. In view of the aforesaid background it was felt necessary to draw a Disciplinary Proceeding against the Petitioner by the DM, Sambalpur vide order dated 03.04.2004. The Petitioner submitted his reply on 06.05.2004 and on the same day he further renewed his prayer to accept the VR application. Although his previous VR application were rejected under intimation to him citing the ground of non-availability of such scheme but the DM, Sambalpur vide reply dated 23.07.2005 informed the Petitioner that his application for VR in phase-III was not accepted by the competent authority for his long continuous absconding from duty unauthorizedly. Accordingly this fact was intimated by the Head Office to the Divisional Manger, Sambalpur (KL) Division and the Petitioner was given an option to take voluntary retirement as per Rule 38 of the OFDC Service rules.

21. Taking into consideration the long absence of the Petitioner, the Divisional Manager (KL), Sambalpur further published a notice in newspaper on 20.03.2006 calling upon the Petitioner to join. The Inquiry was conducted in a proper manner and the Petitioner also participated in the inquiry process where his statement was

recorded in which he took a bald stand that he has not received the leave order and he will not join in the duty unless and until his VR application is sanctioned rather shall remain on leave. The relieve order dated 26.09.2003 was sent by registered post and it was received by one S.P. Sharma for the Petitioner but the Petitioner bluntly denied of receiving the same without any proper justification.

22. The inquiry was concluded, resulting in termination of the Petitioner and treating the unauthorized period of his absence from 26.09.2003 as "no work no pay" (Annexure-6).

23. A copy of the Inquiry Report was not supplied to the Petitioner before the proceeding was concluded for which the Appellate Authority directed for issue of enquiry report to the Petitioner vide order dated 20.07.2011 after which the Petitioner submitted a written reply before the Managing Director on 04.08.2011. The Appellate Authority considered all these aspects and passed a well reasoned order rejecting the appeal of the Petitioner as per order dated 24.08.2011 (Annexure-9). It is thus submitted that as such the Writ Petition is liable to be rejected.

Rejoinder

24. Disputing and clarifying the submissions on behalf of the Opposite Parties claiming them to be false and misleading the Petitioner by way of a rejoinder affidavit further submitted that though he had submitted his application for voluntary retirement in terms of the VR Scheme which was introduced but the authority did not take any decision on the same under intimation to him whereas for the first time in the year 2009 the letter was issued to the Petitioner to apply VRS in the prescribed form wherein he was also directed to join in the office where he has been posted. The Petitioner under compelling circumstances had to remain on leave due to his illness and accordingly he extended his leave from time to time by submitting leave application. Therefore reiterating the grounds stated in the Writ Petition, it was contended that his prayers to quash the order of punishment as well as rejection of appeal deserve to be allowed.

25. The Petitioner strongly objected the stand of the Opposite Parties by submitting that on one hand the authorities had claimed for non-consideration of his claim under VRS in such VRS was not in force at the time of considering his case and on the other hand after such scheme was restored his application for VRS was rejected on the ground of unauthorized absence.

Finding

26. The scope of interference by the High Courts in a disciplinary proceeding in exercise of their writ jurisdiction was considered by the Apex Court in the case of **State Bank of India vs. Ram Lal Bhaskar & another** reported in **(2011) 10 SCC 249**, in the said judgment the Apex Court quoted with approval its pronouncement in the case **of State of Andhra Pradesh & others vs. S. Sree Rama Rao** reported in **AIR 1963 SC 1723**.

Paragraphs 12 & 13 of the judgment of the Apex Court in the case of **State Bank of India vs. Ram Lal Bhaskar & another** reported in **(2011) 10 SCC 249** is extracted hereunder:-

> "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….."
>
> "13. 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 leveled against the Respondent No.1 do not constitute any misconduct and that the Respondent No.1 was not guilty of any misconduct."

27. The scope of interference in a departmental proceeding was further reiterated by the Apex Court in its judgment in the case of **State Bank of India vs. A.G.D. Reddy** reported in **2023 SCC OnLine SC 1064**. Paragraph-42 thereof is extracted hereunder:-

> "It is now well settled that the scope of judicial review against a departmental enquiry proceeding is very limited. It is not in the nature of an appeal and a review on merits of the decision is not permissible. The scope of the enquiry is to examine whether the decision-making process is legitimate and to ensure that the findings are not bereft of any evidence. If the records reveal that the findings are based on some evidence, it is not the function of the Court in a judicial review to re-appreciate the same and arrive at an independent finding on the evidence. This lakshman rekha has been recognized and reiterated in a long line of judgments of this Court."

28. Being conscious of contours of interference and also taking into consideration of the fact that the original Petitioner is no more and has been substituted by his legal heir who can confine their claim in shape of monetary claim only as much there being no scope for remanding the matter to the stage of irregularity for conducting the Departmental Proceeding de novo against a dead person and also the nature of charge which stand on the sole allegation of unauthorized absence from duty this Court confines the scrutiny to the nature of penalty and it's sustainability.

29. By the punishment order dt.15.03.2008, the service of the husband of Petitioner No.1 was terminated and treating the period of absence from duty from

26.09.2003 till the date of punishment order as "*no work no pay*" treating it as unauthorized absence are the two punishments imposed and the Appellate Authority has also confirmed the same vide Annexure 6 & 9 respectively.

30. Admittedly, the deceased employee was governed by the Orissa Forest Corporation Service Rules, 1986. Chapter-VIII of such Service Rules deal with disciplinary rules.

31. Rule-121 (Chapter-VIII) thereof outlines the penalties to be imposed and read as under:-

> **121. Penalties :**
> "The following penalties may, for good and sufficient reasons and as hereinafter provided be imposed on an employee/workman, namely:
> Minor Penalties:
> i) Fine,
> ii) Censure,
> iii) Withholding of promotion,
> iv) Recovery from pay of the whole or part of any pecuniary toss caused by him to the Corporation by negligence or breach of orders or misappropriation or any other reasons,
> v) Withholding/stoppage of increments of pay.
> vi) Suspension.
>
> Provided that the penalty of fine shall be nominal and imposed only on Class-IV employees/workmen for specific dereliction of duties.
>
> Major Penalties:
> vii) Reduction to lower stage in the time scale of pay for a specified period with further directions as to whether or not the employee/workman 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 post- poning future Increments of his pay.
> viii) Reduction to a lower time scale of pay, grade, post of service which shall ordinarily be a bar to the promotion of the employee/workman 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, post or service from which the employee/workman was reduced and his seniority and pay on such restoration to that grade, post, or service;
> ix) Compulsory retirement amounting to premature retirement,
> x) Dismissal from Corporation service which shall ordinarily be a disqualification for future employment and re-employment."

32. Rule-122 deals with Disciplinary Authorities sub-Rule 1 thereof reads as under:-

> "1. Chairman/Managing Director may impose any of the penalties specified in Rule-121 on any employee/workman."

33. It is apt to note here that in the Explanation-6 appended to Rule-121 of Orissa Forest Corporation Service Rules, 1986 deals with termination of the services, the same is extracted hereunder for convenience of reference.

> **6. Termination of the services :-**

> "a) of an employee/workman appointed on probation, during or at the end of his probation in accordance with the terms of his appointment or the rules and orders governing such probation; or
>
> b) of a temporary workman/employee in accordance with the terms and conditions of his appointment or as per rules or orders prescribing the appointment; or conditions of such temporary appointment; or
>
> c) of an employee/workman under an agreement in accordance with terms of such agreement."

On a bare reading of the same, it can be seen that order of termination cannot ex-facie be passed in case of the Petitioner since the same can only be passed qua an employee who is on probation or temporary workman/employee or an employee under an agreement.

34. During the course of submission, learned Senior Counsel on behalf of Opposite Party-OFDC referring to the memorandum of Appeal which is at Annexure-M submits that since the Petitioner had not raised any grievance that the punishment imposed are not envisaged under Rule-121 is estopped from agitating the same at this stage by way of oral submission.

35. Such contention on behalf of the Corporation is to be negated since the challenge to the punishment being de hors the rules cannot be frustrated under the cover of cannon of pleadings and more so since this Court is of the considered view whether the punishment imposed comes within the punishment as envisaged under the Service Rules is a point of law.

36. In fact both the learned counsels addressed this Court with reference to penalty imposed keeping in view Rule-121 of the Orissa Forest Corporation Service Rules, 1986 on 10.01.2024, the date on which final hearing was taken up and judgment was reserved.

37. Imposition of punishment not in terms of service Rules and effect thereof was extensively dealt with by the Apex Court in the case of **Vijay Singh V. State of U.P. and others, 2012 (5) SCC 242: AIR 2012 SC 2840**. Paragraphs-15, 21 & 22 which are germane are extracted hereunder:-

> "15. Imposing the punishment for a proved delinquency is regulated and controlled by the statutory rules. Therefore, while performing the quasi-judicial functions, the authority is not permitted to ignore the statutory rules under which punishment is to be imposed. The disciplinary authority is bound to give strict adherence to the said rules. Thus, the order of punishment being outside the purview of the statutory rules is a nullity and cannot be enforced against the appellant. (Emphasised)
>
> 21. Undoubtedly, in a civilised society governed by the Rule of Law, the punishment not prescribed under the statutory rules cannot be imposed. Principle enshrined in criminal jurisprudence to this effect is prescribed in the legal maxim *nulla poena sine lege* which means that a person should not be made to suffer penalty except for a clear breach of existing law.
>
> 22. In S. Khushboo v. Kanniammal this Court has held that a person cannot be tried for an alleged offence unless the legislature has made it punishable by law and it falls within

> the offence as defined under Sections 40, 41 and 42 of the Penal Code, 1860, Section 2(n) of the Code of Criminal Procedure, 1973, or Section 3(38) of the General Clauses Act, 1897. The same analogy can be drawn in the instant case though the matter is not criminal in nature." (Emphasised)

38. Thus, it is well settled that a punishment which is not in terms of the service Rules cannot be imposed even if the charges against an employee are established.

39. Therefore, both the punishments imposed in the present case i.e. Termination from service and treating the period of absence as no work no pay being de hors the purview of "penalty" prescribed under Rule-121 of the chapter VIII of Orissa Forest Development Corporation Rules cannot be construed to be as punishment(s) within the framework of law. The same as such are unsustainable. Therefore the punishments vide Annexure-6 so imposed are accordingly quashed. Consequentially the rejection of appeal order dtd.29.08.2011 at Annexure-9 is also set-aside.

40. As noted the original Writ Petitioner/the employee has unfortunately not survived the litigation leaving behind his legal heirs who are the present Petitioners.

41. Therefore this Court does not find any reason to remit the matter to the stage of irregularity in the proceeding as there cannot be a fresh punishment order against a dead person and more so since the charges are no way related to any financial irregularity or misappropriation.

42. This Court therefore finds it to be an appropriate case where the original Petitioner has to be treated as an employee who died in harness. And, as such his legal heirs are entitled to get all the financial benefits for the period of his service and after his death. In the considered view of this Court the same would subserve equity and ends of justice.

43. However while calculating the period of length of his service for the purpose of terminal/retirement benefits the period of his leave from 26.09.2003 till the period he would have continued in service, keeping in view that he passed away on 04.05.2021 (as stated in the death certificate annexed to as Annexure-1 to I.A. No.4537 of 2022) shall be taken into consideration. But no arrears salary shall be paid for the said period as the petitioner had actually not served during such period.

44. The entire exercise shall be completed within a period of four months from the date of communication or production of certified copy of the Judgment whichever is earlier. Failing which, interest @ 6% per annum from the date of entitlement shall be also paid to the present Petitioners till the actual disbursement.

45. The Writ Petition thus allowed. No costs.

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2024 (II) ILR-CUT-280

V. NARASINGH, J.

W.P.(C) NO.9371 OF 2012 WITH BATCHES
(W.P(C) NOS. 8720 & 8731 OF 2012)

DEBA PRASAD MANGARAJ & ORS. ……Petitioners

-V-

STATE OF ODISHA & ORS. ……Opp.Parties

SERVICE LAW – Determination of *inter se* seniority – In absence of any proper document to decide the *inter se* merit between the selected candidates, is it appropriate to give primacy to age and to treat it as rational factor to determine seniority? – Held, No – Considering the age of the employees as the determining factor for deciding the seniority *inter se* is not sustainable in the eyes of law – The Opp.Parties are directed to recast the gradation list taking into consideration of the position so reflected on the select list in absence of any merit list.

Case Laws Relied on and Referred to :-

1. AIR 2003 SC 2000 : Bimlesh Tanwar vs. State of Haryana & Ors.
2. AIR 2011 SC 2947 : D.P. Das vs. Union of India & Ors.
3. 2021 SCC OnLine SC 971: Sudhir Kumar Atrey Versus Union Of India & Ors.

For Petitioners : Mr. B.K. Sharma

For Opp.Parties : Mr. S.N. Pattnaik, AGA, Mr. D.N. Mohapatra, Mr. P.K. Mishra, Mr. S. Udagata,

JUDGMENT Date of Final Hearing : 18.10.2023 : Date of Judgment : 15.04.2024

V. NARASINGH, J.

The principal issue "fixation of basis of inter se seniority amongst Jr. Assistant of Odisha State Housing Board (OSHB)" to be decided in these W.P.(C)s being identical, all the matters were heard together and disposed of by this common judgment on the consent of the Parties.

The Writ Petition bearing W.P.(C) No. 9371 of 2012 is treated as the lead case, as agreed upon by the Parties, during the course of hearing.

Heard learned counsel for the Petitioners, Mr. B.K. Sharma and Mr. S.N. Pattnaik, learned Additional Government Advocate and Mr. D.N. Mohapatra, learned counsel for the Opposite Party Nos.1 & 2 respectively, Mr. P.K. Mishra, learned Counsel for Opposite Party Nos.3 to 9, 12 & 14 and Mr. S. Udgata, learned counsel for the Opposite Party No.10.

1. Jurisdiction of this Court under Article 226 and 227 of the Constitution of India has been invoked assailing the final gradation list dtd. 26.04.2012 at Annexure-9 (Annexure-6 in the connected Writ Petitions i.e. W.P.(C) Nos.8720 and 8731 of 2012) so far as it relates to the placement of the Petitioners vis-a-vis the Opp. Party Nos.3 to 14 in the rank of Junior Assistant and to issue further direction to the Opp. Party Nos.1 and 2 (State of Odisha represented by Commissioner-cum-

Secretary, Housing & Urban Development Department, Bhubaneswar and The Housing Commissioner-cum-Secretary, Odisha State Housing Board, respectively) to restore the position of the Petitioners in the final gradation list as per the proceeding of the selection committee meeting dtd. 05.12.1994 at Anenxure-1 (same in all the connected Writ Petitions i.e. W.P.(C) Nos.8720 and 8731 of 2012).

2. For convenience of ready reference the prayer in the Writ Petition is extracted hereunder:-

> *"……issue Rule NISI calling upon the opp. Parties as to why the final gradation list dtd.26.04.2012 so far as the position of the petitioners and opp. Party No.3 to 14 are concerned, shall not be quashed and set aside and if the opp. Parties fail to show cause or show insufficient cause make the said Rule NISI absolute and further be pleased to issue writ of certiorari in line with the aforesaid Rule NISI quashing the final gradation list dtd.26.04.2012 to the extent mentioned herein above.*
>
> *And further be pleased to direct the Opp. Party to restore the position of the petitioners in the final gradation list as per the proceeding of the selection committee dtd.2.12.1994 under Annexure-1.*
>
> *xxx xxx xxx"*

Petitioners' Contention

3. The Commissioner-cum-Secretary of the Housing Board requested the Director of Employment Exchange, Orissa to sponsor candidates for the post of Junior Assistants vide letter dtd. 07.09.1992. The name of the Petitioners were sponsored along with others and a selection test was held by the Board selecting the candidates for the post of Junior Assistants in terms of their merits.

4. Annexure-1 to the Writ Petition is the select list prepared in terms of the merit category-wise i.e. S.C., S.T. and U.R. basing upon the written test, personal interview and career marks.

The name of the Petitioners along with private Opp. Parties are all reflected under the U.R. category. The Petitioners as well as Opp. Parties were appointed in terms of the aforesaid selection list and they joined in the post of Junior Assistants on different dates. During their continuance as Junior Assistants, they were terminated from their services as per the office order dtd. 05.07.1996 on the plea that they were appointed temporarily for a period of one year and on completion of the aforesaid tenure of one year, their services were terminated.

5. Being aggrieved with such action, the Petitioners and others filed OJC No.1421/1996 challenging the order of termination which was disposed of by this Hon'ble Court on 04.03.2009 directing the Opp. Parties to regularize the services of the Petitioners within a period of six months from the date of communication of the order and to consider their claim for consequential benefits.

6. In terms of the aforesaid decision of this Court, the Board in their meeting dtd. 24.10.2009 recommended to Government for regularization of services of 34 Jr. Assistants including the case of the Petitioners. The Government accorded approval

for regularization of the 34 numbers of Junior Assistants including the Petitioners as per their communication dtd. 16.06.2010. Thereafter, the Board issued office order on 28.06.2010 regularizing the service of all the 34 employees including the Petitioners as Junior Assistant from the date of their joining.

7. While the matter stood thus, a provisional gradation list in the existing cadre of Jr. Assistant was circulated on 09.08.2011 at Annexure-5 indicating the name of present Petitioners at Sl. No.30, 31 and 32 respectively.

Exercising the liberty granted in the said notice dtd. 09.08.2011 at Annexure-5, the Petitioners submitted their objection relating to their placement in the provisional gradation list.

8. For considering objections relating to the provisional gradation list, a committee was constituted and held its deliberation on 23.09.2011 and 24.10.2011 at Annexure-8 for the purpose of finalizing the gradation list of Jr. Assistants of Orissa State Housing Board wherein a decision was taken that the gradation list is required to be prepared as per the position in the merit list.

For convenience of ready reference, relevant extract of Annexure-8 is culled out hereunder;

> **"xxx xxx xxx**
>
> **".....<u>The committee members were of the opinion that the final gradation list may be prepared as per the original merit list.</u>**
>
> **xxx xxx xxx"**

9. Despite such decision to adhere to the inter se merit as the sole criteria for fixing seniority, the Opp. Party No.2 (The Housing Commissioner-cum-Secretary, Odisha State Housing Board) published the final gradation list on 26.04.2012 at Annexure-9 reflecting the name of the Petitioners at Sl. No.39, 51 and 32 respectively below the Opposite Party Nos.3 to 14 (at Serial Nos.12-14, 16-20, 22, 25-26 and 24 respectively.)

<u>Counter of State-Opposite Parties</u>

10. The Opp. Party No.2, Orissa State Housing Board represented through its Secretary filed a counter wherein while admitting the other facts with respect to engagement and regularization of service of these Petitioners along with others as Junior Assistants, they clarified that Annexure-1 reflects the list of selected candidate but does not reveal the marks secured in the recruitment test which forms the basis of preparation of select list whereas the committee recommended the names block-wise of S.C., S.T. and general and drew a select list. Since the selection file is not traceable, it is difficult to ascertain the numbers secured by the selected candidate in the recruitment test for which the Housing Board decided to seek opinion in this regard from the then learned Advocate General, Odisha, Cuttack.

10-A. Thereafter, on the basis of the views expressed by the learned Advocate General, they decided to prepare the final gradation list with reference to the age, date of birth of the selected candidate in order to set at rest continuing discontentment among employees.

To substantiate the said procedure to be just and proper, they relied upon the principle decided by the Apex Court in the case of **Bimlesh Tanwar vs. State of Haryana and others** reported in **AIR 2003 SC 2000**.

On one hand the hearing committee decided to give emphasis on the merit list for preparation of the gradation list and on the other hand in absence of any proper document to decide the inter se merit between the selected candidates, it was thought appropriate to adopt the views of learned Advocate General which was based upon the principle decided by the Apex Court in the case of **D.P. Das vs. Union of India and Others** reported in **AIR 2011 SC 2947**.

10-B. It is further contended by the Board that to decide the inter se seniority the date of joining of different candidates was also not taken into consideration as all of them were directed to join within a stipulated time. Accordingly, the Board adhered to the rational principle of age criteria to avoid any conflict in the matter.

10-C. It is contended by the Petitioners that they were placed at Sl. Nos.1, 2 and 3 respectively in the merit list prepared on 05.12.1994 at Annexure-1, for the purpose of gradation list in general category on the basis of written test, personal interview and career marks in order of merit. Since the Authority-Opposite Party Nos.1 and 2 decided to adhere to the merit position as the sole criteria for fixing the inter se seniority, the decision in the final gradation list, Annexure-9, reflecting the position of the Petitioners below the Opp. Party Nos.3 to 14, as noted above, is ex-facie fallacious.

Counter of Opposite Party Nos.3 to 9

10-D. Counter affidavit has been filed on behalf of Opp. Party Nos.3 to 9 disputing the submissions of the Petitioners mainly on the ground that the selection list dtd. 05.12.1994 at Annexure-1 is not the document which can be treated as a common merit list so as to form the basis for deciding the inter se seniority. Neither the said list indicates the number secured by the individual candidates nor the inter se merit position of different categories are reflected. As such, it is not possible to treat it as a common merit list which can be utilized for the purpose of deciding inter se seniority among the employees. It is their further stand on the basis of RTI information that selection file is not readily traceable and therefore, the assertion of the Petitioners to accept the Annexure-1 as the sole basis for deciding inter-se seniority as reflected as per the minute of meeting at Annexure-8 is untenable.

Stand of Opposite Party No.10

10-E. An independent counter affidavit has been filed by the Opposite Party No.10 reiterating the stand taken by the Opposite Party No.2 and Opposite Party Nos.3 to

9. He has also emphasized upon the principle adopted by the Board relying upon the opinion of the learned Advocate General at Annexure-B/2. It is thus emphasized referring to the decision of the Apex Court in the case of **D.P. Das (supra)** which was also relied upon by the Learned Advocate General in his opinion, to give primacy to age and to treat it as a rational factor to determine seniority, when the appointments are made in terms of the same order without preparing merit list and in absence of any rule fixing the criteria to determine inter se seniority.

Finding

11. There is no dispute that seniority is of seminal importance in service career of employees and the determination of seniority inter se must be based on such principle which is just and fair. But the principle of adopting age as a factor to determine the seniority can only come into play if there is no guideline deciding inter se seniority. Neither the appointments were made on the same date nor the existence of the merit list Annexure-1 drawn category wise is disputed in the present case.

12. Since it is a dispute between the same category of employees that is UR category therefore, the accepted and undisputed inter se merit cannot be brushed aside.

13. This court therefore respectfully disagrees with the opinion tendered by Learned Advocate General in the facts of the present case on the basis of which inter se seniority has been fixed and is reflected in the impugned gradation list at Annexure-9 relating to Junior Assistants (General category).

14. Law is well settled that the seniority inter se between two employees has to be determined strictly taking into consideration the manner in which the rule governing the field of seniority of such employee is in force.

In case no such rule is available to decide the same, then the inter se seniority should be fixed only on the basis of merit. Where the merit between two candidates is on the equal scale, then for fixation of seniority, age should be the criteria.

It has to be borne in mind that admittedly the Board has misplaced the recruitment file. However, the category wise inter se merit position at Annexure-1 prepared way back in the year 1994 is not in dispute. In fact is apt to note that appointments were undisputedly made consequential to Annexure-1.

The inter se position in the list at Annexure-1, category wise being not in dispute by the respective parties it is no more open for the Opposite Parties i.e. both for the Board as well as the employees to raise any dispute for fixation of the interse seniority on the basis of merit position particularly when the said select list indicates that the names have been arranged in terms of their merit on the basis of written test, personal interview, career marks in order of merit (Category-wise) for the purpose of preparation of gradation list.

15. Relevant extracts of Annexure-1 is culled out hereunder for convenience of ready reference:-

> *"PROCEEDINGS OF THE SELECTION COMMITTEE FOR THE POST OF JUNIOR ASSISTANTS.*
>
> *Present:*
> *1. Sri K.M. Rout, OAS(S) …… Secretary*
> *2. Dr. R.N. Pattnaik*
> *Chief Accounts Officer……Member*
> *3. Shri K.C. Patra, OAS*
> *Land-cum-Admn. Officer……. Member*
>
> *The following candidates have been recommended for the post of Junior Assistants based on* ***written Test, Personal Interview, Career Marks in order of merit (category-wise) and for the purpose of gradation list****;*
>
> *xxx xxx xxx"*

16. In the present case, this Court finds that Annexure-1 is an undisputed document. It is nothing but a merit list prepared on the basis of written test, personal interview, career marks in order of merit (Category-wise) and for the purpose of gradation list, as noted. Therefore, the only logical deduction is that name of the Petitioners and Opposite Party Nos.3 to 14 of general category has been arranged on the basis of their respective merit. And the same is a rational basis for determining seniority eliminating arbitrariness.

17. In this context, it is apt to refer to the ratio decided by Apex court in SLP(Civil) No(s).6572 OF 2014) in the matter of **Sudhir Kumar Atrey Versus Union Of India &Ors.2021 SCC OnLine SC 971**, decided on 26-10-2021;

> *"17. We are also of the view that in the matter of adjudging seniority of the candidates selected in one and the same selection, placement in the order of merit can be adopted as a principle for determination of seniority but where the selections are held separately by different recruiting authorities, the principle of initial date of appointment/continuous officiation may be the valid principle to be considered for adjudging inter se seniority of the officers in the absence of any rule or guidelines in determining seniority to the contrary." (at page 359-360)*

18. In the case hand, although there does not exist any statutory rule but the practice of determining inter se seniority on the basis of the merit list has to be on the basis of Annexure-1, an undisputed document for almost 16 years (the Writ Petition having been filed in 2012) . In Chairman, Puri Gramya Bank &Anr. vs. Ananda Chandra Das &Ors. [1994(6) SCC 301] Apex court held:

> *"……. It is settled law that if more than one are selected, the seniority is as per ranking of the direct recruits subject to the adjustment of the candidates selected on applying the rule of reservation and the roster. By mere fortuitous chance of reporting to duty earlier would not alter the ranking given by the Selection Board and the arranged one as per roster. The High Court is, therefore, wholly wrong in its conclusion that the seniority shall be determined on the basis of the joining reports given by the candidates selected for appointment by direct recruitment and length of service on its basis.*

xxx xxx xxx"

19. In view of the foregoing discussion, this Court is of the considered view that the decision taken by Board to accept age of the employees as the determining factor for deciding the seniority inter se is not sustainable in the eye of law in the face of Annexure-1. And, accordingly, gradation list at Annexure-9 (Annexure-6 in the connected Writ Petitions i.e. W.P.(C) Nos.8720 and 8731 of 2012) is quashed.

The Opposite Party Nos.1 and 2 are accordingly directed to recast the gradation list of Junior Assistants, category wise, taking into consideration their position so reflected in the select list at Annexure-1, with consequential benefits.

20. It is clarified that any financial benefit which may have accrued till date (date of judgment 15.04.2024), to any employee irrespective of category, on the basis of the impugned Annexure-9 (Annexure-6 in the connected Writ Petitions i.e. W.P.(C) Nos.8720 and 8731 of 2012) shall not be recovered.

21. The exercise of preparation of gradation list, as above, shall be completed within a period of four months from the date of production of the copy of the judgment or communication, whichever is earlier.

22. Accordingly, the Writ Petitions stand disposed of. No costs.

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2024 (II) ILR-CUT-286

BIRAJA PRASANNA SATAPATHY, J.

W.P.(C) NO.16810 OF 2016
&
W.P.(C) NO.18225 OF 2023

BASUDEV GURU & ORS. ……Petitioners

-V-

STATE OF ODISHA & ORS. ……Opp.Parties

ADMISSION – Fraud – The petitioners after passing the HSC examination prosecuted +2 Arts course and passed the said examination – The petitioners got themselves admitted to prosecute +2 vocational course (Gomitra) by submitting duplicate SLCs and passed the examination – Whether the qualification/certificates of +2 vocational course are admissible? – Held, No – In view of the clear provision contained under Regulation 123, a candidate is only eligible to get himself admitted to prosecute +2 vocational course after passing his High School Certificate Examination, petitioners are not eligible and entitled to get any relief, as fraud vitiates everything.

Case Laws Relied on and Referred to :-

1. (1994) 1 SCC1: S.P.Chengalvaraya Naidu (Dead)by LRs. Vs. Jagannath (Dead)by LRs.& Ors.
2. 2022 SCC OnLine SC 486 : Indian Oil Corporation Ltd. Vs. Rajendra D. Harmalkar.

For Petitioners : Mr. S.K.Das.
For Opp.Parties : Mr. M.K.Balabantaray, AGA
Mr. P.K.Rath, Sr. Adv. with Mr. A.K.Behera
Mr. N.C.Das, Mr. B.B. Mohanty

JUDGMENT Date of Hearing : 02.02.2024 : Date of Judgment: 21.02.2024

BIRAJA PRASANNA SATAPATHY, J.

The writ petition in W.P.(C) No. 16810 of 2016 has been filed inter alia challenging the communication issued by the Council of Higher Secondary Education, Odisha (in short "Council") – Opp. Party No. 5 on 12.07.2016 under Annexure-6. Vide the said communication the Council pursuant to the request made by Opp. Party No. 4 clarified that a candidate, who has passed the +2 higher secondary course once and has pursued the second +2 higher secondary course fraudulently, the second course certificate is to be rejected.

2. It is the case of the Petitioners that Petitioners after completing their High School Certificate examination prosecuted +2 Arts under the Council and passed the same in the year 1996, 2000 and 2004 respectively. Subsequently, they acquired the +2 vocational course in the year 2013, 2011 & 2011 respectively under the Council vide Annexure-1 series, 2 series and 3 series respectively.

2.1. It is contended that all the Petitioners prior to their acquiring +2 vocational course, were continuing as Gomitra and in the provisional draft merit list of Gomitra published in the year 2013 under Annexure-4, names of the present Petitioners were reflected at Sl. Nos. 11, 2 & 1 respectively. It is contended that while so continuing as Gomitra with due enlistment of their names in the provisional draft merit list of Gomitra published under Annexure-4, advertisement was issued by Opp. Party No. 4 on 23.09.2013 and subsequently in the Daily Samaj on 24.07.2015 to fill up 46 nos. of posts of Live Stock Inspector. Out of those 46 posts so advertised, 50% of the vacancies were reserved for eligible Gomitras.

2.2. Even though Petitioners were placed at Sl. Nos. 11, 2 & 1 of the draft merit list of Gomitra under Annexure-4, but when they were not included in the draft select list issued by Opp. Party No. 4 for engagement of Live Stock Inspector on contractual basis on 01.08.2016, Petitioners when enquired about their omission in the select list for their appointment as Live Stock Inspector, they were intimated that since prior to acquiring the +2 vocational course, Petitioners have passed +2 Arts, they have not been included in the draft select list published by Opp. Party No. 4 on 01.08.2016 basing on the clarification issued by the Council vide letter No. 6284 dt.12.07.2016 under Annexure-6.

2.3. However, it is contended that prior to receipt of the impugned clarification from the Council on 12.07.2016 under Annexure-6, Govt.-Opp. Party No. 1 vide letter dtd.05.07.2016 under Annexure-5, had already observed that if +2 vocational certificate submitted by the candidates are genuine, they should be considered for selection to the post of Live Stock Inspector as per the recruitment rule.

2.4. Learned counsel for the Petitioners contended that since Petitioners on the face of their acquiring the +2 Arts qualification in the year 1996, 2000 and 2004, were allowed by the Council to prosecute their 2 years +2 vocational course and were issued with the certificate having passed the examination in the year 2013 & 2011 respectively, the names of the Petitioners could not have been omitted in the draft select list published by Opp. Party No. 4 on 01.08.2016 basing on the clarification issued by the Council under Annexure-6. Since the Council on the face of their acquisition of +2 Arts qualification, allowed the Petitioners to prosecute +2 vocational course, which they completed successfully with issuance of the certificates under Annexure-1 series to 3 series, not only the Council erred in issuing the impugned clarification on 12.07.2016 under Annexure-6 but also Opp. Party No. 4 committed wrong in excluding the names of the Petitioners in the draft select list published by him on 01.08.2016 by not enlisting the Petitioners in the list of eligible Gomitras to get the benefit of appointment to the post of Live Stock Inspector as against 50% vacancies out of 46 posts so advertised.

2.5. It is also contended that the impugned clarification under Annexure-6 was issued basing on the decision taken by the Council in its proceeding dtd.20.11.2015 under Annexure-7. Since such a decision was taken by the Council much after the Petitioners were issued with the certificate showing their acquisition of +2 vocational course in the year 2013 and 2011 respectively, the decision taken in the proceeding of the meeting dtd.20.11.2015 under Annexure-7 and consequential clarification issued on 12.07.2016 under Annexure-6, have got no application to the entitlement of the Petitioners to get the benefit of appointment as against the post of Live Stock Inspector as eligible Gomitras.

2.6. It is also contended that there was no bar earlier save and except the decision taken in the proceeding dtd.20.11.2015 under Annexure-7, wherein for the first time it was decided not to allow a candidate to prosecute +2 vocational course after acquisition of +2 qualification under the self same Council. Relevant extract of the decision taken by the Council in its proceeding dtd.20.11.2015 under Annexure-7 is reproduced hereunder:-

> *"Resolved that the Committee after careful consideration and thread-bare discussion for 08 (Eight) nos. of cases referred to CHSE (O) in W.P.(C) No. 15319/2015 in its order dt.28.08.2015, the Certificates awarded to the candidates in Vocational stream be cancelled and withdrawn. Hence the first Certificate obtained from the Council be treated as genuine and the Certificate issued later in any stream be rejected/cancelled. Further resolved that all candidates seeking admission to any Higher Secondary course in any stream of the CHSE by depositing duplicate CLC/SLC shall furnish an affidavit that he/she has not obtained any Higher Secondary Degree before hand."*

2.7. Making all such submissions, learned counsel appearing for the Petitioners contended that since because of the impugned clarification issued by the Council under Annexure-6, Petitioners were not included in the draft select list published by Opp. Party No. 4 for their appointment as against the post of Live Stock Inspector in

terms of the selection process conducted by Opp. Party No. 4 pursuant to advertisement dtd.23.09.2013 and 24.07.2015, such a clarification is required to be set aside by this Court with a direction on the Opp. Parties to consider the Petitioners eligible to get the benefit of appointmnet as against the post of Live Stock Inspector as against 50% vacancies meant for Gomitras.

3. Mr. P.K.Rath, learned Sr. Counsel appearing for the Council placing reliance on the counter affidavit filed by Opp. Party No. 5, contended that all the Petitioners after passing their HSC examination, prosecuted their +2 Arts course under the Council and passed the +2 examination held in the year 1996, 2000 & 2004 respectively. But in order to get themselves admitted to the +2 vocational course, Petitioner Nos. 2 & 3 approached the concerned school authority seeking issuance of duplicate School Leaving Certificate vide Annexure-A/14 to the counter so filed by Opp. Party No. 14 and by taking a plea that School leaving certificate so obtained by them have been destroyed due to white ants. After getting the duplicate SLC, Petitioner got themselves admitted to prosecute +2 vocational course and passed the same in the examination conducted by the Council in the year 2013 and 2011 respectively.

3.1. It is also contended by the learned Sr. Counsel appearing for the Council that as provided under Regulation 123 of the Council's Regulation, any registered student of the Council may be admitted to the Annual Examination in Vocational Course, if he/she has completed in any Higher Secondary School/Junior College, recognized by the Council as a Vocational Centre, a regular course in a Vocational subject for not less than two academic years after passing the High School Certificate Examination of the Board of Secondary Education, Orissa or some other examination recognized by the Council as equivalent there to, and has been promoted to the second year class.

Regulation 123 of the Council's Regulation reads as follows:-

> *"123. Any registered student of the Council may be admitted to the Annual Examination in Vocational Course, if he/she has completed in any Higher Secondary School/Junior College, recognized by the Council is a Vocational Centre a regular course in a Vocational subject for not less than two academic years after passing the High School Certificate Examination of the Board of Secondary, Orissa or some other examination recognized by the Council as equivalent there to, and has been promoted to the second year class."*

3.2. Placing reliance on the aforesaid regulation learned Sr. Counsel appearing for the Council contended that a candidate will be entitled to admit himself/herself to prosecute vocational course only after passing the High School Certificate Examination so conducted by Board of Secondary Education, Odisha. Petitioners after passing of their High School Certificate Examination, prosecuted +2 Arts course under the Council by utilizing the School Leaving Certificate issued by the concerned school for that purpose. But by committing fraud on the Council as well as on the School, they obtained the duplicate SLC from the concerned school, for the

purpose of being admitted and to prosecute the +2 vocational course. Since Petitioners in order to get the benefit of admission to +2 vocational course, committed fraud on the Council and on the School and got themselves admitted by taking a false plea that they have lost the original SLC because of white ants and after obtaining such duplicate SLC, they got themselves admitted to prosecute the +2 vocational course, Petitioners are not eligible and entitled to get the benefit of the qualification of +2 vocational course.

3.3. It is also contended that much prior to the decision taken by the Council in its proceeding dtd.20.11.2015 under Annexure-7 and consequential letter issued by the Council on 12.07.2016 under Annexure-6, the regulation was very clear that a candidate only after passing his High School Certificate examination can prosecute +2 vocational course and not after acquiring +2 qualification of any other nature from the self same Council. Learned Sr. Counsel contended that since by committing fraud on the School as well as on the Council Petitioners acquired the +2 vocational course, they are not eligible and entitled to get any benefit of such acquisition of +2 vocational course. It is contended that since admittedly Petitioners have committed fraud to prosecute +2 vocational course, in view of the decision of the Hon'ble Apex Court in the case of ***S.P. Chengalvaraya Naidu (Dead) by Lrs. Vs. Jagannath (Dead) by Lrs. & Ors.*** (1994) 1 SCC 1 and ***Indian Oil Corporation Ltd. Vs. Rajendra D. Harmalkar*** (2022 SCC OnLine SC 486), Petitioners are not eligible and entitled to get any relief as prayed for. Hon'ble Apex Court in Para 6 of the Judgment in ***S.P. Chengalvaraya Naidu*** has held as follows:-

> *"6. The facts of the ne present case leave no manner of doubt that Jagannath obtained the preliminary decree by playing fraud on the court. A fraud is an act of deliberate deception with the design of securing something by taking another. It is a deception in order to gain by another's loss. It is a cheating intended unfair advantage of to get an advantage. Jagannath was working as a clerk with Chunilal Sowcar. He purchased the property in the court auction on behalf of Chunilal Sowcar. He had, on his own volition, executed the registered release deed (Ex. B-15) in favour of Chunilal Sowcar regarding the property in dispute. He knew that the appellants had paid the total decretal amount to his master Chunilal Sowcar. Without disclosing all these facts, he filed the suit for the partition of the property on the ground that he had purchased the property on his own behalf and not on behalf of Chunilal Sowcar. Non-production and even non-mentioning of the release deed at the trial is tantamount to playing fraud on the court. We do not agree with the observations of the High Court that the appellants-defendants could have easily produced the certified registered copy of Ex. B -15 and non-suited the plaintiff. A litigant, who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the court as well as on the opposite party."*

3.4. Similarly, Hon'ble Apex Court in the case of IOCL in Para 29 has held as follows:-

> *"29. In the present case, the original writ petitioner was dismissed from service by the Disciplinary Authority for producing the fabricated/fake/forged SSLC. Producing the*

> *false/fake certificate is a grave misconduct. The question is one of a TRUST. How can an employee who has produced a fake and forged mark sheet/certificate, that too, at the initial stage of appointment be trusted by the employer? Whether such a certificate was material or not and/or had any bearing on the employment or not is Immaterial. The question is not of having an intention or mens rea. The question is producing the fake/forged certificate. Therefore, in our view, the Disciplinary Authority was justified in imposing the punishment of dismissal from service."*

4. Mr. N.C.Das, learned counsel appearing for the Private Opp. Party Nos. 6 to 11 on the other hand made his submission basing on the stand taken in the counter so filed by Opp. Party No. 6. Mr. Das contended that since Petitioners after passing their HSC examination took admission to prosecute +2 Arts, which they passed successfully in the year 1996, 2000 & 2004 respectively, they could not have taken admission to prosecute the +2 vocational course. It is contended that in terms of the decision taken by the Committee in its proceeding dtd.20.11.2015 vide Resolution No. 2947, it was resolved that all candidates seeking admission to any Higher Secondary Course in any stream of the Council by depositing duplicate CLC/SLC shall submit an affidavit that he/she has not obtained any Higher Secondary Degree before hand. Petitioners by suppressing the said fact got themselves admitted to prosecute +2 vocational course. Since Petitioners by using their original SLC prosecuted their +2 Arts course and by utilizing the duplicate SLC so obtained by them by taking a false stand before the School that they have lost their original SLC as those have been destroyed by white ants, they should have filed an affidavit that they have not obtained any higher secondary degree beforehand.

