THE INDIAN LAW REPORTS
(CUTTACK SERIES)

Containing Judgments of the High Court of Orissa.

Mode of Citation
2024 (II) I L R - CUT.

JUNE-2024

Pages : 398 to 762

Edited By

MADHUMITA PANDA, ADVOCATE

LAW REPORTER
HIGH COURT OF ORISSA, CUTTACK.

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

Annual Subscription : ₹ 300/-

ORISSA HIGH COURT, CUTTACK

CHIEF JUSTICE

The Hon'ble Shri Justice CHAKRADHARI SHARAN SINGH, *LL.B.*

PUISNE JUDGES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ADVOCATE GENERAL

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

REGISTRARS

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

NOMINAL INDEX

ACTS & RULES

TOPICAL INDEX

SUBJECT INDEX

direction to dispose of the case as expeditiously as possible, preferably within a period of six months – As per report of the learned Trial Court, there has been no progress in the trial as no witness had been examined till 12.02.2024 – Whether the "fetter" in Section 37 of the NDPS Act will operate as a bar for releasing the petitioner on bail? – Held, No.

Satya Narayan Yadav -V- State of Odisha
2024 (II) ILR-Cut…… 612

ODISHA FOREST ACT, 1972 – Section 2g(ii)(d) r/w Rule 5 of Orissa Timber and other Forest Produce Transit Rule, 1980 – Whether "Murram" is coming under the definition of minor 'Forest Produce' and does not require TT permit while being transported within district? – Held, No – Murram is a mineral, not a forest produce as per definition U/s. 2g(ii)d of the Act & as such TT permit is required.

Nabaghana Parida -V- A.O-cum-Asst.Conservator of Forests, Cuttack Division & Anr.
2024 (II) ILR-Cut…… 581

ODISHA HINDU RELIGIOUS ENDOWMENT ACT, 1951 – Section 19(5) – The appellate authority without any reason has reduced the upset price of auction which was determined by the learned Commissioner of Endowments – Whether the impugned order is sustainable? – Held, No – The state government reserves the right to revise the order only when the alienation is not necessary or beneficial to the religious institution, which thus empowers the authority to annul the sanction for sale given by the learned commissioner and when the consideration fixed for the transfer is inadequate then also the state government is empowered to increase the consideration fixed for transfer as would be so decided as adequate.

Pabitra Mohan Panigrahy & Ors. -V- The Minister, Law, Odisha & Ors.
2024 (II) ILR-Cut…… 491

ODISHA MISCELLANEOUS CERTIFICATE RULES, 1984 – Rule 3 – Whether the Resident Certificate issued U/R 3 (Form No.III) would be treated as valid forever? – Held, No.

Aparajita Mohanty -V- State of Odisha & Ors.
2024 (II) ILR-Cut…… 398

PRINCIPLE OF PROMISSORY ESTOPEL – Explained with reference to case laws.

PROPERTY LAW – Agreement to sell – Whether suit for permanent injunction is maintainable on the basis of an agreement to sell? – Held, No – An agreement to sell by itself does not create any interest or charge in immovable property, because property title does not pass on execution of an agreement to sell until sale is completed.

RAILWAY ACT, 1989 – Section 124-A – Compensation – The death of the deceased was not caused due to any untoward accident – The evidence presented indicates that, the deceased perished as a result of being struck by a Train while traversing the railways tracks – Whether in the given facts, the Railway/Opp.Parties were negligent or had failed to discharge their duty of care towards the trespass of the deceased? – Held, No – The tragic incident did not take place on a level crossing or at a place where the railway tracks crossed a well-used path.

SERVICE LAW – Encashment of Earned Leave and Half Pay Leave – Whether withdrawal of certain benefits accrued in favour of employees in terms of existing rules can be affected by putting a ceiling in guise of clarification? – Held, No – The law provides that a clarification must not have the effect of saddling any party with an unanticipated burden or withdrawing an anticipated benefit**.**

WORDS & PHRASES – "Res ipsa loquitur" – Applicability of the same – Explained with reference to case laws.

Hema Pradhan & Anr. -V- Union of India & Ors.
2024 (II) ILR-Cut…… 597

—— o ——

2024 (II) ILR-CUT-398

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

W.A. NO. 3015 OF 2023

APARAJITA MOHANTY ……Appellant

-V-

STATE OF ODISHA & ORS. ..…Respondents

ODISHA MISCELLANEOUS CERTIFICATE RULES, 1984 – Rule 3 – Whether the Resident Certificate issued U/R 3 (Form No.III) would be treated as valid forever? – Held, No.

For Appellant : Mr. Manoj Kumar Mohanty

For Respondents: Mr. M.K. Khuntia, A.G.A (State), Mr. S.K. Dalai (R/6)

JUDGMENT Date of Judgment : 06.05.2024

CHAKRADHARI SHARAN SINGH, C.J.

This matter is taken up through Hybrid mode.

2. A judgment dated 18.10.2023 passed by a learned Single Judge of this Court in W.P.(C) No.19627 of 2016 filed by the appellant is under challenge in the present intra-Court appeal. By the said judgment, the petitioner's writ petition has been dismissed.

3. We have heard Mr. M.K. Mohanty, learned counsel appearing for the appellant, Mr. M.K. Khuntia, learned Addl. Government Advocate for the State-Respondents and Mr. S.K. Dalai, learned Advocate for Respondent No.6.

4. It would be apposite to notice briefly, the foundational facts leading to filing of the writ petition. The controversy relates to appointment as a Jogan Sahayak in Telnadigam Grama Panchayat under Jharigam Panchayat Samiti. Pursuant to an advertisement for the said post, the appellant had applied. One of the conditions of the advertisement was that the candidate must be a permanent resident of the said Grama Panchayat. The appellant claims that she is the resident of Gudiapadar village in Telnadigam Grama Panchayat under Jharigam Panchayat Samiti. A merit list was prepared by the Selection Committee after scrutinizing the application forms of different candidates. Based on her qualification, the appellant was placed at the top of the merit list. The said merit list was prepared on 27.04.2016. Since the appellant was not given appointment letter whereas the others whose names figured in the selection list were appointed, she filed the said writ petition challenging the inaction of the concerned respondents in not appointing her. In the writ proceeding, a counter affidavit was filed on behalf of respondent No.3 disputing that the appellant was a resident of the village Gudiapadar and accordingly, she was not eligible for appointment to the said post in terms of the advertisement. It is noteworthy that the appellant had submitted a resident certificate issued by the competent authority in

2012. A specific plea was taken in the counter affidavit that despite opportunities granted to the appellant, she did not submit a recent residential certificate and that the said residential certificate issued in the year 2012 was valid for the said year only. A plea was also taken that the appellant was asked by respondent No.5 through a letter dated 29.09.2016 asking her to produce a recent residential certificate by 02.10.2016. Subsequent attempts were made by serving a copy of the said communication requiring submission of a recent residential certificate of the appellant but the appellant failed to produce any such certificate. It further transpires that the Sarpanch of the Telnadigam Grama Panchayat of village Gudiapadar had given in writing that the appellant never stayed in the said village and the villagers of Gudiapadar had also stated so. Accordingly, since the appellant failed to submit a recent residential certificate, she was not appointed, though her name stood at the top of the merit list. Learned Single Judge after having noticed all these factual aspects, dismissed the writ petition with a conclusion that the appellant's resident certificate issued in 2012 could not be treated to be valid in 2016. Further, it was an admitted fact that the villagers and the Sarpanch of that village had specifically stated that the appellant had never stayed in village Gudiapadar because of which the appellant was asked to submit a recent residential certificate.

5. After having noticed these facts and submissions advanced on behalf of the appellant, the learned Singe Judge dismissed the writ petition.

6. Mr. Mohanty, learned counsel appearing on behalf of the appellant has argued that the resident certificate was granted to the appellant on 23.07.2012 under Rule 3 of the Orissa Miscellaneous Certificate Rules, 1984 (in short 'Rules of 1984') which did not stipulate any period of its validity. He submits accordingly that once a resident/nativity certificate is issued under Rule 3 of the said Rules of 1984, the same should be treated to be valid forever. He has argued that only after framing of Orissa Miscellaneous Certificate Rules, 2017, the period of validity of resident/ nativity is one year, which provision has no application in the present selection process initiated in 2016. He accordingly, submits that the reason assigned by the learned Single Judge dismissing the writ application is unsustainable and requires interference.

7. We have perused Form-III of the Miscellaneous Certificate Rules, 1984. Paragraph 2 of which reads as under: -

> "This certificate is being granted only for the purpose of …."

The resident/nativity certificate issued under the Rules of 1984 was, thus, required to be granted for a limited purpose. It is not the case of the appellant that the said certificate was granted in her favour in 2012 for the purpose of selection in question. In any case, the submission is that consequent upon issuance of the resident certificate, the appellant was to be treated to be resident of the said village for all times to come because there was no provision under the Rules of 1984 with reference to time after which the resident certificate was to be treated as valid. Status

of residence of a person is a question of act. A dispute was raised by the Sarpanch and the villagers of Gudiapadar to the effect that the appellant had never resided in that village. In that background, she was asked to submit a recent resident certificate by the Selection Committee. She failed to do so.

8. In such circumstances, the learned Single Judge has committed no error by rejecting the appellant's claim of being resident of village Gudiapadar for the purpose of appointment to the post of Jogan Sahayak. The appeal has no merit and it is, accordingly, dismissed.

—— o ——

2024 (II) ILR-CUT-400

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

W.A. NO. 292 OF 2024

BAISHNAB CHARAN PRUSTY ..…Appellant

-V-

STATE OF ODISHA & ORS. …..Respondents

SERVICE LAW – Scale of Pay – Cut of date – The appellant claims to get benefit of UGC scale of pay with effect from 01.09.1989 – But, as on 01.09.1989 the appellant's College did not have affiliation with the University in science stream – Whether the appointment in the College as a Lecturer for +2 science course w.e.f. 24.08.1989 would be covered under UGC regulation? – Held, No.

Case Laws Relied on and Referred to :-

1. (1998) 3 SCC 613 : State of Odisha & Anr. Vs. Aswini Kumar Dash & Ors.
2. 1997 (II) OLR 241 : Smt. Bandita Dash v. State of Odisha & Anr.
3. (2016) 7 SCC 353 : Modern Dental College & Res. Cen. Vs. State of MP & Ors.
4. (SLP(C) Nos.36023-32 of 2010): P. Suseela v. University Grants Commission.
5. (2007) 10 SCC 306 : Udai Singh Dagar v. Union of India.
6. (2006) 1 SCC 275 : State of Orissa v. Md. Illiyas.

For Appellant : Mr. Abhiram Swain
For Respondents : Mr. M.K. Khuntia, AGA (State), Mr. Tushar Kanti Satapathy

JUDGMENT Date of Judgment : 20.05.2024

CHAKRADHARI SHARAN SINGH, C.J.

This matter is taken up through Hybrid mode.

2. The appellant has put to challenge a judgment dated 15.12.2023 passed by a learned Single Judge of this Court in W.P.(C) No.30976 of 2020 whereby the appellant's writ application has been dismissed.

3. The petitioner claimed in his writ application that he was entitled to University Grants Commission (UGC) scale of pay with effect from 01.09.1989 consequent upon his appointment as a Lecturer in Chemistry (1st Post) in Kishore Nagar College, Kishore Nagar, (the College for short) vide order dated 24.08.1989,

pursuant to which he had submitted his joining on 01.09.1989. The learned Single Judge has rejected the petitioner's claim after having taken into account the admitted fact that the College had commenced its teaching for +2 Science stream from the academic session 1989-90 whereafter concurrence and affiliation from the Council of Higher Education was granted. It has also been noted in the impugned judgment, which is not in dispute that +3 Science stream was opened in the College from the academic session 1993-94 for which recognition was granted on 01.05.1992 by the Director, Higher Education. The college got affiliation by the Utkal University by an order dated 06.02.1996. Further the appellant's service was approved by the Government by an order dated 24.11.1998 with effect from 01.06.1996.

4. Noticing the cut-off date as prescribed in the State Government resolutions dated 06.10.1989 and 06.11.1990 which have been found not to be arbitrary by the Supreme Court in case of the ***State of Odisha and another Vs. Aswini Kumar Dash and others*** reported in ***(1998) 3 SCC 613***, the learned Single Judge has dismissed the writ petition, also taking into account the fact that the appellant/petitioner's similar claim was earlier rejected by the Government by an order dated 04.09.2004, which he had not assailed.

5. Assailing the impugned judgment of the learned Single Judge, learned counsel for the appellant has submitted that the learned Single Judge has not taken into account the fact that the appellant had requisite qualification of a lecturer and he was entitled to UGC scale of pay with effect from 01.09.1989. He has also submitted that the judgment relied upon by the appellant in the case of ***Smt. Bandita Dash v. State of Odisha and another*** reported in ***1997 (II) OLR 241*** has not been duly considered by the learned Single Judge. He has argued that higher education, being in the Union list, the regulation framed by the UGC regarding scale of pay admissible to the teachers of the colleges should be allowed to prevail over the government decisions. He has placed relied on the Supreme Court's decision in the case of ***Modern Dental College and Res. Cen. Vs. State of Madhya Pradesh and Others*** reported in ***(2016) 7 SCC 353***.

6. There are certain facts which are not in dispute. The appellant was appointed as an honorary lecturer in Kishore Nagar College, Kishore Nagar in the district of Cuttack. The appellant has relied on a notification issued by the Utkal University on 15.10.1989 whereby the affiliation was granted to the college for +3 Degree course. We are of the definite opinion that the said notification is of no avail for the petitioner's case which related to opening of +3 Degree Arts Courses. No affiliation was granted to the college for Science Courses by the said notification dated 15.10.1989 which has been brought on record by way of *Annexure*-2 to the memo of appeal.

7. It may be mentioned at this juncture that the appellant had earlier approached this Court by filing a writ petition giving rise to OJC No.6616 of 2001, which was disposed of by an order dated 11.07.2002 in the following terms: -

> "2. The case of the two petitioners in this writ petition is that the petitioner no.1 was appointed as a Lecturer in Physics and the petitioner no.2 was appointed as Lecturer in Chemistry by the Secretary of the Kishore Nagar College, Kishore Nagar, Cuttack by order dt. 29.08.1988. The Kishore Nagar College became eligible to get grant-in-aid with effect from 01.06.1988. By resolution dt. 06.10.1989 of the Government of Orissa Education and Youth Services Department revised scale at U.G.C. rate was made applicable to all categories of full time teachers working in all affiliated Government Colleges and aided non-Govt. Colleges either covered or eligible to be covered under direct payment scheme till 1.4.1989. The aforesaid Resolution was followed by another Resolution dated 6.11.1990 of the Government of Orissa, Education and Youth Services, Department providing for revised pay at the U.G.C. Scale for lecturers of full aided non-Government Colleges either covered or eligible to be covered under Direct Payment scheme till 1.4.1989. The Governing body moved the opp.parties 1 and 2 to place the petitioners in the U.G.C. slab in term of the said Resolution dt. 6.10.1989 and 06.11.1990 as stated in paragraph-17 of the writ petition and furnished such certificates in Annexure-7 and 7/1 respectively for the aforesaid purpose. But no decision has yet been taken by opp.parties 1 and 2 on the said proposal of the Governing Body of the College.
>
> 3. We dispose of this writ petition with the direction that a certified copy of this order and a copy of the writ petition will be filed by the petitioner before the Director of Higher Education, Orissa and the Principal Secretary, Department of Higher Education and the two authorities will consider the case of the petitioners for U.G.C. revised scale in terms of the Resolution dt. 6.10.1989 and 6.11.1990 in Annexures-4 and 5 to the writ petition and communicate the decision to the two petitioners within a period of four months from the date of receipt of the said copies from the petitioner. In case the petitioners file requisites, a copy of the writ petition with the copy of this order will be communicated to each of the opp. parties."

8. In the light of the aforesaid directions of this Court dated 11.07.2002, the petitioner's representation was considered by the Commissioner-cum-Secretary to Government of Odisha in the Department of Higher Education, and disposed of by a reasoned order dated 04.09.2004, rejecting the claim of the petitioner in the following terms:-

> "It is reported that the petitioners, Sri Subrat Pradhan and Sri Baishnab Ch. Prusty joined against 1st Post of Lecturer in Physics and Chemistry on 8.9.89 and 1.9.89 respectively. The (sic) posts have been admitted into the grant-in-aid fold with effect from 1.6.95.
>
> As per para-2(1) of the resolution dated 6.11.90 the revised U.G.C. scale of pay is applicable to the teachers working in all aided non-Government colleges whether covered or eligible to be covered under direct payment scheme till 1st day of April, 1989. Since the posts held by the petitioners were covered under grant-in-aid fold after 1.4.89, they are not entitled to the benefit of U.G.C. Scale of pay. Hence their claim for grant of revised U.G.C. Scale is rejected.
>
> All concerned are intimated accordingly."

9. The appellant again filed a writ petition raising the same grievance, 16 years thereafter, in 2020 giving rise to W.P.(C) No.16089 of 2020. This Court was though not inclined to entertain the writ petition, disposed of the same by an order dated 07.08.2020, which reads as under:-

> "For the nature of relief sought for and for pendency of the representation at the instance of the petitioner, vide Annexure-12 on the selfsame grounds, this writ petition is not entertainable at this stage and the same stands disposed of directing O.P. 1 to look into the request of the petitioner, vide Annexure-12 and pass appropriate orders on the same taking into consideration the grounds raised in this writ petition so also Annexure-6, 7 and 7/1 appended thereto within a period of one and half months from the date of communication of this order by the petitioner."

10. In the light of this Court's observation in the aforesaid order dated 07.08.2020 the Commissioner-cum-Secretary, Higher Education Department, Government of Odisha again considered the petitioner's claim of UGC Scale with effect from 01.04.1989. Referring to the Higher Education Department resolutions dated 06.10.1989 and 06.11.1990, the Commissioner-cum-Secretary, Higher Education Department rejected the petitioner's claim on the ground that he was not eligible for receipt of U.G.C. scale of pay. He noted in his order that the following conditions must be fulfilled by a candidate/claimant for being eligible for receipt of UGC scale of pay:-

> *"I. He/She must have secured minimum of 55% of marks at his/her PG in the concerned subject along with a good academic record.*
>
> *II. He/She must have either been covered or eligible to be covered under Direct Payment Scheme prior to 01.04.1989.*
>
> *III. The +3 (degree) wing in the said College must have opened prior to 01.04.1989.*
>
> *IV. He/She must be a full-time lecturer."*

The said order dated 24.09.2020 became subject matter of challenge in the writ petition, which has been dismissed by the learned Single Judge by the impugned order dated 15.12.2023.

11. Learned counsel for the petitioner has submitted that the rejection of the petitioner's claim of UGC scale on the ground that he came into grant-in-aid fold with effect from 01.06.1995 was wholly unsustainable as that would amount to violation of the UGC regulations framed under the Central Act, by applying the resolution of the Government of Odisha. In support of his submission, he has placed reliance on the following decisions of the Supreme Court:

> ***(i) Modern Dental College & Res. Cen. V. State of Madhya Pradesh (2016) 7 SCC 353;***
>
> ***(ii) P. Suseela v. University Grants Commission (SLP(C) Nos.36023-32 of 2010);***
>
> ***(iii) Udai Singh Dagar v. Union of India (2007) 10 SCC 306; and***
>
> ***(iv) State of Orissa v. Md. Illiyas (2006) 1 SCC 275.***

12. Mr. M.K. Khuntia, learned Additional Government Advocate (AGA), appearing on behalf of the respondents-State defending the impugned judgment, has submitted that the appellant's claim to get benefit of UGC scale with effect from 01.09.1989 is to be considered in accordance with the resolution issued by the erstwhile Education and Youth Services Department dated 06.10.1989 and 06.11.1990. By resolution dated 06.10.1990 it was decided to extend the revised

UGC scale of pay to the college teachers in order to improve the standards in higher education leading to grant of a degree and made it applicable to all categories of full-time teachers working in all affiliated colleges, either covered or eligible to be covered under the direct payment scheme till 01.04.1989. The letter dated 06.10.1989 was further clarified by subsequent resolution dated 06.11.1990 stipulating therein that all categories of full-time teachers working in aided non-government colleges either covered or eligible to be covered under the direct payment scheme till 01.04.1989, could be considered for extension of UGC pay scale benefit. He has argued that the cut-off date as prescribed in the said resolutions dated 06.10.1989 and 06.11.1990 has been approved by the Supreme Court in the case of ***Aswini Kumar Dash*** *(supra)*. He accordingly submits that the learned Single Judge has rightly dismissed the writ application which does not suffer from any infirmity.

13. We need not go into various factual details and submissions advanced on behalf of the petitioner which have been duly noticed by the learned Single Judge. There are two reasons for rejection of the appellant's writ petition as recorded by the learned Single Judge. Firstly, in view of the Supreme Court's decision in the case of ***Aswini Kumar Dash*** *(supra),* the appellant has not been found entitled to UGC scale of pay with effect from 01.09.1989. We do not find any infirmity in the said finding for the reason that as on 01.09.1989, the college in question did not have affiliation with the University in science stream. His appointment in the college as lecturer was for teaching +2 Science course, which course is not covered under the UGC regulations. In the case of ***Aswini Kumar Dash*** *(supra),* the Supreme Court had the occasion to consider the reasonableness of the cut-off date prescribed in the resolutions dated 06.10.1989 and 06.11.1990 of Government of Odisha, on the point of claim of revised UGC scale of the teachers of the aided non-government colleges. The Supreme Court upon a threadbare examination has held in paragraph 13 as under:-

> "13. In the present case the State Government has decided to provide grants-in-aid to cover the revised U.G.C. scales of pay for those teachers in existing colleges which have received Government concurrence and University affiliation on or before 1-4-1989. The date has a direct nexus with the date of the decision to provide for such higher pay scales in the grant-in-aid to be given to the concerned colleges. The date which is so fixed cannot be considered as arbitrary or unreasonable. Colleges which have secured Government concurrence or affiliation from the University after 1-4-1989, therefore, cannot claim any right to the higher grant-in-aid contrary to the policy as laid down by the State. The High Court was, therefore, not right in coming to the conclusion that the Note to para 2(1) of the Government Resolution of 6-11-1990, was arbitrary and unreasonable." **(Underscored for emphasis)**

14. Further, it will be apt to note that the petitioner's claim to get revised scale of pay was rejected way back on 04.09.2004 by the Principal Secretary, Higher Education Department, Odisha, by a reasoned order passed in compliance of this Court's order dated 11.07.2002 in OJC No.6616 of 2001. Nearly 16 years thereafter,

he challenged the said order by filing again writ petition giving rise to W.P.(C) No.16089 of 2020, before this Court again

15. This aspect has also been duly noted by the learned Single Judge, in the impugned order while dismissing the writ application.

16. In view of the Supreme Court's decision in case of ***Aswini Kumar Dash*** *(supra)*, we do not find any merit in this appeal. For the aforesaid reasons the impugned judgment dated 15.12.2023 passed by a learned Single Judge in W.P.(C) No.30976 of 2020 does not require interference.

17. This appeal is accordingly dismissed, being devoid of merit.

18. No orders as to costs.

—— o ——

2024 (II) ILR-CUT-405

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

W.P.(C) NO.7776 OF 2024

M/s. ROSMERTA TECHNOLOGIES LTD. ……Petitioner

-V-

STATE OF ODISHA & ORS. ……Opp.Parties

CONSTITUTION OF INDIA, 1950 – Article 226 – Scope & limitations of a Court while exercising the power of Judicial Review in the matter of contract – Enumerated with reference to case laws.

Case Laws Relied on and Referred to :-

1. (1975) 1 SCC 70 : Erusian Equipment & Chemicals Ltd v. State of West Bengal.
2. W.P(C) No.6897/2016(Decided on 12.04.2017) : Nestor Pharmaceuticals Ltd. & Ors. v. State of Odisha & Ors.
3. W.P(C) No.3572/2017(Decided on 27.03.2017) : Kaustuva Sahu v. State of Odisha &Ors.
4. (2016) 8 SCC 622 : Central Coalfields Ltd.& Anr. v. SLL-SML (Joint Venture Consortium).
5. (2016) 16 SCC 818 : Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd. & Anr.
6. (2022) 5 SCC 362 : Agmatel India Pvt. Ltd. v. Resoursys Telecom & Ors.
7. (2022) 6 SCC 127 : N.G. Projects Ltd. v. Vinod Kumar Jain & Ors.
8. (1979) 3 SCC 489 : Ramana Dayaram Shetty v. International Airport Authority of India.
9. (1994) 6 SCC 651 : Tata Cellular v. Union of India.
10. (1990) 2 SCC 488 : G.J. Fernandez v. State of Karnataka.
11. (2005) 6 SCC 138 : M/s.Master Marine Services (P)Ltd. v. Metcalfe & Hodgkinson (P) Ltd.
12. (2007) 14 SCC 517 : Jagdish Mandal v. State of Odisha.
13. 2002 (6) SCC 315 : Kanheylal Agarwal v. Union of India.
14. (2022) 1 SCC 165 : Uflex Ltd. v. Govt. of Tamil Nadu & Ors.
15. (2022) 6 SCC 401 : National High Speed Rail Corpn. Ltd. v. Montecarlo Ltd. & Anr.
16. 2019 (2) SCALE 134 : Vidarbha Irrigation Devp. Corpn. v. Anoj Kumar Agarwala.
17. 2024 SCC OnLine Ori 1271 : Raj Kishore Sahoo v. State of Odisha & Ors.
18. 2021 SCC OnLine Pat 1971: EMS Infracon Pvt. Ltd., v. State of Bihar & Ors.
19. (1993) 1 SCC 445 : Sterling Computers Ltd. Vs. M & N. Publications Ltd.
20. (2012) 8 SCC 216 : Michigan Rubber (India) Ltd. Vs. State of Karnataka.
21. (AIR 1936 PC 253) : Nazeer Ahmad vs. King Emperor.