4.1. Placing reliance on the provisions contained under Regulation 123 so relied on by the learned Sr. Counsel appearing for Opp. Party No. 5, Mr. Das contended that since Petitioners have acquired +2 vocational course by not disclosing about their previous qualification of +2 Arts so obtained by them from the Council, Council rightly issued the clarification under Annexure-6, basing on the decision taken in the proceeding under Annexure-7 and the provisions contained under Regulation 123. It is accordingly contended that no illegality or irregularity has been committed by the Council in issuing the clarification in question.

4.2. It is also contended that some of the Private Opp. Parties challenging the placement of the Petitioners in the provisional draft merit list of Gomitra so published in the year 2013 and 2015 under Annexure-4 also approached this Court in W.P.C.(OA) No. 1587 of 2016. The present Petitioners also were Party to the writ petition in W.P.C.(OA) No. 1587 of 2016. It is contended that the prayer made in the present writ petition when was allowed by this Court vide its order dtd.18.12.2018, Opp. Party No. 4 published the select list by including the names of the present Petitioners and similarly situated candidates in the merit list for their appointment as against the post of Live Stock Inspector to the extent of 50% of the vacancy meant for Gomitras. But the order passed on 18.12.2018 was set aside vide order dtd.13.12.2021 in Writ Appeal No. 115 of 2019. After the order passed on 18.12.2018 was set aside in Writ Appeal No. 115 of 2019, Opp. Party No. 4 herein

while appearing before this Court on 19.04.2023, submitted that a fresh merit list of eligible candidates will be prepared for appointment of Live Stock Inspector on contractual basis. The order passed by this Court on 19.04.2023 in W.P.C.(OA) No. 1587 of 2016 is reproduced hereunder:-

> *"2. Pursuant to the order passed by this Court on 12.04.2023, Dr. Bira Kishore Parida, CDVO, Jagatsinghpur is present before this Court. He fairly contended that the earlier merit list was published basing on the order passed by this Court in W.P.(C) No. 16810 of 2016. Since in the meantime the order passed on 18.12.2018 in W.P.(C) No. 16810 of 2016 has been set aside by this Court vide order dtd.13.12.2021 in Writ Appeal No. 115 of 2019, a fresh merit list will be prepared and it will be published within a period of four (4) weeks from today.*
>
> *3. List this matter on 15.05.2023. Fresh merit list be published before the next date.*
>
> *4. Personal appearance of O.P. No. 3 is dispensed with.*
>
> *5. Let a copy of the writ petition be served on Mr. Prafulla Kumar Rath, who has entered appearance for the Council of Higher Secondary Education in course of the day."*

4.3. Pursuant to the order passed by this Court on 19.04.2023, a fresh merit list was prepared by Opp. Party No. 4 in its proceeding dt.09.05.2023 of Gomitras as well as Non-Gomitra vocational applicants for the post of contractual Live Stock Inspector of the year 2013 & 2015. Basing on the fresh merit list so published in its proceeding dt.09.05.2023 in respect of Gomitra & Non-Gomitra eligible candidates, for their appointment as contractual Live Stock Inspector, this Court vide order dtd.26.06.2023 disposed of W.P.C.(OA) No. 1587 of 2016 inter alia directing Opp. Party No. 4 to take consequential action in the matter by providing appointment to the Petitioners in W.P.C.(OA) No. 1587 of 2016 as against the post of Live Stock Inspector on contractual basis. The order passed by this Court on 26.06.2023 is reproduced hereunder:-

> *"2. Heard Mr. N.C. Das, learned counsel for the Petitioners, Mr. M.K. Balabantaray, learned Addl. Government Advocate and Mr. S.K. Das, learned counsel appearing for Opposite Party Nos.6, 7 and 14.*
>
> *3. The present Writ Petition was initially filed by the Petitioners inter alia with the following prayer:-*
>
> *"Under the above circumstances, this Hon'ble Tribunal be graciously pleased to issue notices to the respondents, calling upon them to show cause, as to why the Provisional Draft Merit List of Gomitra Applicants for the post of Contractual Livestock Inspectors in the year 2013 and 2015 published by the Respondent No.3 under Annexure-4 and 5 respectively to this original Application shall not be re-casted, if the Respondents fail to show cause or submit insufficient cause, this Hon'ble Tribunal be pleased to direct the Respondent No.1 to 4 to cause an enquiry in the allegation petition/objection filed by the applicants under Annexure-7 to this Original Application and take a decision in the said allegation made by the applicants by affording reasonable opportunities of being heard to the applicants along with the Respondent No.6 to 20 and thereafter final merit list be published, otherwise the applicant will be suffered irreparably. Further this Hon'ble Court be pleased to direct the Respondent No.3 and 4 to take drastic action against the applicants who have committed fraud/ forgery in the process of selection for recruitment*

for the post of Livestock Inspect in the District of Jagatsinghpur under Gomitra category in accordance with law".

4. It is contended that even though pursuant to the order passed by this Court on 19.04.2023, a fresh merit list of non-Gomitra Vocational applicants for the post of Contractual Livestock Inspector was produced by the Chief District Veterinary Officer, Jagatsinghpur vide AnnexureB/3 to the affidavit filed on 10.05.2023 and in the said fresh merit list, the names of the present Petitioners have been included, but the Opposite Party No.3 is not issuing necessary order of appointment appointing the Petitioners as against the available vacancies.

5. In view of such position and taking into account the submissions made by the learned counsel for the Petitioners that all the Petitioners have been included in the fresh merit list so published by the C.D.V.O., Jagatsinghpur vide Annexure-B/3, this Court while disposing the writ petition directs Opposite Party No.3 to take consequential action in the matter by providing appointment to the Petitioners as against the available vacancies. Such an exercise shall be undertaken by the Opposite Party No.3 within a period of one (1) month from the date of receipt of this order.

6. Accordingly, the Writ Petition stands disposed of."

4.4. It is also contended that basing on the clarification issued by the Council on 12.07.2016 under Annexure-6, when the names of the present Petitioners were not reflected in the merit list of eligible Gomitras for their appointment as Live Stock Inspector on 01.08.2016, Petitioners herein challenged the same in W.P.C.(OAC) No. 2796 of 2016. But the said writ petition was disposed of as not pressed vide order dt.19.07.2023. Order dt.19.07.2023 so passed in W.P.C.(OAC) No. 2796 of 2016 is reproduced hereunder:-

"2. Heard.

3. In course of hearing, Mr. S.K. Das, learned counsel for the Petitioner contended that the issue is now pending for final adjudication before this Court in W.P.(C) No. 18225 of 2023.

4. Accordingly, learned counsel for the Petitioner does not want to press this writ petition.

5. In view of such submission, the Writ Petition is disposed of as not pressed."

4.5. It is further contended that even though Petitioners herein were Opp. Parties in W.P.C.(OA) No. 1587 of 2016 and the matter was disposed of after hearing the learned counsel appearing for the Parties on 26.06.2023, but the said Opp. Parties along with some other persons challenging the merit list so published by Opp. Party No. 4 in its proceeding dt.09.05.2023 approached this Court in W.P.(C) No. 18225 of 2023 inter alia with the following prayer:-

"Under the above circumstances, it is therefore humbly prayed that the Hon'ble Court be graciously pleased to quash the proceeding dtd.09.05.2013 under Annexure-6 and the consequential select list under Annexure-7 and further pleased to direct the Opposite Parties No. 3 and 4 to prepared a fresh merit list upon inclusion of the name of the Petitioners therein at appropriate places pursuant to the conditions of the advertisement/selection and if the petitioners found suitable be appointed as Live Stok Inspectors with all benefits within a stipulated period as deem fit and proper;

And/or pass any other appropriate writ/writs, order/orders and direction/directions in the fitness of the case.

And for this act of kindness as in duty bound the petitioners shall ever pray."

4.6. It is contended that this Court while issuing notice of the matter vide order dtd.21.06.2023 in W.P.(C) No. 18225 of 2023 though granted liberty to the authorities to proceed with the merit list prepared pursuant to the order passed by this Court in W.P.C.(OA) No. 1587 of 2016, but directed not to fill up 6 posts of Live Stock Inspector till the next date.

4.7. It is contended that in view of the order passed on 21.06.2023 though Opp. Party No. 4 was permitted to proceed with the merit list and not to fill up 6 posts of Live Stock Inspector, but Opp. Party No. 4 on the face of such order passed on 21.06.2023, did not provide appointment to the eligible candidates, whose names were reflected in the merit list published on 09.05.2023 for both Gomitra and Non-Gomitra category candidates.

4.8. It is however contended that since Petitioners herein prior to their acquiring +2 vocational course had prosecuted +2 Arts under the Council, they are not eligible and entitled to prosecute +2 vocational course in view of the specific provisions contained under Regulation 123 of the Councils' Regulation. It is also contended that by making false affidavits before the school authority that Petitioners have lost their original School Leaving Certificates because of white ants and by providing the duplicate SLC, they got themselves admitted to prosecute +2 vocational course, which they passed in the year 2013 & 2011 respectively. Since Petitioners by committing fraud on the School as well as on the Council managed to prosecute +2 vocational course, Petitioners are not eligible and entitled to get any relief as prayed for in both the writ petitions as per the settled principle of law that fraud vitiates everything. Not only that in view of the order passed on 19.07.2023 in W.P.C.(OAC) No. 2796 of 2016, the prayer made in W.P.(C) No. 18225 of 2023 is not entertainable.

5. Mr. B.B. Mohanty, learned counsel appearing for Opp. Party No. 14 while relying on the submissions made by the learned Sr. Counsel appearing for the Council, contended that Petitioners more particularly Petitioner Nos. 2 & 3 prosecuted their +2 Arts under the Council by producing the original SLC so issued in their favour by the respective schools. But by taking a false stand that they have lost their original SLC because of white ants, they got the duplicate by making applications under Annexure-A/14 to the counter before the school authority. After obtaining such duplicate SLCs, Petitioner Nos. 2 & 3 along with Petitioner No. 1 prosecuted their +2 vocational course under the Council.

5.1. As provided under the relevant recruitment rule i.e. Odisha Veterinary Technical Service, Group-C (Recruitment & Conditions of Service) Amendment Rules, 2013, 50% of the vacancies as against the post of Live Stock Inspector is required to be filled up from amongst the candidates, who have passed the +2

vocational course in Animal Husbandry/Diary/Poultry/Meat/Animal Production from the recognized Educational Institution/Board. Petitioners since have acquired the +2 vocational course by committing fraud on the School as well as on the Council, no illegality or irregularity has been committed by the Council while issuing the clarification under Annexure-6 basing on the proceeding of the meeting of the Council under Annexure-7.

5.2. Mr. Mohanty further contended that the present writ petition with its prayer when was allowed by this Court vide Judgment dtd.18.12.2018, the matter was challenged by some of the Private Opp. Parties in Writ Appeal No. 115 of 2019. Vide order dtd.13.12.2021 the order passed by the learned Single Judge on 18.12.2018 was set aside and the matter was remitted for fresh disposal. While remitting the matter, the Writ Appellate Court also directed for listing of the matter along with records of W.P.C.(OAC) No. 1587 of 2016 and W.P.C.(OAC) No. 2796 of 2016. It is contended that W.P.C.(OAC) No. 1587 of 2016 was filed by some other private Opp. Parties inter alia with the prayer to recast the provisional draft merit list of Gomitra published by Opp. Party No. 4 in the year 2013 & 2015, wherein the names of the present Petitioners were reflected at Sl. Nos.11, 2 & 1 respectively.

5.3. It is contended that in the provisional draft merit lit of Gomitra when the names of present Petitioners were reflected at Sl. Nos. 11, 2 & 1 respectively, objections were filed inter alia taking the stand that since Petitioners after acquiring their +2 Arts course, have prosecuted and passed the +2 vocational course, they are not eligible and entitled to get the benefit of appointment as against the post of Live Stock Inspector to the extent of 50% meant for Gomitras.

5.4. However, basing on the order passed by the learned Single Judge initially on 18.12.2018 Opp. Party No. 4 though had published a merit list of eligible Gomitras by including the names of the Petitioners, but pursuant to the order passed by this Court on 19.04.2023, a fresh merit list was published by Opp. Party No. 4 by deleting the names of the Petitioners from the said list in its proceeding dt.09.05.2023. This Court while disposing the writ petition vide order dtd.26.06.2023, directed Opp. Party No. 4 to act upon the merit list so published in the proceeding of Opp. Party No. 4 dt.09.05.2023. But challenging the merit list of Gomitra issued by the Opp. Party No. 4 on 09.05.2023, Petitioners approached this Court in W.P.(C) No. 18225 of 2023. This Court while issuing notice of the matter passed an interim order to the effect that the authorities may proceeding with the appointment in terms of the merit list so prepared on 09.05.2023, but 6 posts of Live Stock Inspector shall not be filled up till the next date.

5.5. It is contended that Petitioners in the present writ petition are Petitioner Nos. 1, 2 & 6 in the connected W.P.(C) No. 18225 of 2023. It is also contended that in view of the interim order passed by this Court on 21.06.2023, the names of the Private Opp. Parties though have been reflected in the final merit list published by

Opp.Party No. 4 on 09.05.2023, but they are not getting the benefit of appointment as against the post of Live Stock Inspector to the extent of 50% in terms of 2013 recruitment Rule. It is accordingly contended that the relief as claimed by the Petitioners in the present writ petition as well as in W.P.(C) No. 18225 of 2023 are not entertainable and both the writ petitions are liable for dismissal as the Petitioners have acquired +2 vocational course by submitting false hood before the school authority as well as the Council.

6. Learned Addl. Govt. Advocate on the other hand made his submission basing on the materials available on record. Learned Addl. Govt. Advocate contended that basing on the clarification issued by the Council, Opp. Party No. 4 when prepared a fresh merit list on 01.08.2016, the same was challenged by the present Petitioners before this Court in W.P.(C) No. 2796 of 2016 and the clarification issued by the Council on 12.07.2016 was challenged in W.P.(C) No. 16810 of 2016. Basing on the order passed by this Court on 18.12.2018, a fresh merit list was published by including the names of the present Petitioners. But after the order passed by this Court on 18.12.2018 was set aside vide order dtd.13.12.2021 in Writ Appeal No. 115 of 2019 and pursuant to the order passed by this Court on 19.04.2023 in W.P.C.(OA) No. 1587 of 2016, fresh merit list was published on 09.05.2023. However, in view of the interim order passed on 21.06.2023, Opp. Party No. 4 is not in a position to act on the said merit list by providing appointment to the eligible Gomitra candidates as against the post of Live Stock Inspector to the extent of 50% of the vacancy.

7. To the submissions made by the learned counsel appearing for the Council as well as learned counsel appearing for the State and Private Opp. Parties, learned counsel appearing for the Petitioners contended that even though as per Regulation 123, a candidate is eligible to be admitted to prosecute +2 vocational course after passing the High School Certificate Examination, but under the Regulation there is no bar for such candidates to prosecute +2 vocational course after passing their +2 course under the self same Council. Since under the Regulation there is no bar for acquisition of such additional qualification of +2 vocational stream and Petitioners after being allowed by the Council have acquired such qualification, the same cannot be taken away basing on the decision taken by the Council in its proceeding under Annexure-7 and the impugned clarification issued under Annexure-6. It is accordingly contended that Petitioners since possess the +2 vocational qualification, they are eligible to get the benefit of appointment as eligible Gomitras to the post of Live Stock Inspector.

8. Having heard learned counsel appearing for the Parties and after going through the materials available on record, this Court finds that the names of the present Petitioners were included in the draft merit list of Gomitra so published in the year 2013 under Annexure-4. Challenging the inclusion of the names of the present Petitioners when objections were raised by the private Opp. Parties, Opp. Party No. 3 when sought for clarification from the University as well as from the

Govt., Govt.-Opp. Party No. 1 vide letter dtd.05.07.2016 though clarified that if +2 vocational certificate submitted by the candidate are genuine, they should be considered for the selection to the post of Live Stock Inspector as per the recruitment Rule, but the Council while issuing the clarification on 12.07.2016 under Annexure-6 clearly held that a candidate who has passed the 2nd +2 Higher Secondary Course fraudulently, the 2nd course certificate is to be rejected.

8.1. As found from the record and as admitted by the Petitioners, all the Petitioners after passing their High School Certificate Examination, prosecuted their +2 Arts course under the Council and passed the said examination successfully in the year 1996, 2000 and 2004 respectively vide Annexure-1 series, 2 series & 3 series. As found from the record, Petitioner Nos. 2 & 3 by taking a false plea that they have lost their SLC certificate because of white ant, moved the concerned school authority vide Annexure-A/14 for issuance of duplicate SLCs. After obtaining such duplicate SLCs, they got themselves admitted to prosecute +2 vocational course and passed the same in the year 2013 and 2011 respectively. Since by taking a false stand before the school authority vide Annexure-A/14, Petitioner Nos. 2 & 3 obtained duplicate SLCs and prosecuted their +2 vocational stream under the Council to which they are otherwise not eligible in view of the provisions contained under Regulation 123, benefit of such qualification is not to be extended. Not only that in view of the clear provision contained under Regulation 123, a candidate is only eligible to get himself admitted to prosecute +2 vocational course after passing his High School Certificate Examination.

8.2. Since Petitioners after passing their HSC Examination prosecuted +2 Arts course and passed the same under the Council, as per the considered view of this Court, qualification of +2 vocational course so acquired by the Petitioners in the year 2013 and 2011 respectively vide Annexure-1 to 3 series, cannot be used by them to get the benefit of appointment as Live Stock Inspector as eligible Gomitra candidate. Petitioner Nos. 2 & 3 to get themselves admitted to prosecute +2 vocational stream, have committed fraud on the School as well as on the Council. Placing reliance on the decisions of the Hon'ble Apex Court in the case of ***S.P. Chengalvaraya Naidu & Indian Oil Corporation Ltd.*** as well as the provisions contained under Regulation 123, this Court is of the view that Petitioners are not eligible and entitled to get any relief as fraud vitiates everything. This Court accordingly dismiss both the writ petitions and vacate the interim order dt.21.06.2023. While vacating the interim order, this Court directs Opp. Party Nos. 3 & 4 to comply with the direction issued by this Court on 26.06.2023 in W.P.C.(OA) No. 1587 of 2016 within a period of two (2) weeks from the date of receipt of this order.

9. Both the writ petitions are dismissed accordingly.

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2024 (II) ILR-CUT-298

BIRAJA PRASANNA SATAPATHY, J.

W.P.(C) NO. 978 OF 2024 WITH BATCHES

[W.P.(C) NOS.1385,1496,1499,1560,1945,1591,1599,1712 OF 2024]

CHINTAMANI BHUIAN & ORS. ……Petitioners

-V-

STATE OF ODISHA & ORS. ……Opp.Parties

SERVICE LAW – Appointment – Government issued resolution/ guidelines for engagement of Junior Teacher (schematic) in both categories that is category 1 for class I to V and category 2 for class VI to VIII – The Opp.Party published the draft select list violating the terms of the provision prescribed in para 8.3 of the resolution – Whether the selection list prepared violating the prescribed norms is sustainable? – Held, No – This court is inclined to quash the draft result sheet published by the authority.

Case Laws Relied on and Referred to :-

1. Civil Appeal No. 4807 of 2022 : Union of India & Ors. Vs. V. Mahendra Singh.
2. (2008) 3 SCC 512 : K. Manjushree Vs. State of Andhra Pradesh & Anr.
3. (2011) 12 SCC 85 : Bedanga Talukdar Vs. Saifudaullah Khan & Ors.
4. (2023) SCC OnLine SC 1583 : Pavnesh Kumar Vs. Union of India & Ors.
5. (2020) 18 SCC 673 : Vishal Ashok Thorat & Ors. Vs. Rajesh Shrirambapu Fate.
6. (1996) 6 SCC 282 : SECY.(Health) Deptt.of Health & F.W.& Anr. Vs. Dr.Anita Puri & Ors.
7. W.A. No. 1822 of 2023 & batch : Kabita Jena & Ors. Vs. Rajat Kumar Mishra & Ors.
8. 2023 SCC OnLine SC 985 : Devesh Sharma Vs. Union of India & Ors.
9. 2022 SCC OnLine SC 954 : Satyajit Kumar & Ors. Vs. State of Jharkhand & Ors.
10. (2021) 5 SCC 424 : Anmol Kumar Tiwari & Ors. Vs. State of Jharkhand & Ors.
11. (2013) 4 SCC 340 : State of Odisha & Ors. Vs. MESCO Steels Ltd. & Anr.

For Petitioners : Mr. S.K.Das.

For Opp.Parties : Mr. A.K.Parija, Advocate General
with Mr. Saswat Dash, A.G.A. & Mr. M.K.Balabantaray, A.G.A.

JUDGMENT Date of Hearing : 31.01.2024 : Date of Judgment : 12.03.2024

BIRAJA PRASANNA SATAPATHY, J.

Since all these writ petitions involve similar question of law and fact and have been filed challenging the process of selection adopted by Opp. Party No. 2 with regard to recruitment to the post of Junior Teacher (Schematic) in the Primary and Upper Primary Schools under different districts of Odisha, all were heard analogously and disposed of by the present common order. However, for the sake of convenience and considering the fact that pleadings were completed with filing of counter affidavit as well as rejoinder affidavit and written notes of submission in W.P.(C) No. 978 of 2024, the same was treated as the lead case in the present batch of writ petitions and the facts stated in the said writ petition is to be taken into consideration for effectual adjudication of the dispute.

2. Learned counsel appearing for the Petitioners in W.P.(C) No. 978 of 2024 contended that for recruitment to the post of Junior Teacher (Schematic) advertisement/

notice was issued on 10.09.2023 under Annexure-2 by Opp. Party No. 2 i.e. Odisha School Education Programme Authority (in short OSEPA). It is contended that such a notice under Annexure-2 was issued in pursuance of the School & Mass Education Department, Odisha Resolution No. 20336/SME dtd.22.08.2023 and letter No. 21742/SME dtd.08.09.2023.

2.1. It is contended that in the resolution issued by the Govt.-Opp. Party No. 1 on 22.08.2023 under Annexure-1 to the writ petition, the guideline for engagement of Junior Teacher (Schematic) was prescribed. Para 5 of the resolution deals with the eligibility criteria to fill up the post of Junior Teacher (Schematic) in both category i.e. Category 1 for Class I to V and Category 2 for Class VI to VIII. Para 5 of the resolution reads as follows:-

> ***"5. ELIGIBILITY***
> *Candidates securing percentage of marks in their academic qualification as per the eligibility mentioned below can apply for the online computer-based test for engagement as Junior Teacher (Schematic). The percentage of marks secured by the candidates in aggregate out of the total marks will be taken into consideration for eligibility.*
>
> ***5.1 (1) CATEGORY-1 (For Classes I to V)***
> *(a) Higher Secondary (+2) or its equivalent with at least 50% marks and 2-year Diploma in Elementary Education (by whatever name known)*
> *OR*
> *Higher Secondary (+2) or its equivalent with at least 45% marks and 2-year Diploma in Elementary Education (by whatever name known), in accordance with the NCTE (Recognition Norms and Procedure) Regulations, 2002.*
>
> *Higher Secondary (+2) or its equivalent with at least 50% marks and 4-year Diploma in Elementary Education (B.El.Ed.)*
> *OR*
> *Higher Secondary (+2) or its equivalent with at least 50% marks and 2-year Diploma in Education (Special Education)*
> *OR*
> *Graduation and two-year Diploma in Elementary Education (by whatever name known)*
> *AND*
> *b. Pass in the Odisha Teacher Eligibility Test-I (OTET-I)*
> *c. Candidates must have Odia as MIL up to class-X or pass in odia language test equivalent to Matric standard conducted or declared equivalent by Board of Secondary Education, Odisha except for the candidates as mentioned under Para 5.2.*
>
> ***(ii) CATEGORY-2 (For Classes VI to VIII)***
> *a. Graduation and two-year Diploma in Elementary Education (by whatever name known)*
> *OR*
> *At least 50% marks either in Graduation or in Post-Graduation and B.Ed.*
> *OR*
> *Graduation with at least 45% marks and 1-year Bachelor of Education (B.Ed.) in accordance with the NCTE (Recognition Norms and Procedure) Regulations issued from time to time in this regard.*
> *OR*

Higher Secondary (+2) or its equivalent with at least 50% marks and 4-year Bachelor in Elementary Education (B.El.Ed.)

OR

Higher Secondary (+2) or its equivalent with at least 50% marks and 4-year B. A/B.Sc.Ed or B.A.Ed./B.Sc.Ed.

OR

Graduation with at least 50% marks and 1-year B.Ed (Special Education)

OR

Post-Graduation with a minimum 55% marks or equivalent grade and three-year integrated B.Ed-M.Ed.

AND

b. Pass in Odisha Eligibility Test-II (OTET-II)

c. Candidates must have odia as MIL up to class-X or pass in odia language test equivalent to Matric standard conducted or declared equivalent by Board of Secondary Education, Odisha except for the candidates as mentioned under Para 5.2.

***5.2** In order to be eligible for Urdu/Bengali/Telugu Junior Teacher (Schematic), candidates must have passed Urdu/ Bengali/Telugu as the case may be as MIL up to High School Certificate (HSC) standard. Since their engagement is likely to be held in the bilingual schools, such candidates shall produce a certificate from the Head Master of the concerned school to the effect that she/he has passed HSC examination in odia medium.*

***5.3** Persons with Diploma in Education (Special Education) or B.Ed. (Special Education) qualification shall undergo, after appointment, an NCTE recognised 6-month Special Programme in Elementary Education.*

***5.4** Relaxation of 5% in minimum qualifying marks shall be allowed to the candidates belonging to reserved categories, such as SC, ST, SEBC and PwDs.*

***5.5** Candidates can apply in Category-1, in category-2 or both as per their eligibility. In case a candidate applies for both the categories, she/he will have to exercise irrevocable option of preference (between category 1 and 2) for engagement at the time of submission of application.*

Explanation

i. For the purpose of equivalency of Higher Secondary (+2), examinations conducted by the institutions declared equivalent by the Council of Higher Secondary Education, Odisha shall be considered.

ii. For the purpose of equivalency of Graduation and Post- Graduation, examinations conducted by the institutions declared equivalent by the Universities of Odisha shall be considered. The said university must have been affiliated to UGC.

iii. For the purpose of degree in Teacher Education (B.Ed.), B.Ed. Degree of other universities declared equivalent with corresponding degree of the Universities of Odisha and a course recognised by the NCTE shall be considered.

iv. For the purpose of two years Diploma in Education (Special Education) or one year B.Ed, (Special Education), a course recognised by Rehabilitation Council of India (RCI) shall be considered. The candidate must have registered his/her name with the RCI and at the time of submission of application, she/he has to submit the RCI Registration certificate.

v. Candidates possessing Academic/Training qualifications from Boards/Universities /Institutions outside Odisha shall have to produce the authenticated proof of equivalency, affiliation of the ir institution to a recognised University and recognition of such training course and institute by NCTE, failing which she/he shall not be considered as eligible for selection.

vi. A candidate furnishing certificates, mark sheets with grades and grade points shall have to also furnish numerical equivalence of grades/grades point from the examining bodies failing which she/he shall not be treated as eligible for selection.
vii. In case of compartmental examination, the fail marks secured in the subject(s) is to be deducted from the total marks and pass marks of the compartmental examination shall be added to the total marks for arriving at the effective percentage of marks."

2.2. Similarly, Para 8 of the resolution prescribes the selection procedure to be followed for such recruitment to the post of Junior Teacher (Schematic). Para 8 of the resolution is reproduced hereunder:-

"8. SELECTION PROCEDURE

8.1 Publication of Master List

After expiry of last date of submission of online application form, list of the candidates for each category with respect to their first preference district as submitted by them at the time of submission of application form will be published in OSEPA website. Information on subsequent preference districts of each candidate will also be available in OSEPA website on search.

8.2 Online Computer-Based Test

An online computer-based test will be conducted by OSEPA /an Authorised Agency as per the syllabus contained in the advertisement to be published before the recruitment.

8.3 District wise and Category wise draft merit list

District wise and category wise draft merit list will be published in OSEPA website. Draft merit list will be prepared taking into consideration all district preference submitted by individual candidates in order of preference followed by merit rank je for a particular district, after exhausting all candidates having 1st preference, subsequent preferences will be considered. In case of a tie i.e. when two or more candidates obtain equal score, inter-se merit of such candidates shall be decided in the order as mentioned below:
i. Date of birth (Older candidate will be above other candidates)
ii. Percentage of marks in qualifying examination i.e. in Higher Secondary (or its equivalent) will be considered. In case of further tie, marks secured in Graduation will be taken into consideration followed by post-Graduation marks.

If a tie still persists, Government will issue suitable instructions for breaking the tie.

For a particular post, in a category within district, district preference will be preferred over merit.

8.4 Document verification

After publication of the draft merit list, all candidates in the said list will be called for verification of original documents at their respective district headquarters. All documents required for verification will be notified by OSEPA in the detailed advertisement in OSEPA website.

During document verification, if any candidate is not able to produce the essential document(s) in support of his/her claim of the Social/Special category/Age proof/Academic & Training qualification/RCI registration certificate as per information provided in the application form, the candidature will be rejected and his/her name will be marked as deleted in the draft merit list. The candidates have to produce the Academic and Training qualification/RCI registration certificate (in case of Special Education Candidates) acquired/issued on or before the last date of submission of online application.

8.5 <u>Preparation of District wise Provisional Merit List and Approval</u>
Provisional merit list will be prepared after document verification of the candidates placed in the draft merit list. Then objections will be invited from the candidates who are placed in the provisional merit list and rejection list. The provisional merit list will be approved by the Competent Authorities at respective districts after verification of the original documents and inviting objections from candidates within specific time period as mentioned in the calendar of activities issued by the School & Mass Education Department.

8.6 <u>Publication of District wise Final Merit List</u>
District wise final merit list will be published at concerned District websites as well as OSEPA website after approval by the Competent Authority.

8.7 <u>Counselling</u>
The candidates will be called for allocation of schools through counseling by respective districts. Separate notifications will be issued and displayed by respective districts in their District websites as well as OSEPA website. Vacancies remain due to unavailability of eligible candidates, rejection and non-joining will be carried forward and recruitment will be done subsequently as per requirement. There will be no waiting list."

2.3. Placing reliance on the provisions contained under Para 8 of the resolution, learned counsel appearing for the Petitioners contended that as provided under Para 8.1, after expiry of last date of submission of online application form, list of the candidates for each category with respect to their first preference district as submitted by them at the time of submission of application form will be published in OSEPA website. Information on subsequent preference district of each candidate will be available in OSEPA website on search. After such publication of the Master list, as provided under Para 8.2, an online Computer Based Test will be conducted by OSEPA/ an authorized agency as per the syllabus contained in the advertisement to be published before the recruitment. It is contended that after publication of the Master list in terms of the provisions contained under Para 8.1 of the Resolution, the Computer Based Test was conducted by an agency namely EdCIL (India Limited), which is a 'Mini Ratna', Category-I CPSE, Govt. of India.

2.4. It is contended that after conduct of such Computer Based Test by the aforementioned agency, as provided under Para 8.3 of the resolution, a district wise and category wise draft merit list is required to be published in OSEPA Website. As further provided under Para 8.3, draft merit list should be prepared taking into consideration all district preference submitted by individual candidates in order of preference followed by merit rank i.e. for a particular district. After exhausting all candidates having 1st preference, subsequent preference will be considered. It is also indicated in Para 8.3 that for a particular post, in a Category within district, district preference will be preferred over merit.

2.5. It is contended that as provided in the resolution a candidate with having the requisite eligibility can make his application for both Category 1 and Category 2, but the fact remains that after conduct of the Online Computer Based Test as provided under Para 8.2, district wise and category wise draft merit list was to be published by

OSEPA in its website in terms of the provisions contained in Para 8.3. But without complying the provisions contained under Para 8.3 of the resolution, when the impugned draft result sheet of Junior Teacher (Schematic)-2023 was published in the OSEPA website under Annexure-6, but not in terms of the provisions contained under Para 8.3 of the resolution, all these present batch of writ petitions including the present writ petition was filed challenging such illegal action of OSEPA in not adhering to the provisions contained under Para 8.3.

2.6. It is contended that since as provided under Para 8.3 of the resolution under Annexure-1, Opp. Party No. 2 was required to publish district wise and category wise merit list taking into consideration all district preference submitted by individual candidates in order of preference followed by merit rank for a particular district, the draft result sheet published under Annexure-6 series is not in terms of the provisions contained under Para 8.3. It is accordingly contended that such a draft merit list published by OSEPA under Annexure-6 is not sustainable in the eye of law.

2.7. It is also contended that without publishing the district wise and category wise draft merit list as provided under Para 8.3, when Opp. Party No. 3 issued the notice in terms of the provisions contained under Para 8.4, asking the candidates to go for verification of their original documents in their respective district headquarters, this Court considering the submission made by the learned counsel appearing for the Petitioners as well as learned Advocate General appearing for the State while directing the State to obtain instruction vide order dtd.19.01.2024, passed an interim order to the following effect in I.A. No. 1012 of 2024:

> *"1. Since basing on the impugned draft result sheet published under Annexure-6 series, verification of documents has been fixed to 20th & 21st of this month, let the process with regard to verification of the documents may continue on the date fixed, but no final decision be taken with regard to final selection and appointment till 24th January, 2024."*

2.8. Learned counsel for the Petitioners contended that after passing of the interim order by this Court on 19.01.2024, Opp. Party No. 2 though published the district wise merit list of candidates for each of the 30 districts of the State and an affidavit was filed in that regard by Opp. Party No. 2, a rejoinder affidavit was filed by the Petitioners to the affidavit so filed by Opp. Party No. 2 on 24.01.2024.

3. The stand taken by Opp. Party No. 2 in Para 5 & 6 of the affidavit dtd.24.01.2024 is reproduced hereunder:-

> *"**5.** That with regard to the statements made in Paragraph -5 of the affidavit of the Opp. Party No.2, it is humbly submitted that Clause-8 of the Government resolution dtd:22.08.2023 given a detail procedure and stages for selection, which are summaries as follows*:
>
> ➢***Clause-8.1****- On expiry of last date of submission of application form, a master list of candidates of each category with respect to their 1" preference districts is to be published in the OSEPA website.*
>
> ➢ ***Clause-8.2****- Online computer based test is to be conducted.*

➢***Clause-8.3***- *Draft merit list is to be prepared taking into consideration the district preference of the individual candidates for a particular district. After exhausting of candidates having 1" preference, subsequent preference will be considered.*

It means the merit list is to be prepared and published with the candidates from their 1" preference districts in the descending order of their mark in the CBT.

Nowhere in Clause-8.3, it has been authorized to the OSEPA to prepare a state wise combined merit list and then allot the candidates to their 1 preference districts. On the list is to be prepared on the basis of the candidates of the 1" preference districts. Therefore the cutoff mark may vary from one district to another. That means there will be 30 cutoff marks for 30 districts of the State. But as it understood from the affidavit filed by the Opp. Party No.2, it has prepared and state wise combined list and then allot them to the district. This is quite illegal and wrong.

➢***Clause-8.4***- *From these draft merit list candidates are to be directed to cause their original documents verified in the respective districts headquarters.*

➢***Clause-8.5***- *After verification of documents a provisional merit list is to be prepared, district wise and the merit list will be put to objection if any by any candidates and then it has to get its approval from the competent authority of respective districts.*

➢***Clause-8.6***- *On completing all the above procedure the district wise final merit list to be published in the OSEPA website after approval of the competent authority.*

➢***Clause-8.7***- *All these candidates named in the final merit list of particular districts are called upon for counseling for their choice of posting of school.*

In the aforesaid premises the procedure prescribed under the Government resolution dtd:22.08.2023 has to be followed scrupulously. But in the case in hand the Government guideline has been violated by the Opp. Party No.2 at the ***stage of Clause-8.3*** *i.e. preparation of district wise and category wise fresh merit list. Instead of preparing the district wise merit list the Opp. Party No.2 has prepared a state wise list under Annexure-6 series and basing on such a list under Annexure-6 series, directed for document verification, which was conducted on 20th and 21 January, 2024. Therefore there is clear violation of the Clause-8.3 of the Government resolution dtd:22.08.2023.*

6. *That with regard to the statements made in paragraph-6 of the affidavit filed by the Opp. Party No.2 it is humbly submitted that it is quite incorrect and misleading on the part of the Opp. Party No.2 to say that he has prepared the district wise and category wise draft merit list subsequently across the 30 districts and kept in a sealed covered. The aforesaid statement made in Paragraph-6 well justify that the Opp. Party No.2 violated the guideline. Furthermore such a procedure adopted by the Opp. Party No.2 is unacceptable and illegal for the following reasons:*

➢ *If the district wise and category wise list was prepared and kept in a sealed covered after the order of the Hon'ble Court, it is not understood how could the Opp. Party No.2 in Paragraph-5 of the affidavit stated that the documents verification of 8829 candidates of Category-I was completed on 20.01.2014 and 7989 candidates from Category-II have been completed on 21.02.2024. From which list he has done it. When the list is in a sealed covered and not made public, how the verification could be possible. Hence it is a complete misleading statement.*

➢ *The petitioners have already filed an affidavit with documents on 24.01.2024 clarifying the position with evidence that the so called district wise and category wise list is being prepared by the state authorities as alleged and kept in sealed cover is candidates from Annexure-6 series i.e. state wise list cannot be said to be in consonance*

*with **Clause-8.3** of the Government guideline, hence the statements made in Paragraph-6 of the affidavit are absolutely baseless and misleading.*

➢When the draft list is in a sealed covered, it is not understood how could the Opp. Party No.2 called the candidates for verification of documents and from which list. This proves Annexure-6 series is a state wise list."

3.1. It is also stated in the affidavit that in terms of the notification issued by Opp. Party No. 2 on 16.01.2024 vide Annexure-A/2 series and following the interim order passed by this Court on 19.01.2024 verification of documents of the candidates in both Category 1 and Category 2 was conducted successfully on the date fixed. It is also stated in the affidavit that taking into account the interim order passed by this Court on 19.01.2024, separate merit list district wise for each of the 30 districts of the State was also published.

4. To the stand taken in the affidavit dtd.24.01.1024, a rejoinder affidavit was filed by the Petitioners. Basing on the stand taken in the rejoinder affidavit, learned counsel for the Petitioners contended that because of the dispute raised in the writ petition, the authorised agency EdCIL issued a press release under Annexure-D, indicating therein that a combined merit list of the candidates was handed over to OSEPA on 13th January, 2024 followed by submission of merit list with district allocation on 15th January, 2023. Taking into account the stand taken in the press release issued by the agency, learned counsel appearing for the Petitioners contended that since in terms of the provisions contained under Para 8.3 of the resolution a district wise and category wise list was required to be published for each of the 30 districts of the State, the stand taken in the press release by the agency clearly indicates that no such district wise and category wise merit list was ever handed over by the said agency to OSEPA. But after receipt of the combined merit list so handed over by the agency to OSEPA on 13.01.2024 and the merit list with district allocation on 15.01.2024, the impugned draft result sheet was published under Annexure-6 series on 16.01.2024.

4.1. To the stand taken in the affidavit so filed by Opp. Party No. 2 that after passing of the interim order on 19.01.2024 by this Court, district wise list has already been published by segregating the candidates to different districts from out of the draft result sheet published under Annexure-6 series, learned counsel for the Petitioners vehemently contended that the list so published district wise has also not been published in terms of the provisions contained under Para 8.3 of the resolution.

4.2. To be specific and giving an example to the district wise list published by OSEPA in its website and so produced before this Court in sealed cover, learned counsel appearing for the Petitioners contended that in the district wise list published for the district of Balasore & Sambalpur, which was downloaded by the Petitioners on 18.01.2024, it is found that candidates giving 1st preference to other districts have been enlisted in the district list of Sambalpur. Not only that in the district list published for Kalahandi district as well as Gajapati, candidates who have never preferred Gajapati as their 1st preference district found place in the district list for Gajapati.

4.3. Taking a cue from the district wise list published by OSEPA after passing of the interim order by this Court, learned counsel appearing for the Petitioners brought to the notice of this Court the district wise list published in Category 1 for the district of Sambalpur and contended that candidates placed at Sl. No. 76 had given his 1st preference for Jharsuguda. But his name was reflected in the district wise list published for the district of Sambalpur. Similarly, in respect of the district wise list published for the district of Kalahandi vide Annexure-G, candidate placed at Sl. No. 10 has given his 1st preference as Balasore and candidate placed at Sl. No. 11 has given his 1st preference as Keonjhar as per the verification conducted by the Petitioners and so enclosed vide Annexure-H to the rejoinder.