For Petitioner : Mr. Surya Prasad Misra, Sr. Adv, Mr. Abhisek Agarwal, Mr. Pinaki Mishra, Sr. Adv, Mr. Manu Agarwal

For Opp.Parties : Mr. Ashok Kumar Parija, Advocate General, Odisha assisted by Mr.Pravakar Behera, Standing Counsel
Mr. Gautam Misra, Sr. Adv. assisted by Mr. J.R. Deo
Mr.Sidharth Shankar Padhy

JUDGMENT Date of Judgment : 18.06.2024

CHAKRADHARI SHARAN SINGH, C.J.

> "The State need not enter into any contract with anyone, but if it does so, it must do so fairly without any discrimination and without unfair procedure. (***Erusian Equipment & Chemicals Limited v. State of West Bengal***, (1975) 1 SCC 70)"

1. Before referring to the reliefs sought by the petitioner in the present writ petition and the issues which have emerged for the Court's consideration based on the rival pleadings and submissions made on behalf of the parties, we consider it apposite to notice the relevant facts, at the outset, which are considered germane for a just decision of the dispute.

2. The facts, not in dispute, are that opposite party No.3 had floated a tender in the form of Request For Bid (RFB) "for selection of successful bidder for Design, Construction of Automated Testing Stations, Procurement, Supply, Installation of vehicle testing equipment and Operation and Maintenance at 21 locations in Odisha State" in e-Nivida portal as well as on the Transport Commissioner's web portal on 27.01.2024.

2.1 It is pertinent to mention here that Section 56 of the Motor Vehicles Act, 1988 (MV Act) provides that no certificate of fitness shall be granted to a vehicle after such date as notified by the State Government unless such vehicle has been tested in an automated testing station (ATS). The Central Government, by a notification dated 12.12.2023 has amended the provisions of Rule 62 of the Central Motor Vehicle Rules, 1989 (CMV Rules) per Section 56 of the MV Act which provides that the fitness certificate of a vehicle shall be done mandatorily, only through the automated testing stations with effect from 01.10.2024. Apparently, the aforesaid RFB was invited to setting up and operation of ATS to fulfil the statutory requirement under Section 56 of the MV Act read with Rule 62 of the CMV Rules.

2.2. Clause-2.12 of the said RFB contains "Technical and Financial Bid Conditions", Part-1 of which prescribes "The Pre-Qualification Conditions". Item (d) of said Part-1 of Clause-2.12 lays down twenty-three pre-qualification conditions, 23rd of which reads as under: -

> **"(d) The Pre-qualification conditions of Technical Bid and the necessary documents to be submitted along with Technical Bid, are given in the table below:**
>
> **Table-2**

S.No.	Pre-Qualification Conditions	Documents to be submitted along with Technical Bid

23	**Declaration on non-involvement of legal litigation by bidder or any member of the bidder (in case of consortium/partnership)**	**Notarized affidavit As per form (S)**

Note: (a) All Forms of this RFB, required in support of Technical Bid Conditions, must be filled and submitted by the Bidder."

2.3 Form (S) as mentioned in the 3rd column at Sl. No.23 of Table-2 reads thus:

"FORM (S)

UNDERTAKING REGARDING LITIGATION/ARBITRATION

(To be filled by sole bidder/each consortium partner)

(Duly notarized to be submitted along with Technical Bid)

FORMAT OF UNDERTAKING, TO BE FURNISHED ON COMPANY LETTER HEAD WITH REGARD TO LITIGATION/ARBITRATION, BY SOLE BIDDER/CONSORTIUM MEMBER

To,
The Transport Commissioner,
Odisha,
Odisha 6th Floor, RajaswaBhawan,
Cuttack-753002,

We hereby confirm and declare that we, M/s - , does not have any litigation/Arbitration History with any Government department/Public Sector Undertaking/Private Sector/or any other agency for which we have Executed/undertaken the works/Services during the last 10 years.

For_____"
Authorised Signatory
Date: **(*Underscored for emphasis*)**

2.4 It is manifest, on close reading of the pre-qualification conditions at Sl. No.23 of Table-2 read with Form (S) that a declaration of non-involvement in a litigation of a bidder or any member of the bidder (in case of consortium partnership) was to be mandatorily submitted by way of notarized affidavit in Form (S). A bidder, thus, to qualify for the bidding process had to essentially give an undertaking in Form (S) to the effect that it did not have any litigation, or arbitration history with any Government/Public Sector Undertaking/or any other agency during the last 10 years. The said provision thus excludes such companies from participating in the bidding process that have any litigations/arbitration history with any Government Department/Public Sector Undertaking/private sector or any other agency during the last 10 years.

2.5 The petitioner is a Company duly registered under the Companies Act, 1956. It has been averred in the writ petition, which has not been denied by the opposite parties, that it is a leading player in the Road and Rider safety domain and a unique solution provider for the transport sector. It is the largest operator and the first one to

start the transition of commercial vehicle fitness certification from manual process to Automated fitness testing at Inspection and Certification Centers (I & C Centres), which are now called as "Automated Testing Stations (ATS) Centers". Since 2015, the petitioner is said to have established and is operating a majority of the Automated Inspection and Certification Centers for the Government of India and various State Governments. It has vast experience in the software development and Information Technology domain which is involved in the Research and Development of innovative applications and solutions in the field of Video analytics focusing mainly on the Road Safety Sector. It is the only company in India which has both the technologies available for driving tests used in India, the petitioner claims.

2.6. The date for downloading the bid document was fixed to 29.01.2024 and the last date of submission of bids to 19.02.2024. The date for submission of pre-bid queries was fixed to 05.02.2024 and a pre-bid meeting was scheduled to be held on 07.02.2024. As per the schedule, a pre-bid meeting was conducted through virtual mode on 07.02.2024 in which certain queries were raised by aspiring bidders, whereupon, replies to the pre-bid queries were uploaded on the Transport Commissioner's web portal as well as e-Nivida portal. Further, based on queries raised by the bidders, certain clauses of the terms of RFB were modified and accordingly a corrigendum dated 12.02.2024 was published and uploaded to the e-Nivida portal. In the said corrigendum, Sl. No.2 of Clause-1.2 was revised as under:

> "Bid Processing Fee (Non-refundable)
>
> Rs.l0,000/-(Ten Thousand only) Bid Processing Fee plus taxes as applicable. Bid Processing Fee shall be paid via the Online Portal being used for tendering.
>
> "The eNivida Portal is showing an option of paying this fee in BG form. Bidder shall select this option and enter DD details instead of BG details and submit the DD in original along with the Hard copy of the technical bid."

2.7 The last date of submission of bid online was extended from 11.02.2024 to 11.03.2024. Another corrigendum No.2 was issued on 01.03.2024 containing tentative layout designs of 21 locations which was uploaded on the web portal of eNivida as well as the Transport Commissioner's web portal.

2.8 Before the last date of online submission of the bid i.e., 11.03.2024, the petitioner through his e-mails dated 05.03.2024 and 06.03.2024 requested for change of certain clauses in RFB asserting that it had earlier raised certain queries in the pre-bid meeting which remained unanswered by opposite party No.3. The petitioner had specifically stated in his e-mail that pre-qualification condition at Sl. No.23 of Table 2 read with Form (S) was onerous, arbitrary, capricious, and as such was irrelevant for the purpose of tender. After receipt of those e-mails, opposite party No.3 published a clarification to the pre-bid queries on 07.03.2024. The petitioner, however, continued with its grievance that the query as regards Sl. No.23 of Table-2 and Form (S) had not been met as the said condition had not been removed from the tender condition. The petitioner sent another e-mail on 10.03.2024 to opposite party

No.3 with a request for an extension of time for submission of the bid. The Office of opposite party No.3 published a corrigendum on 11.03.2024 extending the last date of submission of the bid to 16.03.2024 with revised BOQ. The petitioner approached this Court, in the meanwhile, by filing a writ petition giving rise to W.P.(C) No.5660 of 2024 challenging the pre-qualification condition at Sl. No.23 of Table-2 regarding the declaration on non-involvement of legal litigation by the bidder in Form (S) on the ground that the aforesaid condition was inherently illegal and no individual or company could ever file an affidavit that he or they were, at no point of time, might have been made involved in litigation on the date of submission of the aforesaid bid.

2.9 Challenging the aforesaid pre-qualification condition on the grounds, *inter alia*, that the same was violative of Articles 14 and 19 (1) (g) of the Constitution of India, the petitioner sought for a declaration that the aforesaid condition in the tender bid was invalid and not sustainable in the eye of law. The said W.P.(C) No.5660 of 2024 came to be disposed of on 11.03.2024 by a co-ordinate bench of this Court with the following order:

> "xxx xxx xxx
> 4. In course of hearing, learned counsel appearing for the petitioner states that the petitioner has already made representation before Opposite Party No.3 vide Annexure-6, and the same may be directed to be disposed of within a stipulated time, to which learned Counsel for the State has no objection.
>
> 5. As agreed by learned counsel for the parties and after going through the records, this Court, without expressing any opinion on the merits of the case, disposes of the Writ Petition directing Opposite Party No.3 to consider and dispose of the representation filed by the petitioner vide Annexure-6 and pass appropriate order as early as possible within a period of three months from the date of production of certified copy of this order."

2.10 The said order dated 11.03.2024 was communicated to opposite party No.3 with a request to consider his representation dated 05.03.2024. An order was, accordingly, passed by opposite party No.3 on 14.03.2024, disposing of the petitioner's representation dated 05.03.2024 with the following observation: -

> "In the representation dated 05.03.2024 Annexure-6, the petitioner-M/s. Rosmerta Technologies Limited has requested to clarify Clause-2.12, Table-2, Sl. No.23, Section-9 Clause-4 in the table and Form-A and S of the RFB. In Clause-23, Table-2, the bidder is required to submit declaration regarding non-involvement in legal litigation by the bidder or any member of the bidder (in case of consortium/partnership). <u>The said declaration was very clear and unambiguous required to be submitted in Form-S</u>".
>
> (underscored for emphasis)

2.11 The petitioner filed another writ petition before this Court giving rise to W.P.(C) No.6277 of 2024 again challenging the same pre-qualification condition at Sl. No.23 of Table-2 read with Form (S) of the RFB, in view of the evident compelling circumstance that the last date for submission of bid was 16.03.2024 and its representation against the said pre-qualification condition clause was yet to be decided.

2.12 It is the case of the opposite parties that the petitioner filed the writ petition i.e., W.P.(C) No.6277 of 2024 on 14.03.2024 itself without awaiting the disposal of his representation. Be that as it may, the W.P.(C) No.6277 of 2024 was also disposed of on 15.03.2024 by the same co-ordinate bench of this Court by the following order:

> "This matter is taken up through hybrid mode.
>
> 2. Heard.
>
> 3. The Petitioner has filed this writ petition with the following prayer:
>
> "In the circumstances, it is most humbly prayed that, your Lordship may be graciously pleased to interfere in the matter and issue a RULE NISI in the nature of certiorari/mandamus calling upon the Opp. Parties to Show Cause as to why:
>
> a) Clause No.23 Part-I: The Pre-qualification conditions, Form(S) and clause-4 of Section-9 Evaluation Parameters, Evaluation Criteria (Technical Bid) of the Request for Bid for construction of automated testing station, procurement, supply, installation of vehicle testing equipment and operation & maintenance at 21 locations in Odisha State dated 27.01.2024, shall not be declared null and void,
>
> b) The opposite parties shall not be restrained in rejecting the Petitioner's bid for the RFB on the ground of failure to satisfy Clause No.23 Part-1 The Pre-qualification conditions, Form(S) and/ or clause-4 of Section-9 Evaluation Parameters, Evaluation Criteria (Technical Bid) of the Request for Bid for construction of automated testing station, procurement, supply, installation of vehicle testing equipment and operation & maintenance at 21 locations in Odisha State dated 27.01.2024;
>
> c) The Opp. Parties shall not be directed not to issue necessary corrigendum for extension of date of invitation of the aforesaid competitive Bid during pendency of the present Writ Petition;
>
> AND in the event, the opposite parties fail to show-cause or show insufficient cause,
>
> a) Clause No.23 Part-I: The Pre-qualification conditions, Form(S) and clause-4 of Section-9 Evaluation Parameters, Evaluation Criteria (Technical Bid) of the Request for Bid for construction of automated testing station, procurement, supply, installation of vehicle testing equipment and operation & maintenance at 21 locations in Odisha State dated 27.01.2024, be declared null and void;
>
> b) The opposite parties be restrained in rejecting the Petitioner's bid for the RFB on the ground of failure to satisfy Clause No.23 Part-1 The Pre-qualification conditions, Form(S) and/or clause-4 of Section-9 Evaluation Parameters, Evaluation Criteria (Technical Bid) of the Request for Bid for construction of automated testing station, procurement, supply, installation of vehicle testing equipment and operation & maintenance at 21 locations in Odisha State dated 27.01.2024,
>
> c) The Opp. Parties be directed not to issue necessary corrigendum for extension of date of invitation of the aforesaid competitive Bid during pendency of the present Writ Petition."
>
> 4. In course of hearing, learned counsel appearing for the Petitioner states that the Petitioner has already made representation before the Opposite Party No.2 vide Annexure-12, and the same may be directed to be disposed of within a stipulated time, to which learned Counsel for the State has no objection.
>
> 5. As agreed by learned counsel for the parties and after going through the records, this Court, without expressing any opinion on the merits of the case, disposes of the Writ Petition directing Opposite Party No. 2 to consider and dispose of the representation

> filed by the Petitioner vide Annexure-12 and pass appropriate order as early as possible within a period of three months from the date of production of certified copy of this order." (Underscored for emphasis)

2.13. Faced with a situation where the opposite party No.3 was directed to consider the petitioner's representation by this Court's order dated 15.03.2024 within a period of three months and the last date for submission of the bid was 16.03.2024, the petitioner submitted his bid and communicated to the opposite party No.3 about submission of the technical bid through e-mail dated 16.03.2024, without prejudice to its contention in respect of the aforesaid impugned tender conditions.

2.14. It is also an admitted fact that only three bids were submitted, one by the petitioner, who questioned the sustainability of the requirement at Sl. No.23 of Table-2 read with Form (S) of the RFB and two others who are opposite parties No.4 and 5 herein, whose technical bids have been found responsive by the bid evaluation committee, and have no litigation/arbitration history at all.

3. It is apposite to note at this stage that Clause 2.8 of the RFB required the bids to be accompanied by an Earnest Money Deposit (EMD) of Rs.80,00,000/- (Rupees Eighty Lakh) payable in the shape of a demand draft drawn in favour of "Transport Commissioner, Odisha" issued by any nationalized bank payable at Cuttack to be attached along with the technical bid of the tender.

4. It is also relevant to mention that Clause 2.9 of the RFB prescribed deposit of a 'bid processing fee' as under:-

> "**2.9 BID PROCESSING FEE**
>
> (a) The Bidders shall deposit bid processing fee of **Rs.10,000/- (Ten Thousand Only) Bid Processing Fee plus taxes as applicable**.
>
> (b) The Bid Processing Fee is non-refundable.
>
> (c) **A Bid which is not accompanied by Bid Processing Fee as per this RFB shall be construed as non-compliant bid and shall be summarily rejected**.
>
> (d) Bid Processing Fee shall be paid Online on the Tendering Portal."
>
> (Highlighted for emphasis)

5. Clause 2.10 prescribed the procedure for submission of bids according to which the process of bid submission was to be online on the tendering portal in the necessary format mentioned in the RFB. The said Clause 2.10 also prescribed that a two part-bid system would be followed for the RFB with a Quality and Cost Based Selection (QCBS) criterion. It is pertinent to mention here that section 9 of the RFB lays down the evaluation criteria. It states that the evaluation of the bids shall be done by a bid evaluation committee constituted for the purpose. The evaluation shall be strictly based on the information and supporting documents provided by the bidders in the bid. It emphasises that it is the responsibility of the bidder to provide all supporting documents necessary to fulfil the mandatory eligibility criteria. In case, the required information is not provided by the bidder, the bid evaluation committee shall proceed with the evaluation based on information provided and will

not request the bidder for further information. It is clearly mentioned under Section 9 of the RFB that any bid submitted by the bidder, which fails to satisfy the eligibility requirements shall not be considered and summarily rejected.

6. The said section 9 of the RFB also lays down the methodology for evaluation and states that the technical bids shall be tabulated by the bid evaluation committee in the form of a comparative statement to evaluate the qualification of the bidders against the criteria for technical qualification set out in the RFB below. It mandates that the members of the bid evaluation committee shall evaluate the technical bids received and shall give marking as per below mentioned marking scheme table. It further lays down the technical proposal evaluation criteria and states that the bidders who qualify in the pre-qualification criteria shall be considered as qualified for technical evaluations. It also states that the bid evaluation committee shall consider documents submitted as part of technical evaluation.

7. The quality and cost-based selection (QCBS) for technically qualified bidders has been given in the table from which it can be easily inferred that against total technical score of hundred Marks, 30 was allotted to bidder financial capacity, 30 for technical experience 20 for key professional experience and the rest 20 for subjective marketing on proof of concept. It is the petitioner's case that the opposite parties No. 4 and 5 have no technical experience at all in the field and they could not have competed with the petitioner had the petitioner's technical bid been evaluated. Further, the bid technical experience for technical evaluation lays down that the sole bidder/any consortium member shall be an OEM should have experience of manufacturing and supplying of test plane equipment globally consisting of at least 4 test plane equipment mentioned in rule 190 of the CMV Rules. Different marks have been allotted based on the experience of manufacturing and supplying of test plane equipment. For example for 4 to 7 equipment 5 Marks has been allotted whereas for 7 to 10 equipment a bidder is entitled to 10 Marks. For more than 10 equipment, a bidder is entitled to full marks of 20 against bidder technical experience. Similarly, separate marks have been assigned based on the bidders experience of successfully conducting number of equal fitness tests during the last 5 financial years in India as on bid submission date. For one thousand to 10,000 tests bidder is to be allotted 5 Marks and from 10,000 one to 20,000 tests, 7 marks and for more than 20,000 tests, full 10 Marks. It is not disputed that the bidders whose technical bids have been found responsive, have no technical experience. Following table contained in RFB demonstrates the technical bid evaluation criteria:-

Section B. Bidder Technical Experience			
The Sole bidder/any consortium member shall be an OEM should have experience of manufacturing and supplying of Test Lane equipment globally consisting of at least 4 (Four) test lane equipment mentioned in CMV rule 190	4 to 7 Equipment	5	20
	7 to 10 Equipment	10	
	More than 10 equipment	20	

Section B. Bidder Technical Experience				
The Bidder (or any member of the consortium) have experience of successfully conducting no of vehicle fitness tests during the last five (3) financial years in India as on bid submission date.	1000 to 10,000 tests		5	10
	10,001 to 20,000		7	
	Greater than 20,000 tests		10	
Section C. Key Professional Experience				
The sole Bidder/Any member of the consortium should have at least 100 technical staff on their payroll having experience in (Equipment servicing/ Software service/IT Services) at the time of bid submission	100 to 150 employee		10	20
	150 to 200 employees		15	
	200 or more employee		20	
Section D. Proof of Presentation and Demonstration				
1) ATS infrastructure and other Facility as per CMVR Guidelines & Demo of all Equipments as per CMVR Norms.	Materials of construction shall be corrosion resist for speedometer tester, sideslip tester, break tester, suspension tester, joint play tester, electronic turn cable:		2	5	20
	Solvent based Paints at least two coats of inc chromate primer followed by two coats of synthetic Enamel Paint.		2		
	Epoxy Paints &Ho: dip Galvanized		1		
2) Efficiency of and modularity of Equipment's communication Easy to trouble shoot the system with least complex wiring for speedometer tester, sideslip tester, break tester, suspension tester, joint play tester, electronic turn cable.	LAN/BT/Wi-fi		2	5	
	USB/rs232/rs485		3		
	CAN		5		
3) Safety features for safe vehicle testing:	1. Vehicle axle park assist on roller set and interlock for safety in case wrong parking or failure of sensing devices for break tester and speedometer tester.	Any one-2	5		
	2. Immediate roller stoppage after achieving maximum breaking force in case of break tester hence power saving and no damage to vehicle.	Any two-3			

	3. Smart health detection of speedometer tester for required pneumatic pressure, axle alignment roller.	All-5		
4) Following inbuilt artificial intelligence and features to ensure correct vehicle testing and correct test reading & Presentations of ATS networking.	1. Smart vehicle type detection to ensure correct selection of vehicle type/category by break tester.	Any one-2		
	2. Inbuilt AI feature to detect the vehicle visual faults, such as reflector tape, SUPD. RUPD, windshield etc.	Any two-3		
	3. Integrated plate surface of friction > 0.6 for suspension tester (both side) and joint play tester (one side) for better locking of vehicle wheel on tester surface.	All-5		
	4. Inbuilt mechanism for removable of deformities stress from tyre resulting in false reading for sideslip tester.			

8. The petitioner submitted the physical technical bid documents on 18.03.2024. On 18.03.2024, the bid opening process of the technical bid was conducted in the presence of the representatives of the bidders. After opening the envelope submitted by the petitioner containing the bid processing fee, it was observed by the bid evaluation committee that the bid processing fee of Rs.10,000/- submitted by the petitioner in the shape of bank draft was not in conformity with Clause 2.9 of the RFB. The petitioner's bid was rejected by the impugned communication stating that *"Tender fee amount submitted by the bidder is INR Rs.10,000/- which is less than the requisite amount INR Rs.10,000 plus applicable tax, which comes to INR Rs.11,800/- as per the section 1 Table 1 Serial No.7 in the RFB"*. Consequently, on 28.03.2024, the technical bids of opposite parties No.4 and 5 were evaluated and declared responsive. It may be noted that it is the stand of the State Opposite Parties that the petitioner had not paid the GST amount @ 18% in addition to the bid processing fee of Rs.10,000/-. The draft amount of Rs.10,000/- paid by the petitioner against the bid processing fee was, thus, computed as Rs.8,475/- +18% of GST (Rs.1525/-) i.e. a total of Rs.10,000/-.The tender committee considered the same and rejected the petitioner's bid applying sub-clause (c) of Clause 2.9 of the RFB.

9. This is the factual background in which the present writ petition has been filed seeking the following reliefs : -

> (a) The impugned communication vide e-mail dated 18.03.2024 issued by Opposite Party No.3 vide Annexure-4 rejecting the bid of the Petitioner be set aside/quashed;
>
> (b) Clause No.23 of Part-I of the Pre-qualification conditions and Form (S) of the Request for Bid, be declared null and void;
>
> (c) The Opposite Party Nos.1 to 3 be directed to re-evaluate the Technical Bid submitted by the Petitioner on 18.03.2024 in respect of the RFB dated 27.01.2024 and restrain them in rejecting the Petitioner's bid on the ground of failure to satisfy Clause No.23 of Part-I of the Pre-qualification conditions and Form (S) of the RFB.

10. It is the petitioner's case as pleaded in the writ petition that opposite parties No.1 to 3 were cognizant of the unsustainability of the impugned tender conditions, as highlighted by the petitioner in the earlier writ petition but rejected the petitioner's bid on the highly specious ground of not having submitted GST of Rs.1,800/- along with the bid processing fee of Rs.10,000/-. It is due to inconsistency, and mismatch between the terms of the RFB and the designated online portal eNivida, for payment required to be made, the petitioner had no other option but to make all payments as specified on the online portal. The online portal showed the bid submission of the petitioner as a 'success'. It has also been pleaded in the writ petition that the petitioner had cumulatively paid a higher sum than what is stipulated under the tender documents inasmuch as while the tender document required the bidder to pay a total sum of Rs.10,000/- plus taxes and Rs.80Lakhs, which on considering the highest GST slab of 28% on the Bid Processing Fee, comes to Rs.80,12,800/-, the petitioner had made a total payment of Rs.80,12,950/-.

11. It is also an admitted fact that after the rejection of the petitioner's bid on 18.03.2024, the petitioner submitted a demand draft of Rs.1,800/- by way of demand draft No.518682 towards GST amount as asked on the Form fee on 20.03.2024.

12. Based on the above-noted facts, it can easily be discerned that the petitioner had questioned the validity of the pre-qualification conditions at Sl. No.23 of Table-2 read with Form (S) right from the beginning, soon after the RFB was floated. It has, however, not been disqualified with reference to the said disqualifying condition rather its technical bid has been rejected on the ground that it failed to pay GST amount of Rs.1,800/- requisite under Clause 2.9 of the RFB.

13. The petitioner asserts that it has been awarded the contract for setting up of ATS at 13 identified places in the State of Maharashtra for five years. It has huge turnover of 250 crores and a net worth of Rs.260 crores and has participated in more than 315 government tenders to date and has been awarded more than 175 contracts pursuant thereto over a period of the last 15 years. In that background, it is the petitioner's case that the impugned tender conditions, which required that there should have been no litigation/arbitration history of the bidder in the past 10 years is a unique condition, which has no rationale to any legal object and has the consequence of ousting of all largest companies in the country, which have expertise

in the field. It is asserted that only such companies which have either no experience or limited experience can meet such conditions. It has been stated in the writ petition that whereas the tender document specified the processing fee as Rs.10,000/- + taxes as applicable, the designated eNivida portal did not have any option under the head of the bid processing fees. The online portal to be used for making payments had only the following heads:-

(i) Form fee Rs.10,000/-
(ii) TPF (tender processing fees) Rs.2950/-;
(iii) EMD Rs.80,00,000/- (Rupees Eighty Lakh).