4.4. Placing reliance on the discrepancies in the district wise list for Sambalpur as submitted under Annexure-F and in respect of Kalahandi district under Annexure-H and so also in respect of Gajapati district as submitted under Annexure-J to the rejoinder, learned counsel appearing for the Petitioners contended that even though district wise list was published after segregating the names from the impugned list published under Annexure-6, candidates who have given their 1st preference in respect of other districts since have been included in a particular district, it is to be held that district wise and category wise list so published after publication of the impugned result sheet under Annexure-6 series is also not in terms of the provisions contained under Para 8.3 of the resolution.

4.5. Making all these submissions, learned counsel appearing for the Petitioners contended that since in terms of the provisions contained under Para 8.3 of the resolution district wise and category wise list has not been published by allotting candidates to a particular district who have given their 1st preference, not only the impugned draft result sheet published under Annexure-6 series is illegal but also the district wise list published by Opp. Party No. 2 subsequent to the interim order passed by this Court and so contended in the affidavit filed by Opp. Party No. 2 on dtd.24.01.2024.

4.6. It is accordingly contended that since the selection has not been conducted with publication of the merit list in terms of the provisions contained under Para 8.3 of the advertisement, such process of selection conducted by Opp. Party No. 2 is vitiated and liable for interference of this Court. In support of his aforesaid submission learned counsel appearing for the Petitioners relied on the decisions of the Hon'ble Apex Court in the case of ***Union of India & Ors. Vs. V. Mahendra Singh*** (Civil Appeal No. 4807 of 2022) disposed of on 25.07.2022. Hon'ble apex Court in Para 14 of the said Judgment has held as follows:-

> *"**14.** The argument of Mr. Bhushan that use of different language is not followed by any consequence and, therefore, cannot be said to be mandatory is not tenable. The language chosen is relevant to ensure that the candidate who has filled up the application form alone appears in the written examination to maintain probity. The answer sheets have to be in the language chosen by the candidate in the application form. It is well settled that if a particular procedure in filling up the application form is*

prescribed, the application form should be filled up following that procedure alone. This was enunciated by Privy Council in the Nazir Ahmad v. King-Emperor9, wherein it was held that "that where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden."

4.7. Similarly, reliance was placed in the decision of the Hon'ble Apex Court in the case of ***K. Manjushree Vs. State of Andhra Pradesh & Anr.*** (2008) 3 SCC 512. Hon'ble Apex Court in Para 27 of the said Judgment has held as follows:-

*"**27.** But what could not have been done was the second change, by introduction of the criterion of minimum marks for the interview. The minimum marks for interview had never been adopted by the Andhra Pradesh High Court earlier for selection of District & Sessions Judges, (Grade II). In regard to the present selection, the Administrative Committee merely adopted the previous procedure in vogue. The previous procedure as stated above was to apply minimum marks only for written examination and not for the oral examination. We have referred to the proper interpretation of the earlier Resolutions dated 24-7-2001 and 21-2-2002 and held that what was adopted on 30-11-2004 was only minimum marks for written examination and not for the interviews. Therefore, introduction of the requirement of minimum marks for interview, after the entire selection process (consisting of written examination and interview) was completed, would amount to changing the rules of the game after the game was played which is clearly impermissible. We are fortified in this view by several decisions of this Court. It is sufficient to refer to three of them — P.K. Ramachandra Iyer v. Union of India [(1984) 2 SCC 141 : 1984 SCC (L&S) 214] , Umesh Chandra Shukla v. Union of India [(1985) 3 SCC 721 : 1985 SCC (L&S) 919] and Durgacharan Misra v. State of Orissa [(1987) 4 SCC 646 : 1988 SCC (L&S) 36 : (1987) 5 ATC 148] .*

4.8. Reliance was placed to the decision of the Hon'ble Apex Court in the case of ***Bedanga Talukdar Vs. Saifudaullah Khan & Ors.*** (2011) 12 SCC 85. Hon'ble apex Court in Para 29 to 32 of the said Judgment has held as follows:-

*"**29.** We have considered the entire matter in detail. In our opinion, it is too well settled to need any further reiteration that all appointments to public office have to be made in conformity with Article 14 of the Constitution of India. In other words, there must be no arbitrariness resulting from any undue favour being shown to any candidate. Therefore, the selection process has to be conducted strictly in accordance with the stipulated selection procedure. Consequently, when a particular schedule is mentioned in an advertisement, the same has to be scrupulously maintained. There cannot be any relaxation in the terms and conditions of the advertisement unless such a power is specifically reserved. Such a power could be reserved in the relevant statutory rules. Even if power of relaxation is provided in the rules, it must still be mentioned in the advertisement. In the absence of such power in the rules, it could still be provided in the advertisement. However, the power of relaxation, if exercised, has to be given due publicity. This would be necessary to ensure that those candidates who become eligible due to the relaxation, are afforded an equal opportunity to apply and compete. Relaxation of any condition in advertisement without due publication would be contrary to the mandate of equality contained in Articles 14 and 16 of the Constitution of India.*

***30.** A perusal of the advertisement in this case will clearly show that there was no power of relaxation. In our opinion, the High Court committed an error in directing that the*

condition with regard to the submission of the disability certificate either along with the application form or before appearing in the preliminary examination could be relaxed in the case of Respondent 1. Such a course would not be permissible as it would violate the mandate of Articles 14 and 16 of the Constitution of India.

31. *In our opinion, the High Court was in error in concluding that Respondent 3 had not treated the condition with regard to the submission of the certificate along with the application or before appearing in the preliminary examination, as mandatory. The aforesaid finding, in our opinion, is contrary to the record. In its resolution dated 21-5-2010, the Commission has recorded the following conclusions:*

"Though Shri S. Khan had mentioned in his letter dated 10-12-2009 that he was resubmitting the identity card with regard to locomotor disability he, in fact, had submitted the documentary proof of his locomotor disability for the first time to the office of the APSC through his above letter dated 10-12-2009. However, after receiving the identity card the matter was placed before the full Commission to decide whether the Commission can act on an essential document not submitted earlier as per terms of advertisement but submitted after completion of entire process of selection.

The Commission while examining the matter in details observed that Shri S. Khan was treated as general candidate all along in the examination process and was not treated as physically handicapped with locomotor disability. Prior to taking decision on Shri S. Khan it was also looked into by the Commission, whether any other candidate's any essential document relating to right/benefits, etc. not furnished with the application or at the time of interview but submitted after interview was accepted or not. From the record, it was found that prior to Shri S. Khan's case, one Smt Anima Baishya had submitted an application before the Chairperson on 26-2-2009 claiming herself to be an SC candidate for the first time. But her claim for treating herself as an SC candidate was not entertained on the grounds that she applied as a general candidate and the caste certificate in support of her claim as SC candidate was furnished long after completion of examination process."

32. *In the face of such conclusions, we have little hesitation in concluding that the conclusion recorded by the High Court is contrary to the facts and materials on the record. It is settled law that there can be no relaxation in the terms and conditions contained in the advertisement unless the power of relaxation is duly reserved in the relevant rules and/or in the advertisement. Even if there is a power of relaxation in the rules, the same would still have to be specifically indicated in the advertisement. In the present case, no such rule has been brought to our notice. In such circumstances, the High Court could not have issued the impugned direction to consider the claim of Respondent 1 on the basis of identity card submitted after the selection process was over, with the publication of the select list."*

4.9. Reliance was also placed to the decision of the Hon'ble Apex Court in the case of ***Pavnesh Kumar Vs. Union of India & Ors.*** (2023) SCC OnLine SC 1583. Hon'ble Apex Court in Para 14 &15 of the said Judgment has held as follows:-

*"**14.** No doubt appointment to a higher post of an incumbent working on lower post is in the form of an accelerated promotion but it cannot be equated with normal mode of promotion. This is evident from the advertisement itself which in unequivocal terms states that applications are invited for selection to the post of Sub-Inspector (GD) in BSF through LDCE. The very fact that the applications were invited for selection to the post of Sub-Inspector (GD) connotes that it was not a normal promotion rather selection*

> *to the higher post from amongst the eligible candidates working on the lower post. Thus, the submission that the normal rules of promotion or medical examination ought to have been applied, is not acceptable.*
>
> ***15.*** *This apart, selection was to be conducted in terms of the advertisement. The scheme of the selection contained in the advertisement categorically provided clearing of the examination in all the five stages which included detailed medical examination. This was independent and in addition of the eligibility condition that a candidate must possess the medical category SHAPE-I while working on the lower post."*

5. Per contra learned Advocate General appearing for the State on the other hand made his submission basing on the stand taken in the affidavit so filed by Opp. Party No. 2 on 24.01.2024. It is contended that after conducting the recruitment process, district wise and category wise draft merit list in OSEPA website was published on 15.01.2024 and notification was issued on 16.01.2024 regarding the schedule and requirement of original documents/certificates for document verification. As per the schedule, out of 9982 candidates in Category 1 original documents of 8829 candidates were verified successfully on 20.01.2024 and out of 8806 candidates in Category-2 original documents of 7389 candidates were completed successfully on 21.01.2024 in terms of the notification issued by the OSEPA under Annexure-A/2 series.

5.1. It is also contended that details of the candidates, their application numbers, roll numbers, category of posts, streams and allocation of district published vide Notification No. 899 dtd.15.01.2024 in OSEPA website remains unchanged in the preset district wise and category wise draft merit list so published for each of the 30 districts and produced in sealed cover before this Court for better appreciation.

5.2. It is also contended that for each of the 30 districts while publishing the district wise and category wise draft merit list, cut off mark was fixed for each of the district and none of the Petitioners who have given their 1st preference as Nabarangpur, Malkanagir and Rayagada as well as Koraput have secured the cut-off mark so fixed by Opp. Party No. 2 in each of the district in question. It is contended that since none of the Petitioners who have given their 1st preference to various district, have secured the cut-off mark so fixed by Opp. Party No. 2 while publishing the district wise and category wise draft merit list for each of the 30 district including Nabarangpur, Malkanagiri, Rayagada and Koraput, Petitioners have no locus standi to challenge the process of selection as they have become unsuccessful having not secured the cut off mark so fixed. It is also contended that seeking permission to proceed with the selection process in terms of the advertisement issued on 10.09.2023 under Annexure-2 pursuant to resolution dtd.22.08.2023 under Annexure-1, an I.A. has been filed in I.A. No. 1536 of 2024.

5.3. Learned Advocate General contended that since the recruitment in question is to fill up 20,000 posts of Junior Teacher (Schematic) and out of those 20,000 posts, 9982 candidates in Category-I and 8806 candidates in Category 2 have been selected in different districts of the State, candidates so selected will be seriously prejudiced if the State is not permitted to proceed with the selection process.

5.4. With regard to the allegation made by the learned counsel for the appearing for the Petitioners in the present writ petition and to the submission of learned counsel appearing in other batch of writ petitions, learned Advocate General contended that since none of the candidate, whose names appeared in the impugned draft select list published under Annexure-6 series have been impleaded as Party to the writ petition, no adverse order can be passed, without them being brought on record. In support of the aforesaid submission learned Advocate General relied on a decision of the Hon'ble Apex Court in the case of ***Vishal Ashok Thorat & Ors. Vs. Rajesh Shrirambapu Fate*** (2020) 18 SCC 673. Hon'ble Apex Court in Para 34 of the said Judgment has held as follows:-

> *"**34.** One more submission raised by the learned counsel for the appellant in civil appeal filed by Vishal Ashok Thorat needs to be noticed. The submission of the appellant is that Respondent 1 in his Writ Petition No. 1270 of 2018 did not implead any of the selected candidates out of the list of 832. No selected candidate having been impleaded by Respondent 1, the High Court erred in issuing direction to modify and review the select list. The direction of the High Court in para 51 is clearly against the interest of the appellants, who as per direction shall go out of the select list, the select list having been published on 31-3-2018 i.e. much before the date when Respondent 1 filed application for amendment in the writ petition for challenging Advertisements Nos. 2 and 48 of 2017, he ought to have impleaded the selected candidates whose names were already published by the MPSC. Respondent 1 without bringing the selected candidates on record could not have obtained any order adverse to the selected candidates."*

5.5. Learned Advocate General also relied on the decision of the Hon'ble Apex Court in the case of ***SECY.(Health) Deptt. of Health & F.W. & Anr. Vs. Dr. Anita Puri & Ors.*** (1996) 6 SCC 282. Hon'ble Apex Court in Para 9 of the said Judgment has held as follows:-

> *"9. The question for consideration is whether such sub-division of marks by the Commission on different facets and awarding only 2½ marks for higher qualification can be said to be arbitrary? Admittedly, there is no statutory rule or any guideline issued by the Government for the Commission for the purpose of evaluation of merit of the respective candidates. When the Public Service Commission is required to select some candidates out of a number of applicants for certain posts, the sole authority and discretion is vested with the Commission. The Commission is required to evolve the relative fitness and merit of the candidate and then select candidates in accordance with such evaluation. If, for that purpose the Commission prescribes marks for different facets and then evaluates the merit, the process of evaluation cannot be considered to be arbitrary unless marks allotted for a particular facet is on the face of it excessive. Weightage to be given to different facets of a candidate as well as to the viva voce test vary from service to service depending upon the requirement of the service itself. In course of the arguments before us the learned counsel for Respondent 1 had submitted that the awarding of 20 marks for viva voce and 20 marks for general knowledge out of 100 marks must be held to be on the face of it arbitrary giving a handle to the Public Service Commission to manipulate the selection and, therefore, the High Court had rightly come to the conclusion that it was arbitrary. We are unable to accept this contention. This Court in the case of Ajay Hasia v. Khalid Mujib Sehravardi [(1981) 1 SCC 722 : 1981 SCC (L&S) 258] , while considering the case of selection, wherein 33%*

marks was the minimum requirement by a candidate in viva voce for being selected, held that it does not incur any constitutional infirmity. As has been stated earlier the expert body has to evolve some procedure for assessing the merit and suitability of the applicants and the same necessarily has to be made only by allotting marks on different facets and then awarding marks in respect of each facet of a candidate and finally evaluating his merit. It is too well settled that when a selection is made by an expert body like the Public Service Commission which is also advised by experts having technical experience and high academic qualification in the field for which the selection is to be made, the courts should be slow to interfere with the opinion expressed by experts unless allegations of mala fide are made and established. It would be prudent and safe for the courts to leave the decisions on such matters to the experts who are more familiar with the problems they face than the courts. If the expert body considers suitability of a candidate for a specified post after giving due consideration to all the relevant factors, then the court should not ordinarily interfere with such selection and evaluation. Thus considered, we are not in a position to agree with the conclusion of the High Court that the marks awarded by the Commission was arbitrary or that the selection made by the Commission was in any way vitiated."

5.6. Learned Advocate General also relied on the decision of this Court in the case of ***Kabita Jena & Ors. Vs. Rajat Kumar Mishra & Ors.*** (W.A. No. 1822 of 2023 & batch) decided on 22.12.2023. This Court in Para 24, 27, 30, 31 & 34 of the said Judgment has held as follows:-

"24. The underlying principles of non-joinder of parties emanates from the provisions contained in Order 1 Rule-9 of the CPC. Although Order 1 Rule-9 of the CPC is a rule of procedure not affecting the substantive law, yet when decree can be effective in absence of necessary parties, the suit is liable to be dismissed, in view of the judgment of the apex Court in the case of Udit Narain Singh Malpaharia (supra). In the present case, the issue of non-joinder of parties was raised at the earliest, but the same has not been answered.

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27. The aforesaid findings were arrived at by this Court relying upon the judgments of the apex Court, as discussed therein, and, as such, the appellants have also relied upon those judgments in the present proceeding. Therefore, there is no iota of doubt that the learned Single Judge ought not to have proceeded without insisting upon impletion of selected candidates as opposite parties in the writ petition, i.e., W.P.(C) No. 32174 of 2022.

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30. The learned Single Judge, while considering the review application, observed in paragraph 35 of the judgment that in course of hearing of the earlier writ petition bearing W.P.(C) No. 32174 of 2022, learned Senior Counsel including the Advocate General appearing for the State-opposite parties took almost all possible grounds to defend the OPSC. The learned Single Judge has also observed that the Court has rendered a detailed judgment by taking note of the contentions of all the appearing parties and has disposed of the said writ petition. One main question of non-joinder of parties was also raised, but the learned Single Judge observed at paragraph-36 of the judgment that the review petitioners were not necessary parties to the previous writ petition and in paragraph-37 of the judgment the learned Single Judge also observed that in the event the review petitioners are Page 73 of 98 aggrieved by the finding of this Court, they could challenge the same by filing intra-court appeal, if advised.

31. Having admitted the fact that the review petitioners were the successful candidates and they, having not been impleaded as parties to the writ petition, have filed the review petition, the learned Single Judge could have allowed their review petition, because their rights have been affected by quashing the select list, where the names of the review petitioners found place. Therefore, dismissal of the review petition filed before the learned Single Judge both on maintainability as well as merits cannot be sustained, as there is gross violation of principle of natural justice and, as such, the review petitioners have not been given opportunity of hearing to defend their case.

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34. It is of relevance to note that the learned Single Judge in the judgment has observed that if the review petitioners are aggrieved by the finding of the Court, they can be well advised to challenge the same in intra-Court appeal. But fact remains, what ultimately the review petitioners will do, the learned Single Judge should not have made an observation to that effect. Therefore, the observation of the learned Single Judge to that effect Page 79 of 98 cannot be sustained. As a consequence thereof, this Court finds gross error apparent on the face of the record by not permitting the review petitioners to be made as parties to the writ petition, in which learned Single Judge has delivered the judgment. When the rights accrued in favour of the selected candidates have been grossly affected, for non-inclusion of their names in the writ petition, the writ petition suffers from non-joinder of parties."

5.7. Learned Advocate General also contended that the draft result sheet of Junior Teacher (Schematic) so published in the OSEPA website on 15.01.2024 vide Annexure-6 series have been so published strictly in terms of the procedure prescribed under Para 8.3 of the resolution, save and except for the fact that district lists were arranged into a single master list so published in the website for information of the candidates. However, by segregating the names from the said master list so published under Annexure-6 series, district wise and category wise merit list have been published by Opp. Party No. 2 and such district wise and category wise draft merit list for each of the 30 districts has been uploaded in the OSEPA website, copy of which have been provided to this Court in sealed cover.

5.8. It is also contended that district wise and category wise list so published in the meantime reveals the details of the candidates, their application numbers, roll numbers, category of posts, streams and allocation of district and everything remains unchanged in the district wise and category wise draft list submitted in sealed cover. It is also contended that though as per the provisions contained under Para 8.3, draft merit list is to be prepared district wise and category wise, but dehors the merit rank of a particular candidate, the list cannot be prepared.

5.9. It is contended that as provided under Article 21(A) of the Constitution of India, rendering of quality education to the students with best quality teachers is sine qua none. State while publishing the draft result sheet under Annexure-6 series and consequential district wise and category wise merit list for each of the 30 district has selected candidates strictly in terms of their merit in terms of the provisions contained under Article 21(A) of the Constitution of India.

With regard to the aforesaid stand, learned Advocate General contended that since best quality teachers have been recruited considering their merit, no illegality can also be found with regard to the draft result sheet published under Annexure-6 and consequential district and category wise merit list published for each of the 30 districts with segregation of their names.

5.10. In support of his aforesaid submission, learned Advocate General relied on the decision of the Hon'ble Apex Court in the case of ***Devesh Sharma Vs. Union of India & Ors.*** (2023 SCC OnLine SC 985). Hon'ble Apex Court in Para 19 & 22 of the said Judgment has held as follows:-

> ***"****19. When the validity of the Act was challenged before this Court7 , this Court, while upholding its validity emphasized that the Act, was intended not only to impart "free" and "compulsory" education to children, but the purpose was also to impart 'quality' education!*
>
> *"The provisions of this Act are intended not only to guarantee right to free and compulsory education to children, but it also envisages imparting of 'quality' education by providing required infrastructure and compliance of specified norms and standards in the schools." [See Para 8, (2012) 6 SCC 1]*
>
> *xxx xxx xxx*
>
> *22. Free and compulsory education for children becomes meaningless if we make compromise on its 'quality'. We must recruit the best qualified teachers. A good teacher is the first assurance of 'quality' education in a school. Any compromise on the qualification of teachers would necessarily mean a compromise on the 'quality' of education. Jacques Barzun, the American educationalist and historian, in his seminal work 'Teacher in America', says "teaching is not a lost art, but the regard for it is a lost tradition"11 . Though this comment was for the state of higher education in America, it is equally relevant here on the treatment of Primary education in our country, as it emerges from the facts before us."*

5.11. Learned Advocate General relied on another decision of the Hon'ble Apex Court in the case of ***Satyajit Kumar & Ors. Vs. State of Jharkhand & Ors.*** (2022 SCC OnLine SC 954). Hon'ble Apex Court in Para 97 & 99 of the Judgment has held as follows:-

> *"97. Even otherwise, it is to be noted that it may be true that so far as basic education (at the level of primary section) is concerned, it may help student at the primary level (while providing basic education) to be taught in their own tribal language. But the same principle may not be applicable when question is of providing education at higher level viz. above 5 th standard. Therefore, if the candidates belonging to other areas (non-Scheduled Areas/ Districts) are given an opportunity to impart education (who may be more meritorious than the candidates belonging to the Scheduled Areas / Districts) than it will be more beneficial to the students belonging to the Scheduled Areas and their quality of the education shall certainly improve. The quality of education of the school-going children cannot be compromised by giving 100% reservation in favour of the teachers of the same/some districts and prohibiting the appointment to more meritorious teachers.*
>
> *xxx xxx xxx*

99. Even under Article 16(3) of the Constitution of India, it is the Parliament alone, which is authorized to make any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State of Union Territory, any requirement as to residence within the State or Union territory prior to such employment or appointment. As per Article 35 of the Constitution of India, notwithstanding anything contained in the Constitution, the Parliament shall have and the Legislature of a State shall not have the power to make laws with respect to any of the matters which, under clause (3) of Article 16 may be provided for law made by Parliament. Therefore, impugned Notification/Order making 100% reservation for the local resident of the concerned Scheduled Area/Districts (reservation on the basis of resident) is ultra vires to Article 35 r/w Article 16(3) of the Constitution of India."

5.12. Learned Advocate General also relied on the decision of the Hon'ble Apex Court in the case of ***Anmol Kumar Tiwari & Ors. Vs. State of Jharkhand & Ors.*** (2021) 5 SCC 424. Hon'ble Apex Court in Para 12 of the said Judgment has held as follows:-

*"**12.** The second issue relates to the claim of the interveners in the writ petitions for appointment. There is no doubt that selections to public employment should be on the basis of merit. Appointment of persons with lesser merit ignoring those who have secured more marks would be in violation of Articles 14 and 16 of the Constitution of India. The interveners in the writ petitions admittedly have secured more marks than the writ petitioners. After cancellation of the appointments of the writ petitioners, 43 persons have been appointed from the revised select list. Those 43 persons have secured more marks than the interveners. By the appointment of 43 persons, the number of posts that were advertised i.e. 384 have been filled up. The interveners have no right for appointment to posts beyond those advertised. The contention on behalf of the interveners in the writ petitions is that they cannot be ignored when relief is granted to the writ petitioners who were less meritorious than them. We are unable to agree. Relief granted to writ petitioners is mainly on the ground that they have already been appointed and have served the State for some time and they cannot be punished for no fault of theirs. The interveners are not similarly situated to them and they cannot seek the same relief. The other ground taken by the interveners in the writ petitions before us is that relief was denied to them only on the basis of a wrong statement made on behalf of the State Government that there were no vacancies. No doubt, the interveners have placed on record material to show that there was no shortage of vacancies for their appointment. One of the reasons given by the High Court for not granting relief to the interveners is lack of vacancies. However, we are not inclined to direct appointment of the interveners as selections in issue pertain to an advertisement issued in 2008. Subsequently, selections to posts of Sub-Inspectors have been held and a large number of persons were appointed. The number of posts advertised in 2008 is 384 and the interveners have no right for appointment for posts beyond those advertised. They cannot claim any parity with the writ petitioners."*

5.13. Learned Advocate General also contended the writ petition against draft merit list is also not entertainable in view of the decision of the Hon'ble Apex Court in the case of ***State of Odisha & Ors. Vs. MESCO Steels Ltd. & Anr.*** (2013) 4 SCC 340. Hon'ble Apex Court in Para 19 & 20 of the said Judgment has held as follows:-

> *"**19.** It is obvious from a conjoint reading of the letter dated 12-1-2006 and communication dated 19-9-2006 sent by the Director of Mines in response thereto that a final decision on the subject had yet to be taken by the Government, no matter the Government may have provisionally decided to follow the line of action indicated in its communication dated 12-1-2006 issued under the signature of the Joint Secretary, Department of Steel and Mines. It is noteworthy that there was no challenge to the communication dated 12-1-2006 before the High Court nor was any material placed before us to suggest that any final decision was ever taken by the Government on the question of deduction of the area granted in favour of the respondent so as to render the process of issue of show-cause notice for hearing the respondent Company an exercise in futility.*
>
> ***20.** On the contrary, the issue of the show-cause notice setting out the reasons that impelled the Government to claim resumption of a part of the proposed lease area from the respondent Company clearly suggested that the entire process leading up to the issue of the show-cause notice was tentative and no final decision on the subject had been taken at any level. It is only after the Government provisionally decided to resume the area in part or full that a show-cause notice could have been issued. To put the matter beyond any pale of controversy, Mr Lalit made an unequivocal statement at the Bar on behalf of the State Government that no final decision regarding resumption of any part of the lease area has been taken by the State Government so far and all that had transpired till date must necessarily be taken as provisional. Such being the case the High Court was in error in proceeding on an assumption that a final decision had been taken and in quashing what was no more than an inter-departmental communication constituting at best a step in the process of taking a final decision by the Government. The writ petition in that view was premature and ought to have been disposed of as such. Our answer to Question 1 is accordingly in the affirmative."*

5.14. To sum up the submissions, learned Advocate General contended that since following the decisions of the Hon'ble Apex Court in the case of ***Devesh Sharma, Satyajit Kumar*** and ***Anmol Kumar Tiwari*** as cited ***(supra)***, candidates with high rank in merit have been selected and enlisted in the draft result sheet published under Annexure-6, so further published by segregating their names in district wise and category wise list published for each of the 30 district, no illegality or irregularity can be found with regard to the placement of the candidates in the draft result sheet published under Annexure-6 and/or in the district and category wise list published for each of the 30 district so produced before this Court in a sealed cover. It is also contended that out of 20,000 vacancies so notified, 18788 no. of candidates in Category 1 and Category 2 were shortlisted while publishing the draft result sheet under Annexure-6 series. Out of those 18,788 candidates so enlisted, after verification of the documents on 20th & 21st January, 16,217 candidates have attended documents verification in different district headquarters and after filling up those 16,217 posts, as against the remaining vacant post, case of the Petitioners in the present batch of writ petitions can be considered subject to their eligibility.

6. To the submissions made by learned Advocate General, learned counsel appearing for the Petitioners contended that since the draft result sheet published under Annexure-6 and subsequent list published district wise by segregating the names is a draft merit list itself and it will only attain finality after completion of the

process enumerated under Para 8.4 to 8.7 of the resolution, the selected candidates whose names appear in the draft result sheet published under Annexure-6 and/or in the district wise list are not necessary party to the writ petition.

6.1. Since prior to publication of the final merit list in terms of the provisions contained under Para 8.6 of the resolution, all these writ petitions including the present one has been filed challenging the publication of the draft result sheet under Annexure-6 series, without complying the provisions contained under Para 8.3 of the resolution, the stand taken by the learned Advocate General that selected candidates, whose names appear in the draft result sheet under Annexure-6 are necessary party to the proceeding is not entertainable. It is also contended that the issue involved in the case of ***Kabita Jena*** as cited supra is not applicable to the facts of the present case as the present batch of writ petitions have been filed against the draft select list, which has not yet attained its finality. It is accordingly contended that names of those candidates, which appear in the draft select list published under Annexure-6 series and so also in the district and category wise list published for each of the 30 districts are neither necessary nor proper Party to the proceeding.

6.2. It is contended that since the recruitment process has not been conducted in terms of the Resolution issued under Annexure-1, in view of the decisions of the Hon'ble Apex Court in the case of ***K. Manjushree, V. Mahendra Singh, Bedanga Talukdar & Pavnesh Kumar*** as cited ***(supra),*** the draft result sheet published under Annexure-6 series and subsequent district and category wise list published by OSEPA and produced in sealed cover before this Court are not to be treated as the draft select list published in terms of the provisions contained under Para 8.3 of the Resolution.

For better appreciation, provisions contained under Para 8.4, 8.5, 8.6 and 8.7 of the resolution dtd.22.08.2023 under Annexure-1 are reproduced hereunder:-

> ***"8.4 Document verification***
>
> *After publication of the draft merit list, all candidates in the said list will be called for verification of original documents at their respective district headquarters. All documents required for verification will be notified by OSEPA in the detailed advertisement in OSEPA website.*
>
> *During document verification, if any candidate is not able to produce the essential document(s) in support of his/her claim of the Social/Special category/Age proof/ Academic & Training qualification/RCI registration certificate as per information provided in the application form, the candidature will be rejected and his/her name will be marked as deleted in the draft merit list. The candidates have to produce the Academic and Training qualification/RCI registration certificate (in case of Special Education Candidates) acquired/issued on or before the last date of submission of online application.*
>
> ***8.5 Preparation of District wise Provisional Merit List and Approval***
>
> *Provisional merit list will be prepared after document verification of the candidates placed in the draft merit list. Then objections will be invited from the candidates who are placed in the provisional merit list and rejection list. The provisional merit list will*

> *be approved by the Competent Authorities at respective districts after verification of the original documents and inviting objections from candidates within specific time period as mentioned in the calendar of activities issued by the School & Mass Education Department.*
>
> ***8.6 Publication of District wise Final Merit List***
>
> *District wise final merit list will be published at concerned District websites as well as OSEPA website after approval by the Competent Authority.*
>
> ***8.7 Counselling***
>
> *The candidates will be called for allocation of schools through counselling by respective districts. Separate notifications will be issued and displayed by respective districts in their District websites as well as OSEPA website. Vacancies remain due to unavailability of eligible candidates, rejection and non-joining will be carried forward and recruitment will be done subsequently as per requirement. There will be no waiting list.")*

6.3. Learned counsel appearing for the Petitioners also contended that with regard to selection of Sikshya Sahayak for each of the district of the State when was not followed with publication of district wise merit list, the matter was before this Court in W.P.(C) No. 3319 of 2018. This Court vide order dtd.28.02.2019 while disposing the writ petition, clearly held that since Sikshya Sahayak is a district cadre post, merit list is to be prepared on district wise. The view expressed by this Court in its order dtd.28.02.2019 is reproduced hereunder:-

> *"Even a candidate secured higher percentage marks in costal districts, he may not be given an appointment in district cadre, but a candidate who secured less percentage of marks in district cadre, he may be selected."*

7. I have heard Mr. S.K. Das, learned counsel appearing for the Petitioners and other counsels appearing in the present batch of writ petitions and Mr. A. Parija, learned Advocate General appearing for the State along with Mr. Saswat Dash and Mr. M.K. Balabantaray, learned Addl. Govt. Advocates.

8. Having heard learned counsel appearing for the Parties and after going through the materials available on record, it is found that for recruitment of 20,000 posts of Junior Teacher (Schematic), OSEPA – Opp. Party No. 2 issued the notice/ advertisement on 10.09.2023 under Annexure-2. As reflected in the said notice, such a notice was issued in pursuance of the resolution issued by Opp. Party No. 1 on 22.08.2023 under Annexure-1. Resolution dtd.22.08.2023 under Annexure-1 prescribes the modalities to be followed for selection and engagement of Junior Teacher (Schematic). As per the said resolution a candidate having the requisite qualification is/was eligible to make his application for both Category 1 and Category 2. Para 8 of the resolution prescribes the selection procedure to be followed for such recruitment.

8.1. As provided under Para 8.1 after expiry of the last date of submission of online application, list of the candidates for each category with respect to their 1st preference district as submitted by them at the time of submission of application

form will be published in OSEPA website. Thereafter, an online Computer Based Test is to be conducted either by OSEPA or an authorized agency as per the syllabus contained in the advertisement to be published before the recruitment. Pursuant to the notice issued under Annexure-1, EdCIL is the authorised agency, which conducted the Computer Based Test.

8.2. As provided under Para 8.3 of the resolution, Opp. Party No. 2 was required to publish district wise and category wise draft merit list taking into consideration all district preference submitted by an individual candidate followed by merit rank for a particular district. As further provided under Para 8.3, after exhausting all candidates having 1st preference for a particular district, subsequent preference will be considered. It is further provided in Para 8.3 that for a particular post, in a Category within district, district preference will be preferred over merit. This Court after going through the initial impugned draft result sheet of Junior Teacher (Schematic)-2023 so published under Annexure-6 series was prima facie satisfied that such a draft result sheet published by OSEPA under Annexure-6 series is not in accordance with Para 8.3 of the resolution and accordingly passed the interim order on 19.01.2024.

8.3. However, since by the time this Court took up the matter on 19.01.2024, Opp. Party No. 2 had already fixed the date of verification of documents of the candidates so enlisted in the impugned draft result sheet published under Annexure-6 series fixing 20.01.2024 for verification of documents of Category-1 and 21.01.2024 for verification of documents of Category-2, vide notice dtd.16.01.2024/ 17.01.2024 under Annexure-A/2 to the affidavit of Opp. Party No. 2, this Court while restraining the Opp. Party No. 2 from publishing the final select list, permitted to go for verification of documents so fixed to 20th & 21st of January, 2024.

8.4. Though in the meantime by segregating the names of the candidates, whose name finds place in the draft result sheet published under Annexure-6 series, district wise and category wise list was published by Opp. Party No. 2 for each of the 30 districts of the State, but as found from Annexure-E, G & I to the rejoinder affidavit, candidates who have given their 1st preference in respect of other districts have been included in a particular district so verified and enclosed vide Annexure-F, H & J to the rejoinder affidavit. The discrepancy reflected in the rejoinder affidavit so filed by Petitioners to the affidavit dtd.24.01.2024 of Opp. Party No. 2 vide Annexure-F, H & J, has not been disputed by Opp. Party No. 2 by filing any further affidavit.

8.5. Not only that as found from the Press Release issued by the authorised agency EdCIL under Annexure-D to the rejoinder affidavit, it is found that after conducting the Computer Based Test, the agency handed over the combined merit list of candidates to OSEPA on 13th January, 2024 followed by merit list with district allocation on 15th January, 2024. The said combined merit list handed over to OSEPA on 13th January, 2024 as found, was published under Annexure-6 series, which is impugned in the present writ petition.

8.6. Even though during pendency of the matter and after passing of the interim order on 19.01.2024, by segregating the names of the candidates whose names were reflected in the draft result sheet published under Annexure-6 series, Opp. Party No. 2 prepared district and category wise list for each of the 30 districts, but as submitted and which is not disputed, in respect of the district wise list published for the district of Sambalpur under Annexure-E for the district of Kalahandi under Annexure-G and for the district of Gajapati under Annexure-I to the rejoinder affidavit, a statement has been prepared by the learned counsel appearing for the Petitioners showing the inclusion of candidates, who have been given their 1st preference for other district, having been included in the district list published for the aforesaid 3 districts under Annexure-F, H & J. The aforesaid discrepancies specifically pointed out by the learned counsel appearing for the Petitioners vide Annexure-F, H & J to the rejoinder affidavit has not been controverted by Opp. Party No. 2. Since district wise and category wise list so produced contains the names of candidates who have given their 1st preference to other districts, as per the considered view of this Court such a district and category wise list cannot be taken as a list prepared and published in terms of the provisions contained under Para 8.3 of the Resolution.

8.7. With regard to the stand taken by the learned Advocate General that since the selected candidates whose names found place in the impugned draft result sheet published under Annexure-6 series have not been impleaded as Party to the writ petition, the writ petition is not maintainable, it is the view of this Court that the present writ petition along with the batch have been filed challenging the draft merit list published by Opp. Party No. 2 under Annexure-6 series. Since the impugned draft result sheet is a draft list though it has not been published in terms of the provisions contained under Para 8.3 and the final merit list is to be prepared after exhausting the provisions contained under Para 8.4 to 8.7 of the Resolution dtd.22.08.2023 under Annexure-1, this Court is of the view that since the list published under Annexure-6 series and the list published district wise and category wise are draft select list, which is to be finally published only after completion of the process so provided under Para 8.7 of the Resolution, the candidates, whose name appear therein are neither necessary party nor proper party to the proceeding. This Court finds no substance with regard to the plea raised by the learned Advocate General that the writ petition is not maintainable in absence of the selected candidates having been impleaded as Party to the writ petition and decision rendered in the case of ***Kabita Jena*** as cited (supra) is not applicable to the facts of the present issue.

8.8. Since this Court finds that the draft merit list published under Annexure-6 and/or consequential district and category wise list published by segregating the names for each of the 30 districts so produced in sealed cover before this Court has not been prepared in terms of the provisions contained under Para 8.3 of the resolution placing reliance on the decisions in the case of ***K. Manjushree, V. Mahendra Singh, Bedanga Talukdar & Pavnesh Kumar*** as cited (supra), this Court

is inclined to interfere with the draft result sheet published under Annexure-6 as well as the district and category wise list published for each of the districts by segregating the names and so produced before this Court in a sealed cover.

8.9. The stand taken by the learned Advocate General that Merit is the sole criterion for selection of teachers and that has been followed is not acceptable as it runs contrary to the provisions contained under Para 8.3 of the Resolution. Taking into account the submission of the learned Advocate General that the list of successful candidates have been prepared taking into account their performance and merit, it can be inferred that the stipulation contained in Para 8.3 of the Resolution has not been followed. Since the provisions contained under Para 8.3 is very specific, selection of candidates only basing on their merit irrespective of their preference given for a particular district is not sustainable in the eye of law. This Court accordingly is inclined to quash the draft result sheet published under Annexure-6 and so also the district and category wise list published for each of the 30 districts, the list of which was produced before this Court in a sealed cover. While quashing the list in question, this Court directs Opp. Party No. 3 to prepare district wise and category wise draft merit list strictly in terms of the provisions contained under Para 8.3 of the resolution dtd.22.08.2023 under Annexure-1. After such publication of district wise and category wise list, Opp. Party No. 2 shall proceed with the selection in terms of the provisions contained under Para 8.4 and 8.5, prior to publishing the district wise final merit list as provided under Para 8.6.

8.10. On such publication of district wise and category wise draft merit list in terms of the provisions contained under Para 8.3 as directed, the candidates whose names will be there from out of the list published by segregating the names from the list published under Annexure-6 series, they may not be asked to go for document verification as in terms of the interim order passed by this Court on 19.01.2024, the verification of documents of such candidates has already been completed. However, by fixing another date for both Category 1 & 2, verification of documents of the rest of the candidates will be made and thereafter the selection process will be completed in terms of the provisions contained under Para 8 of the resolution.

This Court accordingly disposes of the present batch of writ petitions with the aforesaid observation and direction.

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2024 (II) ILR-CUT-320

SANJAY KUMAR MISHRA, J.

W.P.(C) NO. 20847 OF 2016

KABITA DASH ……Petitioner

-V-

SUB-COLLECTOR-CUM-CERTIFICATE OFFICER, BHUBANESWAR & ORS. ……Opp.Parties

ODISHA PUBLIC DEMANDS RECOVERY ACT, 1962 – Sections 6, 8, 46 r/w Rules under Schedule II & Section 29 of Odisha General Clauses Act, 1937 – The show-cause notice for issuance of warrant of arrest of petitioner was issued without following due procedure as prescribed U/ss. 6, 8 of the Act and without proper notice in terms of the Rules under Schedule II – Whether impugned notice is sustainable? – Held, No – The show cause notice for issuance of warrant of arrest is set aside. (Para 15)

For Petitioner : Mr. N.C. Panigrahi, Sr. Advocate
For Opp.Parties : Mr. T. Pattnaik, (A.S.C)

JUDGMENT Date of Hearing & Judgment : 08.04.2024

SANJAY KUMAR MISHRA, J.

1. This Writ Petition has been preferred challenging the notice to Show-Cause, in relation with warrant of arrest issued on 30.08.2016 against the Petitioner by the Court of Sub-Collector-Cum-Certificate Officer, Bhubaneswar, so also the under valuation proceeding initiated against her in U.V.M.C. No.1326 of 2008, as at Annexure-3 series.

2. Mr. Pattnaik, learned ASC for the State-Opposite Parties submitted that since Notice to Show-Cause at Annexure-2 is the outcome of the order passed in U.V.M.C. No.1326 of 2008, which has been passed by the Stamp Collector (US 47-A of Indian Stamp Act)-Cum-Dy. IGR (CR), Cuttack, under the Indian Stamp Act, 1899 for under valuation of the document, ordering therein to recover an amount of Rs.7,10,062/- by instituting Certificate Proceeding against the Petitioner, this Court has no assignment to deal with any order passed by the Authority under the Indian Stamp Act, 1899 and the matter be released from the list with an order to list the matter before the Bench having assignment.

3. In response to the said submission made by the learned ASC for the State-Opposite Parties, Mr. Panigrahi, learned Senior Counsel for the Petitioner submitted that the Petitioner would like to confine the prayer made in the Writ Petition to set aside the notice dated 30.08.2016 at Annexure-2, which was issued by the Certificate Officer, Bhubaneswar to Show-Cause as to why warrant of arrest should not be issued against the Petitioner.

4. In view of the said submission made by Mr. Panigrahi, learned Senior Counsel for the Petitioner, prayer to quash the notice issued under the Odisha Public Demands Recovery, Act, 1962, shortly, here in after "the OPDR Act, 1962", having assignment of this Bench, on consent of the learned Counsel for the Parties, the matter is taken for hearing and final disposal.

5. The case of the Petitioner, in nutshell, is that the Opposite Party No.3, Smt. Paluni Patra, after partition through Court, had entered into an agreement with the present Petitioner through her Power of Attorney Holder, Girija Shankar Mishra

(Opposite Party No.4) to sell the disputed property in favour of the Petitioner. Accordingly, the Deed of Sale was executed by the Opposite Party No.4 in favour of the Petitioner on 31.12.2007 for a consideration amount of Rs.2 lakhs relating to 'Sthitiban' Plot No.550, Khata No.112, Kisam-Biali, Mouza-Patia measuring an area of Ac.0.267 decimals.

6. When the matter stood thus, the Petitioner was surprised to receive a notice under section 37(1) of the OPDR Act, 1962 issued on 30.08.2016 by the Opposite Party No.1 (Sub-Collector-Cum-Certificate Officer, Bhubaneswar), vide which she was asked to Show Cause as to why warrant of arrest shall not be issued against her and she was directed to appear before the said Opposite Party on 29.09.2016. In obedience to the said Show-Cause Notice, the Petitioner appeared before the Certificate Officer on 29.09.2016 and sought for time to challenge the Show-Cause Notice pertaining to warrant of arrest.

7. It is further case of the Petitioner that prior to the issuance of notice to Show-Cause under Certificate Case No.5 of 2015, neither she had knowledge of initiation of the Certificate Proceeding against her nor about the proceeding relating to under valuation case registered as U.V.M.C. No.1326 of 2008 pertaining to registered DOCT No.13993 of 2007. Since the Petitioner was never served with any notice, after enquiry, with much difficulty, she could procure the document relating to the under valuation case from the Authority, which has been annexed to the Writ Petition as Annexure-3 series.

8. Though the Writ Petition was preferred way back in 2016, the Opposite Party Nos. 1 and 2 i.e. the Sub-Collector-Cum-Certificate Officer, Bhubaneswar, so also the Stamp-Collector-Cum-Deputy Inspector General of Registration, Camp at District Registration Office, Bhubaneswar, filed a common Counter Affidavit only on 09.02.2024. So far as the allegation made in Paragraph 6 of the Writ Petition and the Certificate Proceeding is concerned, Paragraphs 6 and 8 of the Counter Affidavit, being relevant to the present lis, are extracted below:

> " 6. That, it is stated that with regard to non-payment of adequate amount of Stamp Duty on the Sale Deed dated 31.12.2007, a U.V.M.C. No.1326 of 2008 in relation to Registered Document No.13993 of 2007 was instituted by the court of the Stamp Collector under Section 47(A) of the Indian Stamp Act (Page No.17 of the Writ Petition). It was decided that the notice to the Petitioner under Rule 21(1) of the Indian Stamp Act, 1899 to pay deficient amount of Stamp Duty and deficient registration fees be issued. Thereafter, the aforesaid proceeding was posted to 30.05.2012 and on the said date, the Petitioner did not appear before the court of Stamp Collector.
>
> On 22.11.2013, the proceeding relating to U.V.M.C. No.1326 of 2008 was again taken up for hearing, wherein it was observed that despite service of notice on the petitioner, he chose not to remain present before the court of the Stamp Collector. **Thereafter, a notice in Form No.2 was issued to the Petitioner through ordinary post. It is stated that the office of District Sub-Registrar, Khordha, at Bhubaneswar, do not have any record to show whether notice in Form No.2 has been received by the Petitioner or not.**

It is pertinent to mention here that in the said notice, the Petitioner was asked to pay an amount of Rs.7,10,062/- within the date mentioned therein and in the event if the same is not paid within the timeline fixed, the deficit amount towards Stamp duty and Registration Fees will be recovered as an arrear of land revenue.

8. That, on receipt of the aforesaid notice, a Certificate Case No.05/2014 was instituted by the Opp. Party No.1. On 04.05.2016, it was ordered by the Opp. Party No.1 that the notice under Section 6 of the OPDR Act be issued to the Petitioner. **Subsequently, notice under Section 6 of the OPDR Act in Form-3 bearing PR No.190, dated 05.05.2016 was issued to the Petitioner by the Opp. Party No.1 through ordinary post which is ascertained from the process register. The token of receipt of the said notice by the Petitioner is not available due to dispatch of the same through ordinary post**.

Copy of the order dated 04.05.2016 and Notice in Form-3 bearing PR No.190, dated 05.05.2016 issued by the Opp. Party No.1 is annexed herewith as **Annexure-B/1 series**.

Copy of the relevant page of the process register for the year 2016 is annexed herewith as **Annexure-C/1**.

It is pertinent to mention here that Form No.1 was issued to the Petitioner by the Opp. Party No.1 as per Section 3 read with Section 5 of the OPDR Act, 1962.

Copy of the Form No.1 issued by the Opp. Party No.1 is annexed herewith as annexed herewith as **Annexure-D/1**." **(Emphasis supplied)**

9. In response to the said Counter filed by the Opposite Party Nos. 1 and 2, the Petitioner has filed a Rejoinder Affidavit specifically denying therein as to receiving any notice in any of the proceeding initiated against her by the Opposite Party Nos. 1 and 2. That apart, it has been stated in the Rejoinder that before issuance of the notice to Show-Cause as to warrant of arrest shall not be issued against her, as required under section 6 of the OPDR Act, 1962, no notice in Form No.3 was issued to the Petitioner. So far as fresh notice under Annexure-B/1 given by the Certificate Officer-Cum-Sub-Collector, Bhubaneswar, it has been specifically denied that the Petitioner has no knowledge about Annexure-B/1 series, C/1 and D/1 and had not received any notice issued under section 6 of the OPDR Act, 1962 in Form No.3, bearing P.R. No.190 dated 05.05.2016.

10. Reiterating the stand taken in the Writ Petition so also in the Rejoinder, Mr. Panigrahi, learned Senior Counsel for the Petitioner submitted that before issuance of the notice under section 37(1) of the OPDR Act, 1962 to Show-Cause why warrant of arrest should not be issued against the Petitioner, as required under section 6 of the OPDR Act, 1962, after receipt of requisition in Form No.2 in terms of section 4 of the OPDR Act, 1962, the Certificate Officer should give opportunity to the Petitioner to file Petition denying liability in terms of section 8 of the OPDR Act, 1962. Mr. Panigrahi further submitted, as is required under section 9 of the OPDR Act, 1962, the Certificate Officer, in whose Office the original certificate is filed, only after hearing the Petition denying liability and taking evidence, if necessary, can confirm, set aside, modify or vary the certificate as he deems fit and thereafter, the steps for execution of Certificate Proceeding have to be taken only

after 30 days has elapsed since the date of service of notice, as required under sections 6 and 10 or, when a petition is duly filed under section 8, until such petition is heard and determined.

Mr. Panigrahi, learned Senior Counsel for the Petitioner, drawing attention of this Court to the impugned notice of Show-Cause, as at Annexure-2, so also order sheet in C.C. No.5 of 2015 annexed to the Counter filed by the State as Annexure-A/1, submitted that though the Show-Cause Notice indicates that the certificate case number is C.C. No.5 of 2015, the documents annexed to the Counter filed by the State indicate that the certificate case was registered as C.C. No.5 of 2014.

Similarly, the order sheet in C.C. No.5 of 2015 reflects that the requisition was received from the Stamp Collector-Cum-DSR, Bhubaneswar on 04.05.2016 by the Certificate Officer and on receiving such requisition, on the very same day, it was ordered to issue notice to the present Petitioner under section 6 of the OPDR Act, 1962 fixing the date to 22.07.2016. Mr. Panigrahi further submitted that the rest of the order sheets in C.C. Case No.5 of 2015, as at Annexure G/1 to the Counter, do not reflect that the notice in terms of section 6 of the OPDR Act, 1962 in the prescribed Forms was issued and duly served on the Petitioner giving her opportunity to file Petition denying liability in terms of section 8 of the OPDR Act, 1962.

Mr. Panigrahi, learned Senior Counsel for the Petitioner further submitted that the Counter filed by the State is also silent as to what was the date and mode of giving notice to the Petitioner in U.V.M.C. No.1326 of 2008. Apart from that, it has been admitted in Paragraph 6 of the Counter filed by the State that the said proceeding was taken on 22.11.2013 and as the Petitioner allegedly remained absent, notice in Form No.2 was issued to her through ordinary post.

Similarly, drawing attention of this Court to the averments made in Paragraph 8 of the Counter, Mr. Panigrahi, learned Senior Counsel submitted that notice under section 6 of the OPDR Act, 1962 in Form No.3 bearing P.R. No.190, dated 05.05.2016 was allegedly issued to the Petitioner by the Opposite Party No.1 through ordinary post.

Mr. Panigrahi, learned Senior Counsel further submitted that in terms of section 29 of the Orissa General Clauses, Act, 1937 so also section 27 of the General Clauses Act, 1897, presumption of service of notice only arises, if the same has been sent by the Registered Post to the noticee. That apart, the Opposite Party No.1 (Certificate Officer) has also not followed the procedure laid down under sections 6 and 9 of the OPDR Act, 1962 before issuance of the impugned notice under section 37 (1) of the OPDR Act, 1962. Hence, the under valuation proceeding so also the certificate proceeding are bad. Since in the Certificate Proceeding, the Petitioner was never noticed, as required under the law, the Proceeding in C.C. No.5 of 2015 deserves to be set aside.

Drawing attention of this Court to Form Nos. 1 and 2, which have been appended to the Writ Petition as Annexure-3 series so also annexed to the Counter

filed by the State Opposite Parties, the learned Senior Counsel for the Petitioner submitted that both the Forms are undated though the said Forms are bearing signature of the Certificate Holder so also the Certificate Officer. He further submitted that the order sheet in the certificate case annexed to the Counter filed by the State indicates that the requisition was received by the Opposite Party No.2 on 04.05.2016 and the date was fixed to 22.07.2016 ordering therein to issue notice to the present Petitioner (Certificate Debtor) in terms of section 6 of the OPDR Act, 1962. Thereafter, the subsequent order sheets, which are annexed to the Counter as Annexures G/1 i.e. the orders dated 02.08.2016 and 30.08.2016, do not reflect that the notice in terms of section 6 of the OPDR Act, 1962 was sent and duly served on the Petitioner. In view of such irregularities, Mr. Panigrahi, learned Senior Counsel for the Petitioner submitted that the impugned notice in Annexure-2 deserves to be set aside.

11. In response to the argument advanced by Mr. Panigrahi, learned Senior Counsel for the Petitioner, Mr. Pattnaik, learned ASC for the State, drawing attention of this Court to the extract from the Process Register annexed to the Counter, submitted that the notice was duly issued to the Petitioner (Certificate Debtor) as the extract from the Process Register of the Certificate Proceeding indicates that notice was issued to the Certificate Debtor through ordinary post vide P.R. No.190, dated 05.05.2016. Despite being noticed, the Petitioner neither appeared before the Certificate Officer nor filed Petition denying liability in terms of section 8 of the OPDR Act, 1962. Hence, the Certificate Officer was justified to issue Show-Cause Notice as to why warrant of arrest shall not be issued against the Petitioner.

12. In view of the submissions made by the learned Counsel for the Parties, it would be apt to extract below sections 6, 8, 9, 13 and 46 of the OPDR Act, 1962 with Rules under Schedule-II so also section 29 of the Orissa General Clauses Act, 1937, which are relevant for proper adjudication of the present lis.

> "**6. Service of notice and copy of certificate on certificate debtor-** When a certificate had been filed in the office of a Certificate Officer under Section 3 or Section 5, **he shall cause to be served upon the certificate debtor, in the prescribed manner, a notice in the prescribed form and a copy of the certificate.**
>
> **8. Filing of petition denying liability** –(1) the certificate-debtor may, within thirty days from the service of the notice required by Section 6 or where the notice has not been duly served, then within thirty days from the execution of any process for enforcing the certificate, present to the Certificate Officer in whose office the certificate is filed or to the Certificate Officer who is executing the certificate, **a petition, in the prescribed from, signed and verified in the prescribed manner, denying his liability** only on the ground that –
>
> (a) the certificate dues have been fully or partly paid; or
>
> (b) the person on whom such notice has been served is not the person named as certificate-debtor in the certificate:

Provided that a certificate-debtor in respect of dues other than those in relation to which the liability under any law for the time being in force is not open to question in a Civil Court may also deny his liability on any other ground;

Provided further that no petition under this sub-section shall be entertained by a Certificate Officer unless he is satisfied that such amount of the certificate dues as the certificate-debtor may admit to be due from him has been paid.

(2) If any such petition is presented to a Certificate Officer other than the Certificate Officer in whose office the original certificate is filed, it shall be sent to the latter officer for disposal.

9. Hearing and determining of such petition – The Certificate Officer in whose office the original certificate is filed may **after hearing the petition and taking evidence, if necessary**, confirm, set aside, modify or vary the certificate as he deems fit."

13. When certificate may be executed – No step in execution of a certificate shall be taken until the period of thirty days has elapsed since the date of the service of notice required by Sections 6 and 10 or, **when a petition has been duly filed under Section 8, until such petition has been heard and determined**:

Provided that where the whole or any part of the movable property of the certificate-debtor is liable to attachment under this Act, the Certificate Officer may, at any time for reasons to be recorded in writing direct an attachment of the whole or any part of such movable property." **(Emphasis supplied)**

CHAPTER – V

Rules

46. Effect of rules in Schedule II – The rules in Schedule II shave have effect as if enacted in the body of this Act, until altered or annulled in accordance with the provisions of this Chapter.

SCHEDULE – II

RULES

[See Section 46]

Signature and verification of requisitions for Certificates

1. Signature and verification of requisitions for certificates- (1) Every requisition made under section 4 shall be signed and verified at the foot by the person making it, or by some other person on his behalf who is proved to the satisfaction of the Certificate Officer to be acquainted with the facts of the case.

(2) The verification shall state that the person signing the requisition has been satisfied by enquiry that the amount stated in the requisition is actually due.

(3) **The verification shall be signed by the person making it, and shall state the date on which it is signed.**

Service of Notices

2. Mode of service - Service of a notice issued under Section 6, or under any other provisions of this Act, shall be made by delivering or tendering a copy thereof, signed by the Certificate Officer or such ministerial officer as he authorises in this behalf, and sealed with the seal of the Certificate Officer.

3. Service on certificate-debtor or his agent -Wherever it is practicable, **service shall be made on the certificate-debtor in person**, unless he has an agent empowered to accept service, in which case service on such agent shall be sufficient.

4. Service on adult male member of certificate-debtor's family - Where the certificate-debtor cannot be found, and has no agent empowered to accept service of the

notice on his behalf, service may be made on any adult male member of the certificate debtor who is residing with him.

Explanation - A servant is not a member of the family within the meaning of this rule.

5. Persons served to sign acknowledgment - Where the serving officer delivers, or tenders a copy of the notice to the certificate-debtor personally, or to an agent or other person on his behalf, he shall require the signature of the person to whom the copy is so delivered or tendered to an acknowledgment of service endorsed on the original notice.

6. Procedure where certificate-debtor refuses to accept service or cannot be found- Where the certificate-debtor or his agent, or such other person aforesaid, refuses to sign the acknowledgment, or where the serving officer, after using all due and reasonable diligence, cannot find the certificate-debtor, and there is no agent empowered to accept service of the notice on his behalf nor any other person on whom service can be made, the serving officer shall-

(a) affix a copy of the notice on the outer door or some other conspicuous part of the house in which the certificate-debtor ordinarily resides or carries on business or personally works for gain; or

(b) if there be land affected by the notice, affix a copy of the notice on some conspicuous place in the office of the Certificate Officer and also on some conspicuous part of the land.

and shall then return the original to the Certificate Officer by whom it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person, if any, by whom the house or land was identified and in whose presence the copy was affixed.

7. Endorsement of time and manner of service-The serving officer shall, in all cases in which the notice has been served under Rule 5 endorse or annex, or cause to be endorsed or annexed, on or to the original notice, a return stating the time when and the manner in which the notice was served, and the name and address of the person, if any, identifying the person served and witnessing the delivery or tender of the notice.

8. Examination of serving officer - Where a notice is returned under rule 6, the Certificate Officer, shall, if the return under that rule has not been verified by the affidavit of the serving officer on oath, or cause him to be so examined by another Certificate Officer, or, subject to any general order of the Collector, by an Assistant Collector, Deputy Collector or Sub-Deputy Collector, touching his proceedings and may make such further inquiry in the matter as he thinks fit; and shall either declare that the notice has been duly served or order such service as he thinks fit.

9. Service by post-Notwithstanding anything hereinbefore contained, the notice may, if the Certificate Officer so directs, be served by post." (Emphasis supplied)

Section 29 of the Orissa General Clauses Act, 1937

29. Meaning of service by post :- Where any Orissa Act authorizes or requires any document to be served by post whether the expression "serve" or either of the expressions "give" or "send" or any other expression is used, then, unless a different intention appears**, the service shall be deemed to be effected by properly addressing, prepaying, and posting by registered Post** a letter containing the documents and, unless the contrary is proved to have been effected at the time at which the letter would be delivered in the ordinary course of post." **(Emphasis supplied)**

13. From the legal provisions enshrined under the OPDR Act, 1962, it is amply clear that the Certificate Debtor has to be noticed in the prescribed Form and the prescribed manner and has to be provided with a copy of the certificate duly signed and verified by the Certificate Holder so also Certificate Officer giving him/her opportunity to file Petition denying liability. Further, so far as service of notices, as detailed in the Rules under Schedule-II read with Section 46 of the OPDR Act, 1962, apart from service of notice on the Certificate Debtor in person, Rule 9 in Schedule-II prescribes as to service of notice by post. Since the OPDR Act, 1962 is a State Act, this Court is of the view that, as prescribed under section 29 of the Orissa General Clauses Act, 1937, service by 'post' in terms of Rule-9 in Schedule-II means the service shall be deemed to be effected if the notice is sent to the Certificate Debtor by properly addressing, prepaying and posting it by registered Post and not by ordinary post, as was allegedly done in the present case.

14. From the documents available on record, it is amply clear that the Opposite Party No.1 (Certificate Officer) received the requisition in Form No.2 from the Opposite Party No.2 on 04.05.2016 and thereafter, the date was fixed to 22.07.2016 for appearance of the Certificate Debtor.

Similarly, as is revealed from Form No.1, as at Annexure D/1 to the Counter, the same is undated, vide which the Certificate Officer-Cum-Sub-Collector, Bhubaneswar was required to certify that the amount in terms of the requisition is due and recoverable from the Certificate Debtor and the recovery by suit is not barred by law. The subsequent order sheets of the Certificate Proceeding, which have also been annexed to the Counter as Annexure-G/1, do not reflect that the notice was duly sent and served on the Petitioner in terms of section 46 of the OPDR Act, 1962 read with the Rules under Schedule-II, as extracted above, giving the Petitioner opportunity to file Petition denying liability before issuance of the impugned notice dated 30.08.2016 to Show-Cause.

15. In view of the above, this Court is of the view that the Show-Cause Notice for issuance of warrant of arrest dated 30.08.2016, as at Annexure-2, being issued without following due procedure as prescribed under sections 6 and 8 of the OPDR Act, 1962 and without proper notice in terms of the Rules under Schedule-II, is liable to be set aside. Accordingly, the Show-Cause Notice for issuance of warrant of arrest dated 30.08.2016, as at Annexure-2, is set aside.

16. Matter is remitted back to the Opposite Party No.1 with a direction to provide opportunity to the Petitioner in accordance with various provisions of the OPDR Act, 1962 and rules made there under, as detailed above, and thereafter proceed further in accordance with law.

17. In order to avoid delay, the Petitioner is directed to appear before the Opposite Party No.1 on 29.04.2024 along with a certified copy of this Order. On being so appeared, the Sub Collector-cum-Certificate Officer, Bhubaneswar shall furnish all the Forms with proper seal, signature and date to the Petitioner giving her

opportunity to file her petition denying liability, if any, and thereafter, shall proceed further following due procedure, as prescribed under section 9 of the OPDR Act, 1962.

18. With the said observation and direction, the Writ Petition stands disposed of.

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2024 (II) ILR-CUT-329

SANJAY KUMAR MISHRA, J.

W.P.(C) NO. 8243 OF 2024

I.C.I.C.I. LOMBARD GENERAL INSURANCE CO. LTD., BHUBANESWAR ……Petitioner

-V-

SMT. KARUNA MANDAL & ORS. ……Opp.Parties

ODISHA MOTOR VEHICLES (ACCIDENTS CLAIMS TRIBUNAL) RULES, 1960 – Rule 7 – Time limit for filling the written statement – The claim Tribunal rejected the written statement – The Claims Tribunal rejected the written statement filed by the petitioner on the ground that the trial already been commenced and evidence from the side of claimant was closed – Whether the impugned rejection is sustainable? – Held, No – A perusal of Rule 7 does not show that, any time limit has been fixed for filing of written statement. (Paras 10-13)

For Petitioner : Mr. A.A. Khan

For Opp.Parties : Mr. P.K. Mishra.

JUDGMENT Date of Hearing & Judgment : 30.04.2024

SANJAY KUMAR MISHRA, J.

Pursuant to the order dated 08.04.2024, notice being issued to the Opposite Parties, Mr. P.K. Mishra, learned Counsel is present and files Vakalatnama duly executed in his favour by the Opposite Party Nos.1 to 3, who are the claimants before the Tribunal. The same is taken on record.

Though the A.D. showing service of notice on Opposite Party No.4 has returned but the said Opposite Party goes unrepresented when the matter is called. However, on consent of the learned Counsel for the parties, matter is taken up for hearing and final disposal at the stage of admission.

2. Heard learned Counsel for the Petitioner so also Opposite Party Nos.1 to 3.

3. This Writ Petition has been preferred by the Insurance Company (Opposite Party No.2 before the Claims Tribunal), being aggrieved by the order dated 14.03.2024, as at Anenxure-4. Vide the said order, the District Judge-cum-1st M.A.C.T., shortly, 'the Claims Tribunal', rejected the petition dated 28.02.2024 filed

by the Petitioner-Insurance Company for acceptance of its Written Statement by setting aside the order dated 05.10.2023, vide which the Petitioner-Insurance Company was precluded from filing the Written Statement. However, the very day the Tribunal allowed the petition to accept the Affidavit Evidence of witness of the Petitioner-Insurance Company so also documents and the said witness was examined as O.P.W. No.1 through whom the documents filed by the Petitioner-Insurance Company were marked as Exts.A & B without any objection. Accordingly, a prayer has been made to set aside the said order dated 14.03.2024 as at Anenxure-4 and direct the Tribunal to allow the Petition dated 28.02.2024 and accept the Written Statement filed by the Petitioner-Insurance Company.

4. Mr. Khan, learned Counsel for the Petitioner submitted that the Petitioner-Insurance Company could not file the Written State in time due to want of information and documents. However, on getting the necessary information, on 28.02.2024 the Written Statement was filed along with a petition for its acceptance on the ground that if the same is accepted and taken into record, it will be helpful for proper adjudication of the matter on merit. Mr. Khan further submitted that since the Claims Tribunal allowed the affidavit evidence filed by the Petitioner-Insurance Company so also documents filed by it were also exhibited through O.P.W.1 without any objection, it should have accepted the Written Statement, as law is well settled that evidence without or beyond pleadings is not acceptable. Hence the Claims Tribunal has committed an apparent error by rejecting the Petition of the Insurance Company to accept its Written Statement.

5. Mr. Mishra, learned Counsel for the Opposite Party Nos.1 to 3, who are Claimants before the Claims Tribunal, submitted that as per the instruction received, the Claims Tribunal rejected the petition of the Petitioner-Insurance Company despite the leaned Counsel for the claimants made an endorsement on the margin of the said petition that they have no objection to the said prayer made by the Petitioner-Insurance Company. He further submitted that because of the admitted fact that the affidavit evidence filed by the Insurance Company has been accepted and the witness was permitted to be examined by the Insurance Company and documents were also marked as exhibits through the said witness, he has no objection to the prayer made in the Writ Petition.

6. In view of the said submissions made by the learned Counsel for the parties, before dealing with the issue regarding legality of the impugned order, it would be apt to reproduce below Rules-6, 7 & 20 of the Odisha Motor Vehicles (Accidents Claims Tribunal) Rules, 1960, shortly hereinafter, 'the Rules, 1960'.

> *"6.* ***Notice to parties involved*** *– If the application is not dismissed under Rule 5, the Claims Tribunal shall send to the owner of the motor vehicle involved in the accident and its insurer, a copy of the applications together with a notice of the date on which it will hear the application and may call upon the parties to produce on that date any evidence which they may wish to tender.*

> *7. **Appearance and examination of parties** – (1) The owner of the motor vehicle **and the insurer may, and if so required by the Claims Tribunal shall, at or before the first hearing or within such further time as the Claims Tribunal may allow, file a written statement** dealing with the claims raised in the application, and any such written statement shall form part of the record.*
>
> *(2) **If the owner or the insurer contests the claim, the Claims Tribunal may, and if no written statement has been filed, it shall proceed to examine the owner and the insurer upon the claim and shall reduce the substance of the examination to writing**."*
>
> *20. Code of Civil Procedure to apply in certain cases - The following provisions of the First Schedule to the Code of Civil Procedure, 1908, shall, so far as may be, apply to proceedings before the Claims Tribunals, namely, Order V, Rules 9 to 13 and 15 to 30; Order IX, Order XIII, Rules 3 to 10; Order XVI, Rules 2 to 21; Order XVIII and Order XXIII Rules 1 to 3. (Emphasis supplied)*

7. As is revealed from the pleadings made in the Writ Petition so also the certified copy of the order sheet in M.A.C. Case No.96 of 2022 as at Annexure-4, the Petitioner-Insurance Company was precluded to file its Written Statement vide order dated 05.10.2023 because of non-filing of the same within the time granted by the Tribunal. Present Opposite Party Nos.1 to 3 (the Petitioners/Claimants before the Claims Tribunal) adduced evidence by producing two witnesses from their side on 18.01.2024 and closed their evidence on the same day. Thereafter the petition was filed by the present Petitioner (Opposite Party No.2 before the Claims Tribunal) on 28.02.2024 with a prayer to set aside the order dated 05.10.2023 to the extent precluding it to file its Written Statement and to accept the Written Statement filed along with the said petition. The Claims Tribunal rejected the said petition vide order dated 14.03.2024 on the ground that the trial has already been commenced and evidence from the side of the Petitioners (present Opposite Party Nos.1 to 3) has already been closed and at this stage, if the petition dated 28.02.2024 filed by the Opposite Party No.2 is allowed, the Petitioners-Claimants will be prejudiced and the same will also lead to lingering of the proceeding. However, on the very same day i.e on 14.03.2024, evidence of O.P.W.1 was filed by the Petitioner in shape of an affidavit along with the documents so also a petition to accept the same. The Claims Tribunal allowed the said petition then and there without inviting any objection, perhaps because of the fact that the learned Counsel for the claimants made an endorsement of no objection. O.P.W.No.1 was further examined-in-chief, documents were marked as Ext.A & B through the said witness without any objection. He was cross-examined by the Petitioners' Counsel and discharged.

8. In the present case, the Petitioner-Insurance Company (Opposite Party No.2 before the Claims Tribunal) was not allowed to file its written statement because of the reasons detailed in the impugned order. Hence, the Tribunal should have examined the witness of the Insurer and recorded the sum and substance of his statement in writing as has been prescribed under sub-rule 2 of rule-7 of the Rules, 1960 instead of permitting it to file affidavit evidence and lead evidence as detailed above. Since the Claims Tribunal allowed Petitioner-Insurance Company to file

affidavit evidence of O.P.W. No.1 thinking the same is required for proper adjudication of the claim case, the said witness was further examined, cross-examined and discharged and documents were also marked as Ext.A & B though the said witness and there was no objection of the claimants to the prayer made in the said petition.

9. Law is well settled that evidence adduced beyond the pleading cannot be admissible nor any evidence can be permitted to adduce which is at variance with the pleadings. Law is also well settled that the Court at a later stage of the trial as also the appellate Court having regard to the rule of pleadings would be entitled to reject the evidence where for there does not exist any pleading.

10. A perusal of Rule-7 does not show that any time limit has been fixed for filing of Written Statement. Similarly a perusal of Rule-20 does not show that the provision under Order-8 of the Code of Civil Procedure applies to the proceeding before the Tribunal.

11. In the above circumstances so also in view of the specific provision under sub-rule 1 of rule-7 of the Rules, 1960, this Court is of the view that the Claims Tribunal can allow the Owner or Insurer of the offending vehicle contesting the claim to file their Written Statement at any stage before pronouncement of the award, if so required by it. This Court is of further view that the intent of the legislature empowering the Claims Tribunal to allow the Written Statement at any stage is to allow genuine claims and check bogus and fake claims so also to pass award against the owner and driver of the offending vehicle, where there is no insurance coverage of the offending vehicle or the terms of the policy has been flouted by the parties.

12. In view of the above, this Court is of the view that the Claims Tribunal should have exercised its power allowing the petition of the Insurance Company and accepted the written statement filed along with the said petition instead of rejecting the petition dated 28.02.2024 on the grounds that the present Opposite Party Nos.1 to 3 (Petitioners before the Claims Tribunal) will be prejudiced and it will only linger the proceeding.

13. Accordingly, the order dated 14.03.2024 passed by the Claims Tribunal in M.A.C. Case No.96 of 2022 is partially set aside. The Claims Tribunal is directed to reconsider the petition dated 28.02.2024 field by the Petitioner-Insurance Company (Opposite Party No.2 before the Claims Tribunal) and accept its Written Statement and proceed further in accordance with law. Since the evidence has already been adduced by the parties and the matter stands posted for argument, the Claims Tribunal shall do well to conclude the said proceeding at the earliest, preferably within a period of eight weeks from the date of production of the certified copy of this order.

14. With the said observation and direction, the Writ Petition stands disposed of.

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2024 (II) ILR-CUT-333

CHITTARANJAN DASH, J.

CRA NO. 162 OF 1991

BAIKUNTHANATH BEHERA ……Appellant

-V-

STATE OF ORISSA ……Respondent

INDIAN PENAL CODE, 1860 – Section 366 – The appellant made a false promise of marriage to victim only to satisfy his lust – The appellant had no intention to marry the young girl as he was already married and after fulfilling his lust he abandoned the victim on the bus stop – Whether the offence under Section 366 is sustainable? – Held, No – As there was no compulsion to marry but only allurement, the ingredients fulfill the offence U/s. 363 IPC. (Para 13)

For Appellant : Mr. Barunaditya Mohapatra (Amicus Curiae)

For Respondent : Mr. Shasanka Patra, ASC

JUDGMENT Date of Judgment : 28.03.2024

CHITTARANJAN DASH, J.

1. The Appellant, namely Baikunthanath Behera faced the trial on the charges under sections 366/376 of the Indian Penal Code, 1908 (in short, hereinafter referred to "IPC") before the learned Sessions Judge, Udala for having kidnapped the victim for the purpose of forcing/seducing her to illicit intercourse and for having committed rape, wherein the learned court found the Appellant guilty for the offences charged as above, convicted and sentenced him to undergo rigorous imprisonment for 8 (eight) years on each count.

2. The prosecution case in brief is that, on 19.04.1990 during night hours Bhaskara Chandra Sahu (P.W.1), the Informant, his wife, his younger son, daughter and the victim girl (P.W.5) while were sleeping in a room of his house at Udala, at about 3.00 A.M. when he (P.W.1) got up, found his daughter (the victim girl) absent in the house and the door of the house was open. Finding her absent in the house and the back door of the house being open, he called out his elder brother Manamath Chandra Sahu and his neighbours Prahallad Prusty and others. They searched for her at different places but could not get her traced. However, 4 to 5 days after the missing of the victim girl, he (P.W.1) came to know that Appellant Baikuntha Behera had kidnapped her. Having failed to rescue the victim, P.W.1 reported the incident of missing in writing before the Udala P.S. on 27.04.1990. On 01.05.1990, the victim returned to her house and narrated that the Appellant brought a jeep and took her to Baripada Bus Stand and from there he took her to different places and had forceful sexual intercourse with her and finally when they were returning to Udala, the Appellant left her alone at Sajanagarh while travelling in a bus and accordingly she returned to her house. Having heard her daughter, the informant

took her to the police station along with her mother. On the basis of the report already submitted before the police, FIR was registered vide Udala P.S. Case No. 33 of 1990 and the investigation commenced.

3. In the course of investigation, the I.O. (P.W.6) examined the victim u/s 161 Cr.P.C. and sent her for medical examination. The I.O. visited the spot, prepared the spot map, examined other witnesses including the neighbours. Subsequently, the charge was handed over to the O.I.C., who, in course of his investigation obtained the medical report of the victim so also the ossification test report and the School Admission Register in order to ascertain the age of the victim, seized the other incriminating articles and, upon completion of the investigation, submitted the chargesheet.

4. The case of the defense is one of complete denial and false implication.

5. To bring home the charge, the prosecution examined 10 witnesses in all. P.W.1, Bhaskar Chandra Sahu is the father of the victim, P.W.2, Nilamani Das and P.W.4, Niranjan Behera are the Clerk and Peon of Udala Girls' High School, P.W.3, Binod Kumar Das is the Driver of the jeep, P.W.5 is the victim girl, P.W.6, Kartik Chandra Tarai is the initial I.O., P.W.7 and P.W.8 namely Padmanava Kara and Rasbihari Nayak are the Circle Inspector of Police respectively. P.W.9, Dr. Meena Kumari Dwari is the lady Asst. Surgeon who examined the victim and P.W.10, Manasananda Tripathy is the I.O. who submitted the chargesheet.

6. The learned trial court having believed the evidence of the prosecution witnesses and the corroborative circumstances paired with the legal principles concerned, found the prosecution to have proved its case beyond all reasonable doubt and held the Appellant guilty and convicted him awarding the sentence as described above.

7. The learned counsel for the Appellant while assailing the impugned judgment, argued that the victim girl eloped with the appellant on her own volition, and is a consenting party to the sexual intercourse and, had the victim girl subjected to sexual acts without her consent, there would have been some injury marks on her person, and in absence of such injury marks her version cannot be relied upon. He further submitted that, according to the version of the victim, she was taken from place to place by the Appellant and she had enough scope to attract the notice of the people in general, more particularly for the reason that nothing has been stated by the victim that she was transported from one place to another under threats or keeping her aloof of the public places. Rather, according to the learned counsel there is ample of evidence to support the fact that the victim accompanied the appellant to different places where she was exposed to the public in general who could have easily attracted the notice of the victim if she had any compulsion in moving with the appellant. The learned counsel further submitted that there is inordinate delay in submitting the FIR which is fatal to the prosecution case, and finally summed up his argument stating that a false case has been hatched against the appellant.

8. The learned counsel for the State on the other hand while supporting the impugned judgment to be akin to the evidence led by the victim as well as the prosecution case, submitted that the versions of the prosecutrix being clear, candid, and natural which can very well be called as sterling quality, well proved the appellant to be the perpetrator of the offence and the alleged act of the Appellant being free from embellishments, bring sim within the ambit of the charges alleged. He further submitted that the findings recorded by the trial court is no way found contradicted to the testimony of the victim vis-à-vis the medical evidence, and the prosecution having proved the victim to be a minor, the criticism of the appellant to the effect that the victim voluntarily eloped with the appellant and conducted herself engaging in the sexual intercourse get completely belied. The learned counsel for the State further submitted that, considering the age of the victim girl as assessed by the learned trial court who held her to be a minor, a forcible sexual act on a minor is graver than an adult and further that the consent, if any on the part of the victim, does not amount to a consent in consonance with law and hence, the impugned judgment suffers from no infirmity and requires no interference.

9. To appreciate the aforesaid submissions, the relevant provisions with respect to the charges are required to be referred to.

> **"90. Consent known to be given under fear or misconception**
>
> A consent is not such a consent as is intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or
>
> Consent of insane person.—if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or
>
> Consent of child.—unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.
>
> **Section 361. Kidnapping from lawful guardianship**
>
> Whoever takes or entices any minor under [sixteen] years of age if a male, or under [eighteen] years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.
>
> Explanation.--The words "lawful guardian" in this section include any person lawfully entrusted with the care or custody of such minor or other person.
>
> Exception.--This section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to the lawful custody of such child, unless such act is committed for an immoral or unlawful purpose.
>
> **363. Punishment for kidnapping**
>
> Whoever kidnaps any person from [India] or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.
>
> **366. Kidnapping, abducting, or inducing woman to compel her marriage, etc.**

Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; [and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall also be punishable as aforesaid].

Section 375. Rape

A man is said to commit "rape" if he—

(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:

(1) Against her will.

(2) Without her consent.

(3) With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

(4) With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

(5) With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome Substance, she is unable to understand the nature and consequences of that to which she gives consent.

(6) With or without her consent, when she is under eighteen years of age.

(7) When she is unable to communicate consent.

Explanations

(1) For the purposes of this section, "vagina" shall also include labia majora.

(2) Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act; Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Section 376. Punishment for Rape

(1) Whoever, except in the cases provided for in sub-section (2), commits rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine.

(2) ***

(3) Whoever, commits rape on a woman under sixteen years of age shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine:
Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:

Provided further that any fine imposed under this sub-section shall be paid to the victim."

10. The foremost duty of the court in a case of the present nature is with respect to the determination of the question as to whether the victim was a minor at the time of the incidence. The prosecution case with regard to the fact that the victim was a student of class VI has not been disputed by the defence. Taking into account the fact that the victim was admitted to the school at the age of 5/6 years, her age could not have been more than 12 years at the time of the incident. The very fact proved from the side of the prosecution vide Ext. 3 – the Admission Register wherein the date of the birth of the victim is reflected, as admissible under Section 35 of the Evidence Act, unambiguously establishes the victim girl to be aged about 12 years. Further, the medical evidence corroborating the age of the victim reflected in the Admission Register and deposed to by the victim and her parents proves beyond reasonable doubt that she was minor at the time of the incident. It is on this count alone, the argument advanced by the learned counsel for the Appellant that the victim volunteered to move out of the house and remained consensually in cohabitation with the appellant is hit by Section 90 of the IPC, in as much that the consent of the minor is not a consent in the eye of law. Consequently, all that is alleged against the appellant with regard to the overt act shown by him in subjecting the victim girl to sexual intercourse well proves the offence charged. The evidence laid by the victim does not appear shaky or unnatural, since the narration made by her with regard to the manner in which she was taken from place to place and having subjected to sexual intercourse found not contradicted in any manner and, on the contrary the appellant held the said act to be consensual in nature makes the version of the prosecutrix sacrosanct and leaves no room to doubt her credibility.