14. There was no amount as specified under the head of the bid processing fee in the Form. There was a 'Form fee' of Rs.10,000/- prescribed on the portal which had no reference in the tender documents and there was an additional amount towards TPF of Rs.2,950/- which did not find any mention in the tender document. Therefore, there was a clear mismatch between the terms of the tender documents concerning the payment required to be made and the online portal used for making the payment.

15. It is also the petitioner's allegation that the RFB contemplates award of two contracts, to the highest and the second highest bidders respectively and as such it has now become a foregone conclusion that the contracts under the tender shall be awarded to the opposite parties No.4 and 5 only, who have no experience at all in this highly technical field, in absence of any other competitor only the sole ground that they fulfil pre-qualification of no litigation history.

16. The petitioner has assailed the rejection of bid on specious ground of short payment of Rs.1800/- only.

17. In the counter affidavit filed on behalf of the opposite party No.3, the rejection of the petitioner's technical bid has been justified on the ground that it was clearly mentioned under Clause-2.9 that a sum of Rs.10,000/- plus taxes as applicable was required to be paid as the bid processing fee. The petitioner had deposited Rs.10,000/- only against the bid process fees and, therefore, the amount paid by the petitioner against bid processing fee was rightly treated as Rs.8,475/- + 18% GST i.e. Rs.1,525/- (total Rs.10,000/). There being specific provisions under Clause 2.9(c) that the technical bid shall be rejected that a bid which is not accompanied by a bid processing fee as per the RFB shall be construed as non-compliant bid and shall be summarily rejected, the petitioner's technical bid was rightly rejected. Further, the petitioner realized the defect as regards non-payment of applicable taxes provided under Clause-2.9 and, therefore, subsequently paid the sum by way of a demand draft of Rs.1,800/- after the bid submission date, on 19.03.2024. The opposite party No.3 has relied on paragraph 9 of the letter dated 20.03.2023 written by the petitioner in this regard, which has been quoted in the preliminary counter affidavit filed on behalf of opposite party No.3, which reads thus:-

> "9. Further, the amount allegedly under paid by us being small, we have immediately upon the default being brought to our attention by uploading of the rejection of our bid on the e-Nivida portal on 18.3.2024, have physically submitted demand draft of Rs.1800/- by way of demand draft No.518682 drawn on ICICI Bank dated 19.3.2024 towards the GST amount as asked on the Form fee on 20.3.2024. Proof of payment is enclosed as Annexure-C."

18. Refuting the petitioner's contention as regards payment of Rs.2,950/-, it has been stated that such payment cannot be said to have formed part of the payment as required under Clauses 2.9 and 2.8 of the RFB. The said amount if any may have been paid by the petitioner through online for the charges providing service in respect of the bid documents in e-Nivida portal. Such a rejection of the petitioner's technical bid on the ground of the same being non-compliant in terms of Clauses 2.9 (c) and 2.20(c) of the RFB by a Committee duly formed for evaluation of the bid cannot be said to be actuated with *mala fide* or *perverse*. It has been argued that the petitioner after having submitted the tender and, thus, participated in the bidding process, cannot turn around to question the tender process itself.

19. It has been asserted that the tender bidding system was floated as per the CVC guidelines and the bidding system is to be followed as per the present RFB with QCBS criterion in which even a single tender can be accepted with the approval of the Government.

20. It is significant to note that since during the course of hearing of the matter, the Pre-qualification condition in item 23 of Table-2 of Part-1 read with Form (S) of the RFB was assailed also on the ground of the same having been introduced with *mala fide* intention purposefully to exclude other bidders, capable of setting up and operationalize the ATS, a further affidavit has been filed on behalf of opposite party no.3, making following statements of crucial nature:

> "1. That the Request for Bid (RFB) was invited by the opposite party No.3 vide Bid Invitation No. RFB No/LX-10/2024/1504/TC, dated 27.01.2024 under Annexure-A/3 for setting up and operation of Automated Testing Station thereby setting certain eligibility criteria/pre-qualification condition requires to be complied with by the bidders and to be submitted along with the technical bid.
>
> 2. That the aforesaid Tender has been invited to carry out the mandatory provision of Section-56 of the Motor Vehicles Act, 1988 which provides that no certificate of Fitness shall be granted to a vehicle, after such date as notified by the Central Govt., unless such vehicle has been tested in an automated testing station.
>
> 3. That in view of the aforesaid provisions of the Motor Vehicles Act, 1988 the Central Govt. vide Notification dated 12.12.2023 has amended the provisions of Rule-62 of the Central Motor Vehicle Rules, 1989 which provides that the Fitness Certificate of a vehicle shall be done mandatorily only through an automated testing station w.e.f. 1st October, 2024. It is therefore humbly submitted that, the State is required to operationalize 21 (Twenty-One) Automated Testing Stations before 01-10-2024 for ensuring the provisions of Section 56 of MV Act, 1988 read with Rule 62 of CMV Rules, 1989.

> 4. That the present tender is therefore designed to complete the Automated Testing Stations by the aforesaid period where time is of essence. One of the tender condition in Table-2, Clause-23 (Form -S), wherein it has been stipulated that, a declaration on non-involvement of legal litigation by bidder or any member of the bidder (in case of consortium/partnership) to be submitted by way of Notarized Affidavit in Form-(S) has been adopted by this opposite party No -3 in view of the guidelines contained in the "Manual for Procurement of Works" issued by the Department of Expenditure in Ministry of Finance, Government of India. In view of said procurement guideline the instant clause has been incorporated in the tender floated by several departments under the government of India / State Government as well as PSUs. True copy of "Manual for Procurement of Works" issued by Government of India & copies of some of the tenders invited by various department under the State /Central Government & PSUs are annexed herewith as Annexure-K/3 & L/3 Series respectively.
>
> 5. That after noticing similar clauses in the tender documents floated by different State / Central government organization & PSUs as under Annexure L/3 Series, the impugned clause has been stipulated in the instant tender. The said clause was not inserted with mala fide intention to exclude any bidders who are capable of setting up & operationalize the Automated Testing Station.
>
> 6. That it is humbly submitted that the setting up Automated Testing Station & its operation being a highly specialized job, there are limited players in the market. The equipment to be installed at each Automated Testing Station has been specified by MoRTH under Rule 190 of CMV Rule,1989. There are only about 9 (Nine) equipment manufacturer from all over the world who are operating in India.
>
> 7. **That without prejudice to the aforesaid submissions it is humbly submitted that the Opp. Party No. 3 is willing to allow the other available bidders/ players in the country as stated above to participate in the present bid by deleting clause -23, Form-(s) for the said new players/ bidders by issuing appropriate notices in the present tender. Such a step will not affect the bidders who have participated in the present tender and it will only be for new players/ bidders**."
>
> (highlighted for emphasis)

21. In the said affidavit, it has been asserted that the said clause under challenge was incorporated in the RFB after noticing similar clauses in the tender documents floated by the different State/ Central Government organizations and PSUs. Copies of such tender documents have been brought on record by way of Annexure-L/3 series. One such document is in the form of an undertaking with regard to non-litigation in Form-3 in the Request for proposal issued by the Council of Scientific and Industrial Research, National Aerospace Laboratories, paragraph-9 of which refers to requirement of submitting no litigation certificate as per the format provided in Form-3 which is similar to Form (S) of the RFB.

22. Another tender document for supply of Server item for Vision XT's Artificial Intelligence (AI) Lab at National Institute of Fashion Technology (NIFT), Chennai is part of the said Annexure-L/3 series which also requires submission of similar undertaking.

23. Mr.Pinaki Mishra, learned Senior Counsel appearing on behalf of the petitioner has argued that the impugned tender conditions relating to absence of

litigation are inherently arbitrary, unconscionable and violative of Articles 14 and 19 of the Constitution of India. He contends that every legal person can sue and be sued and no adverse inference can be drawn therefrom. He has argued that on a bare reading of the offending clause, the said disqualification would attach to a bidder who has filed a suit for recovery of any legitimate claim against any person or has filed a writ petition for enforcement of any legal or fundamental right or a suit has been filed by any person against the bidder, rightly or wrongly. The said Pre-qualification conditions discriminate between the people who may have invoked legal remedies for redressal of their grievances or enforcement of their rights, including fundamental rights and those who did not have any occasion to do so. It also discriminates against the people, against whom any person had filed a false and/or frivolous legal proceeding. These are not intelligible differentia with any rational nexus to any legal object to be achieved to justify such classification which is therefore violative of Articles 14 of the Constitution. He has vehemently argued that the impugned condition is vitiated by *mala fide* as they have clearly been inserted to exclude all highly experienced bidders, and particularly, the petitioner, whose technical score in the Quality and Cost Based Selection bid process (QCBS) under RFB with 70% weightage to the technical score is highly likely to oust the favoured bidders. He contends that the opposite parties no.4 and 5 are such favoured bidders, which is evident from the fact that they have been able to submit the declaration contained in Form (S) of having no litigation experience in the last 10 years.

24. In response to the stand taken on behalf of the State-opposite parties that the impugned conditions were inserted after noticing similar clauses in the tenders floated by the different State/Central Government organizations and PSUs, he has submitted that the same have no bearing on the validity of the impugned conditions. The tender so floated by some of the organizations does not tantamount to judicial determination of their validity. He has further argued that complete tender documents allegedly containing such conditions have not been placed on record and thus it is not clear whether the text of the tender documents in those cases contain any ameliorating conditions, reducing the rigour of an undertaking in the nature of Form (S). In any event, the action of the State-opposite parties cannot be said to be *bona fide* on the said ground.

25. He has argued that admittedly, there are only nine equipment manufactures from all over the world who are operating in India in the field of ATS. Two bidders, allegedly comprising of six participants, are those with no litigation history, and have successfully submitted Form (s). No bidder, except the petitioner who does not meet the condition had submitted the bid. In such circumstances, the contracts under RFB are liable to be awarded to these two bidders, as the RFB contemplates the award of contract to both the H1 and H2. The mere fact that the State was able to find clauses in some other tenders, which ensures the selection of these two bidders only, does not militate against the overwhelming evidence of the conditions being

tailor-made to favour opposite parties no.4 and 5, he contends. He has argued that the impugned conditions relating to non-litigation deserves to be set aside/ withdrawn, which should be done either by way of issuance of corrigendum and extending the date for bid submission (as suggested by the State Government) or by setting aside the entire tender process and with a direction for issuance of fresh tenders notices. In either case, the petitioner should be permitted to resubmit its bid for the following reasons:

> i. The RFB contemplates that after submission of the final bid a bidder may resubmit the bid, and the bid would accordingly be updated, per clause 2.2 (o) and 2.2 (p) of the RFB. The mere fact that the petitioner's earlier bid was rejected, without opening the technical bid proposal, would not take away this option of resubmission of the bid till the last date for bid submission.
>
> ii. Any corrigendum/ modification in the bid document gives additional right to the previous bidders to resubmit their bid per clause 2.17 (f) of the RFB. This right also does not get washed away by the earlier summary rejection of the bid.
>
> iii. A modification in the tender amounts to a fresh invitation to offer. This invitation to offer must be open to all participants who have not been blacklisted.

26. Assailing the rejection of the petitioner's bid, it has been argued by him that the bid was required to be submitted and the payment of the requisite amounts with the bid was required to be made through e-Nivida web portal. The RFB required payment of bid processing fee of Rs.10,000/- plus "taxes as applicable". He has reiterated that the opposite party no.3 in its counter affidavit has stated that the tender processing fee of Rs.2950/- is not provided in the RFB and the same does not form part of the payment as required under Clause 2.9 and 2.8 of the RFB but the said amount is "akin to the requirement under the RFB". He argues that as per the e-Nivida portal, which was the designated portal for bid submission against RFB, on the other hand, there was no amount specified under the head of 'Bid Processing Fees' instead following payments were specified: -

> *"Form Fee: Rs.10,000/-;*
> *Tender Processing Fee (TPF): Rs.2,950/-"*

27. The petitioner had made the payment as stated above and the e-portal had returned the status of success. When the petitioner was informed on 18.03.2024 that there was short payment of Rs.1800/- for which the bid was summarily rejected, the petitioner paid the alleged short amount of Rs.1800/- on 20.03.2024. He has accordingly submitted that if there was any error in deposit along with the bid, to the extent of small amount of Rs.1800/-, the said error is attributable to the opposite parties to a significant extent. The inadvertent error which was rectifiable was rectified immediately on being notified without any prejudice having been caused to opposite party no.3.

28. He has further argued that in any event, even if it is presumed that the petitioner had failed to deposit the GST amount in addition to the bid processing fee, the said condition cannot be treated to be such essential requirement as to reject the

bid at the outset. He has argued that once the amount was deposited soon after the same was notified by opposite party No.3, opposite party No.3 ought to have reconsidered the same. In support of his submission, he has placed reliance on a Division Bench decision of this Court in case of ***Nestor Pharmaceuticals Ltd. and Ors. v. State of Odisha and Ors.*** (Decided on 12.04.2017 in W.P.(C) No.16897 of 2016)/***Kaustuva Sahu v. State of Odisha and others*** (Decided on 27.03.2017 in W.P.(C) No.3572 of 2017).

29. Mr. Ashok Kumar Parija, learned Advocate General, with reference to the statement made in the further affidavit filed on behalf of opposite party No.3, while defending the attack on behalf of the petitioner on the ground of *mala fide* by incorporating the requirement of submission of an undertaking in Form-(S) under the pre-qualification condition, has submitted that the same was done following similar practice in the Central Government and other Public Section Undertakings ('PSUs' in short). He has submitted, with reference to the said affidavit, that setting up ATS and its operation is a highly specialized job and there are limited players in the market. He has submitted that opposite party No.3 is willing to allow other available bidders/players in the country to participate in the present bid by deleting Clause-23, Form-(S) for the said new players/bidders by issuing appropriate notices in the present tender. Such a step, he contends, will not affect the bidders, who have participated in the present tender and it will only be for new players/bidders. He has however submitted that since the petitioner already participated in the bid process by submitting its bid, which has been found to be non-compliant by the Tender Evaluation Committee, it cannot be allowed to submit a fresh bid even if a corrigendum is issued by deleting the offending Clause-23, Form-(S) from the RFB. The sum and substance of his submission as regards Clause-23 and Form-(S) is that the same shall be deleted and new players/bidders shall be allowed to participate by issuance of appropriate notices, but not this petitioner as its bid has already been found to be non-compliant.

30. In response to the submission that failure on the part of the petitioner to deposit the amount of GST at the time of submission of bid is not an essential requirement/essential term, he has submitted that whether a condition or requirement is an essential condition or requirement shall depend upon the consequence of failure to fullfil the requirement prescribed in the RFB. He has drawn the Court's attention to Clause-2.9 of the RFB and has submitted that summary rejection of a bid not accompanied by the Bid Processing Fee is the only consequence since in such circumstance, the bid is mandatorily to be construed as a non-compliant bid. He has submitted accordingly that the said condition of depositing Bid Processing Fee with taxes as applicable is an essential condition. In support of his submission, he has placed reliance on the Supreme Court's decisions in cases of ***Central Coalfields Limited and another v. SLL-SML (Joint Venture Consortium)*** reported in ***(2016) 8 SCC 622*** (paragraphs-41, 42, 43, 47, 48); ***Afcons Infrastructure Limited v. Nagpur Metro Rail Corporation Limited and Another*** reported in ***(2016) 16 SCC 818***

(paragraphs-13, 14 & 15); ***Agmatel India Private Limited v. Resoursys Telecom and Others***, reported in ***(2022) 5 SCC 362*** (paragraphs-28 to 31.2); ***N.G. Projects Limited v. Vinod Kumar Jain and others***, reported in ***(2022) 6 SCC 127*** (paragraphs-21, 22, 23 & 26); ***Ramana Dayaram Shetty v. International Airport Authority of India***, reported in ***(1979) 3 SCC 489***; ***Tata Cellular v. Union of India*** reported in ***(1994) 6 SCC 651*** (paragraph 94); ***G.J. Fernandez v. State of Karnataka*** reported in ***(1990) 2 SCC 488*** (Paragraph 66); ***M/s. Master Marine Services Pvt. Ltd. v. Metcalfe and Hodgkinson Pvt. Ltd.***, reported in ***(2005) 6 SCC 138***; ***Jagdish Mandal v. State of Odisha*** reported in ***(2007) 14 SCC 517*** and ***Kanheylal Agarwal v. Union of India*** reported in ***2002 (6) SCC 315*** (Paragraph-6).

31. He has accordingly submitted that rejection of the bid by opposite party No.3 on 18.03.2024 does not suffer from any legal infirmity. He has argued that the petitioner had acknowledged the default on its part in making payment of the Bid Processing Fee as per Clause-2.9 and subsequently paid the GST amount of Rs.1800/- on 19.03.2024 (20.03.2024 mentioned in above paragraph) after the last date of submission of bid dated 16.03.2024. He has submitted that if the petitioner is allowed to participate in the bidding process by overturning the decision of the Tender Evaluation committee then it will amount to violating certain Clauses of the RFB including Clause-2.6(b), Clause-2.9 (a), Clause-2.9 (c), Clause-2.10 (h), Clause-2.11 9(a), Clause 2.11 (a), Clause 2.20 (c) and the Corrigendum dated 12.02.2024.

32. Addressing the challenge to Clause-23 of Part-I and Form-(S), he has submitted that it has been clarified in the counter affidavit of opposite party No.3 in paragraph 20 that the said Clause does not disqualify a bidder from evaluation of its bid. Further, the rationale behind the inclusion of the said Clause has been explained in the Additional affidavit by bringing on record Annexures K/3 and L/3 Series to the said additional affidavit filed on 15.05.2024 bringing on record tender call notices issued by the other State Government, Central Government and other PSUs wherein similar stipulations as in Clause-23 have been made. He submits that in no case, it can be said that stipulation in Clause-23 has been tailor-made for any particular bidder. It has been argued that overwhelming public interest demands proceeding with the tender call notice.

33. Mr. Gautam Misra, learned Senior Counsel has appeared on behalf of opposite Parties No.4 and 5. He has extensively referred to the various Clauses of the RFB. He has submitted that a Corrigendum was issued on 27.01.2024 and 12.02.2024, with Revised Clause. In the Revised Clause No.1.2, following was added:-

> *"The e-Nivida Portal is showing an option of paying this fee in BG form. Bidder shall select this option and enter DD details instead of BG details and submit the DD in original along with the Hard copy of the technical bid."*

34. He has questioned the petitioner's stand of having paid higher sum of Rs.80,12,950/- as against the maximum payable amount as per the terms of RFB i.e.

Rs.80,12,800/-. The payment of registration fee and tender processing fee of Rs.2,950/- each were to be made online whereas the payment of Rs.80,00,000/- and bid processing fee of Rs.11,800/- was required to be deposited by way of Demand Draft/Bank Guarantee along with the bid. He has submitted that the petitioner had paid the said amount of Rs.2,950/- on 07.03.2024 against the tender processing fee under Clause-2.4(b). The petitioner has attempted to mislead this Court by making a false statement to make out a case that the said amount of Rs.2,950/- paid on 07.03.2024, prior to submission of his technical bid should be treated as part of the bid processing fee. The said amount was non-refundable and was paid in terms of the RFB, to facilitate "searching for tender documents" (Caluse-2.4). He has accordingly submitted that summary rejection of the petitioner's bid by the Bid Evaluation Committee is wholly justified. He has argued that the contention of the petitioner to show that all the documents were successfully uploaded including the payment would be contrary to Caluse-2.2(q), which clearly stipulated that submission of the bid meant saving of the bid online but it would not amount to confirm the correctness of the bid by the system. The correctness of the bid was to be decided by the tender inviting authority only as per Clause-2.2(q), he contends. He has relied on the following decisions of the Supreme Court in support of his contentions: -

a. ***Uflex Limited v. Government of Tamil Nadu and others*** reported in ***(2022) 1 SCC 165*** (Paragraphs 1 -7 & 42);
b. ***National High Speed Rail Corporation Limited v. Montecarlo Limited and Another*** reported in***(2022) 6 SCC 401*** (Paragraphs 25 – 32)
c.***Vidarbha Irrigation Development Corporation v. Anoj Kumar Agarwala*** reported in ***2019 (2) SCALE 134*** (Paragraphs 3, 6, 10, 14 & 15)

35. He has also placed reliance on this Court's decision in case of ***Raj Kishore Sahoo v. State of Odisha and others*** reported in ***2024 SCC OnLine Ori 1271*** (Paragraphs 2, 10-15 and 17-19). He has referred to a Single Bench decision of Patna High Court in case of ***EMS Infracon Pvt. Ltd., v. State of Bihar and others*** reported in ***2021 SCC OnLine Pat 1971*** to contend that the Court may decline to interfere in the present case on the sole ground that the petitioner has not approached this Court with clean hands.

36. Mr. Gautam Misra, while defending the decision of opposite party No.3 to reject its bid on the ground of the bid being non-compliant in terms of Caluse-2.9 of the RFB has taken an exemplary stand befitting the stature of a Senior Counsel that the Pre-Qualification Condition Clause at Sl. No.23 of Table-2 read with Form-(S) of the RFB is indefensible. He has however relied on the Supreme Court's decision in case of ***N.G. Projects Ltd***.(supra) to contend that the satisfaction whether a bidder satisfies the tender condition is primarily upon the authority inviting the bids and such authorities are aware of expectation from the tenderers while evaluating the consequences of non-performance. He submits that the writ petitioner has not been able to make out a case that the action of Technical Evaluation Committee was actuated by extraneous consideration or was *mala fide*. Only because the view of the

Technical Evaluation Committee was not to the liking of the petitioner, such decision does not warrant for interference, he submits. He has referred to paragraphs-22 and 23 of the said judgment in support of his submission, which read as under:-

> *"**22**. The satisfaction whether a bidder satisfies the tender condition is primarily upon the authority inviting the bids. Such authority is aware of expectations from the tenderers while evaluating the consequences of non-performance. In the tender in question, there were 15 bidders. Bids of 13 tenderers were found to be unresponsive i.e. not satisfying the tender conditions. The writ petitioner was one of them. It is not the case of the writ petitioner that action of the Technical Evaluation Committee was actuated by extraneous considerations or was mala fide. Therefore, on the same set of facts, different conclusions can be arrived at in a bona fide manner by the Technical Evaluation Committee. Since the view of the Technical Evaluation Committee was not to the liking of the writ petitioner, such decision does not warrant for interference in a grant of contract to a successful bidder.*
>
> ***23**. In view of the above judgments of this Court, the writ court should refrain itself from imposing its decision over the decision of the employer as to whether or not to accept the bid of a tenderer. The Court does not have the expertise to examine the terms and conditions of the present day economic activities of the State and this limitation should be kept in view. Courts should be even more reluctant in interfering with contracts involving technical issues as there is a requirement of the necessary expertise to adjudicate upon such issues. The approach of the Court should be not to find fault with magnifying glass in its hands, rather the Court should examine as to whether the decision-making process is after complying with the procedure contemplated by the tender conditions. If the Court finds that there is total arbitrariness or that the tender has been granted in a mala fide manner, still the Court should refrain from interfering in the grant of tender but instead relegate the parties to seek damages for the wrongful exclusion rather than to injunct the execution of the contract. The injunction or interference in the tender leads to additional costs on the State and is also against public interest. Therefore, the State and its citizens suffer twice, firstly by paying escalation costs and secondly, by being deprived of the infrastructure for which the present day Governments are expected to work."*

37. He has also argued, relying on the Supreme Court's decision in case of ***Jagdish Mandal*** (supra) that a tenderer or contractor with a grievance can always seek damages in a Civil Court instead of invoking writ jurisdiction under Article 226 of the Constitution of India. The said decision has been referred to with approval by the Supreme Court in case of ***N.G. Projects Ltd***.(supra) (SCC Paragraph 15), he argues.

38. Responding to the submissions advanced on behalf of the opposite parties as noted above, Mr. Pinaki Mishra, in reply, has contended that even if for the sake of argument it is presumed that the rejection of the petitioner's bid by opposite party No.3 on the ground of same being non-compliant in terms of Clause 2.9 of the RFB is justified, the impugned tender condition relating to absence of litigation is so inherently arbitrary, unconscionable and violative of Articles 14 and 19 that the opposite parties should not be allowed by this Court to proceed with the tender process with such conditions. Such condition is not only violative of Article 14 of

the Constitution of India, but it also defeats the public interest to provide level playing field for other competing companies having expertise, nature of work being highly technical. He has reiterated his submission that because of the said Pre-Qualification Condition, only two companies i.e. opposite parties No.4 and 5 submitted their tender documents and in view of the prescription under the RFB two bidders are to be considered as the preferred bidders, presumably on the ground that they do not have any litigation history. They do not have any litigation history, he contends because they do not have any expertise in the field or any other contractual work. He has submitted that the stand taken by the State that the offending condition does not disqualify a bidder in case of litigation, but it merely requires the bidders to submit a declaration stating all pending litigation for last 10 years. Such interpretation, he contends, is contrary to the plain language of Sl.No. 23 in Table-2 of Pre-Qualification Conditions read with the language used in Form-(s).