11. In her sworn testimony, P.W.5, the victim has categorically stated that she knew the informant, as he was staying in the neighbourhood and working as an Electrician in the same shop where her brother used to work as well. He used to come to her house to learn stitching-tailoring from her father and brought sweets for her. She was asked by the appellant to leave with him to Puri to get married. She has also stated that she had no knowledge that the appellant was a married man with a family. Supposing the contention of the Appellant that she was a consenting party to the allegations of rape and with her conscious mind, she accompanied with the accused from Udala to Balasore to Cuttack to Bhubaneswar to Puri, wherein both spent several nights together where he had sexual intercourse with her, the prosecution has proved beyond reasonable doubt that the appellant had lured the

prosecutrix to have sexual relationships with him on the pretext that he would marry her and had taken her away from the residence of her parents in the midst of a night without their permission. Such consent overtrained by the appellant was under a misconception of fact and allurement of having a married future. It cannot be gainsaid that a consent given by a person would not be a consent as intended, if such consent was given by the person under a misconception of fact as contemplated in Section 90 IPC. Even in the offence Section 375 IPC, describes certain acts which, if committed by the accused under the circumstances mentioned therein, terms as commission of 'Rape', even though committed with the consent of the prosecutrix. The expression "misconception of fact" contained in Section 90 IPC is to be appreciated in the light of the clause "Sixthly" – containing in Section 375 IPC. The consent of a minor is unsubstantial and invalid in the eyes of law. A minor is more susceptible to being deceived into running away from her parental house and lured into having sexual encounters under the false promises. Due to her limited understanding of the reality, if a minor girl of such tender age consents to have sex on the promise of marriage, it has to be noted that the girl is delusional about the meaning of the concept of 'consent' or its consequences. The subject of voluntary consent does not exist in the instant case, as the consent of a minor is equal to no valid consent at all.

12. With regard to the argument made by the learned counsel for the Appellant that the F.I.R. was lodged on 27.04.1990 when the occurrence had taken place on 19/20.04.1990, in the fitness of circumstance cannot be accepted as delay. According to the argument of the learned counsel for the Appellant, it is a clear delay in filing the F.I.R. and a case has been hatched against him does not appear probable because, according to the Appellant, he was present from 19.04.1990 to 01.05.1990 in the shop of D.W.2, but there is no material to support or give value to such plea of alibi claimed. Further, the defence plea to the effect that the girl had accompanied him on her own volition and that she is a consenting party to the alleged rape gives a complete goodbye to the plea of the appellant as the plea is in material contradiction with the evidence led by the defence. Hence, the trial court has rightly found the appellant to be the perpetrator and liable for the commission of offence of rape and has been convicted under section 376 IPC.

13. With respect to the offence of kidnapping, the Appellant was convicted under section 366 of the IPC. Here, it has been clearly established by the prosecution that the Appellant had mala fide motives and had made a false promise to the effect only to satisfy his lust. The Appellant clearly had no intention of marrying the young girl, as for firstly he was already married and secondly, he abandoned the victim girl on the Sajanagarh bus stop. He got down from the bus in the Sajanagarh bus stop saying to buy some betel, but never returned and left the victim girl on her own, from where she returned to her parents' house and narrated the entire incident resulting in the instant case. Hence, the charges with respect to this particular offence is made out to fulfill the ingredients of offence under section 363 IPC and

the offence under section 366 IPC is not sustainable, as there was no compulsion to marry, but only allurement.

14. From the above discussions, this court is of the view that the learned trial court has not erred in convicting the Appellant under section 376 IPC. However, the findings recorded by the learned trial court convicting the Appellant under section 366 IPC is hereby modified to Section 363 IPC. Since the sentence has been awarded under a higher offence under Section 376 IPC for a period of eight years, no separate sentence for the offence under section 363 IPC need to be awarded, which is a lesser offence. Hence, the Appeal is allowed in part. With the above modification in the offence and sentence, the impugned judgment and order of conviction passed by the learned trial court is confirmed.

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2024 (II) ILR-CUT-339

CHITTARANJAN DASH, J.

CRLA NO. 226 OF 2007

PRAKASH CHANDRA SWAIN ……Appellant

-V-

STATE OF ORISSA ……Respondent

PREVENTION OF CORRUPTION ACT, 1988 – Section 13(1)(d) r/w 13(2) – Whether violation of the rules and departmental norms would amount to the offence U/s. 13(1)(d)? – Held, No – The presence of a dishonest intention is fundamental to prove the abuse of position or authority of a public servant.

Case Laws Relied on and Referred to :-

1. 1963 AIR 1116 : M. Narayan Nambiar Vs. State of Kerala.
2. 1977 AIR 822 : S.K. Kale Vs. State of Maharashtra.
3. 2013 (1) SCC 205 : C.K.Jaffer Sharief v. State.

For Appellant : Mr. M. Mohanty

For Respondent : Mr. M.S. Rizvi, ASC (Vigilance)

JUDGMENT Date of Judgment : 19.04.2024

CHITTARANJAN DASH, J.

1. The Appellant, namely Prakash Chandra Swain faced the trial on the charges under Section 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988 (in short, herein after referred to "P.C. Act") before the learned Special Judge (Vigilance), Berhampur for having misappropriated the government funds wherein, the learned court found him guilty in the offences charged as above, convicted and sentenced the Appellant to undergo rigorous imprisonment for two years for the offence under 13(1)(d) read with Section 13(2) of the P.C. Act and to pay a fine of ₹5,000/-, in default, to undergo R.I. for three months.

2. The prosecution case in brief is that on 25.07.1997, the Vigilance Department, Raygada, lodged a written report before the Superintendent of Police (Vig.), Berhampur Division, Berhampur, alleging that the present Appellant during his tenure had diverted certain funds which had been sanctioned in favour of Sinapali Weavers Co-operative Society (herein referred to as "W.C.S.") vide letter No. 2159/T&H, dated 08.03.1994 of Govt. of Orissa, Textiles and Handloom Department, Bhubaneswar, as per the advice of Handloom Development Commissioner, Govt. of India, for setting up Handloom Development Centre and Quality Dyeing Unit. According to the prosecution, on 21.04.1994, the Appellant received the draft. He, however, deposited the said bank draft in Bhawanipatna Central Co-operative Bank Ltd., Sadar Branch on 23.05.1994 without giving clear instruction to the Bank as to in which account the amount of the draft had to be credited. The Bank Authority, therefore, kept the amount in the Sundry account of the Bank in favour of Asst. Director of Textiles, Bhawanipatna. It is further alleged that as per the instruction of the Government, Mr. Swain was to credit the draft amount in the SBD account of Sinapali W.C.S. Instead of doing so, Mr. Swain obtained a Bank draft of ₹4,76,800/- in favour of the National Handloom Development Corporation, Hyderabad through Bhawanipatna Central Cooperative Bank vide Demand draft no. TL/A/II-720926 dated 06.06.94. Mr. Swain personally handed over the draft at Bhubaneswar Branch of National Handloom Development Corporation Ltd. on 07.06.1994. He also placed orders for supply of 40 bales of 26S yarns. On 22.7.1994, 40 bales of 26S yarns were received in favour of Nehuru Nagar Weavers Cooperative Society. Mr. Swain distributed the same in favour of different primary weaver societies through Nehuru Nagar W.C.S. under the "Hank Yarn Subsidy Scheme" with a view to derive subsidy benefit by the above society, although the money had been sanctioned for Sinapali W.C.S. Moreover, out of the sanctioned amount of ₹6,00,000/- a sum of ₹4,00,000/- was to be utilised as margin money towards the purchase of raw materials and the balance of ₹2,00,000/- was for setting up Quality Dyeing Unit in favour of Sinapali W.C.S. but Mr. Swain deliberately did not credit the draft amount in favour of Sinapali W.C.S. The report further alleged that Mr. Swain, A.D.T., Bhawanipatna by violating the orders of the Government and Director of Textiles, Bhubaneswar, Odisha in order to arrange pecuniary benefit for Nehuru Nagar W.C.S. diverted the funds though it was received for Sinapali W.C.S. for setting up Handloom Development Centre and Quality Dyeing Unit. Mr. Swain had shown undue official favour to Nehuru Nagar W.C.S. by abusing his official position being a public servant, whereby Nehuru Nagar W.C.S. got pecuniary benefit and Sinapali Weavers Co-operative society had been deprived off the benefits.

3. In the course of investigation, the Superintendent of Police (Vigilance), Berhampur treated the inquiry report as F.I.R., and directed for investigation of the case against Prakash Chandra Swain, Asst, Director of Textiles, Bhawanipatna. He further directed the Inspector (P.W.26) to investigate the case. It was discovered that

₹6,00,000/- earmarked for establishing a Quality Dying Unit and Handloom Development Center for Sinapali W.C.S. was redirected by the Appellant, who held the position of Assistant Director of Textiles, Bhawanipatna, to Nehuru Nagar Weavers Co-operative Society under the hank yarn scheme. This unauthorized diversion prevented Sinapali Weavers Co-operative Society from receiving a subsidy of ₹14,500/-, which they would have been entitled to, had the funds been utilised for the intended purpose. The Appellant unlawfully diverted the funds without any approval from the appropriate authorities. The I.O. examined witnesses and seized several documents marked as Exts. 1, 2, 3, 7, 10, 11, 12, and 13, along with documents marked as Exts. 1/2, 2/3, 3/3, 7/2, 10/3, 11/2, 12/2, and 13/2, all bearing his signature. Additionally, on 12th June 1998, two minutes books and the cash book of Nehuru Nagar Weavers Co-operative Society, along with documents marked as Exts. 41, 42, and 43/2, with Ext. 42/1 were seized. These documents were presented before the sanctioning authority, leading to the issuance of the sanction order by P.W.11 marked as Ext. 4. Subsequently, upon concluding the investigation, a charge sheet was filed against the Appellant.

4. The case of the defense is one of complete denial and false implication. The Appellant has denied to have misutilised his official position in doing the alleged act and as such the provisions of Section 13(1)(d) of the P.C. Act are not attracted.

5. To bring home the charge, the Prosecution examined 26 witnesses in all. P.W.1 and 2 being the seizure witnesses, namely, Surendra Patnaik and Ashok Kumar Sahu; PW.3, Uma Shankar Barik; P.W.4, Udhab Deep; P.W.5, 6, 7, 8, 9, 10, 12, 13, 16, 18, and 20 being the secretaries of the primary centres of Nehuru Nagar W.C.S. namely Sripati Meher, Radhashyam Meher, Prahallad Meher, Kirtiram Meher, Bhaskar Meher, Abhaya Prasad Meher, Hare Krushna Meher, Arjuna Meher, Fakir Mohan Naik, Jakob Manda, and Durga Prasad Das respectively; P.W.11, Tara Shankar Chakraborty being the Dy. Secretary of G.A. Department who accorded the sanction for prosecution; P.W.14, Satyanarayana Meher being the Secretary of Nehuru Nagar W.C.S.; P.W.15, Purna Chandra Muduli; P.W.18, Satrughna Meher; P.W.19, Ram Chandra Sahu; P.W.21, Prafulla Gouda; P.W.22, Rameswara Meher being the Secretary of Sinapali W.C.S.; P.W.23, Basant Kumar Dash being the Inspector of Vigilance who arrested the Appellant; P.W.24, Sangram Kishore Mohanty; P.W.25, Debi Prasad Dash, and P.W.26, Raj Kishore Choudhury being the I.O.

6. The learned trial court having believed the evidence of the prosecution witnesses and the corroborative circumstances paired with the legal principles concerned, found the prosecution to have proved its case beyond all reasonable doubt and held the Appellant guilty and convicted him awarding the sentence as described above.

7. The learned counsel for the Appellant while assailing the impugned judgment argued that the impugned judgment against the present Appellant is based

on mere surmises and conjectures, as there is no concrete evidence to prove the alleged connivance between the Appellant and the Central Bank Cooperative Societies. The Appellant had given instructions for deposit of the amount in the account of Sinapali W.C.S. and it was for the bank authorities to explain why the amount was not deposited. He further argues that the bank officials/manger have not been examined though they were cited as chargesheet witnesses as it is essential to prove the involvement of the bank officials and the alleged connivance in order to establish the charges against the Appellant. Furthermore, the Appellant has not been given the opportunity to explain the discrepancy in the amount spent on raw materials, which is a significant aspect of the case. The fact that the draft in question was in favour of Sinapali W.C.S and could not have been encashed in the absence of any endorsement by Sinapali W.C.S is a crucial piece of evidence that has not been taken into account. Additionally, the evidence of P.W.22, the Secretary of Sinapali W.C.S, regarding the Joint Director, Textiles visiting their Society and taking away their resolution book, and not returning the same despite repeated requests, is an important aspect of the case which has not been taken into account. The fact that they had received a sum of 4,00,900/- from Nehuru Nagar Weavers Co-operative Society is equally substantial to read in the evidence which could have clarified the issue in question that has not been taken note of.

8. The learned counsel for the State, Mr. Rizvi, on the other hand while supporting the impugned judgment to be akin to the evidence led by prosecution, submitted that the Appellant during his tenure, engaged in a series of actions that clearly demonstrate a deliberate and calculated effort to divert the concerned funds for personal gain and to benefit other entities at the expense of the rightful beneficiaries. The Appellant in his capacity as a public servant entrusted with the responsibility of managing and disbursing public funds, blatantly disregarded the directives of the Government and the Director of Textiles, Orissa. It is cogent from the evidence presented that he received a draft intended for the Sinapali W.C.S. with clear instructions on its utilisation for the establishment of a Handloom Development Centre and a Quality Dyeing Unit but instead of adhering to these directives, the defendant chose to divert the funds to the National Handloom Development Corporation, thereby depriving the Sinapali W.C.S. of its rightful entitlement. Furthermore, the learned counsel for the Appellant asserts that the Appellant's actions were not merely inadvertent or accidental but were, in fact, calculated and premeditated as his decision to deposit the draft in a bank without providing clear instructions on its utilisation, followed by the procurement of a bank draft in favour of another entity, clearly indicates a pattern of behaviour aimed at siphoning off the funds allocated for the Sinapali W.C.S. Moreover, the subsequent distribution of yarns to other societies under the guise of a subsidy scheme, intended for the benefit of the Sinapali W.C.S., further underscores the intention of the Appellant to abuse his official position. He further submits that the Appellant was in connivance with the Central Bank Cooperative Societies in the sundry account and

the defence has failed to prove his innocence with respect to the withdrawal of ₹4,76,800 from ₹6,00,000 in the absence of the signature of the account holder of Sinapali W.C.S. Hence, the impugned judgment suffers from no infirmity and requires no interference.

9. To appreciate the aforesaid submissions, the relevant provisions with respect to the charges are required to be referred to –

> ***Prevention of Corruption Act 1988***
>
> ***13. Criminal misconduct by a public servant.—***
>
> (1) A public servant is said to commit the offence of criminal misconduct,—
>
> (a) ***
>
> (b) ***
>
> (c) ***
>
> (d) If a public servant, by corrupt or illegal means or by otherwise abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage.
>
> Explanation 1.—A person shall be presumed to have intentionally enriched himself illicitly if he or any person on his behalf, is in possession of or has, at any time during the period of his office, been in possession of pecuniary resources or property disproportionate to his known sources of income which the public servant cannot satisfactorily account for.
>
> Explanation 2.—The expression ‘‘known sources of income’’ means income received from any lawful sources.]
>
> (2) Any public servant who commits criminal misconduct shall be punishable with imprisonment for a term which shall be not less than [four years] but which may extend to 3[ten years] and shall also be liable to fine.

10. Section 13(1)(d) of the Prevention of Corruption Act, 1988 outlines the offense of criminal misconduct by a public servant. The ingredients of this provision include:

> i) that he should have been a public servant at the time of occurrence
>
> ii) that he should have used corrupt or illegal means or otherwise abused his position as such public servant; and
>
> iii) that he should have obtained a valuable thing or pecuniary advantage for himself or for any other person.

There is no dispute that the Appellant was a public servant at the relevant time. The question for determination would be as to whether he had misappropriated the alleged funds by virtue of his official position or that he has used illegal means or otherwise abused his position as such public servant and obtained valuable thing or pecuniary advantage for himself or any other person.

11. P.W.14, the Secretary of Nehuru Nagar W.C.S in his sworn testimony has stated that in the year 1994, the Appellant purchased yarn for Sinapali Weavers Cooperative Society using the funds allocated to them. As Sinapali Weavers Cooperative Society declined to accept the 26^{S} yarn, the Appellant asked him to issue a receipt to Sinapali Weavers Cooperative Society for ₹4,76,800/- and so the

receipt, marked as Ext. 5, was issued by him accordingly. Subsequently, the Appellant provided a credit bill book, and he signed 27 credit vouchers indicating yarn supply to various primary societies, with Exts. 6 to 6/26 comprising those credit bills. Furthermore, the Appellant presented a yarn stock book in Nehuru Nagar W.C.S's name, with P.W.14's signatures confirming the distribution of 800 bundles of yarn to different primary centers. Initially, the Appellant had mentioned a subsidy of ₹15/- per kg. of yarn but later declined to take action, claiming it was a transaction between our society and Sinapali. Upon investigation, it was confirmed that no such transaction existed between the two societies. Consequently, P.W.14 retrieved the receipt issued to Sinapali and cancelled it. In June of 1994, the Nehuru Nagar W.C.S. passed a resolution urging the A.D.T. to procure yarn on credit for use by the primary societies. Following this, the A.D.T. instructed the Nehuru Nagar W.C.S. to take stock of yarn from Sinapali on credit, resulting in Ext. 5 being issued in favor of Sinapali W.C.S. According to P.W.14, the A.D.T. did not directly oversee the supply of yarn to primary Weavers cooperative societies. Throughout the year of 1994, P.W.14 personally received 220 bundles of yarn in two installments and obtained a subsidy of ₹ 14,500/-, as reflected in their cash book and bank passbook. By the time of the vigilance inquiry, ₹2,07,862/- out of ₹4,76,800/- had already been deposited by the concerned primary societies to Sinapali W.C.S.

12. On the other hand, P.W.22 who served as the secretary of the Sinapali Weavers Co-operative Society during the years 1988 to 1999, has stated that in the period between 1994 and 1995, he became aware that the central government had allocated ₹6,00,000 to Sinapali society. According to him, the society follows a protocol where resolutions are passed for any undertaken work or activities, and copies of these resolutions are sent to the Assistant Director of Textiles in Bhawanipatna. Upon learning about the allocation of ₹6,00,000, he visited the Assistant Director's office and discovered that he had directly purchased 40 bales of yarn from NHDC (National Handloom Development Corporation) without informing the Sinapali W.C.S. This yarn purchase was not included in the sanctioned allotment for the society. Normally, the sanctioned amount would have been deposited into the Sinapali W.C.S.'s accounts, and they would then pass a resolution for implementing any work using those funds. Upon realizing that the purchased yarn was unnecessary for the society, they passed a resolution stating so. However, the Assistant Director instructed them to record the receipt of ₹6,00,000 in their cash book and directed that a portion of it (₹4,76,800) be withdrawn and be paid to the Nehuru Nagar Weavers Co-operative Society. He provided a letter and a receipt as instructions for this payment. Later, the Secretary of the Nehuru Nagar Society came to P.W.22, took back the receipt, and cancelled it when Sinapali W.C.S. denied to have agreed to this circumstance. Subsequently, the Nehuru Nagar Cooperative Society deposited ₹4,00,900.30 into the account of Sinapali W.C.S. P.W.22 later stated that the Director of Textiles had informed them about the sanction of ₹6,00,000 and the selection of the society through a letter dated12.03.1994. Out of

this amount, ₹4,00,000 was allocated for yarn, while the remaining ₹2,00,000 was intended for purchasing utensils and providing training to society members in dyeing techniques. Twenty members of the society received training at Chicheiguda Cooperative Society, and 20 sets of utensils were provided by the Assistant Director. However, no dye was supplied. When the Joint Director of Textiles conducted an inquiry, all 20 sets of utensils were in the possession of the President. On 01.05.1994, the society passed a resolution expressing it's need for yarns, specifically requesting 40 bundles of 26^S of yarn. The same was requested to the Assistant Director to approve the resolution but he was not authorized to purchase 40 bales of 26^S of yarn as per the resolution dated 01.05.1994. On 2.7.1994, the society passed a resolution stating that the 26^S of yarn purchased by the Assistant Director would not be useful for the society. The Handloom Dying Unit and Quality Dyeing Unit scheme was to be implemented by the Assistant Director through the society selected by the Central Government. According to the scheme, yarns should be purchased from spinning mills of the concerned states, and no yarns can be purchased from private firms. When they declined to accept the 26^S of yarn purchased by the Assistant Director, it was diverted to the Nehuru Nagar society. The Assistant Director informed them that the Nehuru Nagar society would pay interest on this amount of ₹4,76,800 at 1% for the first two months and 5% thereafter. However, P.W.22 was unaware of any such resolution passed by Nehuru Nagar W.C.S. Subsequently, Sinapali W.C.S. provided a utilisation certificate for the sanctioned amount of ₹6,00,000 to the Central Government.

13. From the above and upon careful examination of the evidence presented, there is indeed discrepancies in the utilisation of funds allocated for the Sinapali W.C.S. as the testimonies of witnesses, including the Secretary of Nehuru Nagar W.C.S. and P.W.22, former Secretary of Sinapali W.C.S., highlight the divergence between the sanctioned purpose of the funds and their actual utilisation. However, Appellant's actions were guided by instructions and resolutions passed by the respective weaver’s societies. It is contended that the purchases made by the Appellant were in accordance with the directions received from the societies and were intended for the benefit of the cooperative sector as a whole. In the context of misappropriation case, an “irregularity” would refer to a deviation from established procedures, or legal requirements governing the handling or allocation of funds. It can encompass a wide range of actions or omissions that result in the improper use or allocation of resources, but may not necessarily involve intentional wrongdoing or criminal intent. It is important to note that while irregularities may not always involve criminal intent, they can still have serious consequences, including financial losses, damage to reputation, and legal liabilities. The determination of whether an action constitutes an irregularity or criminal misconduct often depends on factors such as the intention behind the act, the degree of negligence or recklessness involved, and the impact on affected parties.

14. The Apex Court in it's decision in the matter of ***M. Narayan Nambiar Vs. State of Kerala*** **1963 AIR 1116**, also cited in ***S. K. Kale Vs. State of Maharashtra*** **1977 AIR 822**, and various other decisions, has discussed the essentials in provision of Section 13(1)(d), as held:

> In our view this passage, if we may say so, restates the rule of construction of a penal provision from A correct perspective. As we will presently show the case of the appellant on the facts found clearly falls not only within the words of clause (d) but also within 'its spirit. Indeed if his argument be accepted not only we will be doing violence to the language but also to the spirit of the enactment. First taking the phraseology used inthe clause, the case of a public servantcausing wrongful loss; to the Government be benefiting a thirdparty squarely falls within it. Let us look at the clause "by otherwise abusing the position of a public servant', for the argument mainly turns upon the said clause. The phraseology is very comprehensive. It covers acts done "otherwise" than by corrupt or illegal means by an officer abusing his position. The gist of the offence under this clause is that a public officer abusing his position as _a public servant obtains for himself or for any other person any valuable thing or pecuniary advantage. "Abuse" means misuse i.e. using his position for something for which it is not intended That abuse may be by. corrupt or illegal means or otherwise than those means. The word 'otherwise' has wide connotation and if no limitation is placed on it, the words 'corrupt, 'illegal', and "otherwise' mentioned in the clause become surplusage, for on that construction every abuse of position is gathered by the clause. So 'some limitation will have to. be put on that word and that limitation is that it takes colour from the preceding words along with which it appears in the clause, that is to say something savouring of dishonest act on his part. The contention of the learned counsel that if the clause is widely construed even a recommendation made by a public servant for securing a job for another may come within the Clause and that could not have been the intention of the Legislature. But in our view such innocuous acts will not be covered by the said clause. The juxtaposition of the word or otherwise' with the words "corrupt or illegal means" and the dishonesty implicit in the word "'abuse" indicate the necessity for a dishonest intention on his part to bring him within the meaning of the clause. Whether he abused his position or not depends upon the facts of each case; nor can the word 'obtains' be sought in aid to limit the express words of the section

15. Furthermore, the question as to whether violation of the rules and departmental norms would amount to the offence under Section 13(1)(d) of the PC Act was considered by the Apex Court in ***C. K. Jaffer Sharief v. State*** **2013 (1) SCC 205**. The Apex Court held thus:

> "If in the process, the rules or norms applicable were violated or the decision taken shows an extravagant display of redundance it is the conduct and action of the appellant which may have been improper or contrary to departmental norms. But to say that the same was actuated by a dishonest intention to obtain an undue pecuniary advantage will not be correct. That dishonest intention is the gist of the offence under Section 13(1)(d) is implicit in the words used i.e. corrupt or illegal means and abuse of position as a public servant."

16. In the instant case, the prosecution has failed to produce any material to show that the Appellant with dishonest intention abused his position as a public servant. Firstly, the Appellant while distributing the bundles of yarn to the primary

centres of Nehuru Nagar W.C.S., had supplied so, on credit only, which was adjusted in the M.D.A. account of the concerned societies as deposed to by P.Ws. 5, 6, 7, 8, 9, 10, 12, 16, 18 and 20 where the Appellant, under Ext. 17, 18 and Ext. A had given instructions to deposit the amount in the account of Sinapali Weavers Cooperative Society. Secondly, by the time of the vigilance inquiry, ₹2,07,862/- out of ₹4,76,800/- was already deposited by the concerned societies to Sinapali W.C.S. and Nehuru Nagar Cooperative Society had subsequently deposited ₹4,00,900.30 into the account of Sinapali W.C.S. as is also admitted by Sinapali W.C.S.

17. The essence of the offense outlined in Section 13(1)(d) implies that the presence of a dishonest intention is fundamental to prove the abuse of position or authority of a public servant. The Appellant's actions and way of managing the funds might have deviated from accepted standards or regulations within the department, however, it would be inaccurate to claim that these actions were motivated by a dishonest intention to gain an unjust benefit either for himself or for Nehuru Nagar W.C.S.

18. Furthermore, the only "pecuniary benefit" that the Nehuru Nagar W.C.S. obtained was a subsidy of ₹14,500/- as per the regulations in the Hank Yarn Subsidy Scheme which the Sinapali W.C.S. is claiming but has admitted to have refused the same. On 2.7.1994, the Sinapali society passed a resolution stating that the 26S of yarn purchased by the Assistant Director would not be useful for the society. The Handloom Dying Unit and Quality Dyeing Unit scheme was to be implemented by the Assistant Director through the society selected by the central government. According to the scheme, yarns should be purchased from spinning mills of the concerned states, and no yarns can be purchased from private firms. When Sinapali W.C.S. declined to accept the 26S of yarn purchased by the Appellant-A.D.T., it was diverted to the Nehuru Nagar society. Subsequently, the Joint Director of Textiles had visited the Sinapali W.C.S. and had taken the society's resolution book. Despite several request for its return, he did not comply, so the society opened a new resolution book and passed a resolution regarding the earlier book's removal. The resolution book was however produced by D.W.1 as per summons vide Ext. B which clearly shows at Page 99 that on 06.04.1994, the Sinapali W.C.S. had rejected the 26S yarn as they did not require it at that time. From the fact above, it can be seen that the actions undertaken by the Appellant adhered to the directions provided by the societies and were aimed at ensuring the welfare of the cooperative sector in its entirety without causing harm or loss to any individual entity as a result of his decision. The distribution on credit can be seen as an adjustment to be made in order to have utilised the already purchased yarns from the National Handloom Development Corporation. Finally, there was no financial benefit accrued in favour of the Appellant as for the remainder amount of ₹76,800 in question was never proved by the prosecution to have been obtained by the Appellant for himself to the fact that the utilisation is only shown for ₹4,00,000, or on the part of the Nehuru Nagar W.C.S. as the distribution was made on credit and the same was returned to the Sinapali W.C.S. eventually.

19. On a perspicacious analysis of the evidence on record and the settled principles of law in the decisions referred to above, the ingredients of offence under Section 13(1)(d) of the P.C. Act are not found established. Consequently, the offence under Section 13(2) will not be attracted. Hence, it is irresistible to hold that the prosecution has not been able to prove the charges against the Appellant beyond all reasonable doubt and the Appellant as such is entitled to an acquittal.

20. In this result, the Appeal is allowed. The Appellant is acquitted of the charge. As a necessary corollary, the judgment of conviction and order of sentence convicting the Appellant for commission of offence punishable under Section 13(1)(d) read with Section 13(2) of the P.C. Act of the P.C. Act are hereby set aside.

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2024 (II) ILR-CUT-348

SIBO SANKAR MISHRA, J.

CRLMC NO.1921 OF 2023

SREE METALIKS LTD. & ORS. ……Petitioners

-V-

UNION OF INDIA & ANR. ……Opp.Parties

CRIMINAL PROCEDURE CODE, 1973 – Section 482 – Offence U/ss. 276B/278B of the Income Tax Act, 1961 – Allegation against the petitioner is that, the TDS amount for the financial year 2019-20 have not been deposited within the statutory period & the delay for such non payment not been explained properly – However, the petitioner pleaded that, though the amount has been paid belatedly but for such delay the TDS amount along with interest has paid and the same has been received by the department – Now the question crops up that, once the amount has been received along with interest, whether the criminal action under the sections 267B/278B is maintainable? – Held, No.

Case Laws Relied on and Referred to :-

1. [2023] 454 ITR 48 : Dev Multicom Pvt. Ltd. & another Vs. State of Jharkhand & Anr.
2. CRLREV No.408 of 2023 (13.10.23) : M/s. D.N. Homes Pvt. Ltd., Khurda & Anr. vs. Union of India.

For Petitioners : Mr. Sidhartha Ray, Senior Advocate.

For Opp.Parties : Mr. Sidharth Sankar Mohapatra, Sr. Standing Counsel (I.T)
Mr. A. Kedia.

JUDGMENT Date of Hearing : 08.04.2024 : Date of Judgment : 15.04.2024

S.S. MISHRA, J.

1. In the present petition, the petitioners are seeking quashing of the complaint case registered as 2(c) CC Case No.09 of 2023 pending in the Court of the learned Additional Chief Judicial Magistrate (Spl.)-cum Asst. Sessions Judge, Cuttack. The

petitioners are also aggrieved by the order dated 22.02.2023 passed by the learned Additional Chief Judicial Magistrate (Spl.)-cum-Asst. Sessions Judge, Cuttack in 2(c) CC Case No.09 of 2023 whereby the learned Court below has taken cognizance of the offences under Sections-276B/278B of the Income Tax Act, 1961 (In short "The Act"). The petitioners have also assailed the order dated 05.01.2023 passed by the Commissioner of Income Tax according sanction under Section 279(1) of the Income Tax Act for prosecuting the present petitioners for the offences as mentioned above.

2. The case against the opposite parties put forth in the statutory complaint filed by the opposite party no.1 is that the petitioners have violated the provisions of Sections-276B and 278B of the Act by not depositing the TDS amount for the Financial Year 2019-20 within the statutory period prescribed under law and delay caused by them remained unexplained.

3. It is contended by the opposite parties that although the TDS amount was deposited belatedly by paying interest for the belated period by the petitioners, still the statutory offence under Section-276B r/w Section-278B of the Act has been admittedly committed by the petitioners. Admittedly, the petitioners have delayed in depositing the amount collected on behalf of the govt. ranging from 15 days to 394 days. Since the delays are beyond one year, the competent authority has rightly accorded sanction under Section-279(1) of the Act for prosecuting the petitioners for having committed the offences U/Ss 276B r/w Section-278B of the Act.

4. Mr. Sidhartha Ray, learned Senior Counsel appearing for the petitioners, *inter alia*, contended that due to general sluggishness in the market price of iron ore etc , the petitioners-company suffered huge loss. Apart from that at the instance of one of the financial creditor, a proceeding under Section-7 of the Insolvency & Bankruptcy Code, 2016 was initiated against the petitioner company. The I.B. proceeding was admitted on 30.01.2017 and resolution plan of the resolution applicant was approved on 07.11.2017. After approval of the resolution plan, the company gradually started paying the debts and statutory dues on the basis of the case flows of the company. Therefore, the delay has been caused in making payment of the TDS amount to the revenue. The petitioners have also contended that due to the outbreak of COVID-19 pandemic in the month of March, 2020, they could not deposit the TDS amount for the Financial Year 2019-20.Therefore, there is *no mense rea* involved in the unavoidable act of the petitioner in depositing the TDS amount with the Revenue belatedly. Despite general explanation afforded by the petitioners, the opposite parties have mechanically dealt with those explanations and proceeded to file the statutory complaint against the petitioners. Hence, the petitioners seek, indulgence of this Court.

5. My Ray, learned Senior Counsel to begin with has relied upon a Circular No F No 285/90/2008-IT(Inv-I)/05 dated 24.04.2008 and contended that the benefit of the said Circular ought to have been extended to the petitioners. The relevant part of the Circular reads as under:-

*"Subject:- **Streamlining of procedure for identification and processing of case for prosecution under Direct Tax Laws- matter reg**.-*

xxx xxx xxx xxx

2. xxx xxx xxx xxx

*3. **Identification and processing of potential prosecution cases**:*

*3.1 The following categories of offences shall be processed for launching prosecution:- (i) Offences u/s 276B: Failure to pay taxes deducted at source to the credit of Central Government Cases, where amount of tax deducted is Rs.25,000 or more, and the same is not deposited even **within 12 months from the date of deduction**, shall be processed for prosecution in addition to the recovery steps as may be necessary in such cases.*

The authority for processing the prosecution under this section shall be the officer having jurisdiction over TDS cases. The prosecution shall preferably be launched within 60 days of such detection. If any such default is detected during search/survey, the processing ADIT/DDIT or the authorized officer shall inform the A.O having jurisdiction over TDS forthwith."

6. Mr. Ray, learned Senior Counsel to buttress his aforementioned argument, relied upon the judgment of the Jharkhand High Court in the case of ***Dev Multicom Pvt. Ltd. and another vs. State of Jharkhand and another*** reported in ***[2023] 454 ITR 48 (Jharkhand)***. The relevant portion of the said judgment reads as under:

*"**The amount has already been deposited with interest and there is no reason why the criminal proceeding shall proceed and the criminal proceeding was launched after receiving the said amount with interest**, had it been a case that the case was immediately instituted and thereafter the tax deducted at source amount has been deposited with interest, the matter would have been different. As such the continuation of the proceedings will amount to an abuse of the process of the Court.*

Accordingly, the entire criminal proceedings and the cognizance orders in their respective cases, passed by the learned Special Economic Offices, Dhanbad, in the respective C. O. cases, whereby cognizance has been taken against the petitioners for the offences under sections 276B and 278B of the Income-tax Act, pending in the court of the learned Special Judge, Economic Offences, Dhanbad, are hereby, quashed."

7. Mr. Ray, learned Senior Counsel has also relied upon the judgment of our own High Court in the case of ***M/s. D.N. Homes Pvt. Ltd., Khurda and another vs. Union of India*** passed in **CRLREV No.408 of 2023**, the relevant paragraphs of which reads as under:

"20. The legislative intent would be well discernable when simultaneously, we glance at the provision of section 201 and 221 of the IT Act which says that penalty is not leviable when the Company proves that the default was for 'good and sufficient reasons', whereas, the expression used in section-278AA is 'reasonable cause'. The legislature has carefully and intentionally used these different expressions in the situations envisaged under those provisions.

*22. Coming to the case before us, the prosecution has been launched against the petitioners for delay in deposit of the collected TDS for the Financial Year, 2020-21 (Accounting Year, 2021-22). The collected TDS was admittedly not deposited with the Central Government by the due date. **The petitioners thus have failed to deposit the collected TDS within the time stipulated as ordained under provision of the I.T. Act and Rules. They have deposited the said amount in phase manner with the delay in***

> ***making the deposit which begins with the minimum of 31 days, ending at 214 days****. It is not in dispute that the petitioners have by the time of consideration of the matter as to launching of the prosecution for such delayed deposit, had deposited the entire TDS with the interest as they were liable to pay as per this statutory provision for such delayed deposit of the TDS. The collected TDS with interest as above has been accepted and gone to the State Exchequer when by then no loss to the Revenue was standing to be viewed."*

8. Mr. Ray submits that in the instant case also the opposite parties have accepted the delayed interest on the TDS amount as per the provision of law and after receiving the TDS amount along with interest initiated the Criminal Prosecution against the petitioners. Therefore, the criminal prosecution launched against the petitioners is not sustainable under law as has been authoritatively held by our own High Court and the High Court of Jharkhand. Apart from that the petitioners are entitled to be exempted for criminal prosecution under the Departmental circular dated 24.04.2008. Therefore, he seeks indulgence of this Court.

9. Mr. Mohapatra, learned Senior Standing Counsel appearing for the Income Tax opposed the prayer made by the petitioners and contended that the distress financial condition of the petitioners company and the COVID-19 pandemic situation cannot be taken as an alibi for late deposit of TDS into the Government account, as the amount was collected on behalf of the Government and due diligence was supposed have been taken for depositing the tax amount within the stipulated time frame. Mr. Mohapatra further contends that the COVID-19 pandemic restriction measures were only imposed during the month of March, 2020. However, the delay in remittance is not limited to that period. Mr. Mohapatra further contends that the Circular dated 24.04.2008 relied upon by the petitioners will not come to their aid because the delay is beyond one year. The petitioners could have escaped the prosecution, had the delay been within a period of 12 months. In that view of the matter, the sanction accorded by the competent authority under section 279(1) of the Act cannot be faulted with.

10. Taking into consideration the rival contentions of learned counsels for the parties and the judgments relied upon by the petitioners, I am of the considered view that the maximum delay of 394 days for depositing the TDS amount to the revenue account have been well explained by the petitioners, therefore, the authorities ought to have been taken into consideration same, particularly for the reasons that the petitioners company has suffered the I.B. proceeding and the restriction imposed during the COVID-19 pandemic, I am of the view that the petitioners case is directly covered by the judgments cited in the case of **Dev Multicom Pvt. Ltd.** (supra) and **M/s. D.N. Homes Pvt. Ltd. Khurda & another** (supra), because the prosecution indeed has been initiated by the opposite parties against the petitioners after having received the TDs amount along with the interest. Therefore, the entire proceeding arising out of 2(c) CC Case No. 09 of 2023 pending in the Court of the learned

Additional Chief Judicial Magistrate (Spl.)-cum-Asst. Sessions Judge, Cuttack and the consequential proceedings arising therefrom qua the petitioners stands quashed.

11. Accordingly CRLMC is allowed.

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2024 (II) ILR-CUT-352

SIBO SANKAR MISHRA, J.

CRLMC NO. 5310 OF 2023

DHYAN FOUNDATION ……Petitioner

-V-

STATE OF ODISHA & ORS. ……Opp.Parties

PREVENTION OF CRUELTY TO ANIMALS ACT, 1960 r/w Rule 3(a) of the Prevention of Cruelty to Animals (Care and Maintenance of Case Property Animals) Rule, 2017 – The learned magistrate rejected the petition U/s. 457 of Cr.P.C filed by Opp.Party No.3 – The learned District and Session Judge allow the petition and gave the interim custody of the cattle despite the cattle were subjected to cruelty by the Opp.Party No.3 – Whether the order is sustainable? – Held, No, the learned Court below has failed to appreciate the conduct of Opp.Party and has also not taken into consideration of the object of the PCA Act and its Rules while passing the impugned order.

Case Laws Relied on and Referred to :-

1. 2023 SCC OnLine Bom 1123 : Ansar Ahmad and others vs. State of Maharashtra, Thru. P.S.O. & another and batch.
2. (2014) 7 SCC 547 : Animal Welfare Board of India vs. A. Nagaraja and others.
3. 2022 SCC OnLine SC 1402 : Shri Chatrapati Shivaji Gaushala vs. State of Maharashtra and others.
4. 2020 SCC OnLine SC 1325 : Raghuram Sharma & Another vs. C. Thulsi & Another.
5. 2021 SCC OnLine Gau 2698 : Meher Banu Begum vs. State of Assam.
6. 2022 SCC OnLine SC 1894 : 2021 SCC OnLine Gau 2698 : Meher Banu Begum vs. State of Assam.
7. 2022 SCC OnLine SC 1478 : Jagatguru Sant Tukaram Goshala vs. State of Maharashtra.
8. 2023 SCC OnLine Ori 294 : Gau Gyan Foundation ‘Rudrashram Gaushala’ vs. State of Odisha and another.
9. 2017 SCC OnLine HYD 191 : Criminal Revision Case No.517 of 2017, Ramavath Hanuma @Hanumanthu vs. State of Telengana.

For Petitioner : Mr. Sidharth Luthra, Sr.Adv. & Mr. T.K. Sahu, Mr. A. Anand, Mr. P. Singhal, Mr. R.R.Gupta.

For Opp. Parties : Mr. P.K. Maharaj, Additional Standing Counsel, Mr. Jayanta Kumar Majhi, Mr. Gopal Krushna Acharya, and Mr. Madan Mohan Mishra.