39. After having carefully examined the pleadings on record and submissions advanced on behalf of the parties as noted above, the following questions arise for this Court to consider and answer:-

> A. Whether the pre-qualification condition of technical bid at Sl.No.23 of Table 2 read with the note thereunder and Form-(s) of the RFB which restricts the competition in the matter of award of Government contract to such parties only which do not have any litigation/arbitration history with any Government Department/Public Section Undertaking/Private Sector/any other Agency during the last 10 years, is violative of Article 14 of the Constitution of India?
>
> B. Whether pendency of a litigation or arbitration at the instance of or against a legal person can itself be a ground for disqualification in the matter of award of a Government contract in favour of such person?
>
> C. Whether the pre-qualification condition at Sl.No.23 of Table-2 was of the nature that a bidder was essentially required to state that he 'did not have' any litigation/arbitration history during the last 10 years or it was just required to furnish the details of litigation/arbitration history as stated in the counter affidavit filed on behalf of the State?
>
> D. Whether the rejection of the petitioner's bid being non-compliant of Clause-2.9(c) of the RFB by opposite party No.3 was valid?
>
> A question ancillary to this question is as to whether the condition of payment of Bid Processing Fee **plus tax** was an essential condition so much so that for the amount of tax (Rs.1800/-) having not been paid, the petitioner's bid could be summarily rejected?
>
> E. What is the scope and limitations of a Court exercising power of judicial review in the matters of award of Government contract?
>
> This question has two components for the present adjudication, the first of which relates to the challenge to the Pre-Qualification Condition under Clause-2.12 of Table-2 at Sl. No.23 read with Form-(s) of the RFB on the ground of the same being ultra vires Article 14 of the Constitution of India.
>
> The second component of this question pertains to the challenge made by the petitioner to the decision of opposite party No.3 to reject the petitioner's bid on the ground of the same being non-compliant in view of Clause-2.9 of the RFB.

40. The scope and limitations of the power of judicial review in the matters of award of a Government contract has by now been clearly laid down by the Supreme Court in a series of cases. In the celebrated decision in case of ***Ramana Dayaram Shetty*** (supra), the Supreme Court observed that the State (within the meaning of Article 12 of the Constitution of India) need not enter into any contract with anyone, but if it does so, it must do so fairly without discrimination and without unfair procedure. This proposition, the Supreme Court, ruled, would hold good in all cases of dealing by the Government with the public, where the interest sought to be protected is a privilege. It further observed that where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largesse, the Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with the standard or norms which is not arbitrary, irrational or irrelevant, and if the Government departs from such standard or norm in any particular case or cases, the action of the Government would be liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory. While observing so, the Supreme Court further held in case of ***Ramana Dayaram Shetty*** (supra) that the said principle flows directly from the doctrine of equality embodied in Article 14, which strikes at arbitrariness in State action and ensures fairness and equality of treatment. The State cannot, therefore, act arbitrarily in entering into relationship, contractual or otherwise with a third party, but its action must conform to some standard or norm which is rational and non-discriminatory. The three-Judge Bench decision in case of ***Ramana Dayaram Shetty*** (supra) has been consistently followed by the Supreme Court in subsequent decisions.

41. In case of ***Tata Cellular*** (supra), a three-Judge Bench of the Supreme Court again dealt elaborately with the principle of judicial review in the matter of exercise of contractual powers by the Government bodies in order to prevent arbitrariness or favouritism.

42. In the case of ***Erusian Equipment & Chemicals Limited v. State of West Bengal***, reported in ***(1975) 1 SCC 70***, the Supreme Court has held that the activities of the Government have a public element and, therefore, there should be fairness and equality. It is stated that the State need not enter into any contract with anyone, but if it does so, it must do so fairly without any discrimination and without unfair procedure.

43. In ***Sterling Computers Ltd. Vs. M & N. Publications Limited***, reported in ***(1993) 1 SCC 445***, the Supreme Court observed that the contracts having commercial element, some more discretion has to be conceded to the authorities so that they may enter into contracts with persons, keeping an eye on the augmentation of the revenue. In even in such matters thy have to follow the norms recognized by the Courts while dealing with public property.

44. It is noteworthy that in case of ***Tata Cellular*** (supra), consequent upon a tender notice for grant of licence, one of the bidders-company was selected for the City of Madras, which had become a subject matter of challenge before the Delhi High Court, by filing writ petitions by some of the bidders. Two of the said writ petitions were dismissed and one was allowed with the issuance of a mandamus to grant of license to the said petitioner after reevaluation of their bids. After the judgment of Delhi High Court, the matter of grant of license was reconsidered in the light of the said judgment and a revised list of provisionally selected bidders were prepared. The consequence of preparation of the revised provisionally selected bidders was that the Tata Celluar, which was originally selected for Delhi, was left out. In that background, ***Tata Cellular*** (supra) filed an SLP before the Supreme Court questioning the correctness of the decision of the Delhi High Court by filing an SLP. Few other SLPs were also filed by the bidders questioning the correctness of the decision of the Delhi High Court. In the aforesaid background, in case of ***Tata Cellular*** (supra), the question of scope of judicial review had arisen. After having noticed the judicial precedents, the Supreme Court held that it was undeniable that the principles of judicial review would apply to the exercise of contractual powers by the Government bodies in order to "arbitrariness or favourtism" while observing that the Government is the guardian of the finances of the State, the Supreme Court held that the principles laid down under Article 14 of the Constitution of India have to be kept in view while accepting or refusing a tender. The right to choose cannot be considered to be an arbitrary power. However, if the said power is exercised for any collateral purpose, the exercise of that power will be struck down, the Supreme Court ruled. The Supreme Court held in paragraph 77 in the case of ***Tata Cellular*** (supra) as under:

> "**77**. The duty of the court is to confine itself to the question of legality. Its concern should be:
> 1. Whether a decision-making authority exceeded its powers?
> 2. Committed an error of law,
> 3. committed a breach of the rules of natural justice,
> 4. reached a decision which no reasonable tribunal would have reached or,
> 5. abused its powers.
>
> Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:
>
> (i) Illegality : This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.
> (ii) Irrationality, namely, Wednesbury unreasonableness.
> (iii) Procedural impropriety.
> The above are only the broad grounds but it does not rule out addition of further grounds in course of time. As a matter of fact, in *R. v. Secretary of State for the Home Department, ex Brind* [(1991) 1 AC 696], Lord Diplock refers specifically to one development, namely, the possible recognition of the principle of proportionality. In all

these cases the test to be adopted is that the court should, "consider whether something has gone wrong of a nature and degree which requires its intervention".

45. The Supreme Court further held that the Court will intervene where the facts taken as a whole could not warrant the conclusion of the decision maker. It further held in paragraph-81(2) as under:-

"81. Two other facets of irrationality may be mentioned.
(1) xx xx xx
(2) A decision would be regarded as unreasonable if it is impartial and unequal in its operation as between different classes. On the basis in R. Vs. Barnet London Borough Council ex p. Johnson, the condition imposed by a local authority prohibiting participation by those affiliated with political parties at events to be held in the authority's parks was struck down."

After having noticed a catena decisions including foreign decisions, the Supreme Court in ***Tata Cellular*** (supra) concluded the principles of judicial review in contractual matters and held in paragraph 94 as under:

"**94**. The principles deducible from the above are:
(1) The modern trend points to judicial restraint in administrative action.
(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.
(3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.
(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.
(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.
(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure."

46. In case of ***Michigan Rubber (India) Ltd. Vs. State of Karnataka***, reported in ***(2012) 8 SCC 216***, the Supreme Court held that 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. The Supreme Court noticed in the said decision that 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. Paragraph 23 of the said decision reads 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."

47. In case of ***Uflex Ltd vs. Government of Tamil Nadu***, reported in ***(2022) 1 SCC 165***, the Supreme Court has reiterated the principles of judicial review laid down in ***Tata Cellular*** (supra).

48. In the background of the law which has been laid down by the Supreme Court on the scope and limitations of the judicial review of administrative action of the State in the matter of award of the contract, we need to examine the consequences of prequalification condition at Sl. No. 23 of Table-2 read with Form (S) and the note under the said table. Item (d) of Part 1 of Clause 2.12 of the RFB lays down pre-qualification conditions of technical bid and requires necessary documents to be submitted along with the technical bid, which includes a declaration on non-involvement of legal litigation by bidder or any member of the bidder (in case of consortium/partnership) in Form (S). Form (S) makes it compulsory for a bidder to declare that he does not have any litigation/arbitration history with any Government Department/public sector undertaking/private sector or any other agency during the last 10 years. It is further evident from the note under Table-2 that all forms of the RFB, apparently including Form (S), must be filled and submitted by the bidder. Apparently, thus, it is impossible for a bidder involved in any nature of litigation/arbitration to fill up a mandatory Form (S), irrespective of the nature of such litigation/arbitration and its stage.

49. The effect of such prescription is exclusion of all such players who are though otherwise competent, eligible having experience, expertise in the field, from participation in the bid process itself. In view of the unambiguous language used in Form (S), which was to be compulsorily filled in and submitted, a company could not have submitted the tender, he being disqualified by operation of the aforementioned provision, let alone, evaluation of his technical bid. We find force in the submission advanced on behalf of the petitioner that it is quite natural that the

parties having experience of execution of contractual work, that too of the present nature, would be involved in litigation/arbitration arising out of the contractual dispute. Further, a legal person can sue or might be sued but that itself cannot incur disqualification. We also find force in substance in the submission that in most likelihood only such companies/consortium of companies can make a declaration, who have no experience of execution of any contractual work. The outcome of requirement of the said declaration is that there were only two bids which were submitted by opposite parties No. 4 and 5. The petitioner questioned the requirement of such declaration by approaching this Court twice which was disposed of with a direction to the authorities to consider its representation. The petitioner's representation against the requirement of such declaration was rejected by an order dated 14.03.2024. The said rejection does not deal with the petitioner's challenge to the requirement of making such declaration rather with the only observation, "the said declaration was very clear and unambiguous required to be submitted in Form (S)".

50. We are of the definite view, thus, from the language of the declaration in Form (S) read with Sl. No. 23, prequalification condition and the note thereunder that according to the State-opposite parties that the said requirement was a mandatory requirement and that the language was very clear and unambiguous in Form (S), which was to be submitted by a bidder. The petitioner submitted its bid, in utter desperation, on the last date fixed for submission of technical bid.

51. On the question as to whether the requirement of such declaration was mandatory or not, it has been stated in paragraph 20 of the counter affidavit filed on behalf of Opposite Party No.3 that the condition to submit declaration of no litigation pending history, no way disqualifies a bidder for evaluation of his technical bid as nowhere in the tender condition, it has been stipulated that the pendency of the litigation against a bidder, is a disqualification for evaluation of his bid.

52. The said stand deserves to be rejected for the apparent reason that Part 1 of Clause 2.12 of RFB provides pre-qualification condition, which has a simple meaning that one who does not fulfil the condition, does not qualify and therefore, stands disqualified. The 'Note' under Table-2 further made it clear that all forms must be filled and submitted by the bidder. Apparently, after having realized the difficulty in defending the aforesaid clause 23 read with Form (S) of the RFB, the State in its counter affidavit expressed its willingness to delete clause 23 Form (S) of the RFB and, thus, allow the other available players in the country to participate in the present bid by issuing appropriate notices. It is, however, the stand of the State that though other players may be allowed to participate upon deleting clause 23 and Form (S), the petitioner shall not be allowed because he had submitted his tender, which has been found non-compliant.

53. At the cost of repetition, we notice the stand of the State itself in its further affidavit that setting up of an Automated Testing Station and its operation is highly specialized job and there are limited players in the market. Further, there are only 9 equipment manufacturers from all over the world, who are operating in India. We fail to understand as to why the State, having known the requirement of expertise in the setting up of Automated Testing Stations and its operation and availability of limited players in the market, it introduced such clause in the RFB which has the effect of exclusion of specialists in the field and thus, allowing only those who have no experience/expertise. Presence of such clause in such forms requiring declaration similar to Form (S) for awarding contracts by other PSUs cannot justify the State's action to incorporate such clause in its RFB, considering the nature of work involved.

54. We have noted above the submission made by Mr. Gautam Misra, learned Senior Counsel for the Opposite Parties No.4 & 5, who, in his usual fairness, has agreed that the requirement under the pre-qualification condition at Sl. No.23 of Table-2 read with Form (S) is indefensible, being violative of Article 14 of the Constitution of India.

55. We are of the opinion that Sl.No.23 of Table-2 read with Form (S) of the RFB introduces a classification between such companies, who have litigation history and those who do not have. Litigation history itself initiated by or against a legal person cannot incur a disqualification from participating in a tender process. Such classification, thus, does not have any intelligible differentia and nexus with the object to be achieved. Apparently, the purpose of issuance of public notice inviting tender is to select the best from the market. In the present case, by introduction of such clause, the very purpose of fair competition stands defeated.

56. We, accordingly, declare the pre-qualification condition at Sl.No.23 of Table-2 under Clause 2.12(d) of the RFB "for selection of successful bidder for Design, Construction of Automated Testing Stations, Procurement, Supply, Installation of vehicle testing equipment and Operation and Maintenance at 21 locations in Odisha State" unconstitutional being violative of Article 14 of the Constitution of India. We answer Questions (A), (B) and (C) accordingly.

57. Now we come to question (D) as formulated above. It has not been disputed that the petitioner has history of litigation/arbitration. The petitioner, therefore, suffered from fundamental disqualification because of the pre-qualification condition at Sl.No.23 of Table-2- read with Form (S) of the RFB. This was the reason why the petitioner was challenging the said clause from the very beginning when the RFB was issued by raising issues before the authorities and by filing the writ petitions in this Court. The said requirement at Sl.No.23 of Table-2 read with Form (S) being mandatory as is evident from the unambiguous language used in Form (S), the petitioner stood disqualified, also because of filing of two writ petitions before this Court, other than the present one and it could have been declared

disqualified, accordingly, without evaluating the technical bid. Knowing well the litigation history of the petitioner who had filed two cases before this Court in relation to the RFB in question, the Technical Evaluation Committee proceeded to evaluate the bid submitted by the petitioner. Curiously, the opposite parties did not hold the petitioner disqualified by invoking the pre-qualification condition at Sl.No.23 of Table-2 read with Form (S) and disqualified it on the ground that it had not paid a sum of Rs.1,800/- of GST in addition to the bid processing fee of Rs.10,000/-. This is an undisputed fact that the petitioner had deposited the earnest money of Rs.80,00,000/- and the bid processing fee of Rs.10,000/- on the last date of submission of the bid. The said amounts have been accepted as 'success' transaction by the system. We ponder, had it been otherwise, the payment in this regard would not have shown 'success. It leads to a peculiar situation where, had the petitioner's bid been rejected on the ground of dis-qualification in view of the pre-qualification condition, which has been held to be not only arbitrary but also unconstitutional by us, there would have been no impediment for him to participate if a fresh notice was issued by the State Government upon deleting the said pre-qualification condition (Sl.No.23), in view of their own stand. We agree with the submission advanced on behalf of the opposite parties that the condition of payment of bid processing fee plus applicable tax was an essential condition in view of the clear stipulation in clause 2.9(c) that a bid not accompanied by a bid process fees as per RFB shall be construed as non-compliant bid and shall be summarily rejected. However, equally essential condition was submission of a declaration in Form (S), which laid down the pre-qualification condition.

58. Had it been a case of summary rejection of the petitioner's bid being non-compliant in terms of clause 2.9 of the RFB only, the matter would have been different and this Court exercising power of judicial review under Articles 226 of the Constitution of India could have declined to interfere with the summary rejection of bid, following the law laid down by the Supreme Court in the case of ***Central Coalfields Limited*** (supra), paragraph 48 of which reads thus:-

> "**48**. Therefore, whether a term of NIT is essential or not is a decision taken by the employer which should be respected. Even if the term is essential, the employer has the inherent authority to deviate from it provided the deviation is made applicable to all bidders and potential bidders as held in *Ramana Dayaram Shetty [Ramana Dayaram Shetty v. International Airport Authority of India*, (1979) 3 SCC 489] . However, if the term is held by the employer to be ancillary or subsidiary, even that decision should be respected. The lawfulness of that decision can be questioned on very limited grounds, as mentioned in the various decisions discussed above, but the soundness of the decision cannot be questioned, otherwise this Court would be taking over the function of the tender issuing authority, which it cannot."

59. While holding as above, the Supreme Court stated that the salutary principle laid down in the case of ***Nazeer Ahmad vs. King Emperor (AIR 1936 PC 253)*** that where a power is given to do a certain thing in a certain way the things must be done in that way or not at all and other methods of performance are necessarily forbidden,

applies mutatis-mutandis to the bid documents. The principle deserves to be applied in contractual disputes, particularly in commercial contracts or bids leading upto commercial contracts, where there is steep competition.

60. It is noteworthy that in the present case, because of the impugned pre-qualification condition, the element of competition, much less, steep competition almost vanished.

61. Coming to Question (E), we have already noticed the scope and limitations of a Court exercising power of judicial review in the matters of awarding of Government contract in the backdrop of the present facts and circumstances of the case before holding the pre-qualification condition at Sl.No.23 of Table-2 under Clause 2.12 read with Form (S) of the RFB on the ground of the same being ultra vires.

62. In view of the above noted discussions, since we have declared pre-qualification condition at Sl.No.23 of Table-2 under clause 2.12(d) read with Form (S) of the RFB as unconstitutional, we allow the present writ application with a direction to opposite party No.3 to either issue a corrigendum deleting the said requirement and, thus, permitting eligible bidders to participate including the petitioner "for selection of successful bidders for Design, Construction of Automated Testing Stations, Procurement, Supply, Installation of vehicle testing equipment and Operation and Maintenance at 21 locations in Odisha State" or issue a fresh RFBs without similar pre-qualification condition which excludes competent players from participating in the process of selection, without any valid reason.

63. Considering the facts and circumstances noted above, we are also of the opinion that it would be highly unjust and improper to deny the petitioner an opportunity to participate in the tender process, upon issuance of corrigendum/fresh tender notice. We direct accordingly.

64. This writ petition is allowed with the aforementioned directions and observations.

65. Before we part with the present judgment, we record our appreciation for the assistance extended by Mr. S.P. Mishra and Mr.Pinaki Mishra, learned Senior Counsel for the petitioner, Mr. Ashok Ku. Parija, learned Advocate General for the State. We specially acknowledge the fair stand taken by Mr.Gautam Misra, learned Senior Advocate representing opposite parties No.4 and 5 in this case.

66. There shall be no order as to costs.

—— o ——

2024 (II) ILR-CUT-433

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

W.P(C) NO. 10406 OF 2020

UNION OF INDIA & ORS. ……Petitioners

-V-

TRIPATI KUMAR ANJANGI & ORS. ……Opp.Parties

(A) SERVICE LAW – The petitioners were aware about the process of departmental examination & minimum qualifying marks fixed for each subject – They appeared in the examination and being unsuccessful challenged the same – Effect of – Held, when the petitioners participated in the selection process without any demur or protest they cannot challenge the same being tainted with malafides, merely because they were unsuccessful.

(B) PRINCIPLE OF PROMISSORY ESTOPEL – Explained with reference to case laws.

Case Laws Relied on and Referred to :-

1. AIR 2005 SC 1579: 2005 (3) SCC 451: Secretary to the Govt & Anr. v. M. Senthil Kumar.
2. 2008 (2) SCC 417 : Sarabjit Rick Singh v. Union of India.
3. 2009 (14) SCC 132 : State of WB & Anr. v. WB Regn. Copy Writers Assn & Anr.
4. AIR 1986 SC 1043 : Om Prakash Shukla v. Akhilesh Kumar Shukla & Ors.
5. AIR 1995 SC 1088 : Madan Lal v. State of Jammu and Kashmir.
6. (2011) 1 SCC150 : Vijendra Ku.Verma v. Public Service Commission, Uttarakhand & Ors.
7. (2007) 11 SCC522 : Marripati Nagaraja v. Government of A.P.
8. C.A.Nos. 2164-2172 of 2023 (disposed of on 28.03.2023) : Tajvir Singh Sodhi & Ors. v. The State of Jammu & Kashmir & Ors.
9. AIR 2002 SC 2322 : Chandra Prakash Tiwari v Shakuntala Shukla.
10. (2007) 8 SCC 100 : Union of India v. S. Vinodh Kumar.
11. (2010) 12 SCC 576 : Manish Kumar Shahi v State of Bihar.
12. 2016 (I) ILR-CUT-417 : Sevati Patra v. State of Odisha.
13. 2017 (II) OLR 274 : Pradeep Kumar Jena v. State of Odisha.
14. 2018 (Supp-II) OLR 946 : Pravati Nayak v. State of Odisha.
15. (1956) 1 All ER 256 : Central London Property Trust Ltd. v. High Treas House Ltd.
16. (1970) 1 SCC 582 : Century Spg. And Mfg. Co. Ltd v. Ulhasnagar Municipal Council.
17. (1983) 3 SCC 379 : Gujurat State Financial Corporation v. Lotus Hotels.
18. 1988 SCC LSS 592 : Ashok Kumar Maheswari v. State of U.P.
19. AIR 2002 SC 322: 2002) 2 SCC 188 : Sharma Transport v. Govt. of A.P.
20. (2004) 7 SCC 673 : State of Rajasthan v. J.K. Udaipur Udyog Ltd.
21. (2007) 2 SCC 725 : A.P. Steel Re-rolling Mill Ltd. v. State of Kerala.
22. (2003) 9 Scale 578 : State of Orissa v. Manglam Timber Products Ltd.
23. (2003) 2 SCC 355 (365) : B.L. Sreedhar v. K.M. Munireddy.
24. (2010) 12 SCC 458 : H.R. Basavaraj v. Canara Bank.
25. 1989(1) OLR 440 : Ambika Prasad Mohanty v. Orissa Engineering College.
26. 2014 (I) OLR 226 : Dr. (Smt.) Pranaya Ballari Mohanty v. Utkal University.
27. 2015 (I) OLR 212 : Rajanikanta Priyadarshy v. Utkal University, through its Registrar.
28. 2021 (III) ILR-CTC-720 : Bikash Mahalik v State of Odisha.
29. 2019 (I) ILR-CTC-214 : M/s. Balasore Alloys Ltd v State of Odisha.

For Petitioners : Mr. D. Gochhayat, C.G.C

For Opp.Parties : M/s. Nirmal Ranjan Routray,J. Pradhan, T.K. Choudhury & S.K. Mohanty

JUDGMENT Date of Hearing : 18.04.2024 : Date of Judgment : 23.04.2024

Dr. B.R. SARANGI, J.

The Union of India and its functionaries have filed this this writ petition assailing the order dated 01.08.2019 passed by the Central Administrative Tribunal,

Cuttack Bench, Cuttack in O.A No. 605 of 2012 under Annexure-1, by which direction has been given to the present petitioners to review the result of opposite party no.1 ignoring the condition of the minimum qualifying marks for each subject, which is not mentioned in the notification dated 19.10.2010, and if the opposite party no.1 is otherwise found eligible, to appoint him against a vacant post of Postman, on the promotional quota of the GDS, as would be available at present, with consequential service benefits as per the provisions of law.

2. Brief facts of the case, as borne out from the records, are that opposite party no.l, as the applicant filed the Original Application contending before the Tribunal that he, while working as Grameen Dak Sevak (GDS), Badagumuda Branch Post Office, appeared in the Limited Departmental Competitive Examination (LDCE) held on 30.01.2011 by the Postal Department for promotion of Group-D (MTS) & GDS to the cadre of Postman for the vacancies of the years 2009 & 2010. The said LDCE was conducted in accordance with the guidelines stipulated in Letter No. RE/30-22/2009 dated 19.10.2010 of the Circle Office, Bhubaneswar. In the said examination, as many as 172 GDS employees and 2 Group-D (MTS) officials appeared, for filling up of the following vacancies pertaining to the year 2009 & 2010:-

Year	Outsider Merit	Departmental	
	UR	UR	SC
2009	04	9	-
2010	01	2	1

2.1. In accordance with the order contained in letter No. RE/23-2/2005 dated 24.02.2011 of the Regional Office, Berhampur, the result of the candidates in respect of LDCE held at Jeypore (K) Center was declared at Regional Office, Berhampur on 27.02.2011 vide SSPOs, Koraput Division, Jeypore (K) Memo No. B/2/ General - 8/Ch-III dated 27.02.2011. In the said examination, no departmental candidate came out successful, for which 11 UR vacancies and 01 SC vacancy, approved under departmental quota, were transferred to GDS merit quota and the community already declared as unchanged as per the instruction of Chief Postmaster General, Odisha. As such, result of the examination was to be declared among the GDS merit quota for the total vacancy of UR-16 and SC-1. Out of 157 candidates appeared in the examination, 9 GDS belonging to OBC and 1 belonging to SC Category were qualified on merit without any relaxed standard and 4 GDS under UR vacancy were qualified. One GDS candidate under SC category was qualified under relaxed standard. Finally, a total of 15 GDS were declared qualified and two Postman Posts under UR community remained vacant. In later course, the vacant posts had been filled up by absorbing qualified candidates from neighboring division as per Regional Office, Berhampur (Gm) Memo No. RE/23-2/2005 dated 10.03.2011.

2.2. The opposite party no.1 belongs to OBC category and he was allowed to appear in the said examination. On perusal of the tabulation sheet, it was found that he had secured total 98 marks out of the maximum 150 marks in the said examination, i.e., Paper A-44 marks, Paper B- 20 Marks and Paper C-34 marks. The opposite party no.1, for having secured 20 marks in Paper-B as against the qualifying marks 23, was not qualified in the said examination. As such, his claim for promotion to the cadre of

Postman was not considered. Therefore, aggrieved by the same, he approached the Central Administrative Tribunal, Cuttack Bench, Cuttack in O.A. No. 605 of 2012.