JUDGMENT Date of Hearing : 22.02.2024 : Date of Judgment : 16.04.2024

S.S. MISHRA, J.

1. The petitioner has preferred the instant petition assailing the legality and judicial propriety of the impugned order dated 01.11.2023 passed by the learned District and Sessions Judge, Mayurbhanj, Baripada in Criminal Revision No.28 of 2023 setting aside the order dated 16th September, 2023 passed by the learned Judicial Magistrate First Class-1 (Cog. Taking), Baripada in Criminal Misc. Case No. 249/2023, whereby the Revisional Court released the seized cattle to opposite party No. 3 on the grounds *inter alia* that there is absolutely no bar for the accused owner in taking custody of the animals during the pendency of litigation. Petitioner seeks indulgence of this court under inherent jurisdiction against the said order.

2. It is contended by the petitioner that Jharapokhoria P.S. Case No.164 of 2023 was registered under Section 279 read with Section 34 of the Indian Penal Code and Section 11(1)(d)(e)(f) of the Prevention of Cruelty to Animals Act, 1960 (hereinafter referred to as 'the PCA Act'), 9 numbers of cattle were rescued while being illegally transported in a goods carrier vehicle bearing registration No.MH-40-BL-2759 without proper care and arrangement of water, food and medical aid. It is further contended that the local police handed over the cattle to the present petitioner for immediate care, protection and maintenance as they were in extremely weak and miserable condition. No health inspection, identification and marking of such animals were conducted as per Rule 3(a) of the Prevention of Cruelty to Animals (Care and Maintenance of Case Property Animals) Rule, 2017 (hereinafter referred to as 'the Rules').

3. In the meantime, the opposite party No.3 filed Criminal Misc. Case No.249/2023 before the learned Judicial Magistrate, First Class-1 (Cog. Taking), Baripada under Section 457 of Code of Criminal Procedure for release of the cattle in his favour claiming himself to be the owner. However, the learned Magistrate vide order dated 16th September 2023 (Annexure-6) rejected the petition of the opposite party No.3. The opposite party no.3 being aggrieved and dissatisfied preferred Criminal Revision No.28/2023 before the learned District and Sessions Judge, Mayurbhanj, Baripada. The revisional Court allowed the petition of the opposite party no.3 vide the order dated 1st November, 2023 (Annexure-5) which is impugned in the present petition.

4. The Revisional Court, while allowing the revision petition of the opposite party No.3 vide its order dated 01.11.2023 has, *inter alia*, stated as follows: -

> *"Considering the above submissions and rival submissions of both the parties and on going through the documents available in the L.C.R., I find that the petitioner is the registered owner of the said seized cattle. Undisputedly, the S.I. of Police, Jharapokharia P.S. seized the said cattle on the allegation of commission of the offence U/Sec. 279/34 I.P.C. read with Sec. 11(1)(d)(e)(f) of the Prevention of Cruelty to Animals Act. It reveals that trial of the said C.T. Case has not yet commenced. The learned Court below has also called for a report from the concerned P.S. relating to requirement for the purpose of investigation wherein, the I.O. has submitted that the*

alleged seized cattle in question is not required for further investigation. In the backdrop of the above facts and law, recourse may be taken of a ruling of our own High Court given in the case of ***Gau Gyan Foundation-Rudrashram Gaushala vs. The State of Odisha and another*** *reported in* ***(2023) 90 OCR 337****. In the Rudrashram Gaushala Case Hon'ble Court referred some principal ruling as relied by Revisionist. In the just mentioned Rudrashram Gaushala case, the Hon'ble Court held that there is no absolute ban for the accused owner in taking custody of animals during the pendency of litigation. So being alive to the said position of law, this Court is of the opinion that the Revision Petition filed by the petitioner is to be allowed as he is the bonafide purchaser of the cattle entitled to its possession thereof."*

5. The learned Sessions Judge based its order primarily on two points. Firstly, the opposite party no. 3 being the admitted owner of the cattle is entitled to interim custody of the cattle. Secondly, the cattle not being further required for the purpose of investigation, the same was directed to be released in favour of the opposite party No.3. The petitioner in the instant case is aggrieved and assailing the order of the Revisional Court dated 01.11.2023.

6. Mr. Sidharth Luthra, learned Senior Counsel appearing for the petitioner submits that the petitioner has obtained the documents from the competent authority which are placed as Annexure-11 series would indicate that the documents produced by the opposite party No.3 to establish the ownership over the cattle are forged documents. Therefore, the first ground on the basis of which the Revision Petition was allowed is not sustainable on facts. For ready reference, the letter dated 17.10.2023 issued by the District Society for Prevention of Cruelty to Animals, Guntur is reproduced below: -

"DISTRICT SOCIETY FOR PREVENTION OF CRUELTY TO ANIMALS, GUNTUR

From	*To*
Dr. J.P. Venkateswarlu, M.V.Sc.	*The Superintendent of Police,*
District Animal Husbandry Officer,	*Vice-President – II*
Hon. Secretary, SPCA,	*District Society for Prevention Guntur of Cruelty to Animals, Guntur*

Lr. No.132/AHD/2023, Dated : 17-10-2023

Sir,

Sub: Animal Husbandry Department- Guntur District–Random check of cattle trafficking in Baisinga Police Station jurisdiction, Mayurbhanj District, Orissa– Discrepancy in the signatures of the Officers of Animal Husbandry Department, Guntur District- Forgery made in the signatures- Request to make an enquiry in the incidence– Regarding.

Ref: 1. Representation received from Sri Sumant Ojha, Animal Rights Activist, Delhi through mail dated: 11.10.2023.

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Vide reference cited above, I submit to inform that a representation was received on 11.10.2023 through mail, stating that random check of cattle trafficking was conducted on 29.09.2023 at Baisinga Police Station jurisdiction, Mayurbhanj District, Orissa by various NGOs which were registered under Animal Welfare Board of India. On 29.09.2023, the NGOs noticed, that vehicles with milking cows were intercepted from

Guntur, Andhra Pradesh. The NGO urged to check the validity of the documents through mail on 11.10.2023.

Upon enquiry, it is observed that the signatures made in the certificates by Veterinary Assistant Surgeon, Mangalagiri and Assistant Director (AH), District Livestock Development Agency, Guntur are forged and proved to be fake which is serious violation of the policies and procedures. The abovesaid officials have not issued the said certificates and the matter is to be viewed seriously.

In light of the above circumstances, investigation may be made on the incidence and proper action may be taken against the offenders.

Enclosure: As mentioned above

Yours faithfully,
Sd/-
District Animal Husbandry Officer
Hon. Secretary, SPCA, Guntur.

Copy submitted to
The President, SPCA, Collector & District Magistrate, Guntur."

7. Perusal of the aforementioned letter indicates that the opposite party no.3 has employed unfair and illegal method to establish the ownership over the cattle by forging the documents. Therefore, the allegation of the prosecution that the cattle were illegally transported by the opposite party no.3 with an object to slaughter them is established from the conduct of the opposite party no.3.

8. Mr. Luthra, learned Senior Counsel further submits that the Revisional Court order is also not tenable under law because there is no consideration applied to the order regarding the object of the Act sought to be achieved while passing the release of the cattle. Mr. Luthra relied upon the judgment of the Bombay High Court in the case of ***Ansar Ahmad and others vs. State of Maharashtra, Thru. P.S.O. and another and batch***, reported in ***2023 SCC OnLine Bom 1123***. He supplied emphasis on the Para-20 of the said judgment:

*"**20.** It is not out of place to mention that the animals have emotions, feelings and senses similar to a human being. The only difference is that the animals cannot speak and therefore, though their rights are recognized under the law, they cannot assert the same. The rights of the animals, welfare of the animals and protection of the animals has to be taken care of by the concerned in accordance with law. Before the Act of 1960, there was no enactment to deal with the aspects which are now taken care of in the Act of 1960. The Hon'ble Apex Court in the case of Animal Welfare Board of India v. A. Nagaraja, reported at (2014) 7 SCC 547, has aptly set out the object of the Act of 1960 and the duty of all concerned to implement the same. Paragraph 26 of the said decision is relevant for the purpose of these cases. It is extracted below:—*

"26. PCA Act is a welfare legislation which has to be construed bearing in mind the purpose and object of the Act and the Directive Principles of State Policy. It is trite law that, in the matters of welfare legislation, the provisions of law should be liberally construed in favour of the weak and infirm. Court also should be vigilant to see that benefits conferred by such remedial and welfare legislation are not defeated by subtle devices. Court has got the duty that, in every case, where ingenuity is expanded to avoid welfare legislations, to get behind the smoke-screen and discover the true state of affairs. Court can go behind the form and see the substance of the devise for which it

has to pierce the veil and examine whether the guidelines or the Regulations are framed so as to achieve some other purpose than the welfare of the animals. Regulations or guidelines, whether statutory or otherwise, if they purport to dilute or defeat the welfare legislation and the constitutional principles, Court should not hesitate to strike them down so as to achieve the ultimate object and purpose of the welfare legislation. Court has also a duty under the doctrine of parents patriae to take care of the rights of animals, since they are unable to take care of themselves as against human beings."

Mr. Luthra submits that in order to achieve the object of PCA Act, the Court directing release of the cattle need to take into consideration the wellbeing of the animals and their protection.

9. To buttress the aforementioned argument, Mr. Luthra, learned Senior Counsel also relied upon the judgment of the Hon'ble Supreme Court in the case of ***Animal Welfare Board of India vs. A. Nagaraja and others*** reported in ***(2014) 7 SCC 547***. He has supplied emphasis to paragarphs-32, 33, 34 and 35 which are reproduced hereunder:

The PCA Act

"32. The PCA Act was enacted even before the introduction of Part IV-A dealing with the fundamental duties, by the Constitutional (47th Amendment) Act, 1956. Earlier, the then British in India enacted the Prevention of Cruelty to Animals Act, 1890 for the human beings to reap maximum gains by exploiting them with coercive methods with an idea that the very existence of the animals is for the benefit of the human beings. During the course of administering the abovementioned Act, many deficiencies were noticed by the Government of India and a committee was constituted to investigate and suggest measures for prevention of cruelty to animals. Following that, a Bill was introduced in Parliament and, ultimately, the PCA Act, 1960 was enacted so as to prevent the infliction of unnecessary pain or suffering on animals and to amend the law relating to prevention of cruelty to animals.

Judicial evaluation

33. *The PCA Act is a welfare legislation which has to be construed bearing in mind the purpose and object of the Act and the directive principles of State policy. It is trite law that, in the matters of welfare legislation, the provisions of law should be liberally construed in favour of the weak and infirm. The court also should be vigilant to see that benefits conferred by such remedial and welfare legislation are not defeated by subtle devices. The court has got the duty that, in every case, where ingenuity is expanded to avoid welfare legislations, to get behind the smokescreen and discover the true state of affairs. The court can go behind the form and see the substance of the devise for which it has to pierce the veil and examine whether the guidelines or the regulations are framed so as to achieve some other purpose than the welfare of the animals. Regulations or guidelines, whether statutory or otherwise, if they purport to dilute or defeat the welfare legislation and the constitutional principles, the court should not hesitate to strike them down so as to achieve the ultimate object and purpose of the welfare legislation. The court has also a duty under the doctrine of parens patriae to take care of the rights of animals, since they are unable to take care of themselves as against human beings.*

34. *The PCA Act, as already indicated, was enacted to prevent the infliction of unnecessary pain, suffering or cruelty on animals. Section 3 of the Act deals with duties of persons having charge of animals, which is mandatory in nature and hence confer corresponding rights on animals. Rights so conferred on animals are thus the antithesis*

of a duty and if those rights are violated, law will enforce those rights with legal sanction. Section 3 is extracted hereunder for an easy reference:

***"3. Duties of persons having charge of animals.**—It shall be the duty of every person having the care or charge of any animal to take all reasonable measures to ensure the well-being of such animal and to prevent the infliction upon such animal of unnecessary pain or suffering."*

***35.** Section 3 of the Act has got two limbs, which are as follows:*
(i) Duty cast on persons in charge or care to take all reasonable measures to ensure the well-being of the animal;
(ii) Duty to take reasonable measures to prevent the infliction upon such animal of unnecessary pain and suffering.
Both the above limbs have to be cumulatively satisfied. Primary duty on the persons in charge or care of the animal is to ensure the well-being of the animal. "Well-being" means state of being comfortable, healthy or happy. Forcing the bull and keeping the same in the waiting area for a number of hours and subjecting it to scorching sun, is not for the well being of the animal. Forcing and pulling bulls by nose ropes into the narrow closed enclosure of vadi vasal, subjecting it to all forms of torture, fear, pain and suffering by forcing it to go to the arena and also overpowering it at the arena by the bull tamers, are not for the well-being of the animal. The manner in which the bull tamers are treating the bulls in the arena is evident from the reports filed before this Court by ABWI. Forcing the bull into the vadi vasal and then into the arena, by no stretch of imagination, can be said to be "for the well-being of such animal". Organisers of Jallikattu are depriving the rights guaranteed to the bulls under Section 3 of the PCA Act. Sadism and perversity is writ large in the actions of the organisers of Jallikattu and the event is meant not for the well-being of the animal, but for the pleasure and enjoyment of human beings, particularly the organisers and spectators. Organisers of Jallikattu feel that their bulls have only instrumental value to them, forgetting their intrinsic worth. First limb of Section 3, as already indicated, gives a corresponding right to the animal to ensure its well being. AWBI, a body established to look after the welfare of the animals has to see that the person in charge or care of the animals looks after their well-being. We have no hesitation to say that Jallikattu/bullock cart race, as such, is not for the well-being of the animal and, by undertaking such events, organisers are clearly violating the first limb of Section 3 of the PCA Act."

Mr. Luthra further relied upon the judgment of the Hon'ble Supreme Court in the case of ***Shri Chatrapati Shivaji Gaushala vs. State of Maharashtra and others***, reported in ***2022 SCC OnLine SC 1402***. He has emphasized paragraphs - 20 & 21 which are reproduced as under: -

*"**20.** The intention of the legislature in incorporating the proviso to Section 8(3) was to give effect to the object of the Maharashtra Act to preserve and protect cows, bulls, and bullocks useful for milch, breeding, draught, or agricultural purposes. The proviso to Section 8(3) of the Maharashtra Act provides for handing over of the seized cow, bull, or bullock to the nearest gosadan, goshala, pinjrapole, hinsa nivaran sangh or such other animal welfare organization willing to accept such custody. In the present case, the appellant was willing and ready to accept custody of the seized cattle. In light of the prima facie observation that the private respondents were in violation of the Transport of Animal Rules 1978, it was incumbent upon the High Court to ensure that the seized cattle would be properly preserved and maintained until the conclusion of the trial proceedings.*

> ***21.*** *The appellant has shown its willingness to accept the interim custody of the cattle. In view of the fact that private respondents were prima facie carrying the cattle in cruel conditions without a valid permit, the JMFC rightly concluded that the cattle would be safe in the custody of the appellant instead of the private respondents. In view of the above findings, the ultimate direction which was issued by the High Court was contrary to the proviso to Section 8(3) of the Maharashtra Act and would have to be set aside, while restoring the order of the JMFC. We order accordingly."*

And by relying upon, ***Raghuram Sharma & Another vs. C. Thulsi & Another*** reported in ***2020 SCC OnLine SC 1325***; ***Meher Banu Begum vs. State of Assam*** reported in ***2021 SCC OnLine Gau 2698***; ***Meher Banu Begum vs. State of Assam*** reported in ***2022 SCC OnLine SC 1894***; ***Jagatguru Sant Tukaram Goshala vs. State of Maharashtra*** reported in ***2022 SCC OnLine SC 1478***, Mr. Luthra, learned Senior Counsel submits that if the accused, consignor, consignee, agents and transporter prima facie found guilty of offence due to transportation of more than 6 cattle in one goods carrier/truck, then the accused/owner are not entitled to get interim custody of cattle. He further contended that, even after conviction the convicts are not entitled to the custody of the cattle under command of Section 29 of the PCA Act. Thus, the argument that there is no bar to give the interim custody of the cattle to the owner who is facing the prosecution and owner can be deprived of the custody only on his conviction under the PCA Act is not the law operating in the field in view of the judgment as discussed in the preceding paragraphs of this judgment and in view of the object behind the PCA Act.

10. Reverting to the merits of the present case, it is an admitted fact on record that the opposite party no. 3 has been transporting the cattle illegally without taking care and caution regarding the wellbeing of the cattle as a result of which the cattle have received severe injuries. Therefore, the cattle were subjected to cruelty. In this scenario, if the present petitioner has expressed the willingness to take care of the cattle, the application ought to have been allowed. In the instant case, the learned Magistrate has rightly rejected the application of the Opp. Party No.3, whereas the Revisional Court has reversed the order of the learned Magistrate which directly hits the settled principles as enumerated above.

11. Mr. Maharaj, learned Addl. Standing Counsel supported the submissions raised by the learned Senior Counsel appearing for the Petitioner and further submits that the learned Sessions Judge passed the revision order dated 01.11.2023 without considering the welfare legislation enacted for mute and hapless animals. Even for granting interim custody the paramount consideration is to see that the cattle are safe and they are taken care of well.

12. In the instant case, what is borne out of the record is that on 06.07.2023, the opposite party no.3 was transporting the cattle illegally for which a case under Section-11(1)(d)(e)(f) of the PCA Act, 1960 was registered against him and the cattle as well as the vehicle was seized. It was found that the said opposite party no.3 has tied and dumped the cattle in the offending vehicle without providing them food and water.

13. As required under the PCA Act and Rules neither the health inspection/checkup of the cattle nor proper identification or marking of animals was done through the jurisdictional Veterinary Official. The conduct of the opposite party no.3 and the manner in which the cattle were dealt with could lead to the only inference that the cattle were subjected to cruel treatment in violation of the mandatory provisions of the PCA Act and Rules. The object of the PCA Act as discussed above is definitely offended by the conduct of the opposite party no.3. In the light of the aforementioned facts germinating from the record, the Revisional Court ought to have applied the principle while allowing interim custody of cattle to the opposite party No.3.

14. The Gau Gyan Foundation 'Rudrashram Gaushala' approached this Court by filing **CRLMC No.1192 of 2022**. While dealing with the similar situation in the said case of ***Gau Gyan Foundation 'Rudrashram Gaushala' vs. State of Odisha and another*** reported in ***2023 SCC OnLine Ori 294***, the coordinate Bench in that case observed regarding enquiry to be conducted under Section 29 of the PCA Act and observed as follows:

> *"**12.** In the case at hand, opposite party No. 2 claimed himself as the owner of the cattle but was found to be transporting it in a vehicle without proper care and treatment. The impugned order suggests that opposite party No. 2 had produced money receipt to show the purchase of cattle on payment of consideration and also having a dairy farm in support of which submitted its certificate of registration and on ensuring a deposit of Rs. 54,000/-, the animals were released from custody. When the cattle were found to be transported in the vehicle without care and proper treatment, the learned S.D.J.M., Bhadrak should have called for a report or enquired into the profile of opposite party No. 2 as to if he is having past misconduct or conduct of such nature and in case the animals are released in his favour, whether, they would be treated without cruelty, the aspect which was not duly examined and not only that, proper verification and identification of the animals as it seems was not carried out at any time before being handed over to him. The purpose of the PCA Act demands such an exercise to be undertaken not only at the end of trial but presupposes it during pendency of litigation for the purpose of interim release. The spirit of the PCA Act and the objective of the law shall have to be understood and appreciated in its proper perspective, at all stages of the proceeding, otherwise, any such custody during the pendency of the litigation could further cause cruelty to the animals which would certainly frustrate the purpose for which it is enacted."*

Keeping in view, the welfare of the cattle aforementioned observation was made by the Court and issued slew of directions.

15. Confronted with the similar situation, the Hon'ble High Court for the State of Telengana by taking note of various judgments have passed a judgment, on 01.03.2017, in ***Criminal Revision Case No.517 of 2017, Ramavath Hanuma @Hanumanthu vs. State of Telengana*** reported in ***2017 SCC OnLine HYD 191***, and observed in para- 27 as follows:

> *"27) In **Narad Joshi v. State of Uttarakhand** the High Court of Uttarakhand while dismissing the interim custody of the cattle to the owners, it was held relying upon the*

judgments of the High Courts of Andhra Pradesh and Madhya Pradesh and of the Apex Court observed as follows:

"The judgment rendered by Hon'ble Madhya Pradesh High Court in ***Secretary, Gopal Goshala Jhonkar v. Ramesh and others*** *reported* ***in 2009 (4) MPHT182 decided on 28.11.2008*** *and the judgment rendered by Hon'ble Andhra Pradesh High Court in* ***Mohd. Moinuddin v. State of Andhra Pradesh*** *delivered on 07.07.2010 in Criminal Revision Case no. 1181 of 2010 that were referred in the unreported judgment of the Hon'ble Apex Court in* ***State of Uttar Pradesh v. Mustakeem and others*** *in Criminal Appeal no. 283-287 of 2002, wherein the Hon'ble Apex Court held as follows:-*

"The State of Uttar Pradesh is in appeal against the direction of the Court directing release of the animals in favour of the owner. It is alleged that while those animals were transported for the purpose of being slaughtered, an FIR was registered for alleged violation of the provisions of Prevention of Cruelty to Animals Act, 1960, and the specific allegation in the FIR was that the animals were transported for being slaughtered, and the animals were tied very tightly to each other. The criminal case is still pending. On an appeal for getting the custody of the animals being filed, the impugned order has been passed. We are shocked as to how such an order could be passed by the learned Judge of the High Court in view of the very allegations and in view of the charges, which the accused may face in the criminal trial. We, therefore, set aside the impugned order and direct that these animals be kept in the Gowshala and the State Government undertakes to take the entire responsibility of the preservation of those animals so long as the matter is under trial. The appeals stand disposed of accordingly." The High Court observed therefrom that the facts of the instant case are identical to the case of Mustakeem's case (supra). The criminal trial against the respondents (Saleem and Bilal) is pending adjudication before learned Magistrate. They have been charge-sheeted not only in respect of the Prevention of Cruelty to Animals Act, 1960, but also for violation of the Uttarakhand Protection of Cow Progeny Act, 2007, as also under Section 429 Indian Penal Code. Judging from the above yardstick, this Court is of the opinion that accused respondents are not entitled to the interim custody of seized cattle".

16. On the touch stone of the sprit and objective of the PCA Act and various pronouncements, few of which have been discussed above, every case needs to be dealt with on its own facts. If in a given case the facts are glaring from the record that the cattle were being transported in violation of the provisions of Rule 56(c) of the Transport of Animals Rules, 1978 and health certificate was not issued by Veterinary Department in terms of the provision of Rule 47(a) of the Transport of Animals Rules, there is no question of giving even interim custody to such owner even from the very reading of Section 29 of the PCA Act. Chance of further cruelty likely to be caused to the cattle if given to the perpetrator of law cannot be ruled out, rather in the fitness of things even interim custody should be entrusted to a neutral body, which can protect and preserve the cattle in safe. After final disposal of the case, the trial court shall pass appropriate orders regarding disposal or custody or confiscation of the cattle, vehicle etc. as the case may be in accordance with law.

17. In the present case, the Revisional Court has reversed the order of the learned J.M.F.C.1 (Cog. Taking), Baripada and gave the interim custody of the cattle despite the cattle were subjected to cruelty by the opposite party no.3, since he

claimed to be the owner of the cattle. The Court below has failed to appreciate the conduct of the opposite party no.3 that fake documents have been produced by him to establish his ownership and the court has also not applied the principle enumerated by various judgments of the Hon'ble Supreme Court and the other High Courts as mentioned above to the present case while allowing interim custody of cattle. Learned Court below has also not taken into consideration the object of the PCA Act and its Rules as well, while passing the impugned order. Therefore, the order passed by the Revisional Court lacks merit.

18. While considering the case of the present petitioner in the spirit of the object of the Act and by evaluating the facts scenario of the present case, this Court is of the prima facie view that in the interest and for the wellbeing of the cattle, the petitioner may have a superior right over the opposite party no.3 for getting interim zimma of the cattle.

19. Accordingly, the order dated 01.11.2023 passed by the learned District and Sessions Judge, Mayurbhanj, Baripada in Criminal Revision No.28 of 2023 is set aside and the matter is remanded back to the same Court to decide the revision petition afresh in the light of the observation made in this judgment and in view of the fact that the petitioner has discovered various documents subsequent to the passing of the impugned order, which allegedly establishes that the opposite party No.3 is not the owner of the cattle. However, it is made clear that this Court is not expressing any opinion on the merit of the present case. Therefore, the Revision petition shall be decided by the learned District and Sessions Judge, Mayurbhanj, Baripada on its own merit afresh.

20. In the light of the aforesaid observation, the CRLMC is disposed of.

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2024 (II) ILR-CUT-361

A.C. BEHERA, J.

S.A. NO. 01 OF 2002

JAGABANDHU BADAPANDA ……Appellant

-V-

LOKANATH MESWA & ANR. ……Respondents

ADVERSE POSSESSION – Whether a party can claim title over the suit properties through registered sale deed as well as through adverse possession? – Held, No – Because, the above two types of claim at a time mutually inconsistent and destructive to each other – Proposition of law clarifying the plea of adverse possession enumerated with reference to case laws.

Case Laws Relied on and Referred to :-
1. CRLMC No.2940 of 2022 : Chintan Joshi vs. Niranjan Behera.
2. (2001) 7 SCC 401 : Bhaskar Industries Ltd. vs. Bhiwani Denim & Apparels Ltd.

For Appellant : Mr. Budhiram Das on behalf of Mr. N.C. Pati.
For Respondents : None

JUDGMENT Date of Hearing : 05.04.2024 : Date of Judgment : 07.05.2024

A.C. BEHERA, J.

The 2nd appeal has been preferred against the confirming judgment.

2. The appellant of this 2nd appeal was the plaintiff before the trial court in the suit vide T.S. No.03 of 1997 and he was the appellant before the 1st Appellate Court in the 1st appeal vide T.A. No.02 of 2000.

3. The respondents of this 2nd appeal were the defendants before the trial court in the suit vide T.S. No.03 of 1997 and they were the respondents before the 1st appellate court in the 1st appeal vide T.A. No.02 of 2000.

4. The suit of the plaintiffs vide T.S. No.03 of 1997 before the trial court was a suit for declaration and confirmation of possession, in alternative for demolition of the structures, if the structures are made forcibly by the defendants in the suit properties during the pendency of the suit and also for recovery of possession of the suit properties, in case the possession of the suit properties is taken away by the defendants forcibly from the plaintiff during the pendency of the suit and also for permanent injunction against the defendants from interfering into his possession in the suit properties.

5. As per the plaint of the plaintiff, the suit properties are non-consolidable Plot No.360 Ac.0.420 decimals and non-consolidable Plot No.365 Ac.0.480 decimals under Consolidation Khata No.73.

According to him (plaintiff), he (plaintiff) is the exclusive owner and in possession over the suit properties and the suit properties covered under Consolidation Khata No.73 has been recorded in his name exclusively. The suit properties were also recorded in his name exclusively in the 4th settlement under Khata No.40. During consolidation operation, the defendants had claimed for recording the suit properties in their names, but, their said claim was rejected by the consolidation authorities and ultimately final consolidation RoR of the suit properties was published in the name of the plaintiff under Consolidation Khata No.73 after adjudicating/deciding the right, title and interest of the parties in respect of the suit properties. But, in the final consolidation RoR of the suit properties under Khata No.73, the possession of the defendants were erroneously noted in the remarks column of suit Plot Nos.360 and 365. In fact, the defendants were/are not in possession over any portion of the suit plots. Consolidation authorities were not authorized under law to note the possession of the defendants in the remarks column

of the consolidation RoR, in respect of the suit plots. For which, the said noting of possession in favour of the defendants in the remarks column of the suit plots are required to be ignored for all purposes. The suit properties are situated by the side of the road, for which, the plaintiff has been using the suit properties for multy purposes. When the defendants tried to make construction on the suit properties forcibly by storing the building construction materials near the same, then the plaintiff objected the same, for which, the defendants could not able to make any construction on the suit properties. The defendants have no manner of right, title and interest in the suit properties, because, neither the plaintiff nor any of his ancestors has transferred the suit properties in favour of the defendants. When the defendants are trying to make construction over the suit properties forcibly, then, apprehending danger to the title of the plaintiff by the threat of the defendants, he (plaintiff) approached the civil court by filing the suit vide T.S. No.03 of 1997 against the defendants praying for declaration of his right, title and interest over the suit properties and to confirm his possession thereon and also to injunct the defendants permanently from interfering into his possession over the suit properties, in alternative, in case of any forcible construction by the defendants on the suit properties during the pendency of the suit, the decree for demolition of the said structures is to be passed and also for the decree for recovery of possession of the suit properties is to be passed, if, he(plaintiff) is dispossessed from the suit properties by the defendants during the pendecy of the suit along with other relief, to which, he (plaintiff) is entitled for, as the court deems fit and proper.

6. Having been noticed from the trial court in the suit vide T.S. No.03 of 1997 filed by the plaintiff, the defendants challenged the same by filing their joint written statement denying the allegations alleged by the plaintiff against them by taking their stands specifically therein that, the suit properties were originally belonged to Gokula Badpanda, who is the father of the plaintiff. The suit properties along with some other properties were allotted in favour of the plaintiff in his family settlement. When the plaintiff was minor, his father alienated the suit properties along with some other properties as a guardian of the plaintiff for the benefit of the plaintiff to one Ayojeka Rajeswar Rao by executing and registering Sale Deed No.3202 dated 24.12.1965 and its correction Deed No.238 of 1967 followed by delivery of possession. Accordingly, Ayojeka Rajeswar Rao after purchasing the suit properties from the plaintiff, he was possessing the same.

Thereafter, in order to meet his legal necessities, the said, Ayojeka Rajeswar Rao sold the suit Plot No.360, Ac.0.420 decimals to defendant no.1 through registered Sale Deed No.642 dated 30.01.1974 and delivered possession thereof. Since the date of purchase, the defendant no.1 is in possession over that Ac.0.420 decimals of suit Plot No.360 having his house and threshing floor as well as bari on the same.

Thereafter, Ayojeka Rajeswar Rao sold suit Plot No.365 to the defendant no.2 by executing and registering the Sale Deed No. 644 dated 30.01.1974 and

delivered possession thereof. As by the time of the purchase, the defendant no.2 was minor, for which, the father of the defendant no.2 has got the delivery of possession of the suit Plot No.365 from Ayojeka Rajeswar Rao on behalf of minor defendant no.2. Since the date of aforesaid purchase, i.e., since 30.01.1974, he (defendant no.2) became the exclusive owner over the suit Plot No.365 and since then, he has been possessing that Plot No.365 by constructing his house thereon and he has been using the same as his house, bari and threshing floor. During consolidation operation, the consolidation authorities had no power to decide the right and title of the parties in respect of the non-consolidable suit properties. As during the consolidation operation, the defendants could not produce their sale deeds due to missing of the same, for which, consolidation authorities recorded the suit properties erroneously in the name of the plaintiff, but, noted their possession in the remarks column of the suit plots. He (defendant no.1) is paying the electricity dues, because, he has taken electricity connection to his house on the suit Plot No.360. So, they (defendants) have perfected their title over the suit properties through adverse possession. Therefore, the suit of the plaintiff is liable to be dismissed against them (defendants) with costs, because, they (defendants) have right, title, interest and possession over the suit properties and they (defendants) are the owners of the suit properties by purchasing the same through registered Sale Deed Nos.642 and 644 dated 30.01.1974 and accordingly, they (defendants) have perfected their title over the suit properties through adverse possession.

7. Basing upon the aforesaid pleadings and matters in controversies between the parties, altogether seven numbers of issues were framed by the trial court in the suit vide T.S. No.03 of 1997 and the said issues are:-

ISSUES

1. Whether the plaintiff has got absolute right, title and interest over the suit land?
2. Whether the plaintiff is entitled to a decree for mandatory injunction for demolition of the structures over the suit land?
3. Whether the defendants have acquired right, title and interest over the suit land by way of adverse possession?
4. Whether the suit is grossly under-valued and court fees paid is insufficient?
5. Whether the suit is barred by law of limitation?
6. Is there any cause of action for the suit?
7. To what other relief, the plaintiff is entitled?

8. In order to substantiate the aforesaid reliefs sought for by the plaintiff in his plaint vide T.S. No.03 of 1997 against the defendants, he (plaintiff) examined three witnesses from his side including him as P.W.1 and exhibited three documents vide Exts.1 to 3 on his behalf.

On the contrary, in order to defeat/nullify the suit of the plaintiff, the defendants examined four witnesses from their side including the defendant nos.1

and 2 as D.Ws.4 and 3 and relied upon the documents vide Exts.A to E on their behalf.

9. After conclusion of hearing and on perusal of the materials/ documents and evidence available in the record, the trial court dismissed the suit of the plaintiff on contest against the defendants, but, without cost as per its judgment and decree dated 27.11.1999 and 16.12.1999 respectively assigning the reasons that, they(defendants) have perfected their title over the suit properties through adverse possession, as the plaintiff is not in the possession over the same, for which, he (plaintiff) is not entitled to get any relief in the suit against the defendants.

10. On being dissatisfied with the aforesaid judgment and decree of the dismissal of the suit of the plaintiff vide T.S. No.03 of 1997 against the defendants passed by the trial court as per its judgment and decree on dated 27.11.1999 and 16.12.1999 respectively, he (plaintiff) challenged the same by preferring the 1st appeal being the appellant vide T.A. No.02 of 2000 against the defendants by arraying them (defendants) as respondents.

After hearing from both the sides, the 1st appellate court dismissed that 1st appeal vide T.A. No.02 of 2000 of the plaintiff as per its judgment and decree dated 05.10.2001 and 17.10.2001 respectively on contest without cost concurring / accepting to the findings and observations made by the trial court in its judgment and decree passed against the appellant/plaintiff.

11. On being aggrieved with the aforesaid judgment and decree of the dismissal of the 1st appeal of the plaintiff vide T.A. No.02 of 2000 passed by the 1st appellate court on dated 05.10.2001 and 17.10.2001 respectively, he (plaintiff) challenged the same by preferring this 2nd appeal being the appellant against the defendants by arraying them (defendants) as respondents.

12. This 2nd appeal was admitted on formulation of the following substantial questions of law :-

> (i) Whether the judgment and decree passed by the trial court and 1st appellate court in dismissing the suit of the plaintiff ignoring the consolidation RoR in favour of the plaintiff is sustainable under law?
>
> (ii) Whether the findings and observations made by the trial court and 1st appellate court for the dismissal of the suit of the appellant(plaintiff) vide T.S. No.03 of 1997 on the ground that, the defendants have acquired their right, title and interest over the suit land by way of adverse possession is sustainable under law?

13. I have already heard from the learned counsel for the appellant (plaintiff) only, as none appeared from the side of the respondents (defendants) for the hearing of this 2nd appeal.

14. So far as the 1st formulated substantial question of law, i.e., Whether the judgment and decree passed by the Trial Court and the 1st Appellate Court in

dismissing the suit of the plaintiff ignoring the consolidation RoR in favour of the defendants is sustainable under law is concerned;

It is the undisputed case of the parties that, during consolidation operation, the claim of the defendants for recording the suit properties in their favour as the owners thereof was rejected and the claim of the plaintiff for recording the suit properties in his name as the owner of the same was accepted and the final consolidation RoR vide Khata No.73 (Ext.3) of the suit properties was published exclusively in the name of the plaintiff. The said decision of the consolidation authorities for recording the suit properties exclusively in the name of the plaintiff under Consolidation Khata No.73 vide Ext.3 after rejecting the claims of the defendants has not been varied/altered/set aside as yet, because that order of the consolidation authorities has not been challenged by the defendants before any higher forums under the Orissa Consolidation of Holding and Prevention of Fragmentation of Land Act, 1972.

15. The law concerning the legal effect of the order passed by the consolidation authorities for recording the non-consolidable properties and noting of possession in the remarks column of the consolidation RoR like this suit/appeal at hand has already been clarified by the Hon'ble Courts in the ratio of the following decisions:-

> (i) ***2009 (2) C.J.D.(HC)-71 : Purna Chandra Panda(dead) through his legal heirs vrs. Chaitanya Mahaprabhu Bije Nizgaon and others***—Orissa Consolidation of Holding and Prevention of Fragmentation of Land Act, 1972—Sections 2(g) and 4—Non-consolidable land—The decision taken by the Consolidation Officer as to right, title, interest of non-consolidable land would be valid in view of amendment of Section 2(g) by Odissa Act No.2 of 1989 and the same is applicable retrospectively. (Para-13)
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> (ii) ***50(1980) CLT-337(F.B.) : Srinibas Jena (and after him) Madhabananda Jena and others vrs. Janardan Jena and others(para-6)***—C.P.C.1908—Section 9 Civil Suit—Once, the parties work out their rights before the consolidation authority and exhaust their remedies under that Act, they cannot re-agitate the same questions over and again in the civil court, and that those questions stand finally concluded by the decision of the consolidation authorities.
>
> The decision of the consolidation authorities on the question of right, title and interest, which are matters within their jurisdiction would operate as res-judicata and that being so, the civil court will have no jurisdiction to hear and decide the suit afresh.
>
> (iii) ***2021(Vol-2) CLR-645 : Gita Mishra vrs. Premananda Mishra and others— Record of Rights— Value of***—Record of right prepared and finally published under the Orissa ***Consolidation*** and Prevention of Fragmentation of Land Act holds good for the right, title and interest in respect of the property so recorded therein in favour of the holder of the said record of rights—Possession in respect of the suit land also stands presumed in favour of holder of the record of rights.(Para-9)
>
> (iv) ***2018(II) CLR-31 : Chhabi Bagh vrs. Saila Bagh(dead) and others***—Consolidation RoR—Value thereof—Consolidation RoR holds good for right, title and interest of the recorded tenant. (Para-12)

(v) ***63(1987) CLT-347 : Braja Kishore Panda vrs. Damodar Rout and another—C.P.C., 1908—Section 9***—The civil court has no jurisdiction to sit in judgment over the decisions of the consolidations authorities and declare those as without jurisdiction. Such decisions are available to be varied by the Higher Forums provided under the consolidation Act.(Para-4)

(vi) ***2019(1) OLR-795 :Laxmidhar Sahu and others vrs. State of Orissa and others—OCH &PFL Act, 1972 —Sections 9 and 16***—The consolidation authorities have got jurisdiction to decide the questions of right, title and interest, which would operate as res-judicata, civil court has got no jurisdiction to hear and decide the suit afresh.(Para-10)

(vii) ***2007(Suppl-1) OLR-276 : Balaram Bhoi and others vrs. Babajee Bhoi and others—OCH& PFL Act, 1972***—Right, title and interest of the land-holders—An RoR published by the consolidation authorities cannot be varied or set aside by the civil court.(Para-9)

(viii) ***2003(II) OLR-16 : Mohan Biswal vrs. Sri Gopinath Dev and 6 others***—Consolidation RoR prepared by the ***Consolidation*** Authority is not under challenge before any competent authority, so, said RoR has to be respected until it is found to be illegal or incorrect.

(ix) ***2015(I) CLR-360 : Chintamani Kandi(dead) after him, his L.Rs. Para Dei and others vrs. Arjun Kandi and others—RoR prepared by the consolidation authority—value thereof—***RoR is necessary to pronounce the judgment. Because, the consolidation authority having decided appellant's title in the suit land have recorded in the name of appellants. The title and possession through the same declares. (Para-13)

(x) ***2009 (2) C.J.D.(HC)-71—Orissa Consolidation of Holdings and Prevention of Fragmentations of Land Act, 1972—Sections 4(4) and 51 forcible possession noting in RoR—Effect of***—The authorities under Orissa Consolidation of Holding and Prevention of Fragmentation of Land Act, 1972 are not vested with power to record forcible possession with a party while preparing land record.(Para-15)

(xi) ***65(1988) CLT-440(F.B.) : Sundarmani Bewa and another vrs. Dasarath Parida (dead) and after him Labanya Dei and others***—Note of possession in consolidation RoR-affect of—Noting of possession in consolidation RoR is beyond the scope of consolidation authorities. Because, the recording of title to the properties with one person and possession with another does not serve the intent and purpose of the consolidation act and therefore, ought not to be undertaken by the consolidation authorities under that act.

The authorities under the Consolidation Act are not vested with the power to record forcible possession with a party other than the person recorded as the owner of the land while preparing land records.(Para-2)

(xii) ***2019(1) CLR-950 : Laxmidhar Sahu and others vrs. State of Orissa and others—C.P.C., 1908—Section 9 & 11—Res judicata***—A decision of the consolidation authorities on the question of right, title and interest, which are matters within their jurisdiction would operate as *res judicata* and that being so, the Civil Court will have no jurisdiction to hear and decide the suit.