2.3. Pursuant to the notice issued by the Tribunal, the present petitioners appeared and filed their reply stating inter alia that LDCE for promotion of Group-D (MTS) & GDS to the cadre of Postman for the vacancies of the years 2009 & 2010 was held on 30.01.2011 in accordance with the guidelines stipulated in the Circle Office, Bhubaneswar Letter No. RE/30-22/2009 dated 19.10.2010 and in pursuance of Regional Office Berhampur (Gm) Letter No. RE/23-2/2005 dated 21.10.2010. In the said examination, 172 GDS employees and 2 Group D (MTS) officials were allowed to appear for filling up of the vacancies pertaining to the years 2009 and 2010. The vacancy position, duly approved by the Postmaster General, Berhampur (Gm) was circulated among all concerned vide SSPOs, Koraput Division, Jeypore (K) Letter No. B2/Gen-8/Ch-III dated 24.01.2011. It was further submitted that though opposite party no.1 had secured 98 marks, it was mandatory for a candidate to secure 45% qualifying marks in each paper to be declared successful in the examination. The opposite party no.1, having secured 20 marks in Paper B against the prescribed qualifying marks 23, i.e., 45% of total mark, was not qualified. Consequentially, his name was not included in the list of qualified candidates. As such, no illegality or irregularity was committed by the authorities in not including the name of opposite party no.1 in the list of successful candidates.

2.4. The Tribunal, without considering the same in its proper perspective, passed the impugned order on 01.08.2019 making the following observation at paragraph-8 thereof:-

> *"8. From the discussions above, it is clear that there is no stipulation of the minimum qualifying mark in each paper in the vacancy notification dated 19.10.2010 and no satisfactory reason has been furnished in the counter for not specifying such important criteria for qualifying the examination in the advertisement for the posts itself. There is no unambiguous rule produced before us through the pleadings, which specifies such minimum mark for each paper as the criteria for qualifying the examination in question. Further, it is not disputed that the respondent No. 4 to 9, who were selected in the test, had secured less aggregated marks than the applicant, who was declared fail'. No rule or circular has been furnished by the respondents in their pleading to support of the contention regarding minimum marks for each subject. In absence of such rules or circular, we are unable to accept the contentions of the respondents in this regard."*

2.5. By so observing, the Tribunal directed to review the result of opposite party no.1 ignoring the condition of the minimum qualifying marks for each subject, which is not mentioned in the notification dated 19.10.2010 for the post and, if opposite party no.1 is otherwise eligible, to appoint him against a vacant post of Postman against the promotional quota of the GDS, as would be available at present, with the consequential service benefits as per the provisions of law. Hence, this writ petition.

3. Mr. D. Gochayat, learned Central Government Counsel appearing for the petitioners vehemently contended that Tribunal, having failed to appreciate the conditions stipulated in the Letter No. RE/30-22/2009 dated 19.10.2010 of the Circle Office, Bhubaneswar, has come to such a conclusion, which cannot be sustained in the

eye of law. As such, the guidelines, for holding of departmental examination for promotion of Group-D/Mailman & GDS to Postman/ Mail-guard cadre for the vacancies of the years 2009 & 2010, stipulate the educational qualification under Clause-4. Sub-clause (1) of Clause-4 specifies that the educational qualification for appearing in departmental examination for promotion to Postman/Mail-guard cadre has been raised to matriculation standard for all EDAs, who are recruited on or after 25.09.1987, as envisaged under Directorate's Letter No. 10-6/86-PCC/SPB-I dated 28.04.1988, but for EDAs (now GDS), who were in service on or before 25.09.1987, would be eligible to appear in the Postman/VPM/MG examination without obtaining matriculation qualification, as required vide Directorate's Letter No. 60-62/92-SPB-I dated 22.12.1993. Therefore, it is specifically urged that the guidelines dated 28.04.1988, which are applicable to opposite party no.1, where the qualifying mark in each paper has been fixed as 45% for other caste candidates and 30% for SC/ST candidates, as per the executive instruction dated 11.05.1989, have not been properly considered and, thereby, the finding arrived at by the Tribunal cannot be sustained. It is further contended that by misinterpreting the circular dated 17.11.1988, the Tribunal has come to such a finding, even though in the said circular the qualifying marks, as per the revised syllabus for departmental candidates for induction in the cadre of Postman/Village Postman/Mail guard, has been prescribed as 45%, and qualifying standard in respect of SC/ST for Promotion to the Post of Postman etc. has been prescribed as 30% in each paper. Thereby, the Tribunal has totally failed in appreciating minimum qualifying mark prescribed by the authority, as per the guidelines/ circulars issued, and passed the order impugned, which cannot be sustained in the eye of law.

4. Mr. N.R. Routray, learned counsel appearing for opposite party no.1, per contra, justified the order impugned passed by the Tribunal and contended the advertisement does not contemplate any minimum qualifying mark for each subject. The Tribunal is well justified in passing the order impugned, which does not warrant interference of this Court. It is further contended that the circular indicating fixation of minimum qualifying mark, which has been relied upon by the petitioners, was not placed before the Tribunal for consideration. For the first time, the same has been filed by the petitioners in the present case to justify their action. Therefore, the same cannot be taken into consideration. It is contended that the petitioners should have confined their argument to the materials available before the lower court, as such the petitioners cannot take advantage of the circular, which they had failed to produce before Tribunal. To substantiate his contention, learned counsel for opposite party no.1 has relied upon the judgments of the apex Court in the case of ***Secretary to the Govt and Another v. M. Senthil Kumar***, AIR 2005 SC 1579: 2005 (3) SCC 451; ***Sarabjit Rick Singh v. Union of India***, 2008 (2) SCC 417 and ***State of West Bengal & Another v. West Bengal Regn. Copy Writers Assn & Anr.***, 2009 (14) SCC 132.

5. This Court heard Mr. D. Gochhayat, learned Central Government Counsel appearing for the petitioners and Mr. N.R. Routray, learned counsel appearing for opposite party no.1 in hybrid mode and perused the records. Pleadings have been exchanged between the parties and with the consent of learned counsel for the parties, the writ petition is being disposed of finally at the stage of admission.

6. Based on the factual matrix and rival contentions of the parties, as discussed above, the only question revolves around to be decided in this case is, whether minimum qualifying mark in each subject to be secured by a candidate to qualify the Departmental Examination for Promotion of Group-D/Mailman & GDS to Postman/ Mail-guard cadre for the vacancies of the years 2009 & 2010 was notified or communicated to the candidates?

7. There is no dispute before this Court LDCE for promotion of Group-D (MTS) & GDS to the cadre of Postman for the vacancies for the years 2009 & 2010 was held on 30.01.2011. For holding of such examination, the Department of Posts : India, Office of the Chief Postmaster General, Orissa Circle had issued a Circular bearing No. RE/30-22/2009 dated 19.10.2010. The time schedule of Departmental Examination, as had been indicated in Clasue-1 of the said Circular, is extracted hereunder:-

"1) Time schedule of Department Examination.

(i)	*Last date fixed for submission of the application by the candidate in the prescribed proforma to his immediate controlling authorities concerned.*	*20-12-2010*
(ii)	*Last date fixed receipt of applications at the Divisional Office.*	*28-12-2010*
(iii)	*Last date fixed for completion of security work of applications received from the candidate*	*05-01.2011*
(iv)	*Last date fixed for issue of Hall Permits to the eligible candidates.*	*10-01-2021*
(v)	*Last date fixed for submission of information regarding exact number of candidates (both departmental & GDSs) permitted to appear the examination along with proforma report in the prescribed proforma.*	*15-01-2011*
(vi)	*Last date fixed for submission of the number and detail particulars of the APS candidates permitted to appear the examination.*	*20-01-2011*
(vii)	*Date of holding the examination.*	*30-01-2011*

Claue-2 of the said circular dated 19.10.2010 deals with method of filling up of the vacancies and Clause-3 deals with the eligibility condition to apply for the examination. Clause-4 of the said circular, which deals with educational qualification, reads as follows:-

> *"(i) Educational qualification for appearing departmental examination for promotion to Postman/Mailguard cadre has been raised to matriculation standard for all EDAs who are recruited on or after 25.9.1987 as envisaged under Directorate letter no. 10-6/86-PCC/SPB-I dtd. 28.4.88 but for EDAs (now GDS) who were in service on or before 25.9:1987 would be eligible to appear in the Postman/NPMMG examination without obtaining matriculation qualification as required vide Directorate letter no. 60-62/92-SPB-I dtd. 22.12.1993.*
>
> *(ii) A minimum educational qualification of 8th Pass has been prescribed for GDS under 25 % seniority quota as instructed vide Directorate letter no. 44-29/94-SPB-1(P) dtd. 19.5.1995."*

8. On perusal of Sub-clause (i) of Clause-4, it is evident that educational qualification for appearing departmental examination for promotion to Postman/Mail guard cadre has been raised to matriculation standard for all EDAs., who are recruited on or after 25.09.1987 as envisaged under Directorate's Letter No. 10-6/86-PCC/SPB-I dated 28.04.1988. Therefore, the EDAs (now GDS), who are in service on or after

25.09.1987, for them the minimum qualification for promotion would be matriculation. The modalities have been prescribed vide letter dated 28.04.1988. The letter dated 28.04.1988, which has been annexed as Annexure-5 to the writ petition, regarding recruitment of the cadre of Postmen/Village Postmen/ Mail Guards and implementation of recommendation of Fourth Central Pay Commission, Revision of syllabus for Departmental Candidates/EDAs, has prescribed as follows:-

	Paper	Total Marks	Qualifying Marks	Duration
A (i)	Making entries either in Postmen's Register (MS 58) according to the choice of a candidate (for Postmen)	50	45%	45 minutes
(ii)	Preparation of mail lists, filing up of mail abstracts and writing up daily reports (for mail Guard). The entries should be made either in English or in the recognized language of the State			
B	Arithmetic of 10th Standard of Board of Schools Education.	50	45%	90 minutes
C	Writing from dictation in English language of Matriculation Standard and also in the regional language.	50	45%	30 minutes

9. On perusal of the above guidelines, it is clear that the qualifying mark for each subject has been fixed as 45% as per the circular dated 28.04.1988, which has been referred in the educational qualification prescribed under Clause-4 (1) of the circular dated 19.10.2010. Therefore, it was made known to all the examinees that they have to secure minimum 45% of qualifying mark in each of the subjects. The same has also been fortified in letter dated 17.11.1988 under Annexure-6, where it has been stated as follows:-

> *"I am directed to invite your kind attention to this office letters of No. 10-6/86-PCC/SPD-I dated 25.09.87 (fixing 45% marks in each paper for qualifying the examination for Direct Recruitment) and 28.4.8 containing revised syllabus for Departmental candidates /for induction to the cadre of Postmen/Village Postmen/ Mail guards fixing 45% marks in each paper for qualifying the examination and to state that a question with regard to qualifying standard in favour of SC/ ST candidates / officials/ EDAs has been under consideration of the Directorate for some time past. It has now been decided that the qualifying standard in respect of SC/ST candidates /Officials /EDAs appearing in the examination for the pot of postmen / village postman and mail guards should be 30% (Thirty percent) in each paper.*

10. Similarly, in letter dated 11.05.1989 under Annexure-7, the qualifying mark has also been fixed to be 45% and the contents of the said letter read as under:-

> *"I am directed to invite your kind attention to this office letter of number even dated 28.4.88, wherein revised syllabus for the examination for departmental officials and EDAs for promotion/ Selection to cadre of Postmen/ Village Postmen/ Mail guards has been circulated and to state that some of the circles have raised doubt about fixation or marks of two parts of paper "C" and its qualifying standard. The matter has been*

examined in this office and it is seen that there is really no room for confusion regarding the syllabus. It is further clarified that the candidates will have to appear in both parts of paper 'C' and allocation of marks for the two parts may be equal, The qualifying mark for the paper is 45% for O.C candidates marks and 30% for SC/ST candidates will be determined by taking the total marks obtained in both parts."

11. In letter dated 06.12.2006 under Annexure-8, so far as procedure for declaring the result for the Departmental Examination for promotion of Group-D/GDS to Postman/ Mail Guard cadre held on 08.10.2006 for the vacancies of the years 2003, 2004 & 2005 is concerned, it was stated as follows:-

"The qualifying standard for induction /promotion to Postman/ Mailguard cadre (Both for department candidate & GDS) is 45% mark in each paper in respect of OC candidates but for SC/ST candidates it is 30% in each paper for qualifying the departmental examination as envisaged vide the DTE letter No.44-26/98-SPB. I dtd. 17.11.88 & 20.12.88 & also vide Directorate letter No. 10-6/86-PCC/SPB.I dtd.11.05.89. The result the examination be declared accordingly based on the merit of the candidates."

12. In view of the above letters/circulars issued from time to time for departmental examination for different years, it is made clear that the minimum qualifying mark for each subject has been fixed as 45%. As such, opposite party no.1, having not secured the qualifying mark in Paper-B, since he had secured 20 marks as against the qualifying mark of 23, was not declared successful.

13. So far as the judgments of the apex Court in ***M. Senthil Kumar; Sarabjit Rick Singh and West Bengal Regn. Copy Writers Assn.*** (supra) are concerned, on which reliance was placed by learned counsel for opposite party no.1, there is no ambiguity on the principles laid down by the apex in the said judgments, but facts and circumstances of said decisions are distinguishable from that of the present one, as because opposite party no.1, in the case at hand, was aware of the fact of minimum qualifying mark for each subject, as in the guidelines issued on 19.10.2010 reference was made to Sub-clause (1) of Clause-4 of the letter dated 28.04.1988 with regard to educational qualification, which envisages the minimum qualifying mark for each subject to be eligible for consideration for promotion. Having this fact made known to opposite party no.1, now, after having become unsuccessful in the process of selection, he cannot turn around and contend that minimum qualifying mark was not intimated to the candidates and, therefore, the same is not applicable to opposite party no.1.

14. In ***Om Prakash Shukla v. Akhilesh Kumar Shukla and Ors.***, AIR 1986 SC 1043, it has been clearly laid down by a Bench of three learned Judges of the apex Court that when the petitioner appeared at the examination without protest and when he found that he would not succeed in examination he filed a petition challenging the said examination, the High Court should not have granted any relief to such a petitioner.

15. In ***Madan Lal v. State of Jammu and Kashmir***, AIR 1995 SC 1088, the apex Court held as follows:-

"....If a candidate takes a calculated chance and appears at the interview then, only because the result of the interview is not palatable to him he cannot turn round and subsequently contend that the process of interview was unfair or Selection Committee was not properly constituted."

16. In ***Vijendra Kumar Verma v. Public Service Commission, Uttarakhand and others***, (2011) 1 SCC 150, the apex Court in paragraph-27 ruled as follows:-

> *"In Union of India v. S. Vinodh Kumar, (2007) 8 SCC 100 in para 18, it was held that:*
>
> *"18…It is also well settled that those candidates who had taken part in the selection process knowing fully well the procedure laid down therein were not entitled to question the same."*

17. In ***Marripati Nagaraja v. Government of A.P.***, (2007) 11 SCC 522, the apex Court observed as follows:-

> *"The other contention of Mr. Rao that the candidates had given only seven days time for making preparation to appear in the second screening test, cannot, in our considered view, give rise to a ground for setting aside the entire selection process. The Tribunal did not make any discrimination. One screening test had already been held. The number of candidates appeared in the first screening test was 510. The Commission obtained the permission of the Tribunal for holding the second screening test. It issued a notification on 12.12.2000 stating that such a test would be conducted on 7.1.2001. All the candidates were given the same time for preparation. Only because the appellants herein were employees at the relevant time, the same by itself could not confer on them any special privilege to ask for an extended time. They had no legal right in relation thereto. Appellants had appeared at the examination without any demur. They did not question the validity of the said question of fixing of the said date before the appropriate authority. They are, therefore, estopped and precluded from questioning the selection process."*

18. In ***Tajvir Singh Sodhi and others v. The State of Jammu and Kashmir and others***, (Civil Appeal Nos. 2164-2172 of 2023 disposed of on 28.03.2023), the apex Court held that having participated in the selection process without any demur or protest, the writ petitioners cannot challenge the same as being tainted with malafides, merely because they were unsuccessful.

19. In ***Chandra Prakash Tiwari v Shakuntala Shukla***, AIR 2002 SC 2322, the apex Court held that the principle that when a candidate appears at an examination without objection and is subsequently found to be not successful, a challenge to the process is precluded. The question of entertaining a petition challenging an examination would not arise where a candidate has appeared and participated. He or she cannot subsequently turn around and contend that the process was unfair or that there was a lacuna therein, merely because the result is not palatable.

20. In ***Union of India v. S. Vinodh Kumar*** (2007) 8 SCC 100, the apex Court held that it is also well settled that those candidates who had taken part in the selection process knowing fully well the procedure laid down therein were not entitled to question the same.

21. In ***Manish Kumar Shahi v State of Bihar***, (2010) 12 SCC 576

> *"We also agree with the High Court that after having taken part in the process of selection knowing fully well that more than 19% marks have been earmarked for viva voce test, the appellant is not entitled to challenge the criteria process of selection. Surely, if the appellant's name had appeared in the merit list, he would not have even dreamed of challenging the selection. The appellant invoked jurisdiction of the High*

Court under Article 226 of the Constitution of India only after he found that his name does not figure in the merit list prepared by the Commission. This conduct of the appellant clearly disentitles him from questioning the selection and the High Court did not commit any error by refusing to entertain the writ petition."

Similar view has also been taken by this Court in ***Sevati Patra v. State of Odisha***, 2016 (I) ILR CUT 417; ***Pradeep Kumar Jena v. State of Odisha***, 2017 (II) OLR 274; ***Pravati Nayak v. State of Odisha***, 2018 (Supp-II) OLR 946; and also judgment dated 02.04.2019 rendered in W.P.(C) No. 14047 of 2012 (***Keshari Sahoo v. State of Odisha***).

22. Above apart, since opposite party no.1 was aware of the fact that the circular dated 28.04.1988, where minimum qualifying mark has been prescribed, is applicable, now, at this stage, he is estopped from challenging the same.

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

24. The ***Law Dictionary*** expresses *promissory estoppel* to the following effect:-

"A promise by which the promisor should reasonably expect to induce action or forebearance of a definite and substantial character on the part of the promise, and which does induct such action or forebearance. Such a promise is binding if injustice can be avoided only by enforcement of the promise."

25. In ***Halsbury's Laws of England***, Fourth Edition, Vol.16 in Para-1514 at page 1017, the "*promissory estoppel*" has been defined to the following effect:-

"Promissory estoppel: When one party has, by his words or conduct made to the other a clear and unequivocal promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced."

26. In ***Central London Property Trust Ltd. v. High Treas House Ltd***., (1956) 1 All ER 256, it has been held that a promise is intended to be binding, intended to be acted upon, and in fact acted upon is binding.

27. In ***Century Spg. And Mfg. Co. Ltd v. Ulhasnagar Municipal Council***, (1970) 1 SCC 582, it has been held that there is no distinction between a private individual and a public body, so far as the doctrine of *promissory estoppel* is concerned.

28. In ***Gujurat State Financial Corporation v. Lotus Hotels***, (1983) 3 SCC 379, it has been held that the principle of "*promissory estoppel*" would estop a person from backing out of its obligation arising from a solemn promise made by it to the respondent.

29. In ***Ashok Kumar Maheswari v. State of U.P***., 1988 SCC LSS 592, it has been held that doctrine of "*promissory estoppel*" has been evolved by the Courts on the principle of equity to avoid injustice.

30. In ***Sharma Transport v. Govt. of A.P.***, AIR 2002 SC 322: 2002) 2 SCC 188, it has been held that the Government is equally bound by its promise like a private individual, save where the promise is prohibited by law, or devoid of authority or power of the officer making the promise. The equitable doctrine of *promissory estoppel* must yield where the equity so requires in the larger public interest.

31. In ***State of Rajasthan v. J.K. Udaipur Udyog Ltd.***, (2004) 7 SCC 673, it has been held that the "*promissory estoppel*" operates on equity and public interest.

32. In ***A.P. Steel Re-rolling Mill Ltd. v. State of Kerala***, (2007) 2 SCC 725, it has been held that where a beneficent scheme is made by the State, the doctrine of "*promissory estoppel*" would apply.

33. In ***State of Orissa v. Manglam Timber Products Ltd.,*** (2003) 9 Scale 578, it has been held that to attract applicability of "*promissory estoppel*" a contract in writing is not a necessary requirement. This principle is based on premise that no one can take advantage of its own omission or fault.

34. In ***B.L. Sreedhar v. K.M. Munireddy***, (2003) 2 SCC 355 (365) it has been held by the apex Court that '*estoppel*' is based on the maxim "*allegans contrarir* non *est audiendus*" (a party is not to be heard contrary) and is the spicy of presumption "*juries et de jure*" (absolute, or conclusive or irrebuttable presumption).

35. In ***H.R. Basavaraj v. Canara Bank***, (2010) 12 SCC 458, it has been clarified that in general words, '*estoppel*' is a principle applicable when one person induces another or intentionally causes the other person to believe something to be true and to act upon such belief as to change his/her position. In such a case, the former shall be stopped from going back on the word given. The principle of estoppels is only applicable in cases where the other party has changed his positions relying upon the representation thereby made.

36. The principle of *promissory estoppels* has been considered by the apex Court in ***Union of India v. M/s Anglo, Afghan Agencies etc.,*** AIR1968 SC 718; ***Chowgule & Company (Hind) Pvt. Ltd. v. Union of India***, AIR 1971 SC 2021; ***M/s Motilal Padampat Sugar Mills Co. Ltd. v. The State of Uttar Pradesh***, AIR 1979 SC 621; ***Union of India v. Godfrey Philips India Ltd.***, AIR 1986 SC 806; ***Delhi Cloth & General Mills Ltd. v. Union of India***, AIR 1987SC 2414; and ***Bharat Singh v. State of Haryana***, AIR 1988 SC 2181 and many other subsequent decisions also.

37. In ***Ambika Prasad Mohanty v. Orissa Engineering College***, 1989(1) OLR 440, the Division Bench of this Court has already held that a student admitted after satisfying all qualifications, subsequently his admission is cancelled and he cannot prosecute his studies elsewhere, rule of *estoppel* is applicable.

38. This Court in ***Dr. (Smt.) Pranaya Ballari Mohanty v. Utkal University***, 2014 (I) OLR 226 has come to a finding that the action taken at belated stage by the University after lapse of 20 years of publication of the result is hit by the principle of *estoppel*.

39. Similar view has also been taken by this Court in ***Rajanikanta Priyadarshy v. Utkal University, represented through its Registrar,*** 2015 (I) OLR 212, wherein this

Court held that the result of +3 Final Degree (Regular) Examination, 2010 of the petitioner therein having been published and on that basis he has already undergone higher studies and passed in different courses, subsequently his initial result cannot be cancelled on the ground that he has failed in the said examination.

40. Similar principle has been followed by this Court in the case of ***Bikash Mahalik v State of Odisha***, 2021 (III) ILR CTC 720 and ***M/s. Balasore Alloys Ltd v State of Odisha***, 2019 (I) ILR CTC 214, in which one of us (Dr. Justice B.R. Sarangi) was a member.

41. In view of the facts and law, as discussed above, this Court unhesitatingly held that the order dated 01.08.2019 passed by the Central Administrative Tribunal, Cuttack Bench, Cuttack in O.A. No. 605 of 2012 under Annexure-1 cannot be sustained in the eye of law and the same is liable to be quashed and is hereby quashed.

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

—— o ——

2024 (II) ILR-CUT-444

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

W.P.(C) NO. 37472 OF 2023

M/s. NEELACHAL ISPAT NIGAM LTD. ……Petitioner

-V-

UNION OF INDIA & ORS. ……Opp.Parties

(A) CENTRAL EXCISE ACT, 1944 – Section 11-A, sub-section 11 – The show cause notice was issued by the authority on 10.09.2008 but it was not received by the petitioner – The authority subsequently on 08.01.2018, after lapse of 10 years issued notice for personal hearing – Whether the impugned show cause notice as well as subsequent proceeding tenable in the eyes of law? – Held, No – Keeping the show cause notice pending for a period of more than 9 years is contrary to the mandate of Section 11-A(11) of the Act as well as violative of Article 14 of the Constitution of India.

(B) CONSTITUTION OF INDIA, 1950 – Article 226 r/w Section 35-B of Central Excise Act – Alternative remedy when not a bar – The authority acted upon the show cause notice dated 10.09.2008 after lapse of 10 years – The petitioner challenged the show cause notice and subsequent orders – Effect of – Held, since there is statutory infraction of adjudicating the dispute, in as much as, after long lapse of more than 15 years and without giving any reason to the objections raised by the petitioner to the show cause reply on limitation, the Court does not

deem it proper to relegate the matter for adjudication U/s. 35-B of the Act.