(xiii) ***74(1992) CLT-741 : Biranchi Sahu vrs. Jujesti Sahu***— It was clearly laid down that, the decision of the consolidation authorities on the question of right, title and

interest, which are matters within their jurisdiction would operate as *res judicata* and that being so, the civil court will have no jurisdiction to hear and decide the suit afresh.

(xiv) ***57(1984) CLT – 398 : Hrudananda Panda and another vrs. Dhirendra Behura alias Behera—C.P.C.—Section—Res judicata***—Declaration of rights and interests in land by the consolidation authorities—*Res judicata* in civil court.(Para-9)

(xv) ***125(2018) CLT-416—C.P.C., 1908—Sections 9 and 11—***Matter in issue was directly and substantial before consolidation authority—Held decision of the consolidation authority shall operates *res judicata* in the Civil Court.

Consequently, entry in the consolidation RoR, which is in favour of the appellant has rightly argued to the meaningless. Therefore, learned courts below cannot be said to have add in deciding the suit ignoring the consolidation RoR.

16. Here in this suit/appeal at hand, when the defendants after being defeated from the competent authorities under the Consolidation Act for recording the suit properties in their names, they (defendants) have not challenged the orders of the consolidation authorities concerning the recording of the suit properties in favour of the plaintiff exclusively under Khata No.73 before any higher forums under the Consolidation Act, then at this juncture, by applying the principles of law enunciated in the ratio of the aforesaid decisions, it is held that, the judgments and decrees passed by the trial court and the 1st appellate court in dismissing the suit of the plaintiff ignoring the consolidation RoR of the suit properties in favour of the plaintiff are not sustainable under law. Because, as per law and in view of the ratio of the aforesaid decisions, the finally published RoR under the Consolidation Act vide Ext.3 holds good for the right, title and interest in respect of the suit properties in favour of the plaintiff and accordingly, the possession of the plaintiff in respect of the suit properties also stands presumed. For which, the RoR of the suit properties vide Ext.3 prepared by the consolidation authorities in favour of the plaintiff cannot be varied or set aside by the civil court and the said RoR/decision of the consolidation authorities for recording the suit properties in favour of the plaintiff has operated as *res judicata* on the civil court and the civil court has got no jurisdiction to hear and decide the suit concerning the right, title, interest and possession of the parties over the suit properties afresh. Because in view of the ratio of the above decisions reported in ***2009(2) C.J.D. 71***, the decision taken by the consolidation authorities as to the right, title and interest in respect of the non-consolidable properties like the suit properties would be valid, proper and effective as per law like the consolidable properties and the consolidation authorities were/are not vested with any power under law to note the possession in favour a party other than the recorded owner thereof. For which, as per law, the noting of possession in favour of the defendants in the remarks column of the Consolidation RoR vide Ext.3 is held to be meaningless having no value thereof. Therefore, the noting of possession in favour of the defendants in the consolidation RoR vide Ext.3 has no impact on the title and possession of the plaintiff over the suit properties. For which, the said noting of possession in the remarks column of the consolidation are ignored as per law.

17. So far as the 2nd formulated substantial question of law, i.e., whether the findings and observations made by the trial court and 1st appellate court for the dismissal of the suit of the appellant (plaintiff) vide T.S. No.03 of 1997 on the ground that, the defendants have acquired their right, title and interest over the suit land by way of adverse possession is concerned;

Here in this suit/appeal at hand, as per the pleadings of the defendants, i.e., in Para nos.4, 5 and 6 of the written statement of the defendants, they (defendants) have claimed their title over the suit properties through the registered Sale Deed bearing No.642 dated 30.01.1974 and they (defendants) have also claimed their title over the suit properties through adverse possession simultaneously.

It is very fundamental in civil law that, the claim/plea of title over the suit properties through adverse possession by the defendants against the plaintiff itself is an indirect admission of the defendants to the title of the plaintiff over the suit properties. Because, the defendants cannot claim their title over the suit properties through adverse possession without admitting the title of the plaintiff on the same. Therefore, as per law, the claim of title over the suit properties through adverse possession by the defendants like the suit/appeal at hand against the plaintiff is their indirect admission to the title of the plaintiff over the suit properties.

18. The claim of title of the defendants over the suit properties through registered sale deed as well as through adverse possession simultaneously is prohibited under law. Because, the above two types of claims, i.e., claim of title over the suit properties through documents as well as through adverse possession at a time are mutually inconsistent and destructive to each other. If the above two pleas are taken by a party simultaneously, none among the said pleas can be acceptable under law.

19. On that aspect, the propositions of law has already been clarified by the Hon'ble courts in the ratio of the following decisions:-

> (i) ***2005(3) CCC-167 (Madras) : Pappayammal vrs. Palanisamy and Ors.***—A party can plead adverse possession, when he admits that, another party has got title.
>
> (ii) ***2008(3) CCC-173(P&H) : Jagat Singh and others vrs. Srikishan Dass and others***—Once plea of adverse possession is raised, it pre-supposes the title over the suit land of the plaintiff. The title of the plaintiff is deemed to be admitted.
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> (iii) ***2008(4) CCC-239(P&H) : Gurubax Singh (dead) by LRs. vrs. Karnail Singh***—The plea of adverse possession necessarily implies the admission of the title of the plaintiff.
>
> (iv) ***2005(4) Civil Law Times-378(P&H) : Sultan and Ors. vrs. Kasturi and Ors.—Adverse Possession***—Plea of adverse possession is indirect admission of ownership of plaintiff. (Para-8).
>
> (v) ***2006(I) Civil Law Time-86(P&H) : Mahinder Pal and others vrs. Prem Kumar and others—Adverse Possession***—Once plea of ownership based on sale-deed revised, then the plea of adverse possession would be mutually destructive and inconsistent.(Para-4)

(vi) ***2006(3) CCC-234 (Andhra Pradesh) : Gafoor Khan vrs. Sultan Jehan through LRs and others***—Plea of title and adverse possession are mutually inconsistent and latter does not begin to operate till former is renounced.

20. In view of the ratio of the decisions referred to (supra), when the defendants are precluded under law to take the above inconsistent and mutually destructive pleas in their pleadings/written statement, then at this juncture, due to taking up of the aforesaid inconsistent pleas by the defendants, their both the pleas have become inacceptable under law.

21. As per the discussions made above, when the claim of title of the defendants over the suit properties has become inacceptable under law, then, at this juncture, by applying the principles of law enunciated in the ratio of the decisions referred to (supra), it is held that, the findings and observations made by the trial court as well as 1st appellate court regarding the dismissal of the suit of the plaintiff/appellant vide T.S. No.03 of 1997 on the ground that, the defendants have acquired their title over the suit properties by way of adverse possession cannot be sustainable under law.

22. On analysis of the facts and law, when it is held that, the plaintiff has right, title, interest and possession over the suit properties, because, after deciding the right, title, interest and possession in respect of the suit properties, the consolidation RoR vide Ext.3 has been prepared in favour of the plaintiff as per the orders of the consolidation authorities and the said orders of the consolidation authorities have not been varied/altered or set aside by any higher forums under the consolidation Act and when the claims of the defendants regarding their title and possession over the suit properties has become inacceptable under law, then at this juncture, it is held that, the plaintiff has right title interest and possession over the suit properties, but, the defendants have no right, title, interest and possession on the same.

23. Therefore, the plaintiff is entitled for the decree, i.e., declaration of his right, title, interest over the suit properties, confirmation of his possession thereon along with the decree of permanent injuction against the defendants.

As the trial court as well as the 1st appellate court has dismissed the suit of the plaintiff vide T.S. No.03 of 1997, for which, there is justification under law for making interference with the same through this 2nd appeal filed by the plaintiff. Therefore, there is merit in the 2nd appeal of the appellant (plaintiff). The same must succeed.

24. In result, this 2nd appeal filed by the appellant (plaintiff) is allowed on merit, but, without cost.

25. The judgments and decrees passed by the trial court in T.S. No.03 of 1997 and the confirmation of the same by the 1st appellate court in T.A. No.02 of 2000 are set aside.

26. The suit be and the same filed by the appellant (plaintiff) vide T.S. No.03 of 1997 is decreed on contest against the defendants, but, without cost.

The right, title and interest of the plaintiff over the suit properties are declared and his possession over the same is confirmed.

27. The defendants are permanently injuncted from interfering in the possession of the plaintiff over the suit properties.

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2024 (II) ILR-CUT-371

A.C. BEHERA, J.

SA NO. 393 OF 2000

MADHUSUDAN SAHU (SINCE DEAD) & ORS. ……Appellants

-V-

STATE OF ORISSA ……Respondent

(A) TRANSFER OF PROPERTY ACT, 1882 – Sections 107, 117 – Lease for agriculture purpose – Test to determine – The 1st Appellate Court held that, in absence of registration and stamp duty and in absence of proof of the contents of lease deed (Ext 1) the document is not admissible in evidence for any collaterial purpose – Whether the lease of Agricultural Land needed to be registered? – Held, No – A lease for agricultural purpose is exempted from registration. (Para 19)

(B) ODISHA ESTATE ABOLITION ACT, 1951 – Sections 8(1), 39 – The 1st Appellate Court held the order passed by Tahasildar in response to Section 8(1) of OEA Act is *non est* in the eyes of law – Whether the order passed by the OEA authority can be questioned before Civil Court? – Held, No – In view of the bar U/s. 39 of the Act the civil court lacks jurisdiction to question the order passed by OEA authority.

(C) CODE OF CIVIL PROCEDURE, 1908 – Order 41, Rule 27 – Additional evidence at appellate stage – When can be accepted? – Discussed with reference to case laws.

Case Laws Relied on and Referred to :-

1. AIR 1961 Supreme Court 1655 (V 48 C 312):Javer Chand & Ors Vs. Pukhraj Surana.
2. 1999 (II) OLR 319: Natabar Behera Vs. Batakrushna Das
3. 1992 (I) OLR 41: Smt. Basanti Kumari Sahu Vs. State of Orissa & Ors.
4. 1993 (I) OLR 4: Hiradhar Patel Vs. Lalindra Gand@Naik & Anr.
5. AIR 1996 SC 906:State of Kerala Vs. M.K. Kunhikanan Nambiar Manjeri Manikoth, Naduvil (dead) & Ors.

6. AIR 1996 SC 910:Mohan Lal (deceased) through his LRs Kachru & Ors. Vs. Mira Abdul Gaffar & Anr.
7. AIR 2011 Supreme Court 1140: Krishnadevi Malchand Kamathia & Ors. Vs. Bombay Environmental Action Group & Ors.
8. AIR 2022 SC 5317: S. Ramchandra Rao Vs. S. Nagabhusand Rao & Ors.
9. AIR 2016 SC 564:Sri Jagannath Temple Managing Committee Vs. Siddha Math & Ors.
10. AIR 1984 Ori. 88: Gouri Shankar Vs. State of Orissa.
11. AIR 1964 Pat 1:Rama Nath Mandal VS Jojan Mandal.
12. AIR 1955 SC 328: Sita Maharani & Ors. Vs. Chhedi Mahto & Ors.(Para-13)
13. AIR 1946 PC 51: Rama Rattan Vs. Parma Nand.
14. 44 (1977) CLT 65: Magu Sahu Vs. Bhramarbara Behera.
15. 57(1984) CLT (1):Radharani Dibya Vs. Braja Mohan Biswal.
16. 2000(II) OLR 9:Union of India & Ors. Vs. Kathi Bewa & Ors.
17. (2008) 4 SCC 594 : Anathula Sudhakar Vs. P. Buchi Reddy.
18. 2024 SCC Online SC 169:Tehsildar, Urban Improvement Trust & Anr. Vs. Ganga Bai Menariya (Dead through LRS & Ors.)
19. 2000 (I) OLR 590: Gopal Patra Vs. Loknath Patra.

For Appellants : Mr. G. Mukherji, Sr. Adv.assisted by Mr. A. Mishra

For Respondent : Mr. A.R. Dash, AGA.

JUDGMENT Date of Hearing :19.02.2024 : Date of Judgment : 07.05.2024

A.C.BEHERA, J.

This 2nd Appeal has been preferred against the reversing Judgment.

2. The predecessor of the appellant Nos.1(a) to 1(d) i.e. Madhusudan Sahu was the sole plaintiff before the trial court in the suit vide O.S. No.17 of 1983-I and he was the respondent before the 1st Appellate Court in the 1st Appeal vide T.A. No.18 of 1994.

The respondent-State of this 2nd Appeal was the sole defendant before the trial court in the suit vide T.S. No.17 of 1983-I and it was the appellant before the 1st Appellate Court in the 1st Appeal vide T.A. No.18 of 1994.

The suit of the plaintiff (Madhusudan Sahu) vide O.S. No.17 of 1983-I was a suit for permanent injunction.

3. The suit property is Ac.0.460 decimals i.e. Sabik plot No.441 under Sabik Khata No.71 in Mouza Kundheibenta Sahi inside Puri Town at present Mouza-Jhadeswari in the district of Puri corresponding to Hal M.S Plot No.334 and M.S plot No.342, under Hal M.S Khata No.119.

As per the averments made in the plaint of the plaintiff, the suit properties were originally belonged to Dakhinaparswa Math and the same were the amrutmanohi properties of Lord Jagannath. The Mahant of Dakhin Parswa math i.e. Shri Jagannath Ramanuj Das was the marfatdar of Dakhin Parswamath in respect of the suit properties. The suit properties were lying fellow. So, for the benefit of the math, the then Mahnt Sri Jagannath Ramanuj Das inducted to the father of the plaintiff , i.e, Baidyanath Sahu as a tenant of the suit properties for horticultural

purposes. The said tenancy of the father of the plaintiff over the suit properties was created through execution of a lease deed dated 10.10.1938 with delivery of possession and acceptance of rent from the father of the plaintiff i.e. Baidyanath Sahu. Since, the creation of such tenancy i.e. since 10.10.1938, the father of the plaintiff i.e. Baidyanath Sahu became an occupancy tenant in respect of the suit properties and planted several trees such as cashew and casuarina and converted the suit properties into a horticultural garden. Accordingly, the father of the plaintiff i.e. Baidyanath Sahu was paying rent of the suit properties to the Dakhinaparswa Math and he was obtaining the rent receipts. But, in course of time, the trees in the suit properties were cut and after the death of the father of the plaintiff i.e. after the death of Baidyanath Sahu, the plaintiff being the successor of his father, he (plaintiff) possessed the suit properties like his father and paid the rent of the same. As the suit properties were under the Ex-intermediary estate, then after the abolition of Ex-intermediary system, the suit properties vested with the Government on 18.03.1974 free from all encumbrances and thereafter, the tenancy of the plaintiff over the suit properties was acknowledged by the State of Orissa i.e. by the defendant and accordingly the plaintiff paid rent of the suit properties to the defendant (State of Orissa) as per Order dated 04.01.1982 passed in O.E.A Misc. Case No.276 of 1981.

During Hal Settlement, the plaintiff applied before the settlement authorities by filing an objection case to record the suit properties in his name and that objection case was decided by the settlement authorities in his favour and a draft Khatian was issued in his favour for recording the suit properties in his name. As such, he (plaintiff) had/has been continuing his possession over the suit properties since the time of his father i.e. since 10.10.1938 to the knowledge of everybody including the defendant State. The suit properties are situated near the reserve police line, Puri. As, no permanent boundary wall was there around the suit properties, for which, the plaintiff wanted to raise boundary wall around the same. So, the plaintiff engaged some labourers and masons to construct boundary wall around the suit properties. But, suddenly on 04.09.1982, the Revenue Inspector came to the suit properties and prevented the labourers of the plaintiff from putting pillars for boundary wall and arrested the labourers of the plaintiff with the help of the town police.

Therefore, in order to file the suit against the defendant in respect of the suit properties for the relief of injunction, he (plaintiff) issued a statutory notice under Section 80 (1) of the CPC to the State (defendant) through his Advocate on 07.09.1982 and after receiving such notice, the State (defendant) through Deputy Superintendent of Police, Puri issued letters on dated 30.11.1982 and 14.12.1982 respectively to the plaintiff asking him to produce his papers in respect of the suit properties relating to his title and possession on the same and accordingly, the plaintiff produced all the documents in his favour including the final order of O.E.A Misc. Case No.276 of 1981, rent receipts and other connected papers and after seeing the said documents of the plaintiff, the Deputy Superintendent of Police was

satisfied about the title and possession of the plaintiff over the suit properties and absence of title and possession of the defendant on the same, but in spite of that, the Reserve Inspector of Police threatened the plaintiff to arrest him, if, he (plaintiff) will construct boundary wall around the suit properties. So, in order to oust the plaintiff from the suit properties, the Revenue Inspector of Police came to the suit properties on 13.01.1983 with some labourers and tried to dig foundation inside the suit properties and also threatened the plaintiff to posses the same forcibly by dispossessing him (plaintiff), from the same. For which, the plaintiff filed the suit vide O.S. No.17 of 1983-I against the defendant (State) after serving statutory notice under Section 80 (1) of the CPC on the defendant praying for restraining the defendant (State) permanently from raising any construction on the suit properties or from making any interference in the possession of the plaintiff over the suit properties or from encroaching any portion of the suit properties forcibly along with other relief(s), to which, he (plaintiff) is entitled for.

4. Having been noticed from the Trial Court in the suit vide O.S. No.17 of 1983-I, the defendant-State contested the same by filing its written statement taking its stands inter alia therein that:

> *Mahant of Dakhina Parswa Math Shri Jahannath Ramanuj Das had not inducted to the father of the plaintiff i.e. Baidyanath Sahu as tenant in respect of the suit properties at any point of time. Neither the father of the plaintiff nor the plaintiff had/has possessed the suit properties. The Hal Settlement operation has not been finalized as yet. Therefore, the question of recording the suit properties in the draft R.o.R in the name of the plaintiff does not arise. The plaintiff has not been threatened by the R.I. at any point of time.*
>
> *The further case of the defendant was that, an Order, which was passed in O.E.A Case No.276 of 1981 in respect of the suit properties in favour of the plaintiff, the said order has been obtained by the plaintiff fraudulently by influencing the local Revenue Inspector. In fact, the plaintiff has no right, title, interest and possession over the suit properties, for which, the suit of the plaintiff is liable to be dismissed against the State (defendant).*

5. Basing upon the aforesaid pleadings and matters in controversies between the parties, altogether 4 numbers of issues were framed by the Trial Court in the suit vide O.S. No.17 of 1983-I and the said issues are:

> **ISSUES**
> ***1. Is the suit maintainable in law?***
> ***2. Is the suit barred by limitation?***
> ***3. Has the plaintiff any right, title, interest or possession in respect of the suit property?***
> ***4. To what relief, if any, the plaintiff is entitled?***

6. In order to substantiate the aforesaid relief i.e. permanent injunction sought for by the plaintiff against the defendant (State), he (plaintiff) examined altogether 2 numbers of witnesses from his side including him (plaintiff) as P.W.1 and relied upon series of documents vide Exts.1 to 7 on his behalf.

Though the defendant/State cross-examined the witnesses of the plaintiff, but, the defendant/State did not adduce any oral or documentary evidence from its side.

7. After conclusion of hearing and on perusal of the materials, documents and evidence available in the record, the trial court answered issue Nos.1,3 & 4 in favour of the plaintiff and against the defendant and basing upon the findings and observations made by the trial court in issue Nos.1,3 & 4 against the defendant, the trial court decreed the suit of the plaintiff vide O.S. No.17 of 1983-I on contest against the defendant (State) without cost as per its Judgment and Decree dated 01.10.1986 & 23.10.1986 respectively and restrained the defendant (State) permanently from raising any construction or from interfering in the possession of the plaintiff over the suit properties assigning the reasons that, the plaintiff has established that, his father was inducted as a tenant in respect of the suit properties in the year 1938 and he (plaintiff) has been possessing the suit properties since the time of his father i.e. since the year 1938 continuously and when the defendant (State) through its employees is trying to disposses the plaintiff from the suit properties forcibly, then, he (plaintiff) is entitled for the decree of permanent injunction against the defendant, because, the possession of the suit properties is with him (plaintiff) since 1938 and all the revenue documents of the suit properties are in his favour, for which, the plaintiff has right, title, interest and possession over the suit properties. Therefore, the suit of the plaintiff against the defendant (State) is maintainable under law and the plaintiff is entitled for the relief i.e. permanent injunction against the defendant.

Eight years after the aforesaid Judgment and Decree dated 01.10.1986 and 23.10.1986 respectively passed by the trial court in O.S. No.17 of 1983-I in favour of the plaintiff against the defendant, the defendant challenged that Judgment and Decree dated 01.10.1986 and 23.10.1986 respectively passed in O.S. No.17 of 1983-I by preferring 1st Appeal under Section 96 of the CPC, 1908 vide T.A. No.18 of 1994 before the District Judge, Puri praying for condonation of delay in preferring that 1st Appeal.

8. After hearing from both the sides, the delay of 8 years in preferring that 1st Appeal vide T.A. No.18 of 1994 by the defendant-State was condoned subject to payment of cost of Rs.500/-, to which, the plaintiff challenged by filing a Civil Revision vide Civil Revision No.95 of 1996 before the Hon'ble High Court of Orissa.

In that Civil Revision, the amount of cost for condonation of delay was enhanced from Rs.500/- to Rs.15,000/-. Accordingly, after complying the direction of the Revisional Court passed in Civil Revision No.95 of 1996, the 1st Appeal of the defendant-State vide T.A. No.18 of 1994 was admitted for hearing.

In that 1st Appeal vide T.A No.18 of 1994, the defendant (State) (appellant in the 1st Appeal) filed two separate petitions i.e. one under Order 6, Rule 17 of the CPC for amendment of its W.S. and another under Order 41, Rule 27 of the CPC, 1908 for adducing additional evidence.

After hearing the 1st Appeal along with the aforesaid two petitions under Order 6 Rule 17 and under Order 41, Rule 27 of the CPC, 1908 from both the sides, the 1st Appellate Court allowed that two petitions/applications of the appellant-Defendant and set aside the Judgment and Decree passed by the Trial Court in O.S. No.17 of 1983-I in favour of the plaintiff and remitted back to that suit vide O.S. No.17 of 1983-I to the Trial Court for its fresh disposal by framing new issues.

9. On being aggrieved with the said Judgment of remand of the suit passed by the 1st Appellate Court in the Judgment and Decree passed in T.A. No.18 of 1994, the plaintiff preferred Misc. Appeal No.185 of 1997 under Order 43 Rule 1(u) of the CPC, 1908 before the Hon'ble High Court of Orissa against the defendant and after hearing from both the sides, that Misc. Appeal vide Misc. Appeal No.185 of 1997 of the plaintiff was allowed by the Hon'ble High Court of Orissa and directed the 1st Appellate Court to dispose of the 1st Appeal vide T.A. No.18 of 1994 afresh along with the two applications/petitions of the defendant under Order 6, Rule 17 and under Order 41, Rule 27 of the CPC.

After remand of the 1st Appeal vide T.A. No.18 of 1994, the 1st Appellate Court heard that 1st Appeal vide T.A. No.18 of 1994 afresh along with its two petitions under Order 6, Rule 17 of the CPC, 1908 and under Order 41 Rule 27 of the CPC, 1908 of the defendant (State) from both the sides.

10. After hearing, the 1st Appellate Court allowed the 1st Appeal vide T.A. No.18 of 1994 of the defendant as per its Judgment and Decree dated 10.08.2000 & 24.08.2000 respectively, but rejected both the applications/petitions of the defendant under Order 6, Rule 17 and under Order 41, Rule 27 of the CPC, 1908 and set aside the Judgment and Decree dated 01.10.1986 and 23.10.1986 respectively passed in T.S. No.17 of 1983-I by the trial court assigning the reasons that, "*Ext.1 (lease deed of the year 1938) in favour of the father of the plaintiff i.e. Baidyanath Sahu in respect of the suit properties being an unregistered document, the same is not admissible in evidence, because, the contents thereof have not been proved and due to non-proving of the contents of that Ext.1, the said Ext.1 is not admissible under law for any purpose and the order of the Tahasildar passed in O.E.A. Case No.276 of 1981 in respect of the suit properties in favour of the plaintiff is without jurisdiction, because, Section 8(1) of the O.E.A Act does not contemplate for filing of any application and the rent receipts, those have been issued by the Government without prejudice in respect of the suit properties in favour of the plaintiff cannot confer any right of the plaintiff in the suit properties and when the Exts.1 to 4 have become inadmissible under law, for which, the draft R.o.R (Ext.5) of the suit properties in the Hal Settlement prepared by the Settlement Authorities in favour of*

the plaintiff has no recognition, as the said Ext.5 has been prepared on the basis of Exts.1,2,3 & 4 and the oral evidence adduced by the plaintiff in respect of his possession over the suit properties is vague, because he (plaintiff) has not examined any witness in respect of his possession over the suit properties and there is also no evidence concerning the delivery of possession of the suit properties in favour of the plaintiff."

11. On being aggrieved with the aforesaid Judgment and Decree dated 10.08.2000 & 24.08.2000 respectively passed by the 1st Appellate Court in T.A. No.18 of 1994 in setting aside the Judgment & Decree dated 01.10.1986 and 23.10.1986 respectively passed by the trial court in T.S. No.17 of 1983-I in favour of the plaintiff, he (plaintiff) challenged the same by preferring this 2nd Appeal being the appellant against the defendant-State arraying the defendant (State) as respondent.

When, during the pendency of this 2nd appeal, the appellant/plaintiff Madhusudan Sahu expired, then, his LRs were substituted in his place as appellant Nos.1(a) to 1(d).

12. This 2nd Appeal was admitted on formulation of the following substantial questions of law i.e.

> *i. Whether the learned lower appellate court is justified in excluding Ext.1 from consideration on the ground that, it does not bear the signature of the plaintiff or his father when no such objection was raised by the State when the document was admitted in evidence for marking the same as an Exhibit?*
>
> *ii. Whether the finding of the learned lower appellate Court ignoring the order of the Tahasildar dated 04.01.1982 recognising the tenancy right of the plaintiff in Misc. Case No.276 of 1981 is without jurisdiction in view of the provision of Section 39 of the O.E.A. Act?*

13. I have already heard from the learned counsel for the appellant and learned Additional Government Advocate for the State/respondent.

14. In order to assail the impugned Judgment and Decree passed by the 1st Appellate Court in T.A. No.18 of 1994 and in support of the Judgment and Decree passed by the trial court in O.S. No.17 of 1983-I, the learned counsel for the appellant(plaintiff) relied upon the following decisions:

> **a) AIR 1961 Supreme Court 1655 (V 48 C 312):Javer Chand & Ors.**
>
> **b) 1999 (II) OLR 319: Natabar Behera Vs. Batakrushna Das**
>
> **c) 1992 (I) OLR 41: Smt. Basanti Kumari Sahu Vs. State of Orissa & Ors.**
>
> **d) 1993 (I) OLR 4: Hiradhar Patel Vs. Lalindra Gand@Naik and Anr.**
>
> **e) AIR 1996 SC 906:State of Kerala Vs. M.K. Kunhikanan Nambiar Manjeri Manikoth, Naduvil (dead) & Ors.**
>
> **f) AIR 1996 SC 910:Mohan Lal (deceased) through his LRs Kachru & Ors. Vs. Mira Abdul Gaffar & Anr.**

g) AIR 2011 Supreme Court 1140: Krishnadevi Malchand Kamathia & Ors. Vs. Bombay Environmental Action Group & Ors.

h) AIR 2022 SC 5317: S. Ramchandra Rao Vs. S. Nagabhusand Rao & Ors.

i) AIR 2016 SC 564:Sri Jagannath Temple Managing Committee Vs. Siddha Math & Ors.

15. On the contrary, in support of the Judgment and Decree passed by the 1st Appellate Court in T.A. No.18 of 1994, the learned Addl. Government Advocate for the State/defendant relied upon the following decisions:

a) AIR 1984 Ori. 88: Gouri Shankar Vs. State of Orissa.

b) AIR 1964 Pat 1:Rama Nath Mandal VS Jojan Mandal.

c) AIR 1955 SC 328: Sita Maharani & Ors. Vs. Chhedi Mahto & Ors.(Para-13)

d) AIR 1946 PC 51: Rama Rattan Vs. Parma Nand.

e) 44 (1977) CLT 65: Magu Sahu Vs. Bhramarbara Behera.

f) 57(1984) CLT (1):Radharani Dibya Vs. Braja Mohan Biswal.

g) 2000(II) OLR 9:Union of India & Others Vs. Kathi Bewa & Others

h) (2008) 4 SCC 594:Anathula Sudhakar Vs. P. Buchi Reddy. (Paragraph No. 13.3, 14, 21 & 25).

i) 2024 SCC Online SC 169:Tehsildar, Urban Improvement Trust & Anr. Vs. Ganga Bai Menariya (Dead through LRS & Ors.)

j) 2000 (I) OLR 590: Gopal Patra Vs. Loknath Patra. (Para. No. 6 to 10):

16. It is the case of the plaintiff that, the father of the plaintiff was inducted as a tenant of the suit properties through an unregistered lease deed dated 10.10.1938. That unregistered lease deed has been marked as Ext.1 on behalf of the plaintiff.

In Para Nos.29 & 30 of the Judgment and Decree passed by the 1st Appellate Court in T.A.No.18 of 1994, the 1st Appellate Court has held that, *unregistered lease deed vide Ext. 1 is not admissible in evidence for any purpose including for any collateral purpose assigning the reasons that, a valid lease deed is required to be adequately stamped under the Indian Stamp Act. The unregistered lease deed vide Ext.1 is an unstamped document purported to have been signed by the lessor only. A valid deed of lease has to be executed by both lessor and lessee and the same has to be registered, if the same is for agricultural purposes from year to year or from any time exceeding a year. Section 35 of the Indian Stamp Act prohibits admission in evidence of an unstamped instrument, which was required to be chargeable with stamp duty for any purpose. The same has been fortified in the ratio of the decision reported in* ***A.I.R. 1946 Privy Council 51 (Rama Rattan Vs. Parmananda)****, wherein it has been held that, where an unstamped document is admitted in proof of some collateral matter, it is certainly admitted for that purpose, which Section 35 of the Indian Stamp Act has prohibited.*

Therefore, according to the 1st Appellate Court, the unregistered lease deed vide Ext.1 relied by the plaintiff is not at all admissible in evidence as the contents thereof have not been proved. For which, it was held by the 1st Appellate Court that,

the learned trial court has committed gross error in relying upon that document vide Ext.1 to uphold the plaintiff's claim of tenancy over the suit land. So, in the absence of registration and stamp duty and in the absence of proof of the contents of Ext.1, that document is not admissible in evidence for any collateral purpose also.

17. In order to assail the above findings and observations made by the 1st Appellate Court in Para Nos.29 and 30 of the Judgment and Decree passed in T.A. No.18 of 1994, the learned counsel for the appellant (plaintiff) argued that, Ext.1 is a document of more than 30 years old, which carries presumption of the correctness of its execution, because, it was produced from the proper custody and the same has the evidentiary value as per Section 90 of the Indian Evidence Act, 1872. In absence of any cogent evidence to disprove it, the findings of the learned 1st Appellate Court is not sustainable. Because, Ext.1 has been admitted into evidence and has been marked as Exhibit without any objection. It was also subjected to examination and cross-examination. Because, it is the settled principles of law that, once a document like Ext.1 has been admitted into evidence and marked as an Exhibit in the case and the same has been used by the parties in examination and cross examination of their witnesses, it is not open either to the trial court itself or to the court of Appeal or Revision to go behind that order.

18. In support of such argument, the learned counsel for the appellant (plaintiff) relied upon the ratio of the decision of the Apex Court reported in ***AIR 1961 Supreme Court 1655 (V 48 C 312): Javer Chand & Others Vs. Pukhraj Surana***.

But, in support of the findings and observations made by the 1st Appellate Court in Para Nos.29 and 30 of the Judgment passed in T.A. No.18 of 1994, regarding the inadmissibility of the unregistered lease deed dated 10.10.1938 vide Ext.1 in respect of the suit properties, the learned Addl. Govt. Advocate for the respondent (State) relied upon the decisions of the Hon'ble Courts and Apex Court reported in ***AIR 1964 Patna 1: Rama Nath Mandal Vs. Jojan Mandal, AIR 1955 SC 328 (Para No. 13): Sita Maharani Vs. Chhedi Mahto, AIR 1984 Orissa 88 : Gouri Shankar Vs. State, AIR 1946 P.C. 51: Rama Rattan Vs. Parma Nanda, 44 (1977) C.L.T 65, 57 (1984) C.L.T 1: Radharani Dibya Vs. Braja Mohan Biswal and 2000 (II) O.L.R. 9: United of India (UOI) & Others Vs. Kathi Bewa & Others***.

As per the decision reported in AIR 1964 Patna 1 (Full Bench): Rama Nath Mandal Vs. Jojan Mandal placing reliance in the decision reported in AIR 1955 SC 328 (Para No.13): Sita Maharani Vs. Chhedi Mahto it has been held that,

> *"A lease for agricultural purposes is not necessary to be made by a written instrument. It may be effected by an oral agreement and when, so effected, no registration is required.*
>
> *However, if the transaction is reduced into writing, then, in the case of a lease from year to year or for any term exceeding a year or reserving a yearly rent, the registration would be required under Section 17 of the Registration Act, and, if unregistered, the lease will be inadmissible in evidence under Section 49 of the Registration Act and other evidence of its terms will be precluded under Section 91 of the Evidence Act."*

19. On this aspect, by taking the ratios of the aforesaid two decisions of the Hon'ble Courts and Apex Court reported in ***AIR 1964 Patna 1 (Full Bench): Rama Nath Mandal Vs. Jojan Mandal & AIR 1955 SC 328 (Para No.13): Sita Maharani Vs. Chhedi Mahto*** into account, it has been held by the Hon'ble Courts in the ratio of the following decisions that,

> **I. 2001 (1) OLR 208:Nrusingha Charan Samal & Another Vs. Kuntala Kumari Samal & Others. (Para No.8)**
> *Lease—Agricultural Land—"Hata Pata"—Agricultural land can be leased out orally by acceptance of rent and delivery of possession "Hata Pata" though not registered can be taken as evidencing oral lease.*
>
> **II. 2019 (II) CLR 1130: Janhabi Dei & Another Vs. Shankhali Alias Krushna Panda (since dead) through LRs & Others. (Para No.12)**
> *T.P. Act, 1882, Section 117—Lease deed—Agricultural land—Exempted from registration—Since under Section 117 of T.P. Act, the agricultural leases are excluded from operation of the Act, the provisions of Section 107 did not apply to it.*
>
> **III. 2019 (II) OLR 289: Madan Mohan Sahoo Vs. State of Odisha & Another.**
> *Registration Act, 1899—Section 17—Un-registration Prajapatta—Where the value is more than Rs.100/-—In view of the authoritative pronouncement of the full Bench decision in the case of Ram Nath Mandal, the same requires registration under Section 17 of the Registration Act.*
>
> **IV. 29 (1963) CLT 428:Naban Bewa Vs. Nabakishore Samal (Para No.6).**
> *T.P. Act, 1882, Section 117 and 107—Agricultural lease can be created orally and by delivery of possession and in order to confer any lese-hold right, a registered document is not essential.*
>
> **V. 2003 (I) OLR (NOC) 86:Panchu Samal Vs. Commissioner of Consolidation, Orissa, Cuttack & Others. (Para No.5).**
> *T.P. Act, 1882, Section 117—A lease for agricultural purpose is not necessary to be made by a written instrument— It may be effected by an oral agreement—No registration is required.*
>
> **VI. AIR 1979 Patna 106: Sardamoni Debi Vs. State of Bihar & Others.**
> *Transfer of Property Act (4 of 1882), S. 117—'Agricultural Purpose'—Test to determine—Settlement of tank and its embankment—Lessee using tank for rearing fish and growing vegetables on embankment—Held, lease was for agricultural purposes.*
>
> **VII. 2005 (2) CCC 239 (M.P): Atar Singh & Others Vs. Jiledar Singh & Others.**
> *Section 117 & 107—Lease of agricultural land—Need not be registered—Agricultural leases are excluded from operation of the Act and thus provision of Section 107 of the Act do not apply to it.*

It is the case of the parties that, the unregistered lease deed vide Ext.1 was executed by the ex-intermediary in favour of the father of the plaintiff in respect of the suit properties for agricultural purposes and that Ext.1 has not been registered and there is no indication in that Ext.1 about its value.

When, it is the settled propositions of law that, a lease for agricultural purposes is exempted from registration and an agricultural tenancy can be created either orally or through delivery of possession and registration of that instrument is

not compulsory, then, at this juncture, by applying such principles of law enunciated in the ratio of the above decisions, it can be held that, land can be leased out for an agricultural purpose either orally by acceptance of rent or by delivery of possession and if a lease deed concerning agricultural lease is not registered, the same can be taken as evidencing an oral lease.

Ext.3 is the Order of the Tahasildar-cum-O.E.A Collector in O.E.A. Case No.276 of 1981, in which, as per Section 8 (1) of the O.E.A. Act, the suit properties were settled in favour of the appellant/plaintiff and on the basis of such settlement, tenancy ledger in respect of the suit properties was opened in favour of the appellant (plaintiff) and after opening of the tenancy ledger of the suit properties in favour of the plaintiff, rent of the suit properties have been accepted by the State from the plaintiff as per Ext.4 and thereafter, during Hal Settlement operation, the draft R.o.R of the suit properties vide Ext.5 was prepared in favour of the plaintiff on the basis of Exts.1,2,3 and 4.

20. On the basis of the documents vide Exts.1, 2 series,3,4 and 5, the plaintiff has claimed his possession over the suit properties as the owner thereof.

The trial court had accepted the claim of the plaintiff on the basis of the documents vide Exts.1, 2 series,3,4 and 5. But, the 1st Appellate Court has negatived to the said findings of the trial court assigning the reasons in Para Nos.31 to 38 of the Judgment and Decree passed in T.A. No.18 of 1994 that, "*when the suit properties were settled in favour of the plaintiff on the basis of the application made on behalf of the plaintiff in O.E.A. Case No.276 of 1981 as per Section 8(1) of the O.E.A Act, then, the order passed by the Tahasildar in response to such petition/application for initiation of O.E.A. Case No.276 of 1981 is nonest in the eye of law. Because, O.E.A Act makes no provision for an application and no enquiry is contemplated under the said Section 8(1) of the O.E.A. Act. Therefore, there was not any basis for initiation of O.E.A. Case No.276 of 1981 through the petition/ application of the plaintiff. For which, the order stated to have been passed by the Tahasildar in O.E.A Case No.276 of 1981 on the basis of the petition/application of the plaintiff is nonest in the eye of law. When the said order passed in O.E.A Case No.276 of 1981 vide Ext.3 in favour of the plaintiff is nonest in the eye of law, then, the subsequent documents i.e. Ext.4 and Ext.5 (draft R.o.R.) in favour of the plaintiff on the basis of a nonest order vide Ext.3 passed in O.E.A. Case No.276 of 1981 are inadmissible under law. That apart, there is also no evidence in record to show that, who has received the rent and who had issued the Ext.2 series and Ext.4 and the acceptance of rent by an agent of the State is not sufficient to establish a tenancy, unless that agent was specially authorized to accept such rent and when the rent receipts were issued without prejudice, then, as per the settled law of the Hon'ble Courts, the said rent receipts have not any legal effect for creation of any right of the plaintiff over the suit properties. The acceptance of rents through such rent receipts cannot confer any tenancy interest in the suit properties in favour of the plaintiff.*

When, the aforesaid documents vide Exts.1,2 series, 3 and 4 have no impact in respect of creation of tenancy right of the plaintiff over the suit properties, then, the preparation of the draft R.o.R of the suit properties in favour of the plaintiff during Hal settlement vide Ext.5 is inconsequential. In addition to that, the plaintiff has not examined any witness to testify regarding the creation of tenancy and acceptance of rent by the Matha. There is also no evidence regarding the delivery of possession of the suit land to the plaintiff's father, for which, the plaintiff has miserably failed to establish his claim to have acquired his tenancy over the suit land and to have exercised any incident of right, title, interest and possession over the suit land so as to be entitled to a decree for permanent injunction against the defendant. Therefore, the suit of the plaintiff is liable to fail"

On the basis of the above findings and observations, the 1st Appellate Court has set aside the Judgment and Decree passed by the trial court in T.S. No.17 of 1983-I.