Case Laws Relied on and Referred to :-

1. W.P(C) No. 11809 of 2017 : M/s IDCOL Ferro Chrome & Alloys Ltd., Ferro Chrome Project v. Commissioner, Central Excise.
2. CWP No. 11860/2021 : M/s Shree Baba Exports v. Commissioner, GST & Central Excise.
3. SLP (C) No. 12376/2022 : Commissioner, CGST & Central Excise v. Shree Baba Exports.
4. 2023 SCC OnLine Jhar 1537 : Kamaladitya Construction (P) Ltd. v. Principal Commissioner of CGST and Central Excise.
5. 2021 (378) ELT 401 (Ori.) : Maxcare Laboratories Ltd. v. Joint Commissioner, CGST, Central Excise & Custom.
6. W.P.(C) No. 13195 of 2010 : M/s Orissa Mining Corporation Ltd. v. Sales Tax Officer.
7. 2022 SCC OnLine Bom 648 : ATA Freight Line (I) Ltd v. Union of India & Ors.
8. W.P.(C) No. 6757 of 2022 : M/s. Siemens Ltd. v. Union of India and Anr.
9. (2006) 7 SCC 642 : Duncans Agro Industries Ltd v. CCE.
10. (2005) 7 SCC 749 : Anand Nishikawa Co. Ltd v. Comm. Of Central Excise.
11. 2019 SCC OnLine All 5341 : Honda Siel Power Products v. Union of India and another.
12. Writ Petition No. 12904 of 2019 : Parle International Limited v. Union of India and Others.
13. 2016 SCC OnLine MAD 6066 : Eveready Industry India Limited v. Customs, Excise and Service Tax Appellate Tribunal and others.
14. W.P.(T) No. 826 of 2023 : Tata Steel Limited v Union of India and others.
15. 2023 SCC OnLine DEL 7143 : BT (India) Pvt. Ltd v. Union of India and another.
16. (1998) 8 SCC 1 : Whirlpool v. Registrar of Trade Marks.
17. MANU/ SC/ 1206 /2022 : State of Maharashtra and others v Greatship (India) Limited.
18. MANU/SC/0541/2010 : (2010) 8 SCC 110 : United Bank of India v. Satyawati Tondon.
19. W.P.(C) No. 810 of 2016 : Jindal Steel & Power Ltd. Vs Union of India.

For Petitioner : Mr. T. Gulati, Sr. Adv. along with M/s. Jnanesh Mohanty, S. Gumansingh & S. Mohanty

For Opp. Parties : Mr. T.K. Satapathy, Sr. Standing Cousnel along with Mr. Avinash Kedia, Jr. Standing Counsel for GST & Central Excise

JUDGMENT Date of Hearing : 09.05.2024 : Date of Judgment :14.05.2024

Dr. B.R. SARANGI, J.

M/s. Neelachal Ispat Nigam Limited, a Joint Venture Company registered under the provisions of Companies Act, 1956 and promoted by M/s MMTC Limited and Industrial Promotion & Investment Corporation of Orissa Limited (IPICOL), having its factory premises located at Kalinga Nagar Industrial Complex, Duburi in the district of Jajpur, Odisha, having Central Excise Registration Certificate No. AAACN-9433BXM001, engaged in manufacturing of 'Pig Iron' and 'Billet' falling under Chapter-72 and 'Coke & Crude Tar', falling under Chapter-27 of the First Schedule to the Central Excise Tariff Act, 1985, has filed this writ petition seeking to quash the demand-cum-show cause notice dated 10.09.2008 under Annexure-2 issued by the opposite party no.2; the consequential notices dated 05.12.2017 and 05.01.2018 issued under Annexure-3 (Colly.); and also the Order-in-Original dated 04.09.2023 under Annexure-9, whereby the demand made in the show cause notice dated 10.09.2008 has been confirmed.

2. The factual matrix of the case, in a nutshell, is that the petitioner, being a Public Limited Company, is primarily engaged in the manufacturing of 'Pig Iron' and 'Billet' falling under Chapter-72 and 'Coke & Crude Tar' falling under Chapter-27 of the First Schedule to the Central Excise Tariff Act, 1985 in its factory located in Kalinga Nagar Industrial Complex, Jajpur. Another company, namely, M/s. Konark Met Coke Limited (KMCL), also situated in the same complex, has set up a Metallurgical Coke Plant along with a Captive Power Plant. The electricity generated was captively used by M/s. KMCL as well as by the Petitioner. M/s. KMCL is the manufacturer of Metallurgical Coke, Pearl Coke, Breeze Coke falling under Chapter-27 and Ammonium Sulphate falling under Chapter-31 of the First Schedule to the Central Excise Tariff Act, 1985, having Central Excise Registration Certificate No. 1/Ch.27&31/KMCL.JPR/99 dated 01.03.1999. Subsequently, M/s KMCL amalgamated with the petitioner with all its assets and liabilities with effect from 08.12.2004, pursuant to the order dated 05.11.2004 passed by this Court in COPET No. 26 of 2004. Paragraphs-2 and 3 of the said order dated 05.11.2004 passed in COPET No. 26 of 2004 reads as under:-

> *"Para-2: That all the property, rights and powers of the transferor company specified in the scheme of amalgamation annexed hereto and all the other property, rights and powers of the transferor company be transferred without further act or deed to the transferee company and accordingly the same shall pursuant to section 394(2) of the Companies Act, 1956 be transferred to and vest in the transferee company for all estate and interest of the transferor company therein but subject nevertheless to all charges now affecting the same;*
>
> *Para-3: That all the liabilities and duties of the transferor company be transferred without further act or deed to the transferee company and accordingly the same shall pursuant to Section 394(2) of the Companies Act, 1956 be transferred to and become the liabilities and duties of the transferee company."*

2.1. M/s KMCL on the date of merger was having unutilized Cenvat Credit balance amounting to Rs.39,17,30,118/ - (Rs.1,14,41,688/- on inputs and Rs.38,02,88,430/- on capital goods) in its Cenvat account. Consequent upon merger of M/s. KMCL with the petitioner, on the application of the petitioner dated 22.12.2004, the Jurisdictional Asst. Commissioner, Balasore Division, vide his letter dated 24.12.2004, allowed the petitioner to take back the unutilised Cenvat credit of Rs.39,17,30,118/- available with M/s. KMCL.

2.2. During verification of records by AG (Audit), the petitioner could not produce any documents evidencing physical transfer of Inputs/Capital Goods from M/s. KMCL to the petitioner. The petitioner, in their statement dated 12.09.2007 recorded before the Jurisdictional Range Officer, against summons issued under Section 14 of the Central Excise Act, 1944, stated that complying with the direction of the this High Court, M/s. KMCL was merged with the petitioner with effect from 08.12.2004. All assets and liabilities were taken over by the amalgamated company as on that date. The company took possession of the assets and necessary entries in the asset register/bin card were made. After hearing both sides, i.e., Creditors and Shareholders, this Court had given its verdict for merger of both the companies as mentioned above. Therefore, with the necessary permission of the Jurisdictional Assistant Commissioner, Central Excise,

Customs & Service Tax, Balasore Division, Balasore and as per the order of this Court, the petitioner has taken the Cenvat Credit lawfully. But, on the alleged contravention of the provisions of Rule 10 (1) and (3) of the Cenvat Credit Rules, 2004, as the petitioner had never disclosed this fact to the Department by any communication and it is only during verification of relevant documents of the petitioner by AG, Audit the matter came to the knowledge of the Department, it was thus presumed that the petitioner knowingly/ intentionally suppressed all the information in respect of their wrong availment of Cenvat Credit from the Department. It was also observed that the aforesaid credit of Rs.39,17,30,118/- availed by the petitioner is recoverable from it, along with interest due thereon, under Rule 14 of the Cenvat Credit Rules, 2004 read with proviso to Section 11A and 11AB of the Central Excise Act, 1944 ("the Act" in short).

2.3. In the light of the above observation and allegations, a show cause notice dated 10.09.2008 proposing the following was issued:-

> *"(i) The Cenvat Credit amounting to Rs.39,17,30,118/- (Rs.1,14,41,688/- on inputs and Rs.38,02,88,430/- on capital goods) wrongly availed by the Noticee shall not be recovered from them under the provisions of rule 14 of the CCR read with Section 11A(1) of the Act;*
>
> *(ii) Interest at the appropriate rate till the date of payment shall not be charged under Section 11AB of the Act; and*
>
> *(iii) Penalty shall not be imposed on it under Rule 15 of the Cenvat Credit Rules, 2004 read with Section 11AC of the Act for its said legal infractions."*

2.4. The said show cause notice was not received by the petitioner. However, personal hearing of the case was fixed to 22.12.2017, i.e., after a lapse of more than 9 years from the date of issue of the impugned notice. As the impugned show cause notice dated 10.09.2008 was not received by the petitioner, the Commissioner was approached by the petitioner to provide a copy of the same, along with supporting documents, enabling the petitioner to file its reply. Another date of personal hearing was fixed to 08.01.2018, vide communication dated 05.01.2018, which was received by the petitioner on 10.01.2018. The petitioner was given a copy of the show cause notice by the office of the Commissioner, Central Excise, Bhubaneswar-I on 08-01.2018 and was asked to file the reply by the last week of January, 2018.

2.5. Needless to mention here, the dispute involved in the impugned show cause notice relates to the period 2004-05. The related documents, being 14 years old, were not easily traceable, for which the petitioner was unable to file its reply by the end of January, 2018. After thorough search of the records, the petitioner with much difficulty was able to locate the relevant records and filed the reply to the notice of show cause dated 10.09.2008, contending that the notice of show cause has been issued with reference to the permission accorded by the Jurisdictional Assistant Commissioner, Central Excise, Customs & Service Tax, Balasore Division, vide his letter dated 24.12.2004, under which he allowed the petitioner to take the Cenvat Credit of Rs.39,17,30,118/- lying un-utilized in the account of erstwhile M/s KMCL in terms of Rule 10(1) of the Cenvat Credit Rules, 2004, consequent upon its amalgamation with the petitioner and pursuant to order of this Court dated 05.11.2004 in COPET No.26 of 2004.

2.6. Therefore, on the basis of a show cause notice issued on 10.09.2008 and after lapse of about 10 years from the date of issuance of show cause notice, notice for personal hearing was issued and the final Order-in-Original was passed on 04.09.2023, after a period of 15 years and, therefore, the present writ petition.

3. Mr. Tarun Gulati, learned Senior Advocate appearing along with Mr. Jnanesh Mohanty and Ms. Gumansingh, learned counsel for the petitioner contended that even though a show cause notice was issued on 10.09.2008, the same was not served on the petitioner and for the first time, on 05.12.2017, the same was served on the petitioner. In compliance of the show cause notice, the petitioner gave its reply, but no action was taken thereon nor the same was decided and, as such, it was kept pending and after lapse of six years, the order dated 04.09.2023 was passed, whereas the matter should have been decided within a reasonable period. It is contended that initially the show cause notice was issued on 10.09.2008, which took 9 years to bring to the notice of the petitioner vide letter dated 05.12.2017. Thereafter, even if reply was filed, the same was kept pending for six years and ultimately the final order was passed on 04.09.2023. Thereby, the entire claim is grossly barred by limitation and belated claim cannot be considered. It is further contended that the audit objection was contested and was taken out after the circular dated 08.04.2016, for which the same is not the valid explanation for delay. The inordinate delay in adjudication of a show cause notice is fatal to its validity, since it causes prejudice. The words "where is it is possible to do so" cannot be construed to be without any meaning. Further, it is contended that the department was bound to inform the petitioner of the case to the call book and if the department was aggrieved with an order, it could have challenged the same and there cannot be two adjudications on the same issue. Moreover, the extended period of limitation cannot be invoked when the Department was aware of the facts of the case and had in fact given approval. To substantiate his contention, learned Senior Advocate appearing for the petitioner has relied upon the judgment of this Court in the case of ***M/s IDCOL Ferro Chrome & Alloys Ltd., Ferro Chrome Project v. Commissioner, Central Excise***, [W.P.(C) No. 11809 of 2017 disposed of on 02.01.2023]; judgment of the Punjab and Haryana High Court in the case of ***M/s Shree Baba Exports v. Commissioner, GST & Central Excise***, CWP No. 11860 of 2021 disposed of on 15.03.2022, which has been confirmed by the apex Court in S.L.P. (C) No. 12376 of 2022 disposed of on 29.07.2022; judgments of the apex Court in the cases of ***Commissioner, CGST and Central Excise v. Shree Baba Exports***, SLP (C) No. 12376 of 2022 disposed of on 29.07.2022; and ***Kamaladitya Construction (P) Ltd. v. Principal Commissioner of CGST and Central Excise***, 2023 SCC OnLine Jhar 1537. It is contended that the judgments passed by this Court in the case of ***M/s IDCOL Ferro Chrome & Alloys Ltd.*** and ***Ferro Chrome Project*** (supra) have also taken note of the judgments of this Court in the cases of ***Maxcare Laboratories Ltd. v. Joint Commissioner, CGST, Central Excise & Custom***, 2021 (378) ELT 401 (Ori.) and ***M/s Orissa Mining Corporation Ltd. v. Sales Tax Officer***, (W.P.(C) No. 13195 of 2010 disposed of on 15.12.2021); and also ***ATA Freight Line (I) Ltd v. Union of India & Ors.***, 2022 SCC OnLine Bom 648 (Bombay High Court), which has been confirmed by the apex Court in S.L.P. (C) No. 828 of 2023 disposed of on 10.02.2023; ***M/s. Siemens Ltd. v. Union of India and Anr***, W.P.(C) No. 6757 of 2022 decided on 03.10.2023 (Bombay High Court); ***Duncans Agro Industries Ltd v. CCE***, (2006) 7 SCC 642; ***Anand Nishikawa Co. Ltd v. Comm. of Central Excise***, (2005) 7 SCC 749;

Honda Siel Power Products v. Union of India and another, 2019 SCC OnLine All 5341; ***Parle International Limited v. Union of India and Others***, Writ Petition No. 12904 of 2019 disposed of 26.11.2020 (Bombay High Court); ***Eveready Industry India Limited v. Customs, Excise and Service Tax Appellate Tribunal and others***, 2016 SCC OnLine MAD 6066 (Madras High Court) ; ***Tata Steel Limited v Union of India and others***, W.P.(T) No. 826 of 2023 disposed of on 13.06.2023 (Jharkhand High Court); ***BT (India) Pvt. Ltd v. Union of India and another***, 2023 SCC OnLine DEL 7143 (Delhi High Court).

4. Mr. T.K. Satapathy, learned Sr. Standing Counsel appearing along with Mr. A. Kedia, learned Jr. Standing Counsel for GST & Central Excise, raised preliminary objection with regard to maintainability of the writ petition. It is contended that the petitioner has challenged the reassessment order before this Court under Article 226 of Constitution of India, which is not maintainable because the order is appealable under Section 35-B before the learned Custom and Excise and Service Tax Appellate, Tribunal. Petitioner has approached this Court without exhausting effective alternative remedies available to it under law raising all factual contentions which can be redressed before statutory authorities under the Act. It is further contended that the show cause notice dated 10.09.2008 was issued to the petitioner and sent by speed post to the petitioner's registered address. During the course of personal hearing held on 08.01.2018, the petitioner submitted that their copy of the show cause notice has got misplaced and hence they are not able to file reply. As per the request of the petitioner, a photocopy of the show cause notice was handed over to it under acknowledgement. He further contended that the impugned show cause notice has been issued based on audit para/objection as per Board's circular dated 10.03.1983. Since the audit para/objection was not admitted by the Department as per Board's circular dated 14.12.1995 and 30.03.98, the show cause notice was not adjudicated and transferred to call book. The audit para was converted to statement of facts vide Para 2 of I.R.No.20/2005-06. Later on, CBEC, vide circular no. 1023/11/2016-CX dated 08.04.2016, issued detailed guidelines about "Adjudication of Show Cause Notices, issued on the basis of CERA/CRA objection". At Para 6 of the said circular, the Board has clarified that the show cause notices relating to audit objections figuring in the list should not be adjudicated and further action should be taken in consultation with the Commissioner. It was further contended, as per the General Ledger for the period from 01.04.2004 to 31.03.2005, in Voucher No.9877 & 9878 both dated 9.12.2004, the Cenvat credit of Rs.35,29,10,811.16/- and Rs.3,88,83,006.92/- respectively have been shown against debit with a note that "merger of KMCL, Transaction for the period 01.04.2004 to 8.12.2004". The ER-I return stated to have been filed with the Jurisdictional Range Superintendent is not available in the case file. Therefore, it is contended that the show cause notice and the resultant Order-in-Original deal with transfer of Cenvat Credit from M/s KMCL to the petitioner not related to availment of credit by M/s KMCL. The cause of action against the Order-in-Original lies with the Central Excise & Service Tax Appellate Tribunal (CESTAT), Eastern Zonal Bench, Kolkata under Section 35-B of the Central Excise Act, 1944, therefore, the writ petition before this Court is liable to be dismissed. To substantiate his contention, learned Senior Standing has placed reliance on ***Whirlpool v. Registrar of Trade Marks***, (1998) 8 SCC 1; ***State of Maharashtra and others v Greatship (India) Limited***, MANU/ SC/ 1206 /2022; ***United Bank of India v.***

Satyawati Tondon, MANU/SC/0541/2010 : (2010) 8 SCC 110; and ***Jindal Steel & Power Ltd. Vs Union of India*** (W.P.(C) No. 810 of 2016 decided on 02.05.2016)

5. This Court heard Mr. Tarun Gulati, learned Senior Advocate appearing along with Mr. Jnanesh Mohanty and Ms. Gumansingh, learned counsel for the petitioner; and Mr. T.K. Satapathy, learned Sr. Standing Counsel along with Mr. A. Kedia, learned Jr. Standing Counsel for Revenue in hybrid mode and perused the records. Pleadings have been exchanged between the parties and with the consent of learned counsel for the parties, the writ petition is being disposed of finally at the stage of admission.

6. As would be evident from the factual matrix, as delineated above, the notice of show cause was issued on 10.09.2008, which came to the knowledge of the petitioner on 05.12.2017, when a personal hearing notice pursuant to the show cause notice dated 10.09.2008, was issued to the petitioner. The same was followed by another personal hearing notice dated 05.01.2018. It is only after issuance of these personal hearing notices, the petitioner became aware of the proceedings and obtained a copy of the show cause notice dated 10.09.2008 on 08.01.2018, i.e., after a lapse of more than 9 (nine) years from the date of show cause notice. The petitioner filed its reply indicating therein that the show cause notice was sought to be adjudicated after a considerable lapse of time, without any justification and without any communication to the petitioner during the intervening period and, thereby, the delay in adjudication of the show cause notice dated 10.09.2008 is fatal to the proceedings and subsequent issuance of notices for personal hearing after a lapse of about 10 years from the date of issuance of the show cause notice is contrary to the mandate of Sub-section (11) of Section 11A of the Central Excise Act, 1944. For a just and proper adjudication of the case, Section 11A of the Central Excise Act, 1944 is quoted hereunder:-

> *"SECTION 11A OF THE CENTRAL EXCISE ACT, 1944*
>
> *"SECTION 11A- Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded. –*
> *(1) Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, for any reason, other than the reason of fraud or collusion or any willful mis-statement or suppression of facts or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty ,-*
> *xxx xxx xxx*
> *(4) Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of*
> *(a) fraud; or*
> *(b) collusion; or*
> *(c) wilfulmis-statement; or*
> *(d) suppression of facts; or*
> *(e) contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty.*
>
> *by any person chargeable with the duty, the Central Excise Officer shall, within five years from the relevant date, serve notice on such person requiring him to show cause why he should not pay the amount specified in the notice along with interest payable thereon under section 11AA and a penalty equivalent to the duty specified in the notice.*

(5) Where, during the course of any audit, investigation or verification, it is found that any duty [has not been levied or paid or has been] short - levied or short - paid or erroneously refunded for the reason mentioned in clause (a) or clause (b) or clause (c) or clause (d) or clause (e) of sub-clause (4) but the details relating to the transactions are available in the specified records, then in such cases, the Central Excise Officer shall within a period of five years from the relevant date, serve a notice on the person chargeable with the duty requiring him to show cause why he should not pay the amount specified in the notice along with interest under section 11AA and penalty equivalent to fifty per cent of such duty,

xxx xxx xxx

(11) The Central Excise Officer shall determine the amount of duty of excise under sub-section (10) –

(a) within six months from the date of notice where it is possible to do so, in respect of cases falling under subsection (1);

(b) within two year [substituted for one year w.e.f. 14-05-2016] from the date of notice, where it is possible to do so, in respect of cases falling under the proviso to subsection (4) or sub-section (5).

xxx xxx xxx"

7. On perusal of the aforementioned provisions, it is made clear Section 11A (11) of the Central Excise Act, 1944 envisages that the Central Excise Officer shall determine the amount of duty of excise under Sub-section (10) within six months from the date of notice where it is possible to do so, in respect of cases falling under Sub-section (1), i.e., where no suppression of facts etc. are alleged) and within one year (substituted by two years by the Finance Act, 2016 w.e.f. 14.05.2016) from the date of notice, where it is possible to do so, in respect of cases falling under the Sub-section (4) (i.e. where suppression of facts etc. are alleged). Therefore, both the notices for personal hearing issued to the petitioner on 05.12.2017 and 05.01.2018 under Annexure-3 (Colly.) are contrary to the mandate of Section 11A of the Central Excise Act, 1944 and thus, the adjudication of the show cause notice is barred by limitation. Keeping the show cause notice pending for a period of more than 9 years is contrary to the mandate of Section 11A(11) of the Central Excise Act, 1944 and, thereby, unreasonable, arbitrary, oppressive and violative of Article 14 of the Constitution of India.

8. There is no dispute that M/s. KMCL, on the date of its merger with the petitioner, had an unutilized Cenvat Credit balance of Rs. 39,17,30,118/ - and the petitioner filed an application on 22.12.2004 before the Jurisdictional Officer for transfer of the said unutilised Cenvat credit, in terms of Rule-10 of the Cenvat Credit Rules, 2004. The relevant provision of Rule-10 is quoted herein below:-

"RULE 10. Transfer of CENVAT credit. -

(1) If a manufacturer of the final products shifts his factory to another site or the factory is transferred on account of change in ownership or on account of sale, merger, amalgamation, lease or transfer of the factory to a joint venture with the specific provision for transfer of liabilities of such factory, then, the manufacturer shall be allowed to transfer the CENVAT credit lying unutilized in his accounts to such transferred, sold, merged, leased or amalgamated factory.

(2) If a provider of output service shifts or transfers his business on account of change in ownership or on account of sale, merger, amalgamation, lease or transfer of the business to a joint venture with the specific provision for transfer of liabilities of such business, then, the provider of output service shall be allowed to transfer the CENVAT credit lying unutilized in his accounts to such transferred, sold, merged, leased or amalgamated business.

(3) The transfer of the CENVAT credit under sub-rules (1) and (2) shall be allowed only if the stock of inputs as such or in process, or the capital goods is also transferred along with the factory or business premises to the new site or ownership and the inputs, or capital goods, on which credit has been availed of are duly accounted for to the satisfaction of the Deputy Commissioner of Central Excise or, as the case may be, the Assistant Commissioner of Central Excise."

The application of the petitioner was allowed vide letter of the authority dated 24.12.2004. Therefore, if the amount has been transferred with the knowledge of the competent authority after being satisfied, subsequently it cannot turn around and take a different plea by issuing a notice of show cause on 10.09.2008 without serving a copy on the petitioner. However, owing to personal hearing notices issued on 05.12.2017 and 05.01.2018, it has been brought to the knowledge of the petitioner after long lapse of nine years and on receipt of the same, the petitioner filed show cause reply, but the same has not been taken into consideration in its proper perspective.

9. Mr. T.K. Satapathy, learned Sr. Standing Counsel for Revenue vehemently urged before this Court that the petitioner has not raised the question of limitation in his show cause reply. Therefore, the action taken by the authority is well justified. But it is brought to our notice by Mr. Gulati, learned Senior Advocate that in post hearing written submission in Demand-cum-Show Cause dated 10.09.2008, which has been placed on record as Annexure-8 at paragraph-3 it has been stated as follows:-

"It is submitted that the limitation for serving of SCN under Section 11A of the CEA 1944, even in cases where suppression, fraud etc. are alleged, is 5 Years from the period of dispute, whereas in the instant case, the impugned SCN was served on the notice after more than 13 Years; hence the impugned SCN is hopelessly barred by Limitation, and liable to be dropped on this ground alone."

Therefore, there is no iota of doubt that the petitioner has raised the question of limitation by filing show cause reply on 16.08.2023, but the Order-in-Original passed by the authority on 04.09.2023 under Annexure-9 has not spelt about the question raised with regard to limitation, though the same has been urged before the authority concerned.

10. In ***Anand Nishikawa*** (supra), the apex Court at paragraphs-23, 24, 25, 26, 27, 29 and 30 observed as follows:-

"23. In the impugned order, CEGAT on perusal of the correspondence between the appellant and the department was unable to find any disclosure in writing by the appellant with respect to post-forming processes like notching, drilling etc. From the materials on record which were produced before the authorities and also from the orders of the CEGAT and the Commissioner, it can be seen that the department had the opportunity to inspect the products of the appellants and in fact, the factory of the appellants was inspected by them. It may be true that the appellants might not have

disclosed the post-forming process in detail but from the correspondence and other materials on record, it cannot be conceived that the authorities were not aware of the facts as, we gather from the materials on record, admittedly, samples were collected by the Department and even after the samples were collected and inspected, classification as supplied by the appellant in respect of the products in question was approved by them.

24. Further more, it is also evident from the record that the flow-chart of manufacturing process which was submitted to the Superintendent of Central Excise, Rampur on 17.5.1990 clearly mentioned the fact of post forming process on the rubber [See page 15 of the Order of CEGAT]. The CEGAT in its order has also recognized the fact of collection of some relevant samples by the excise authorities on 25.9.1985 and 22.1.1988. [See paragraphs 7.1 & Page 14 of the Order of CEGAT].

25. In this view of the matter, we are unable to persuade ourselves to agree with the finding of the CEGAT as admittedly, the products of the appellant were inspected from time to time and the department was aware of the manufacturing process of the products although the appellant might not have disclosed the post forming process in detail.

26. In Tata Iron & Steel Co. Ltd. vs. Union of India & Ors [1988 (35) ELT 605 (SC)], this Court held that when the classification list continued to have been approved regularly by the department, it could not be said that the manufacturer was guilty of "suppression of facts". As noted herein earlier, we have also concluded that the classification lists supplied by the appellant were duly approved from time to time regularly by the excise authorities and only in the year 1995, the department found that there was "suppression of facts" in the matter of post forming manufacturing process of the products in question. Furthermore, in view of our discussion made herein earlier, that the department has had the opportunities to inspect the products of the appellant from time to time and, in fact, had inspected the products of the appellant. Classification lists supplied by the appellant were duly approved and in view of the admitted fact that the flow-chart of manufacturing process submitted to the Superintendent of Central Excise on 17.5.1990 clearly mentioned the fact of post-forming process on the rubber, the finding on "suppression of facts" of the CEGAT cannot be approved by us. This Court in the case of Pushpam Pharmaceutical Company vs. Collector of Central Excise, Bombay [1995 Supp (3) SCC 462], while dealing with the meaning of the expression "suppression of facts" in proviso to section 11A of the Act held that the term must be construed strictly, it does not mean any omission and the act must be deliberate and willful to evade payment of duty. The Court, further, held : -

"In taxation, it ("suppression of facts") can have only one meaning that the correct information was not disclosed deliberately to escape payment of duty. Where facts are known to both the parties the omission by one to do what he might have done and not that he must have done, does not render it suppression."

27. Relying on the aforesaid observations of this Court in the case of Pushpam Pharmaceutical Co. Vs. Collector of Central Excise, Bombay [1995 Suppl. (3) SCC 462], we find that "suppression of facts" can have only one meaning that the correct information was not disclosed deliberately to evade payment of duty, when facts were known to both the parties, the omission by one to do what he might have done not that he must have done would not render it suppression. It is settled law that mere failure to declare does not amount to willful suppression. There must be some positive act from the side of the assessee to find willful suppression. Therefore, in view of our findings made herein above that there was no deliberate intention on the part of the appellant not

to disclose the correct information or to evade payment of duty, it was not open to the Central Excise Officer to proceed to recover duties in the manner indicated in proviso to section 11A of the Act. We are, therefore, of the firm opinion that where facts were known to both the parties, as in the instant case, it was not open to the CEGAT to come to a conclusion that the appellant was guilty of "suppression of facts". In Densons Pultretaknik vs. Collector of Central Excise [2003 (11) SCC 390], this Court held that mere classification under a different sub-heading by the manufacturer cannot be said to be willful misstatement or "suppression of facts". This view was also reiterated by this Court in Collector of Central Excise, Baroda, vs. LMP Precision Engg.Co.Ltd. [2004 (9) SCC 703]

xxx xxx xxx

29. Similarly, in the case of Collector Central Excise, Jamshedpur Vs. Dabur India Ltd., [2005 (121) ECR 129 (SC)], this Court held that the extended period of limitation was not available to the Department as classification lists filed by the Assessee were duly approved by the authorities from time to time. In that decision this Court followed its earlier judgment in O.K. Play (India) Ltd., vs. Collector of Central Excise, Delhi-III, (Gurgaon) [2005 (66) RLT 657 (SC)], held that in cases where classification lists filed by the Assessee were duly approved, the extended period of limitation would not be available to the Department.

30. For the reasons aforesaid, we are of the view that the CEGAT was not justified in holding that the extended period of limitation would be available to the Department for initiating the recovery proceedings under section 11A of the Act on a finding that there was suppression of facts by the appellant. Accordingly, it was not open to the excise authorities to invoke proviso to section 11A of the Act and therefore, the demand of the Revenue must be restricted to six months prior to the issue of notice dated 19.10.1995 instead of five years. In view of this conclusion, it is not necessary for us to consider the question of applicability of the classification lists namely of 4008.29 and 4016.19 and the question of MODVAT facilities. Accordingly, in our opinion, CEGAT came to a wrong conclusion for wrong reasons and therefore, we allow this appeal and set aside the judgment and order of the CEGAT and restore the order of the Commissioner."

11. The entire proceeding was initiated on the basis of AG Audit, though the same was contested and was taken out after the circular dated 08.04.2015, for which there cannot be a valid explanation for delay. This Court in ***IDCOL Ferro Chrome*** (supra) at paragraphs-6, 8, 9 and 10 observed as follows:-

6. In reply to the writ petition, there is no valid explanation offered by the Department as to what prompted it to shift the case to the Call Book on 28th April, 1999 and then retrieved it from the said Call Book 16 years later, all of a sudden. The precise averment in the counter affidavit in this regard reads as under:

"4. That with regard to the averments made in paragraph 1 of the Writ petition, it is humbly submitted that no time limit has been prescribed for section 11A(2) of the Central Excise Act, 1944. The said case has been transferred to Call Book on 28.04.1999 and kept in Call Book as the matter was arose out of objection by the office of the Accountant General, Odisha (AG(O)) and the central Excise Department (Opposite Party) contested the matter with it. However. since no decision has been taken by the Office of the Accountant General, Odisha (AG(O)), even after several letters from the Opposite Parties to settle the issue, the said Show Cause Notice was retrieved from the Call Book on 15.07.2016 based on the Board's Circular No. 1023/11/2016-CX dated

08.04.2016 and initiated the process of Adjudication. A copy of the Board's Circular No. 1023/11/2016-CX dated 08.04.2016 is annexed herewith as ANNEXURE-A/1."

xxx xxx xxx

8. In ***Maxcare Laboratories Ltd.*** *(supra), in more or less identical circumstances, this Court quashed the SCN and the further notice fixing the date of hearing. In the presence case also the Court is unable to find any valid explanation offered by the Department in delaying in issuing the initial SCN under Section 11A of the CE Act, 4 years after the period of demand and then, more importantly, taking 16 years to retrieve the matter from the Call Book. As noticed by this Court in Maxcare Laboratories Ltd. (supra), in similar circumstances, the Supreme Court of India in* ***Government of India v. Citedal Fine Pharmaceuticals*** *1989 (42) ELT 515, in the context of proceedings for recovery of excise duty on medicinal toilet preparations observed as under:*

"While it is true that Rule 12 does not prescribe any period within which recovery of any duty as contemplated by the Rule is to be made, but that by itself does not render the Rule unreasonable or violative of Article 14 of the Constitution. In the absence of any period of limitation it is settled that every authority is to exercise the power within a reasonable period. What would be reasonable period, would depend upon the facts of each case. Whenever a question regarding the inordinate delay in issuance of notice of demand is raised, it would be open to the assessee to contend that it is bad on the ground of delay and it will be for the relevant officer to consider the question whether in the facts and circumstances of the case notice or demand for recovery was made within reasonable period. No hard and fast rules can be laid down in this regard as the determination of the question will depend upon the facts of each case."

9. Likewise, in ***CCE v. Cemphar Drugs and Liniments*** *1989 (40) ELT 276 (SC), the Supreme Court observed as under:*

"In order to make the demand for duty sustainable beyond a period of six months and up to a period of 5 years in view of the proviso to subsection 11A of the Act, it has to be established that the duty of excise has not been levied or paid or short-levied or short-paid, or erroneously refunded by reasons of either fraud or collusion or wilful misstatement or suppression of facts or contravention of any provision of the Act or Rules made thereunder, with intent to evade payment of duty. Something positive other than mere inaction or failure on the part of the manufacturer or producer or conscious or deliberate withholding of information when the manufacturer knew otherwise, is required before it is saddled with any liability, beyond the period of six months. Whether in a particular set of facts and circumstances there was any fraud or collusion or wilful misstatement or suppression or contravention of any provision of any Act, is a question of fact depending upon the facts and circumstances of a particular case."

10. Other High Courts too have invalidated SCNs where attempts were made by the Department to revive a matter sent to the Call Book several years later. These decisions include ***Siddhi Vinayak Syntex Pvt. Ltd. v. Union of India*** *2017 (352) ELT 455 (Guj.) and* ***Meghamani Organics Ltd. v. Union of India*** *2019 (368) ELT 433 (Guj.)"*

12. It is well settled in law that inordinate delay in adjudication of a show cause notice is fatal to its validity since it causes prejudice. In ***Kamaladitya Construction*** (supra), the Jharkhand High Court at paragraphs-21, 22, 25, 30, 31, 32 and 44 held as follows:-

"21. At this stage it is pertinent to note that the words "where it is possible to do so" is elastic only when there are reasonable grounds beyond the control of the adjudicating authority to conclude adjudication within the time frame given under Section 73(4B) and not otherwise.

22. If there is no reasonable explanation, the elasticity would not be available. It is fairly well settled that legislature never wastes words or says anything in vain. The insertion of sub-section (4B) by Finance (No. 2) Act, 2014 is not without any purpose or it is not a dead letter.

xxx xxx xxx

25. Similar provisions exist under Section 11A (11) of the Central Excise Act, 1944 and Section 28(9) the Customs Act, 1962. The period of limitation of 6 months or 1 year under Section 73(4B) of the Chapter V of the Finance Act, 1994 be extended to more than seven years as is done in the instant case.

xxx xxx xxx

30. In the case of Shree Baba Exports Vs. Commissioner of GST & Central Excise reported in (2022) 72 PHT 35 (P&H) [Para 13] it is held by the Punjab & Haryana High Court that the expression "where it is possible to do so" does not mean that the time prescribed can be extended perpetually and the time limit cannot be taken to be directory except in a case where the authority has a reason to offer as an explanation for extending the said time limit.

31. In the case of Meghmani Organics Ltd. Vs. UOI reported in 2019 (368) E.L.T. 433 (Guj.) [Para 24] it is held by the Gujarat High Court that when the legislature has used the expression "where it is possible to do so" it means that if in the ordinary course it is possible to determine the amount of duty with the specified time frame, it should be so done. Similar views have been held in the case of Siddhi Vinayak Put. Ltd Vs. UOI reported in 2017 (352) E.L.T. 455 (Guj.)

"19. Reliance was placed upon the decision of the Supreme Court in the case of Abdul Rehman Antulay v. R.S. Nayak, (1992) 1 SCC 225, and more particularly to the contents of paragraph 86 thereof, wherein the Supreme Court has laid down certain propositions which are meant to serve as guidelines. Reference was made to clause (3)(c) thereof, wherein the Court has observed that the concerns underlying the right to speedy trial from the point of view of the accused are (c) undue delay may well result in impairment of the ability of the accused to defend himself, whether on account of death, disappearance or non-availability of witnesses or otherwise. It was submitted that the said decision though rendered in the context of the provisions of the Code of Criminal Procedure would also be applicable to the facts of the present case, inasmuch as, the petitioner also is entitled to the right of speedy adjudication of the show cause notice issued against it and that the delay would result in disappearance or non-availability of witnesses and other documentary evidence on which the petitioner may place reliance. It was submitted that in case of indirect taxation, the sooner the decision is taken, the assessee can recover its dues from the Revenue or the Revenue from the as-sessee, as the case may be. It was submitted that if transferring of a matter to the call book to await adjudication by the higher authority is taken to its logical end, in a given case, if the Appellate Tribunal comes to a particular view and the aggrieved party approaches the High Court and thereafter the Supreme Court, the matters would remain in the call book for years together. It was submitted that the statute does not contemplate such a course of action."

> *32. In the case of GPI Textiles Ltd. Vs. UOI reported in 2018 (362) E.L.T. 388 (P&H) [Para 17] the Hon'ble Punjab & Haryana High Court has held that although the words 'where it is possible to do' has been used, that will not stretch the period to decades."*

In the aforesaid judgment, the Jharkhand High Court also referred to the decision of Punjab and Haryana High Court in case of ***M/s. Shree Baba Exports*** (supra), which has been confirmed by the Apex Court in S.L.P.(C) No. 12376 of 2022 disposed of on 29.07.2022.

13. Much argument was advanced with regard to transfer of the case to the call book. But fact remains, it has not been brought to the notice of the petitioner at any point of time, though the obligation casts on the department to inform the petitioner of transfer of the case to the call book. In ***ATA Freights Line*** (supra), the High Court of Bombay, at paragraphs- 23, 24, 27 and 29 held as follows:-

> "23. Neither the affidavit-in-reply nor the arguments advanced by the learned counsel for the respondents indicated that the petitioner was at any point of time informed about the transfer of file relating to the show cause notices in question to call book prior to the date of the petitioner's letter asking for closure report.
>
> 24. This Court in case of Parle International Ltd. (supra) after considering the identical facts and after adverting to the judgment in cases of Bhagwandas S. Tolani (supra), Sanghvi Reconditioners Pvt. Ltd. (supra) and Reliance Industries Ltd. (supra) held that that a show- cause notice issued a decade back should not be allowed to be adjudicated upon by the revenue merely because there is no period of limitation prescribed in the statute to complete such proceedings. Larger public interest requires that revenue should adjudicate the show-cause ppn 12 wp-3671.21_j_.doc notice expeditiously and within a reasonable period. It is held that keeping the show-cause notice in the dormant list or the call book, such a plea cannot be allowed or condoned by the writ court to justify inordinate delay at the hands of the revenue. This Court was accordingly pleased to quash and set aside the show cause notices which were pending quite some time.
>
> xxx xxx xxx
>
> 27. It is held that the respondent having issued the Show-Cause notice, it is their duty to take the said Show-Cause notice to its logical conclusion by adjudicating upon the said Show-Cause Notice within a reasonable period of time. In view of gross delay on the part of the respondent, the petitioner cannot be made to suffer. This Court accordingly was pleased to quash and set aside dated 16th September 2005 in that matter. The principles of law laid down by this Court in the above referred judgment would apply to the facts of this case. We are respectfully bound by the principles of law laid down by this Court in the said judgment. We do not propose to take a different view in the matter.
>
> xxx xxx xxx
>
> 29. In our view, since the respondents were totally responsible for gross delay in adjudicating the show cause notices issued by the respondents causing prejudice and hardship to the petitioner and have transferred the show cause notices to call book and kept in abeyance without communication to the petitioner for more than 7 to 11 years, the respondents cannot be allowed to raise alternate remedy at this stage. Be that as it may, no order has been passed by the respondents on the said show cause notices. The question of filing any appeal by the petitioner therefore did not arise."

The said judgment of the Bombay High Court has been confirmed by the apex Court in S.L.P (C) No. 828 of 2023 disposed of on 10.02.2023.

14. A serious contention was raised by learned Senior Standing Counsel for Revenue that due to availability of alternative remedy, i.e., filing of appeal under Section 35-B of the Act, the present proceeding is not maintainable.

15. In **Whirlpool** (supra), the apex Court held,

> *"However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power. And this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumental mandate of Article 14 or for other valid and legitimate reasons, for which the Court thinks it necessary to exercise the said jurisdiction."*

16. In ***Greatship (India) Limited*** (supra), the apex Court at paragraph-14 of the judgment held as follows:-

> *"14. At the outset, it is required to be noted that against the assessment order passed by the Assessing Officer under the provisions of the MVAT Act and CST Act, the petitioner straightway preferred writ petition under Article 226 of the Constitution of India. It is not in dispute that the statutes provide for the right of appeal against the assessment order passed by the Assessing Officer and against the order passed by the first appellate authority, an appeal/revision before the Tribunal. In that view of the matter, the High Court ought not to have entertained the writ petition under Article 226 of the Constitution of India challenging the assessment order in view of the availability of statutory remedy under the Act. At this stage, the decision of this Court in the case of United Bank of India Vrs. Satyawati Tondon, MANU/ SC/ 0541/ 2010 : (2010) 8 SCC 110 in which this Court had an occasion to consider the entertainability of a writ petition under Article 226 of the Constitution of India by by-passing the statutory remedies, is required to be referred to. After considering the earlier decisions of this Court, in paragraphs 49 to 52, it was observed and held as under:*
>
> *"49. The views expressed in Titaghur Paper Mills Co. Ltd. vs. State of Orissa (1983) 2 SCC 433 were echoed in CCE v. Dunlop India Ltd. (1985) 1 SCC 260 in the following words: (SCC p. 264, para 3)*
>
> *"3. ...Article 226 is not meant to short-circuit or circumvent statutory procedures. It is only where statutory remedies are entirely ill-suited to meet the demands of extraordinary situations, as for instance where the very vires of the statute is in question or where private or public wrongs are so inextricably mixed up and the prevention of public injury and the vindication of public justice require it that recourse may be had to Article 226 of the Constitution. But then the Court must have good and sufficient reason to bypass the alternative remedy provided by statute. Surely matters involving the revenue where statutory remedies are available are not such matters. We can also take judicial notice of the fact that the vast majority of the petitions under Article 226 of the Constitution are filed solely for the purpose of obtaining interim orders and thereafter prolong the proceedings by one device or the other. The practice certainly needs to be strongly discouraged."*
>
> *50. In Punjab National Bank v. O.C. Krishnan (2001) 6 SCC 569 this Court considered the question whether a petition under Article 227 of the Constitution was maintainable against an order passed by the Tribunal under Section 19 of the DRT Act and observed: (SCC p. 570, paras 5-6)*

"5. In our opinion, the order which was passed by the Tribunal directing sale of mortgaged property was appealable under Section 20 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (for short 'the Act'). The High Court ought not to have exercised its jurisdiction under Article 227 in view of the provision for alternative remedy contained in the Act. We do not propose to go into the correctness of the decision of the High Court and whether the order passed by the Tribunal was correct or not has to be decided before an appropriate forum.

6. The Act has been enacted with a view to provide a special procedure for recovery of debts due to the banks and the financial institutions. There is a hierarchy of appeal provided in the Act, namely, filing of an appeal under Section 20 and this fast-track procedure cannot be allowed to be derailed either by taking recourse to proceedings under Articles 226 and 227 of the Constitution or by filing a civil suit, which is expressly barred. Even though a provision under an Act cannot expressly oust the jurisdiction of the Court under Articles 226 and 227 of the Constitution, nevertheless, when there is an alternative remedy available, judicial prudence demands that the Court refrains from exercising its jurisdiction under the said constitutional provisions. This was a case where the High Court should not have entertained the petition under Article 227 of the Constitution and should have directed the respondent to take recourse to the appeal mechanism provided by the Act."

51. In CCT v. Indian Explosives Ltd. [(2008) 3 SCC 688] the Court reversed an order passed by the Division Bench of the Orissa High Court quashing the show-cause notice issued to the respondent under the Orissa Sales Tax Act by observing that the High Court had completely ignored the parameters laid down by this Court in a large number of cases relating to exhaustion of alternative remedy.

52. In City and Industrial Development Corpn. v. Dosu Aardeshir Bhiwandiwala [(2009) 1 SCC 168] the Court highlighted the parameters which are required to be kept in view by the High Court while exercising jurisdiction under Article 226 of the Constitution. Paras 29 and 30 of that judgment which contain the views of this Court read as under: (SCC pp. 175-76)

"29. In our opinion, the High Court while exercising its extraordinary jurisdiction under Article 226 of the Constitution is duty-bound to take all the relevant facts and circumstances into consideration and decide for itself even in the absence of proper affidavits from the State and its instrumentalities as to whether any case at all is made out requiring its interference on the basis of the material made available on record. There is nothing like issuing an ex parte writ of mandamus, order or direction in a public law remedy. Further, while considering the validity of impugned action or inaction the Court will not consider itself restricted to the pleadings of the State but would be free to satisfy itself whether any case as such is made out by a person invoking its extraordinary jurisdiction under Article 226 of the Constitution.

30. The Court while exercising its jurisdiction under Article 226 is duty- bound to consider whether:
(a) adjudication of writ petition involves any complex and disputed questions of facts and whether they can be satisfactorily resolved;
(b) the petition reveals all material facts;
(c) the petitioner has any alternative or effective remedy for the resolution of the dispute;
(d) person invoking the jurisdiction is guilty of unexplained delay and laches;
(e) ex facie barred by any laws of limitation;

(f) grant of relief is against public policy or barred by any valid law; and host of other factors.

The Court in appropriate cases in its discretion may direct the State or its instrumentalities as the case may be to file proper affidavits placing all the relevant facts truly and accurately for the consideration of the Court and particularly in cases where public revenue and public interest are involved. Such directions are always required to be complied with by the State. No relief could be granted in a public law remedy as a matter of course only on the ground that the State did not file its counter-affidavit opposing the writ petition. Further, empty and self-defeating affidavits or statements of Government spokesmen by themselves do not form basis to grant any relief to a person in a public law remedy to which he is not otherwise entitled to in law."

17. In ***Jindal Steel*** (supra), this Court, considering the question of maintainability of writ petition, held that against any decision taken by Commissioner of Central Excise as adjudicating authority, appeal lies to appellate tribunal and accordingly dismissed the writ petition with a direction to file appeal before appellate tribunal by making pre deposit of 5% of demand.

18. Though the above judgments were referred to by Mr. Satapathy, learned Sr. Standing Counsel with regard to availability of alternative remedy, but in the peculiar facts and circumstances of the case, since there is statutory infraction of adjudicating the dispute, inasmuch as, after long lapse of time of more than 15 years and without giving any reason to the objections raised by the petitioner in the show cause reply with regard to limitation, this Court does not deem it proper to relegate the petitioner to the forum for adjudication under Section 35-B of the Act. It is made clear that if with the knowledge of the authority the amalgamation has been made, pursuant to the order of this Court in a COPET case, after long lapse of the period prescribed under Section 11A of the Act, two proceedings cannot continue by issuance of notice of show cause.

19. In ***Eveready Industries*** (supra), the High Court of Madrass at paragraphs-38, 50 and 51 of the judgment held as follows:-

38. As we have seen from the language employed in Section 35E, which we have extracted above, a limited revisional jurisdiction is conferred upon the Principal Commissioner and Commissioner of Excise in Sub-Section (2) of Section 35E. This power is not actually to correct any error directly, on the part of an Adjudicating Authority. This power is available only for directing the Competent Authority to take the matter to the Commissioner (Appeals).

xxx xxx xxx

50. The very same argument now advanced by the Department to the effect that Sections 11A and 35E operate in two different independent fields was raised by them. After considering the issue elaborately and also after taking note of the decision in Asian Paints (India) Limited approved by the Supreme Court, this Court came to the conclusion in paragraph 23 as follows:

"In our opinion, there is no nexus between Section 11A and Section 35E. Section 11A does not indicate that the legislature intended to override Section 35E. Both sections have to be read harmoniously. In the present case, Annexure-I certificate has been issued in favour of the petitioners from time to time on executing B-8 security bond and on furnishing a bank guarantee. The Department has to follow the procedure under

> *Section 35E for setting aside the Annexure-I certificate. Unless, the Annexure-I certificate is cancelled or rejected by the competent Authority, by following the procedure under Section 35E, it is not permissible for the respondents to invoke Section 11A of the Act. Therefore, we are of the considered opinion that the issuance of show cause notices is without jurisdiction and is liable to be struck down."*
>
> *51. We are of the considered view that the paragraph extracted above is a complete answer to the question of law now raised. Unfortunately, in none of the decisions relied upon by the learned Standing Counsel, the Courts were confronted with an order of adjudication passed under Section 11B on an application. Once an application for refund is allowed under Section 11B, the expression 'erroneous refund' appearing in Sub-Section (1) of Section 11A cannot be applied. If an order of refund is passed after adjudication, the amount refunded will not fall under the category of erroneous refund so as to enable the order of refund to be revoked under Section 11A(1). One Authority cannot be allowed to say in a collateral proceeding that what was done by another Authority was an erroneous thing. Therefore, the question of law has to be answered in favour of the appellant/assessee and the appeal deserves to be allowed.*

20. In ***Parele International*** (supra), the question was raised with regard to adjudication of show cause notice dated 01.06.2006 and 28.11.2006 after 13 years. The Bombay High Court held the same as illegal, void and bad in law and quashed the same.

21. In ***Tata Steel*** (supra), in a fact akin to the present case, the Jharkhand High Court also quashed the show cause notices and notice of personal hearing and also common Order-in-Original.

22. In ***BT (India) Pvt. Ltd.*** (supra), the Delhi High Court had not accepted the plea of alternative remedy, taking into account the fact that the action was taken in gross violation of the principles of natural justice and undisputedly a violation of the principles of natural justice constitutes an exception to the self-imposed restraint, which is exercised when called upon to invoke constitutional powers conferred by Article 226 of the Constitution. As such, the Delhi High Court found that the second respondent while considering the claim for refund has clearly acted in excess of the jurisdiction which could have been exercised and accordingly rejected the objection of the authority.

23. Considering the factual and legal aspects, as discussed in the foregoing paragraphs, this Court is of the considered view that the notice of show cause issued on 10.09.2008 under Annexure-2 and consequential personal hearing notices dated 05.12.2017 and 05.01.2018 under Annexure-3 (Colly.) issued after long lapse of 9 years from the issuance of show cause notice dated 10.09.2008 and the Order-in-Original dated 04.09.2023 under Annexure-9, whereby demand made in the show cause notice dated 10.09.2008 has been confirmed, cannot be sustained in the eye of law and the same are liable to be quashed and are hereby quashed.