21. In order to render the above findings and observations made by the 1st Appellate Court in Para Nos.31 to 38 of the Judgment and Decree unsustainable, the learned counsel for the appellant (plaintiff) relied upon the ratio of the decisions reported in ***1989(1) OLR 158: Premananda Das Vrs. State of Orissa & Others, 1992 (1) OLR 41: Smt. Basanti Kumari Sahu Vrs. State of Orissa & Others, 1993 (1) OLR 4: Hiradhar Patel Vrs. Lalindra Gand @ Naik & Another & AIR 2011 (SC) 1140 (Para Nos.17 to 21): Krishna Malchand Kamathia & Others Vs. Bombay Environmental Action Group & Others***.

It is no doubt true as per law that, under Section 8(1) of the O.E.A Act, a tenant is not required under law to file an application. But even for permitting continuity of the tenure of tenants, the appropriate authority has to be satisfied that the person concerned was really in possession of any holding as a tenant under the intermediary before the date of vesting, so that, he/she can be recognized as a tenant under the State. For which, though any petitioner/applicant may have misconceived the position in law and made an application under Section 8(1) of the O.E.A Act, the officer, i.e. the Tahasildar, should have considered the same on the administrative side with a view to satisfying himself, whether petitioner/applicant was a tenant under the State prior to vesting having regard to the provisions contained in Section 8(1) of the O.E.A. Act and the State shall be obliged to accept rent from him/her. In that situation, the misconceived application of the applicant under Section 8(1) of the O.E.A. Act cannot and shall not absolve the Tahasildar from proceeding in the right manner.

In this instant case, although as per Section 38-B of the O.E.A. Act, the order passed by the O.E.A. Collector vide Ext.3 passed in O.E.A. Case No.276 of 1981 under Section 8(1) of the O.E.A. Act, regarding the settlement of the suit properties in favour of the plaintiff on the basis of Ext.1 was revisable under law, but the State Government (defendant) in its wisdom did not get it annulled and as

such, the State has accepted the same without challenging the same within prescribed period of limitation for its annulment. For which, that order of settlement of the suit properties in favour of the plaintiff has attained its finality. Therefore, the same is not opened to be questioned now. That too, the order passed by the O.E.A. Authority cannot be questioned before the Civil Court in view of the bar under Section 39 of the O.E.A. Act.

22. It is the settled propositions of law that, an order, even if not made in good faith, the same has legal consequences/forces. It bears no frank of invalidity upon its forehead, unless the necessary proceedings are taken under law to establish the cause of invalidity and to get it quashed or otherwise upset, the said order shall remain as effective.

Even if an order is void, it requires to be declared as void by a competent forum and it is not permissible for any person to ignore the same, merely because, in his opinion, that order is void. The order may be hypothetically a nullity and even if its invalidity is challenged before the court in a given circumstance, the court may refuse to quash the same on various grounds. Because, an order may be void for one purpose or for one person, it may not be so for another purpose or another person.

The officer, who collects the rent, is the agent/employee of the State. For which, the State Government (defendant) cannot say that, the rents in respect of the suit properties have not been collected from the plaintiff.

23. The legal affect of an unchallenged order of settlement of land under Section 8(1) of the O.E.A. Act concerning the suit properties like this suit/appeal at hand, as per Ext.3 has already been clarified by the Hon'ble Courts in the ratio of the following decisions:

> **I. C.W.R. 1970 (1) 450 & 36 (1970) CLT 1307: Ramakrushna Paramguru Vs. Murtunjaya Das & Others.(Para No.5).**
> *"O.E.A Act, (1951)—(Orissa Act, 1 of 1952) Section 39—Settlement made in favour of the plaintiff under the Act—Any defect in the plaintiff's title prior to the settlement need not be enquired into. The admitted position is that, the settlement made in favour of the plaintiff under the Estates Abolition Act has become final. Any defect in the plaintiff's title prior to the settlement need not be enquired into now, particularly because the decision of the Collector under the Act is not open to question under Section 39 of the Estates Abolition Act. In the present suit that question is not open to be gone into again."*
>
> **II. 2014 (2) OJR (200): State of Orissa & another Vs. Pravabati Das & Others.**
> *Orissa Estates Abolition Act, 1951—Section 8(1)—Continuity of tenure of tenants—Order passed by the O.E.A. Collector-cum-Tahasildar, declaring the tenancy right of the predecessor of the respondent—That order has not been challenged in higher forum, and has reached in its finality—Application filed by the respondents under Section 15(b) of the Orissa Survey Settlement Act for correction of the R.O.R. in accordance with the order passed by the O.E.A. Authority has been remitted back to the Tahaildar—Order passed declaring the tenancy right of the predecessor of the respondents over the case land is still in force — It will not affect the revision preferred by the appellants under*

Section 38 of the O.E.A. Act—The matter has already been heard by the competent O.E.A. Authority in exercise of power under Section 38 of the O.E.A. Act and judgment is yet to be pronounced—Any recording made by the Tahasildar pursuant to the order passed under Section 15(b) of the O.E.A. Act shall be subject to the outcome of order passed by the Revisional Authority under Section 38 of the O.E.A. Act.

III. 2014 (II) CLR 1217: Susanta Kumar Jena & Another Vs. Smt. Basanti Sethi & Others. (Para No.12)

O.E.A. Act, 1951—Once the tenancy was created in favour of Kameswar and the State after vesting recognized his tenancy, right accrued in favour of respondents/Opposite Party Nos.1 and 2 to continue as recorded tenants and they were entitled to enjoy the disputed plot in question.

IV. 2018 (I) CLR 644: Krushna Chandra Biswal Vs. State of Orissa & Others.

T.P. Act, 1882, Section 117—Whether an agricultural tenancy can be created through an re-registered lease deed (hata patta) and acceptance of rent as well as salami by ex-land lord?—As per decision of Jagannath Nanda Vs. Bishnu Dalai reported in Vol.40, (1974) CLT 88 of Division Bench of this Hon'ble Court held that, under tenancy laws, a formal document is not necessary to create an agricultural tenancy and a tenant can be inducted to an agricultural holding by mere acceptance of rent.

V. 1973 (2) C.W.R. 987: Duryodhan Das Vs. The Collector of Dhenkanal & Others & I.L.R. 1961 Cuttack, 595: Basiruddin Vs. State of Orissa.

O.E.A. Act, 1951—Once a patta is granted and rent is collected, tenancy right create in favour of the grantee and while government is the landlord and the grantee becomes a tenant under the ordinary tenancy law, it is no more open to the Government in exercise of the powers of a grantor to withdraw from the lease.

VI. 1992 (II) OLR 529: Manmohan Rout (after him) Sundari Devi & Others Vs. State of Orissa & Others (Para No.3).

O.E.A. Act, 1951—When undisputedly petitioners' names were included in the Tenant's Ledger by the revenue authorities and rent was accepted from them, there cannot be any manner of doubt that, the petitioners were accepted as tenants under the State Government and that right cannot be taken away in any manner, by any entry in the R.o.R, therefore, the petitioners' right which they acquired by virtue of acceptance of rent from them by revenue authority under Section 8(1) of the Orissa Estates Abolition Act cannot be whittled down in any manner.

VII. 37 (1971) CLT 379: Dhruba Charan Sahu Vs. State of Orissa & Others (Para No.2).

Under the provisions of the Orissa Tenancy Act, the petitioner acquired a tenant's right in the land, because, it is well settled that, under the Orissa Tenancy Act, a tenant can be inducted to a holding by mere acceptance of rent. In which case, he acquires the status of a tenant. The fact that, the land in question belonged to Government and that the landlord is the Government does not make any difference so far as the incidents of tenancy are concerned. That being the position, the Government cannot by a subsequent executive order extinguish the right, which the petitioner has acquired in the land and much less can they forcibly enter on the land.

VIII. 109 (2010) CLT 639: Rabindra Kumar Das & Others Vs. The Commissioner, Settlement & Consolidation & Others. (Para No.7)

Document—Tenancy ledger prepared by responsible authorities of the State & State being the custodian of the said document—Manipulation in the tenancy ledger to be established with cogent evidence in competent court.

IX. 1992 (I) OLR 41 (Full Bench): Smt. Basanti Kumari Sahu Vs. State of Orissa & Others. (Para Nos.7 to 11).

O.E.A. Act, 1951, Section 8(1)—Under the Act, tenancy rights did not vest in the State—After vesting tenant continues as a tenant—The State as landlord is entitled to collect rent—The Tahasildar collects rent as agent of the landlord-Government—He has no right to settle the land with the tenant—Such settlement is without jurisdiction—When the tenant applies to the Tahasildar with application purporting to be under Section 8 (1) of the O.E.A. Act, the Tahasildar May, for his satisfaction, make enquiry as to the records if he is tenant—This is administrative in nature.

X. 67 (1989) C.L.T. 548: Premananda Das Vs. State of Orissa & Others. (Para No.4).

O.E.A. Act, 1951—Section 8(1)—It is no doubt true that under Section 8(1) of the O.E.A. Act, a tenant is not required to file an application. But, even for permitting continuity of the tenure of tenants, the appropriate authority has to be satisfied that, the person concerned was really in possession of any holding as a tenant under the intermediary before the date of vesting, so that he can be recognized as a tenant under the State.

XI. 38 (1971) CLT 225: Jogendranath Mohanty & Another Vs. Jagannath Mohanty & Others. (Para Nos.7 and 8)

O.E.A. Act, 1951, Sections 6,7 & 8A—Land has been settled in favour of the plaintiff by the Government after abolition of intermediary interest—Title accrues independent of the consideration of previous title over the land.

When the Intermediary interest in the present case was abolished, the previously existing rights of the intermediaries with whomsoever it rested came to an end, by the settlement, the plaintiffs must be deemed to have acquired a new and independent title which is not in any manner connected with or dependent on passing of title or otherwise that might have occurred. Thus, irrespective of the defects that might have existed in the plaintiffs' title to the suit land prior to the date of abolition, they have acquired a valid title by virtue of the settlement obtained from the State Government.

Orissa Estates Abolition Act, 1951—Section 39—Defendant did not challenge the order of the Collector settling land in favour of the plaintiff—Questioning the validity of such Order is a bar in the Civil Suit.

The defendant has not challenged the validity of the order or the jurisdiction of the Collector to pass the same on the ground that in enquiring into the claim of passing the order the mandatory provisions of the procedure have not been complied with, Section

39 of the Act is a bar to questioning the validity of the order settling the land on the plaintiffs by determining the fair and equitable rent under Section 8A of the O.E.A. Act.

XII. 1992 (II) OLR 529: Manmohan Rout (and after him) Sundari Devi & Others Vs. State of Orissa & Others.

Section 8 (1) of the O.E.A. Act—Name entered in Tenants' ledger and the rent has been accepted— No document of lease is necessary for agricultural lease—Acceptance of rent creates tenancy right.

XIII. 2004 (II) OLR 528: Choudhury Balaram Dash Vs. The Commissioner, Consolidation, Orissa & Others.

O.E.A. Act, 1951—Section 6 and 7—When the land vested with the State Government free from all encumbrances in consonance with the O.E.A. Act—After vesting, the lands have been settled in favour of the petitioner under the O.E.A. Act and the record of rights were prepared in his favour—Order not challenged by the O.P. and the same has attained finality—The order being a valid one, the Consolidation Authorities are bound by the said order.

24. Here in this suit at hand, when it is the undisputed case of the parties that, the suit properties have been settled in favour of the plaintiff by the OEA Collector, i.e. the Tahasildar in O.E.A. Case No.276 of 1981 as per Ext.3 and on the basis of such settlement of the suit properties in favor of the plaintiff, the tenancy ledger of the suit properties was opened by the Government in the name of the plaintiff and thereafter the rents have been collected from him as per Ext.4 on the basis of the said tenancy ledger in favour of the plaintiff in respect of the suit properties and when, the defendant (State) has not challenged that order of settlement of the suit properties as per Ext.3 in favour of the plaintiff before any higher forums/authorities under O.E.A. Act and when, after settlement of the suit properties in favour of the plaintiff, the State has accepted the plaintiff as tenant of the suit properties directly under it by accepting the rents from him and when as per law, no formal document is necessary for creation of an agricultural tenancy and a tenant can be inducted to an agricultural holding by mere acceptance of rent and when, as per the discussions and observations made above, the unregistered lease deed vide Ext.1 has not become inadmissible under law, because, there is no material in the record on behalf of the defendant (State) to show that, the value of that Ext.1 was more than Rs.100/- and when the documents vide Exts.1 to 5 are showing about the possession of the plaintiff over the suit properties since the time of his father, then, at this juncture, even if the Ext.1 is not registered, the same also can be taken as evidencing oral lease of the suit properties.

So, by applying the principles of law enunciated in the ratio of the aforesaid decisions, it is held that, the plaintiff is in possession over the suit properties as the tenant of the same under the defendant (State) and his tenancy has been accepted by the defendant (State). For which, the decisions relied by the respondent/defendant/ State indicated above in Para No.15 of this Judgment have become inapplicable to the suit/appeal at hand being quite distinguishable from the facts of the suit as discussed above.

25. Learned Addl. Government Advocate for the defendant (State) has also argued to make the suit for injunction simpliciter vide T.S. No.17 of 1983-I filed by the plaintiff against the defendant (State) in respect of the suit properties as not maintainable, on the ground that, when from the very beginning i.e. starting from its written statement, the defendant (State) has disputed the title of the plaintiff over the suit land, for which, it was required for the plaintiff to seek the relief of declaration as per the proviso of Section 34 of Specific Relief Act, 1963 and in absence of declaration of title, the suit of the plaintiff is not maintainable under law.

In support of his aforesaid contention, the learned Addl. Government Advocate relied upon the ratio of the decision of the Apex Court reported in ***2008 (4) SCC 594: Anathula Sudhakar Vs. P. Buchi Reddy (Dead) By LRs & Ors.***

26. When, as per the discussions and observations made above, it has already been held that, the tenancy of the plaintiff over the suit properties has already been accepted by the defendant/State as per law through documents, then, at this juncture, by applying the principles of law enunciated by the Apex Court in the above decision relied by the defendant/State, it is held that, the suit for injunction vide O.S. No.17 of 1983-I simpliciter filed by the plaintiff in respect of the suit properties against the defendant (State) for permanent injunction is maintainable, because, his title over the suit properties is not under cloud as per law.

When there is a threat to the possession of the plaintiff over the suit properties by the defendant (State), then, the plaintiff has right to sue for injunction simpliciter against the defendant/State without praying for declaration of title.

Therefore, it cannot be held that, the suit of the plaintiff for injunction simpliciter is not maintainable under law without the prayer for declaration of title.

So far as the Misc. Case No.9 of 2018 under Order 6, Rule 17 of the CPC, 1908 filed by the respondent/State/defendant for amendment of its written statement and Misc. Case Nos.10 of 2018 and 81 of 2018 under Order 41 Rule 27 of the CPC for adducing additional evidence as per Annexures D,E,F & G are concerned,

It appears from the Para Nos.18 to 24 of the Judgment of the 1st Appellate Court in T.A. Nos.18 of 1994 that, the State (defendant) being the appellant in the said T.A. No.18 of 1994 had filed the same nature of petitions under Order 6, Rule 17 and Order 41 Rule 27 of the CPC before the 1st Appellate Court praying in that T.A. No.18 of 1994 for amendment of the plaint and for adducing additional evidence making the same prayers, those have been made in the present Misc. Cases vide Misc. Case Nos.9,10,81 of 2018.

In the above Misc. Cases vide Misc. Case Nos.9,10 & 81 of 2018, the appellant (State) has prayed for amendment of the written statement in order to insert the matters relating to the acquisition of the suit land through L.A. Case No.2 of 1963 and for adducing additional evidence through the documents relating to the L.A. Case No.2 of 1963.

After hearing the same prayers of the defendant/State, the 1st Appellate Court had rejected both the petitions under Order 6, Rule 17 and under Order 41, Rule 27 of the CPC of the appellant/State/defendant assigning the reasons in Para Nos.23 and 24 in the Judgment of the 1st Appeal vide T.A. No.18 of 1994 that, "*none of the documents relating to L.A. Case No.2 of 1963 attached with the petitions go to show about the acquisition of suit land by the Government in L.A. Case No.2 of 1963. Because, the said documents do not contain any notification under Section 4 or declaration under Section 6 of the L.A. Act, 1894 with reference*

to the suit plot. The said petitions under Order 6, Rule 17 and Order 41, Rule 27 of the CPC have been filed by the defendant (State) after 15 years from the date of passing of the Judgment and Decree by the Trial Court in the suit vide T.S. No.17 of 1984-I. The defendant (State) is not diligent to produce materials, to support its plea contained in the proposed amendment. For which, the petitions under Order 6, Rule 17 and Order 41, Rule 27 of the CPC filed by the appellant (State) were found to be without merit and the 1st Appeal vide T.A. No.18 of 1994 can be disposed of effectively on merit on the basis of the materials available on record."

27. As per the provisions of law envisaged under Order 41, Rule 22 of the CPC, the findings and observations made by the 1st Appellate Court in Para Nos.23 & 24 in T.A. No.18 of 1994 concerning the rejection of the applications of the State (defendant) under Order 6, Rule 17 and Order 41, Rule 27 of the CPC could have been challenged by the State (defendant) through cross objection in this 2nd appeal, but, the defendant (State) has not done so.

As per law, the State (defendant/respondent) without preferring cross objection can also challenge such findings of the 1st Appellate Court regarding the rejection of its petitions under Order 6, Rule 17 and Order 41, Rule 27 of the CPC during argument of the appeal without filing cross objection for the same.

When the right of filling cross objection in the 2nd appeal was available for the State, but instead of availing such right to challenge the findings and observations made by the 1st Appellate Court in rejecting its petitions under Order 6, Rule 17 and Order 41, Rule 27 of the CPC, the defendant (State) has filed the same nature of petitions under Order 6, Rule 17 and Order 41, Rule 27 of the CPC through Misc. Case Nos.9,10 & 81 of 2018, again in this 2nd Appeal, then, the above 3 Misc. Cases of the State/defendant are not entertainable under law.

In spite of the non-maintainability of the Misc. Case Nos.9,10 & 81 of 2018 of the respondent/State, the respondent/State/defendant is not precluded under law to challenge the findings and observations made by the 1st Appellate Court concerning the rejection of its petitions under Order 6, Rule 17 and Order 41, Rule 27 of the CPC during the course of arguments of this 2nd Appeal. For which, the learned Addl. Government Advocate for the State/respondent argued for upsetting the findings of the 1st Appellate Court concerning the rejection of its petitions under Order 6, Rule 17 and Order 41, Rule 27 of the CPC by the 1st Appellate Court.

The law concerning amendment of the written statement as prayed for by the defendant (State) in an appeal has already been clarified in the ratio of the following decisions of the Apex Court and Hon'ble Courts:

I. 2017 AIR SC 1072 : Satish Kumar Gupta Vs. State of Haryana & Others.

CPC, 1908, Order 41 Rule 27—Additional evidence—Land acquisition proceedings—Neither Trial Court refused to receive the evidence nor it can be said that evidence sought to be adduced was not available despite the exercise of due diligence—Evidence not necessary to pronounce the judgment—Additional evidence cannot be permitted to

fill the lacuna or to patch up the weak points in the case—Impugned order of High Court permitting additional evidence order of remand, set aside.

II. 2018 (Suppl.) Civil Court Cases 460 (H.P.):Shri Moti Ram Vs. Shri Ses Ram & Others.

CPC, 1908, Order 41 Rule 27—Additional evidence at appellate stage—Additional evidence which plaintiff intends to produce on record is not required by this Court for purpose of adjudication of case—Incidentally, it is not the case of plaintiff that either of Courts below refused to admit evidence which is now intended to be produced by way of application—Even, said documents were in the knowledge of plaintiff—No explanation was given for the same—Present application is nothing but an attempt to place on record said documents which plaintiff omitted to do so and to fill up lacunae—Conditions of Order 41, Rule 27 CPC not fulfilled—Application dismissed.

III. 2017 (8) All. DJ 498: Latif Khan & Another Vs. Civil Judge, S.D., Bulandshahar & Others.

CPC, 1908, Order 41 Rule 27— Additional evidence at appellate stage—Documents sought to be produced by way of additional evidence part of public record—However, application of applicant is completely silent as to when applicant has derived knowledge of documents—Moreover, if those documents were part of public record, applicant by exercising due diligence he could have been well aware of documents even before institution of suit—Plea of applicant being illiterate does not satisfy requirement to admit the same—Application rightly rejected.

IV. 2019 AIR CC 3265 & 2019 (3) Madrass WN (Civil) 6:M. Manimegalai & Another Vs. Chellammal & Another.

Additional evidence at appellate stage—Documents which defendants propose to mark are in no way connected with suit property—Such documents are irrelevant documents and not material to facts in issue in the case—Even there is no pleading in written statement regarding such documents—No reasons were substantiated by defendants for not marking said documents during trial process, which were very much available even during the year 2007—Defendants have not stated in their affidavit as to how documents help them—Application rightly rejected.

V. 2016 (2) Civil Court Cases 607 (Allahabad):Pramod Urf Raju & Others Vs. State of U.P. & Others.

CPC, 1908, Order 41 Rule 27—Additional evidence at appellate Stage—If evidence was already available with appellants but was not filed knowingly, such evidences cannot be accepted in appeal.

VI. 2015 (1) Civil Court Cases 200 (Allhabad): Smt. Ganga Devi (dead) Vs. Sri Bhagwan Dass & Others.

CPC, 1908, Order 41 Rule 27— Additional evidence at appellate Stage—Mere discovery of fresh evidence subsequent to decision of lower court is not a ground for its admission in appeal, unless appellate court requires that, evidence to enable it to pronounce judgment or for any other substantial cause—Additional evidence should not be permitted at appellate stage to enable a party to remove certain lacunae & to fill in gaps.

VII. 2017 (Supp.) Civil Court Cases 141 (M.P.):Smt. Ramkuriya Bai Vs. Smt. Kachra Bai (dead) & Others.

CPC, 1908, Order 41 Rule 27— Additional evidence at appellate Stage—In the present case it is not the situation that Court cannot pronounce Judgment without additional evidence—Application rightly rejected.

VIII. AIR 2012 (Madras) 269: S. Sornam Vs. N. Selvaraj.
CPC, 1908, Order 41 Rule 27— Additional evidence at appellate Stage— Production of additional documents—First appellate Court has discussed the merits of document sought to be produced and only after coming to note that all documents are in no way relevant to the case of defendant while dismissing I.A., dismissed the appeal also—Reasoning given by First Appellate Court of disposing both I.As are integral part of impugned Judgment—Held, no prejudice caused to appellant—No error whatsoever can be find fault with—Appeal dismissed.

IX. 2009 (4) Civil Court Cases 057 (P & H): M/s. General Electronics Vs. Amrik Singh.
CPC, 1908, Order 41 Rule 27— Additional evidence at appellate Stage—Documents totally irrelevant—Application rejected.

X. 2009 (2) Civil Court Cases 153 (P & H): Baljinder Kaur Vs. Rajesh Kumar.
CPC, 1908, Order 41 Rule 27— Additional evidence at appellate Stage—Evidence within knowledge not produced in the trial court—Order dismissing application, upheld.

XI. 2012 AIR CC 2809 & 2012 (10) Law Digital.in-182 (Patna): Rajendra Pd. Vs. Ajit Kr. Singh.
CPC, 1908, Order 41 Rule 27—Additional evidence at appellate Stage—Evidence already on record sufficient for decision—Additional evidence not decisive and conclusive in character—If allowed it will prolong litigation—Additional evidence, not allowed.

28. Here in this suit at hand, the fact finding court i.e. the 1st Appellate Court after taking the petitions under Order 6, Rule 17 and Order 41, Rule 27 of the CPC of the defendant/State along with the proposed documents sought to be introduced as an additional evidence into account has held that, the defendant/State is trying to bring some documents relating to the L.A. Case No.2 of 1963 into the record fifteen years after the Judgment passed by the trial court, which is not permissible under law and the said documents have no nexus/connection with the suit land and the defendant/State having the said documents under its possession had not filed the same during trial deliberately.

When, the records of L.A. Case No.2 of 1963 were obviously under the custody of the defendant-State and when as per judicial notice, the defendant-State was fully aware about such documents, but in spite of being fully aware about the same, the defendant/State had not produced that documents before the trial court during the trial of the suit deliberately and when, the evidence in the record are sufficient for the effective adjudication of this 2nd Appeal, then, at this juncture, the rejection to the petitions under Order 6, Rule 17 and Order 41, Rule 27 of the CPC of the defendant/State by the 1st Appellate Court as per its findings in Para Nos.23 and 24 of the Judgment of T.A. No.18 of 1994 cannot be held unreasonable.

29. Therefore, the findings and observations made by the 1st Appellate Court in Para Nos. 23 and 24 of T.A. No.18 of 1994 in rejecting the petitions under Order 6, Rule 17 and Order 41, Rule 27 of the CPC of the defendant (State) have become acceptable under law and Misc. Case Nos.9,10 & 81 of 2018 filed by the respondent

for amendment of the written statement as well as for adducing additional evidence are dismissed/rejected and accordingly, the above 3 Misc. Cases vide Misc. Case Nos.9,10 & 81 of 2018 filed by the respondent/defendant are disposed of finally.

The suit of the plaintiff (appellant) vide O.S. No.17 of 1983-I before the trial court was a suit for permanent injunction simpliciter against the State (defendant). It is very fundamental in civil law that, possession of the suit land is the main consideration, while considering the suit for injunction simpliciter filed by the plaintiff like the present suit at hand.

As per the discussions and observations made above, it has already been held that, the plaintiff is in possession over the suit properties, but the defendant (State) is not in possession over the same.

When, the plaintiff has sought for injunction against the defendant (State) in order to prevent the defendant/State from interfering in his possession over the suit properties, as the defendant (State) is trying to interfere in his possession over the suit properties, then, at this juncture, the plaintiff is lawfully entitled for the decree i.e. permanent injunction against the defendant (State).

When the Trial Court in its Judgment and Decree passed in O.S. No.17 of 1983-I had restrained the State (defendant) permanently from raising any construction or from interfering into the possession of the plaintiff over the suit schedule properties, then, at this juncture, the 1st Appellate Court should not have reversed (set aside) the said Judgment and Decree passed by the trial court in favour of the plaintiff in O.S. No.17 of 1983-I through the Judgment and Decree passed in T.A. No.18 of 1994. For which, the Judgment and Decree passed by the 1st Appellate Court in T.A. No.18 of 1994 cannot be sustainable under law.

30. So, there is justification under law for making interference with the Judgment and Decree passed by the 1st Appellate Court in T.A. No.18 of 1994 through this 2nd Appeal filed by the appellant (plaintiff).

31. Therefore, there is merit in the 2nd Appeal filed by the appellant (plaintiff). The same must succeed.

32. In result, the 2nd Appeal filed by the appellant (plaintiff) is allowed on contest, but without cost.

The Judgment and decree passed by the 1st Appellate Court in T.A. No.18 of 1994 are set aside.

33. The Judgment and Decree passed by the Trial Court in O.S. No.17 of 1983-I am confirmed.

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2024 (II) ILR-CUT-392

A.C. BEHERA, J.

SA NO. 240 OF 1997

SABITRI BHOI ……Appellant

-V-

KHATU KALET ……Respondent

PROPERTY LAW – Locus Standie – The plaintiff is a stranger to the sale deed executed by defendant No.1 in favour of the defendant No.2 – Whether the plaintiff has the locus standie to challenge that sale deed on the ground of non-passing of consideration, non-proving of sell for legal necessity and non-delivery of possession? – Held, No – Reason indicated with reference to case laws.

Case Laws Relied on and Referred to :-

1. 2016 (2) CCC (SC) 176 and 2016 (1) CLR (SC) 1225: Muddasani Venkata Narsaiah (D) Th. LRs. Vs. Muddasani Sarojana
2. AIR 1977 Orissa 194: Sanatan Mohapatra & Ors. Vs. Hakim Mohammad Kazim Mohmmad & Ors.

For Appellant : Mr. Budhiram Das, appearing on behalf of Mr. N.C. Pati.

For Respondent : None

ORDER Date of Hearing : 03.04.2024 : Date of Order : 07.05.2024

A.C. BEHERA, J.

This 2nd Appeal has been preferred against the confirming Judgment.

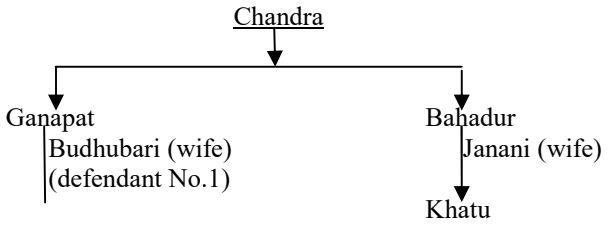
2. The appellant of this 2nd Appeal was the defendant No.2 before the Trial Court in the suit vide T.S. No.32 of 1987 and she was the appellant before the 1st Appellate Court in the 1st Appeal vide T.A. No.31 of 1996.

The respondent of this 2nd Appeal was the sole plaintiff before the Trial Court in the suit vide T.S. No.32 of 1987 and he was the sole respondent before the 1st Appellate Court in the 1st Appeal vide T.A. No.31 of 1996.

The suit of the plaintiff (who is the sole respondent of this 2nd Appeal) vide T.S. No.32 of 1987 was a suit for declaration.

3. The case of the plaintiff before the Trial Court vide T.S. No.32 of 1987 was that, Chandra Mahato was the original owner of the suit properties. He died leaving behind his two sons namely, Ganpat & Bahadur. Ganpat died in the year 1983 leaving behind his widow wife Budhubari (defendant No.1).

The family pedigree of the parties is depicted hereunder:



The 2nd Son of Chandra i.e. Bahadur died in the year, 1980 leaving behind his widow wife namely Janani and one son namely, Khatu (who is the sole plaintiff in the suit vide T.S. No.32 of 1987).

He (plaintiff) was adopted by his elder father i.e. Ganapat and his wife i.e. Budhubari (defendant No.1). The suit properties along with other properties were the joint and undivided properties of the brothers i.e. Ganapat and Bahadur. But, after adopting plaintiff as son of Ganapat and defendant No.1 and after the death of Ganapat, his wife (defendant No.1) brought to her sister's daughter i.e. (defendant No.2) to her house and kept her (defendant No.2) with her (defendant No.1) and executed and registered a sale deed in respect of the suit properties vide sale deed No.1162 dated 26.05.1987 in favour of the defendant No.2 without any consideration amount and without any legal necessity, for which, that sale deed dated 26.05.1987 executed by the defendant No.1 in favour of the defendant No.2 is an invalid deed, by which no interest of the suit properties has been transferred in favour of the defendant No.2.

When the plaintiff came to know about the aforesaid fictious and vague sale deed executed by the defendant No.1 on dated 26.05.1987 in favour of the defendant No.2, then, he (plaintiff) approached the Civil Court by filing the suit vide T.S. No.32 of 1987 against the defendants praying for declaration that, he (plaintiff) is the adopted son of the defendant No.1 and to declare that the registered sale deed No.1162 dated 26.05.1987 executed by the defendant No.1 in favour of the defendant No.2 in respect of the suit properties is void and illegal.

4. Having been noticed from the Trial Court in the suit vide T.S. No.32 of 1987, the defendant Nos.1 and 2 contested the suit of the plaintiff by filing their joint written statement denying the adoption of the plaintiff as the son of the defendant No.1 with their other specific pleas that,

> *There was complete partition of the joint properties between Ganapat and Bahadur and Ganapat had never adopted the plaintiff as the son of Ganapat and defendant No.1. But, she (defendant No.1) has duly executed and registered the sale deed bearing No.1162 dated 26.05.1987 in respect of the suit properties in favour of the defendant No.2, because, she (defendant No.1) was the exclusive owner of the suit properties after partition of the same between her husband and father of the plaintiff i.e. Bahadur. For which, the suit of the plaintiff is not maintainable and the plaintiff is not entitled for any relief. So, the suit of the plaintiff is liable to be dismissed against them (defendants).*

5. Basing upon the aforesaid pleadings and matters in controversies between the parties, altogether 7 numbers of issues were framed by the Trial Court and after hearing, the Trial Court dismissed the suit of the plaintiff on contest.

6. On being aggrieved with the said Judgment and Decree of the dismissal of the suit of the plaintiff vide T.S. No.32 of 1987, he (plaintiff) challenged the same by preferring the 1st Appeal vide T.A. No.51 of 1992 before the learned District Judge, Sambalpur.

After hearing that 1st Appeal vide T.A. No.51 of 1992, the 1st Appellate Court upheld the findings of the Trial Court assigning the reasons that, there was no adoption to the plaintiff by Ganapat and remanded the suit vide T.S. No.32 of 1987 to the Trial Court in order to proceed with the trial of the suit afresh by framing a new issue relating to the validity of the sale deed dated 26.05.1987 executed by the defendant No.1 in favour of the defendant No.2.

7. After the remand of the suit vide T.S. No.32 of 1987 the same was heard afresh by the Trial Court according to the direction of the 1st Appellate Court and after hearing, the Trial Court decreed the suit of the plaintiff vide T.S. No.32 of 1987 in Part on contest with cost against the defendants refusing to declare the plaintiff as the adopted son of Ganapat and defendant No.1, but whereas declared the Registered Sale Deed No.1162 dated 26.05.1987 executed by the defendant No.1 in favour of the defendant No.2 as illegal, improper and invalid as per its Judgment and Decree dated 23.07.1996 & 07.08.1996 respectively assigning the reasons that, passing of the consideration amount and delivery of possession of the properties covered in that sale deed No.1162 dated 26.05.1987 vide Ext.A have not been proved by the defendants.

8. When after the Judgment and Decree passed in the suit vide T.S. No.32 of 1987, the defendant No.1 expired, leaving behind the defendant No.2 as her assignee, then, the defendant No.2 challenged the aforesaid Judgment and Decree dated 23.07.1996 & 07.08.1996 respectively passed in T.S. No.32 of 1987 by the Trial Court by preferring the 1st Appeal vide T.A. No.31 of 1996 against the plaintiff arraying him (plaintiff) as respondent.

9. After hearing from both the sides, the 1st Appellate Court dismissed that 1st Appeal vide T.A. No.31 of 1996 of the defendant No.2 on contest as per its Judgment and Decree dated 29.04.1997 and 12.05.1997 respectively confirming the Judgment and Decree of the Trial Court.

10. On being aggrieved with the aforesaid Judgment and Decree of the dismissal of the 1st Appeal vide T.A. No.31 of 1996 of the defendant No.2, she (defendant No.2) challenged the same by preferring the 2nd appeal being the appellant against the plaintiff by arraying him (plaintiff) as respondent.

This 2nd Appeal was admitted on formulation of the following substantial questions of law i.e.

a) Whether in absence of any issue relating to the partition and there being no clear finding as to whether there was partition or severance of status in view of the evidence of P.Ws. 1, 2, 3 and 4 and D.W.3 read with the recital in Ext.A, the decision of the Courts below are vitiated?

b) Whether the findings of the Court below relating to the passing of consideration, legal necessity and delivery of possession are sustainable in law inasmuch as the finding on those aspect of the matter have been given without considering the evidence of P.W.1 to 4 and D.W.3 as well as non-consideration of the effect of the recital in Ext.A, which is admissible under Section 32(3) of the Indian Evidence Act and Under Section 60 of the Registration Act?

c) Whether the Courts below have committed serious illegality in discarding the evidence of D.W.1 relating to legal necessity previously without keeping in mind that the suit was remanded for giving fresh evidence on that score as there was no relevant issue?

11. I have already heard from the learned counsel for the appellant (defendant No.2) only, as none has appeared from the side of the respondent (plaintiff) to participate in the hearing of the 2nd appeal.

12. As the above 3 formulated substantial questions of law are inter-linked having ample nexus with each other according to the findings and observations made by the Trial Court and 1st Appellate Court in their respective Judgments, then, the above 3 formulated substantial questions of law are taken into consideration analogously for the just decision of this 2nd Appeal.

13. In the respective Judgments and Decrees, the Trial Court as well as the 1st Appellate Court have held that, the sale deed No.1162 dated 26.05.1987 vide Ext.A executed by the defendant No.1 in favour of the defendant No.2 in respect of the suit properties is void on the ground of non-proving of the passing of the consideration amount, non-proving of sell for legal necessity and non-proving about the delivery of possession of the properties covered under that deed through proper evidence.

In the joint written statement of defendant Nos.1 and 2, the defendant No.1 has specifically stated in Para No.5 that, she (defendant No.1) has executed and registered the sale deed dated 26.05.1987 vide Ext.A in respect of her properties i.e. suit properties in favour of the defendant No.2 properly for valid consideration, for which, the plaintiff has no cause of action for filing the suit challenging that sale deed executed by her (defendant No.1) in favour of the defendant No.2.

During trial of that suit, the defendant No.2 has adduced evidence as D.W.1, and she (defendant No.2, D.W.1) has fully corroborated the aforesaid pleadings made in their joint written statement regarding the proper execution of the sale deed dated 26.05.1987 in respect of the suit properties by the defendant No.1 in her favour.

Undisputedly, the plaintiff is not a party to the sale deed dated 26.05.1987 vide Ext.A, because the defendant Nos.1 & 2 are the parties to that sale deed vide Ext.A. He (plaintiff) not being a party to the sale deed vide Ext.A, he has challenged that sale deed praying for a declaration that, the said sale deed as void on the ground of non-passing of consideration, non-proving of sell for legal necessity and non-delivery of possession.

The law concerning the locus standie of the plaintiff, who is not a part to the sale deed vide Ext.A to challenge that sale deed dated 26.05.1987 vide Ext.A on the ground of non-passing of consideration, non-proving of sell for legal necessity and non-delivery of possession has already been clarified by the Hon'ble Courts and Apex Court in the ratio of the following decisions:

> (i) ***2016 (2) CCC (SC) 176 and 2016 (1) CLR (SC) 1225: Muddasani Venkata Narsaiah (D) Th. Lrs. Vs. Muddasani Sarojana***—Third party cannot question the execution of the sale deed on the ground of passing of consideration etc. **(Para No.17)**
>
> (ii) ***AIR 1977 Orissa 194: Sanatan Mohapatra & Others Vs. Hakim Mohammad Kazim Mohmmad & Others***—Stranger to a deed which is intended to be real or operative between the parties thereto cannot dispute payment or non-payment of consideration and its adequacy or inadequacy. **(Para No.13)**

14. Here in this suit/appeal at hand, when the plaintiff not being a party to the sale deed dated 26.05.1987 vide Ext.A has challenged the same on the ground of non-passing of consideration, non-proving of sell for legal necessity and non-delivery of possession and when, the executant of that sale deed vide Ext.A i.e. defendant No.1 herself has pleaded in her joint written statement with defendant No.2 about the proper execution of the said sale deed dated 26.05.1987 vide Ext.A by her in favour of the defendant No.2, then, at this juncture, by applying the principles of law enunciated in the ratio of the aforesaid decisions of the Hon'ble Courts and Apex Court, it is held that, the findings and observations made by the trial court and 1st Appellate Court in their respective Judgments and Decrees concerning the declaration of the sale deed dated 26.05.1987 vide Ext.A executed by the defendant No.1 in favour of the defendant No.2 as void on the ground of non-passing of consideration, non-proving of sell for legal necessity and non-delivery of possession cannot be sustainable under law. Because, admittedly the defendant No.1 was the owner of the suit properties by the time of selling of the same to the defendant No.2 through Ext.A and she (defendant No.1) has admitted about the due and proper execution of the same in favour of the defendant No.2 for her legal necessity after receiving the due consideration amount and giving delivery of possession of the properties covered under that sale deed vide Ext.A by her (defendant No.1) to the defendant No.2, for which, the Judgments and Decrees passed by the Trial Court as well as by the 1st Appellate Court declaring the sale deed dated 26.05.1987 vide Ext. A as illegal, improper and invalid can-not be

sustained under law. Therefore, there is justification under law for making interference with the same through this 2nd Appeal filed by the appellant (defendant No.2).

15. So, there is merit in the 2nd Appeal of the appellant (defendant No.2). The same must succeed.

16. *In result, the 2nd Appeal filed by the appellant (defendant No.2) is allowed on merit.*

The Judgments and Decrees passed by the trial court as well as by the 1st Appellate Court regarding the declaration that, the sale deed No.1162 dated 26.05.1987 vide Ext.A executed by the defendant No.1 in favour of the defendant No.2 as illegal, improper and invalid are set aside.

17. The suit be and the same filed by the respondent (plaintiff) vide T.S. No.32 of 1987 is dismissed in full on contest against the defendants, but without cost.

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