24. The writ petition is accordingly allowed. But, however, in the facts and circumstances of the case, there shall be no order as to costs.

—— o ——

2024 (II) ILR-CUT-462

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

W.P(C) NOS.8290 & 15877 OF 2016

BHARAT KUMAR JANI & ANR. ……Petitioners

-V-

STATE OF ODISHA & ORS. ……Opp.Parties

&

W.P(C) NO. 15877 OF 2016

STATE OF ODISHA -V- RAJESWAR BISOYI & ORS.

(A) SERVICE LAW – Vacancies occur prior to amendment of Rule – Whether the vacancies would be filled up on the basis of new Rule or old Rules? – Held, the vacancies should be filled up as per the 'Rule in force', as on the date consideration take place. (Paras 15-16)

(B) DOCTRINE OF FAIRNESS – "Doctrine of Fairness" – Explained with reference to case laws. (Paras 11-12)

Case Laws Relied on and Referred to :-

1. (2005) 7 SCC 396 : Government of India & Ors. vrs Indian Tobacco Association.
2. (2006) 6 SCC 289 : Vijay vs. State of Maharastra & Ors.
3. (1968) 3 SCR 623 : Keshavlal Jethalal Shah vs. Mohanlal Bhagwandas & Another.
4. (1983) 3 SCC 284 : Y.V.Rangaiah & Ors. vrs. J.Sreenivasa Rao & Ors.
5. (1983) 3 SCC 33 : A.A.Calton Vrs. Director of Education and another.
6. (1997) 10 SCC 419 : State of Rajasthan Vrs. R.Dayal & Ors.
7. (1998) 9 SCC 223 : B.L.Gupta and another vrs. M.C.D.
8. (2008) 3 SCC 641 : A.Manoharan & others vrs. Union of India & Ors.
9. (2005) 4 SCC 154 : A.P.Public Service Commission vrs. B.Swapna & Ors.
10. (2023) 3 SCC 773 : State of Himachal Pradesh & Ors. vrs Raj Kumar & Ors.
11. 2023 SCC Online 344 : Tajvir Singh Sodhi & Ors. vs. State of Jammu and Kashmir & Ors.

For Petitioners : Mrs. P.Rath, Sr. Adv. along with Mr. B.Mohanty

For Opp.Parties : Mr. B.Mohanty, AGA Mr. P.K.Rath, Sr. Adv. (O.P.Nos. 10 & 11-cum-Interveners), Mr. B.Parida

JUDGMENT Date of Hearing : 12.04.2024 : Date of Judgment : 14.05.2024

G. SATAPATHY, J.

1. Challenge by different parties as petitioners to the common order dated 22.03.2016 passed in O.A. No. 3633(C) of 2015 and connected batch of cases is identical in nature in both the writ petitions and they are accordingly disposed of by this common judgment.

2. The petitioners-Bharat Kumar Jani and Bishnu Charan Sahu who were working as Assistant Engineer (AE) and Junior Engineer (JE) Civil respectively in W.P.(C) No. 8290 of 2016 and the State of Orissa being represented by Principal Secretary to Government in Department of Water Resources in W.P.(C) No. 15877 of 2016 have prayed to quash/set aside the common order dated 22.03.2016 passed by the learned Orissa Administrative Tribunal, Cuttack Bench, Cuttack (hereinafter referred to as "Tribunal") in O.A. No. 3633(C) of 2015 and connected three other O.As. by filing

these two writ petitions. The Tribunal by the impugned order has held and passed the following orders/directions:-

> (i) The Odisha Engineering Service (Method of Recruitment and Conditions of Service) Amendment Rules, 2015 has no application to the present recruitment and the posts advertised and accordingly the corrigendum issued pursuant to the said amendment vide Annexure-2 series (in O.A.No.3633(c)/2015) are bad in law and the said corrigenda are quashed.
>
> (ii) Selection and appointment, if any, made pursuant to the impugned corrigendum are quashed,
>
> (iii) Advertisement issued in respect of the posts exceeding ceiling limit of 50% reservation is bad in law being violative of the principle of reservation and hence quashed.
>
> iv) Action of the OPSC in excluding incorrect questions/questions out of syllabus for evaluation is also illegal and hence set aside.

Consequently; instead of quashing the entire recruitment, which will affect a large number of meritorious candidates; the respondents, State of Odisha and OPSC are directed;

> (i) to prepare merit list in respect of the candidates, who have applied and appeared in the recruitment examination pursuant to 1st advertisement dated 17.04.2015 (without giving any relaxation as per the corrigendum) restricting reservation to the extent of 50%,
>
> (ii) Following the decision of the Hon'ble Supreme Court, while preparing the merit/select list, the OPSC is directed to delete the incorrect question/question out of syllabus (faulty questions) and add/allot pro-rata mark.

On the basis of the select list prepared, appointment orders be issued in favour of the selected candidates.

The entire exercise be completed within a period of two months from the date of receipt of a copy of this order.

3. The sum and substance of facts involved in both the writ petitions are identical, but for convenience and in order to avoid repetition, the facts as described in W.P.(C) No. 8290 of 2016 are delineated in brief as, the petitioners being the AE & JE (Civil) are working in Government of Orissa in Water Resources Department under Minor Irrigation Cadre and Major and Medium Irrigation Cadre. On receipt of requisition from Government of Odisha, on 17.04.2015 Orissa Public Service Commission (In short the "OPSC") published Advertisement No. 03 of 2015-16 for filling up post of Assistant Executive Engineer in both Civil and Mechanical Branch belonging to Housing & Urban Development Department (134 posts), Water Resources Department (291 posts in Civil and 25 posts in Mechanical) and Works Department (232 posts); all total 682 (657 in Civil & 25 in Mechanical) posts. It was stipulated in the advertisement that the last date for submission of online application form was fixed to 27.05.2015 by 11.59 P.M. and last date for receipt of print out/hard copy of online application form was fixed to 12.06.2015 by 5.00P.M. By the aforesaid advertisement, the detail of vacancies position along with reservation, eligibility criteria, application fees, method of selection and place of examination, other conditions, certificates & documents required to be attached in the form and how to apply etc.were specified and pursuant to such advertisement,

the petitioners who were working in Water Resources Department, Government of Odisha had applied for the posts in respect of that Department along with other candidates including O.P. Nos. 4 to 8 as well as OP Nos. 10 & 11 who were added as a parties on their intervention applications in I.A. No. 18287 of 2018 & I.A. No. 3009 of 2020 by order No. 04 dated 14.03.2019 & order No. 06 dated 19.08.2021 respectively passed by this Court (hereinafter the candidates appeared in the recruitment test are referred to as the "applicants"), but subsequently, on 29.05.2015, the OPSC issued two corrigenda to the original Advertisement No. 03 of 2015-16 following the requisition received from Water Resources Department, which issued the requisition consequent upon the amendment to the Rules titled as Orissa Engineering Service (Methods of Recruitment and Conditions of Service) Rules, 2015 (In short "Amendment Rules, 2015"). In the first Corrigendum, the 2nd sub-Para of Para-4 of the Advertisement No. 03 of 2015-16 was substituted by the following sentence:-

> *"the upper age limit is relaxable by 5 (five) years for candidates belonging to the categories of Scheduled Castes (S.C.),Scheduled Tribes (S.T.), Socially & Educationally Backward Classes (S.E.B.C.),Women, Ex-servicemen, and by 10 (ten) years for candidates belonging to Physically handicapped (O.H./H.I.) category, whose disability should not be less than 40%".*

Similarly, in the second Corrigendum, a proviso was inserted after the 2nd sub-Para of Para-4 by inserting the following paragraph:-

> *"Provided further that the maximum age limitshall be relaxed to 45 years in respect of the candidates who have entered the Diploma Engineers' Service as Junior Engineers whether promoted to the post of Asst. Engineer or not within the prescribed age limit without the qualification prescribed under clause(b) of rule 6 and have subsequently acquired the same while serving as such or have acquired such qualification prior to entering the State Government Service as Junior Engineers subject to availing of not more than 5 chances".*

Further, in the said Corrigendum after Para-2 Note(e) of the Advertisement, the following clause was inserted:-

> *"As per G.A. Dept. Resolution No. 33044 dated 11.12.2014 published in the Odisha Gazette on 15.12.2014 the Govt. have extended the benefit of reservation for Sportsmen enumerated in G.A. Dept. Resolution No. 24808 dated 18.11.1985 in case of direct recruitment to Group A (JB) services/posts. Out of 657 posts advertised for Assistant Executive Engineer (Civil), 7 (seven) posts are reserved for Sports men as per resolution dated 18.11.1985 within the respective category".*

Further, in the Corrigendum the last date for submission of online application was extended up to 11.59 PM on 15.06.2015 and hard copy of online application up to 5.00PM on 27.06.2015. However, after three months of issue of Corrigenda, the applicants appeared in the examination on 30.08.2015, but before publication of result of written examination, on 29.09.2015, OP Nos. 7 & 8 filed O.A. No. 2652(C) of 2015 and O.A. No. 2653(C) of 2015 respectively and on 05.10.2015, OP No.4 filed O.A. No. 3633(C) of 2015, whereas OP No.5 filed O.A. No. 3551(C) of 2015 before the Tribunal challenging the recruitment process pursuant to the Advertisement No. 03 of

2015-16 *inter alia* questioning the legality of two Corrigenda and clubbing backlog vacancies including vacancies meant of reserved category, in addition to the legality of the advertisement for violation of principle of reservation exceeding the ceiling limit of 50%. In these OAs, initially interim orders were passed on 06.10.2015 permitting the recruitment process to continue, but not to publish the result. However, the aforesaid interim order was modified on 04.12.2015 by the Tribunal in O.A. No. 3551(C) of 2015 permitting to declare the result subject to final outcome of these OAs and accordingly, the result of the recruitment pursuant to Advertisement No. 03/2015-16 was published by OPSC recommending the names of 675 candidates (651 in Civil + 24 in Mechanical), but only four persons including the present petitioners were successful in the recruitment process as inservice Junior Engineer/Assistant Engineer and were selected for the posts after facing both written and viva voce tests and in the process, the names of inservice selected Junior Engineers and Assistant Engineers were forwarded to the Government.

4. In W.P.(C) No. 8290 of 2016, the challenge of OPNo.4 as petitioner in O.A. No.3633(C) of 2015 and that of O.P.No.5 as petitioner in O.A. No.3551(C) of 2015 is identical and they have questioned the validity of the two Corrigenda in the OAs enlarging the scope of candidates who were initially found not to be eligible. Further, OPNo.7 as petitioner in OA No. 2653(C) of 2015 and O.P.No.8 as petitioner in OA No.2652(C) of 2015 in addition to challenge of OPNos.4 and 5 have also challenged the recruitment process pursuant to the advertisement for clubbing up the back log vacancies meant for reserved category instead of going for a special drive to fill up the reserved vacant post. Further, OPNo.5 has claimed the advertisement to be violative of principle of reservation for exceeding the ceiling limit of 50% and indulgence of widespread malpractices by candidates in examination using smart phones, I-pad and other electronic gazettes to solve the questions inside the examination hall. It is also alleged by him that even outsiders were allowed to appear in the examination by impersonating to assist some of the candidates by appearing for them. One of the allegations against OPSC by OPNo.5 in OA is that the question papers had not been set properly and the question papers contained out of syllabus questions as well as wrong questions were framed therein and some of the questions were having more than one answer, which greatly affected the candidates like him. It is accordingly prayed in the OAs to cancel the examination and to direct for conducting fresh examination.

5. In these OAs, the State and OPSC had filed separate counter affidavits. It is, however, stated in these counter affidavits that the Orissa Service of Engineer Rules, 1941 (In short the "Rules 1941") was in force for a long time, but after finding the majority of the provisions of the Rules to have become obsolete, the Orissa Engineering Service (Method of Recruitment and Conditions of Service) Rules, 2012 (In short, Rules, 2012) was framed and Orissa Engineering Service Cadre was restructured, but the Rules, 1941 does not limit the age relaxation for in service candidates like Junior Engineer within the prescribed age limit and thus, by taking into account the case of inservice candidates without the qualification as prescribed under Clause-d to Rule-9, but subsequently acquiring the same while serving as such which was not available in Rules, 2012 and to tide over the discontentment amongst the Diploma holders working

as Junior Engineers/Assistant Engineers in Orissa Engineering Service for being deprived of appearing in the examination for recruitment to the post of Assistant Executive Engineer due to overage and on the demand of the Diploma Engineers Service Association, the Amendment Rules, 2015 was brought with due approval of the Governor with effect from 21.05.2015 and thereby, no illegality was committed by issuance of Corrigenda which was issued pursuant to the requisition received from the Government in Water Resources Department and the said amendment to the Rules is in accordance with the proviso to Article 309 of the Constitution of India and in terms of the Corrigenda, relaxation in maximum age up to 45 years has been provided to the Degree holder Junior Engineer/Assistant Engineer of Diploma Engineering Service for recruitment to the post of Assistant Executive Engineer Civil and Mechanical. Additionally, it is stated in the counter affidavit that there was no wrong question except repetition of one question in Civil Engineering and four out of syllabus questions in Mechanical Engineering which are to be rectified by excluding those questions from the purview of evaluation and there is absolutely no malpractice indulged as claimed in view of the fact that the Collector concerned on being asked submitted report to have conducted written examination smoothly and fairly in a disciplined manner.

6. O.P.No.4 as the petitioner in O.A No. 3633(C) of 2015 filed his rejoinder to the counter affidavits stating *inter alia* that there is no provision in amended Rules, 2015 to make it retrospective and the settled position of law is that in absence of any provisions, the Act and Rules are prospective and even if he has accepted the terms and conditions of the advertisement and appeared in the written examination, yet there being no Rule of estoppel against the provision of law and thus, there is no bar for the petitioner to challenge the issuance of Corrigenda at a subsequent stage, but there is no scope for age relaxation to SEBC candidates, since the Orissa Reservation of Post and Services (Socially Educationally Backward Classes, 2008) has been declared ultra vires by the Tribunal.

7. After having analyzed the materials on record including the rival pleadings together with relevant rules and noticing upon the dictums of some decisions upon hearing the learned counsel for the parties, the Tribunal passed a common order in these four OAs, which is impugned in these two writ petitions filed by the State of Orissa, and two employees working as Assistant Engineer (Civil) and Junior Engineer (Civil), who are found successful in the Recruitment Test, by issuing a slew of directions indicated in the first paragraph.

8. It is, however, clarified that O.P.No.4-Rajeswar Bisoyi, O.P.No.5-Saumyadipta Sahoo and O.P.No.8-Sibasankar Tandia have also filed separate writ petitions in W.P.(C) Nos. 8871, 7756 & 8063 of 2016 respectively in the matter relating to impugned order, but these writ petitions were dismissed by an order passed by this Court on 04.08.2023 for non-prosecution. Further, OPNo.11-Rajib Lochan Padhi was impleaded as a party in both the writ petitions on his intervention application in I.A. No.18287 of 2018 and I.A. No.138 of 2019 by two different orders passed by this Court on 14.03.2019 on which date, while admitting both the writ petitions, orders were also passed therein by this Court clarifying that no intervention application would be

entertained after 25.03.2019 and whosoever wants to file intervention application, he may file the same before 25.03.2019. However, one Suryakanta Pradhan who wanted to support the impugned order passed by the Tribunal has been impleaded as O.P.No.10 by an order passed by this Court on 19.08.2021 in IA No.3009 of 2020 arising out of W.P.(C) No.8290 of 2016, but on 28.08.2023 four unsuccessful candidates in the recruitment process have also filed an intervention petition in I.A. No.13534 of 2023 in W.P.(C) No.15877 of 2016 to be impleaded as parties, however, in order to provide fair opportunity to them, the counsel representing the aforesaid four unsuccessful candidates has also been heard in the matter, notwithstanding to their filing of intervention application beyond the time stipulated by this Court.

9. Mrs. Pami Rath, learned Senior Counsel appearing along with Mr.B.Mohanty, learned counsel appearing for the petitioners in W.P.(C) No. 8290 of 2016 has submitted that the learned Tribunal has gone wrong in appreciating the facts involved in this case by observing that the OPSC had issued Corrigenda after the last date of submission of application which is very much contrary, since after issuance of Corrigenda, the last date for submission of online application and hard copy of application were extended from 17.05.2015 to 15.06.2015 and 12.06.2015 to 27.06.2015 respectively. It is, however, submitted that the Tribunal has erroneously considered the posts advertised were back log vacancies of the year 2014, but the vacancies were admittedly arose from the year 1989 in different Departments and these vacancies had existed when 1941 Rules was prevalent, which provides the same benefits as were introduced by the Corrigenda, but benefitting some candidates after initiation of recruitment process is impermissible, which is the principle under which Corrigenda were struck down, however, such Corrigenda would only render the same provisions as were introduced by way of amendment to the 2012 Rules applicable to all the candidates and thereby the claim of the applicants in OAs would become meaningless. It is alternatively argued that since the vacancies that had arisen prior to the amendment, the Rules, 1941 being applicable to all the applicants is having same effect with the Rules, 2012 along with the amendment Rules of 2015 and therefore, the Tribunal has fallen in error in quashing the Corrigenda. Mrs. Rath has although argued with regard to rest of the findings of the Tribunal, but she, however, has not seriously argued with regard to the observation of the Tribunal regarding maintaining of reservation limit at 50% and allotment of pro-rata mark in respect to answers to wrong and out of syllabus questions.

9.1. Mr.Biplab Mohanty, learned Additional Government Advocate in reiterating the submissions of Mrs. Rath has further submitted that the learned Tribunal has passed the impugned order on wrong appreciation of facts and incorrect interpretation of law by taking into consideration the irrelevant materials which are not germane to the issue and the applicants in OAs having appeared in the examination, it is not open for them to challenge the recruitment process after being remained unsuccessful. It is further submitted by Mr.Mohanty that since none of the selected candidates having being made as parties by the applicants in OAs, the OAs are not maintainable, but ignoring such issue, the learned Tribunal has passed the impugned order. In confining his submission, Mr.Mohanty has prayed to allow the writ petitions by quashing the impugned order so far as it relates to quashing of Corrigenda issued by OPSC.

9.2. Mr.Prafulla Kumar Rath, learned Senior Counsel appearing for the intervener in W.P.(C) No. 8290 of 2016 and W.P.(C) No. 15877 of 2019 has submitted that since the Corrigenda were issued after initiation of the selection of process in the recruitment examination, it cannot confer any right to those persons who were made eligible by issuance of Corrigenda to appear in the examination since by introduction of Corrigenda, the scope of ineligible candidates for recruitment to the post advertised was enlarged and thereby, affecting the prospect of eligible candidates and the Tribunal has rightly passed order directing to struck down the Corrigenda. It is also brought to the notice of the Court by Mr.Rath that OP No. 10 who has been impleaded as party on his intervention has filed OA No. 2474(C) of 2015 which was disposed of in terms of the impugned order and since the impugned order having extended benefit to the persons who only were eligible in terms of the advertisement prior to the issuance of Corrigenda, any interference in the impugned order to upheld the Corrigenda in these writ petitions would cause great hardship to the candidates.

9.3. Mr.B.Parida, learned counsel appearing for the intervener in W.P.(C) No. 15877 of 2019 has confined his submission supporting the impugned order by *inter alia* contending that the order impugned in this writ petition being passed on sound appreciation of facts and correct interpretation of law needs no interference. Accordingly, Mr.P.K.Rath, learned Senior Counsel and Mr. B.Parida, learned counsel appearing for the respective intervener-opposite parties have prayed to dismiss the writ petitions.

10. After having duly considered the rival submissions upon going through the materials placed on record, since there being no factual dispute, this Court considers it appropriate to re-examine the findings of the learned Tribunal by applying the principle of law to the admitted facts of the case. For the purpose of regulating the Method of Recruitment and Conditions of Service in Orissa Engineering Service, the Rules, 1941 was prevalent prior to coming in force the 2012 Rules which has been framed under the proviso to Article 309 of the Constitution of India and the aforesaid Rule has been brought into force with effect from 3rd January, 2013, but subsequently, this Rule was amended vide the Amendment Rules, 2015 by incorporating a paragraph to the proviso to Rule 6 of the Rules 2012, which is mainly for providing age relaxation up to 45 years and some relaxation in qualification for in service candidates. The Amendment Rules 2015 came into force with effect from 21.05.2015, but by this time, Advertisement No. 03/2015-16 had already been published inviting application for eligible candidates for recruitment to the post of Assistant Executive Engineer (Civil) and Assistant Executive Engineer (Mechanical) in Group 'A' of Orissa Engineering Service under Water Resources Department, Works Department and Housing & Urban Development Department through OPSC who had issued the advertisement on 17.04.2015 for filling of 682 posts in the above three Departments and pursuant to requisition received from Government in Water Resources Department, OPSC accordingly issued Corrigenda on 29.05.2015 by which age relaxation to JE/AE and reservation to sports persons were provided, but while doing so, the OPSC extended the last date for submission of application of the candidate in online mode from 27.05.2015 to 15.06.2015 and for submitting hardcopy from 12.06.2015 to 27.06.2015. it is, however, not disputed that the

amended Rules, 2015 came into force on 21.05.2015 and the OPSC had issued the Corrigenda pursuant to the requisition of Water Resources Department vide letter dated 23.05.2015 which was within the last date for submission of application. However, the Corrigenda issued to include reservation for sports person was already been notified in Odisha Gazette w.e.f. 11th December, 2014 which of course cannot be said to be after the last date for submission of application. Be that as it may, since the last date for submission of application form having being extended and no prejudice having being claimed by any of the candidates who had applied for the post pursuant to the advertisement, it would be neither correct to say that no reasonable opportunity has been provided to the candidates nor can it be said that the Corrigenda were issued after the last date for submission of application depriving any of the candidates to take its benefit.

11. It is of course true that the applicants in OAs, however, had claimed that by introduction of Corrigenda, the scope for some of the ineligible candidates as on last date of application on 27.05.2015 was enlarged to deprive the prospective candidates in the process of selection and the amended rules should not be retrospective which was in fact weighed in the mind of the Tribunal while quashing the Corrigenda. Adverting to the findings of the Tribunal on this aspect of striking down the Corrigenda, this Court reminds itself that a statutory rule or act or notification may physically consists of words printed on papers, but conceptually it has far reaching consequence either benefitting or depriving some persons. It is also equally true that the principle of law emanates from the latin phrase "*lex prospicit non respicit*" which means law looks forward not backward. However, for the purpose of supplying an obvious omission in a former legislation or to explain a former legislation, it may be retrospective in operation, since the presumption would be that such a legislation giving it a purposive construction would give it a retrospective effect. While examining the retrospective or prospective operation of a statute or Rule, more particularly in absence of any provision for it, the "doctrine of fairness" would have to be considered. In other words, where a benefit is conferred by a legislation, the Rule against a retrospective construction would be different, however, if a legislation confers a benefit on some persons, but without inflicting a corresponding detriment on some other person or on the public generally; and where to confers such benefit appears to have been the legislature's object, then the presumption would be for giving it a purposive construction benefitting the persons by way of retrospective operation. This is exactly the principle by which procedural law are considered to have retrospective operation. The "doctrine of fairness" was held to be relevant factor to construe a statute conferring a benefit in the context of it to be given a retrospective operation as held in ***Government of India and others vrs Indian Tobacco Association***; ***(2005) 7 SCC 396***, wherein at paragraph-27 it is further held by the Apex Court that where a statute is passed for the purpose of supplying an obvious omission in a former statute, the subsequent statute relates back to the time when the prior act was passed. In the aforesaid decision, the Apex Court has further held at paragraph-29 as under:-

> *"29. The question has furthermore to be considered having regard to the language and object discernible from the statute read as a whole. The Respondents were not ineligible from obtaining the benefit. Once they are held to be eligible for obtaining the benefit, the amended notification being an exemption notification should receive the beneficent construction."*

12. The same definition of fairness to hold "a statute retrospective in nature" was applied in the case of ***Vijay vs. State of Maharastra and Others***; ***(2006) 6 SCC 289*** wherein at paragraph-12, the Apex Court has held as under:-

> *"12. xxx xxx xxx xxx xxx*
> *It is now well-settled that when a literal reading of the provision giving retrospective effect does not produce absurdity or anomaly, the same would not be construed to be only prospective. The negation is not a rigid rule and varies with the intention and purport of the legislature, but to apply it in such a case is a doctrine of fairness. When a law is enacted for the benefit of the community as a whole, even in the absence of a provision, the statute may be held to be retrospective in nature."*

13. In ***Keshavlal Jethalal Shah vs. Mohanlal Bhagwandas & Another (1968) 3 SCR 623***, a eight Judge Constitutional Bench of our Apex Court has held at paragraph-15 of the judgment as under :-

> *"15. The amending clause does not seek to explain any pre-existing legislation which was ambiguous or defective. The power of the High Court to entertain a petition for exercising revisional jurisdiction was before the amendment derived from s. 115 Code of Civil Procedure, and the Legislature has by the Amending Act attempted to explain the meaning of that provision. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act."*

14. On liberal construction of the Rules as directed by the decisions referred to above would not render the Corrigenda inoperable, since the Corrigenda were issued to advance substantial justice and by it, no person or candidate was deprived of to appear in the examination, rather the Corrigenda was intended to fill-up or supplement the eligibility conditions of the in-service candidates by grant of age relaxation which in no manner debar or disqualify any of the prospective candidates from applying and appearing in the examination. Even otherwise, the Corrigenda issued can be considered to have retrospective operation by applying the principle culled out in the decisions referred to above.

15. A careful glance of the impugned judgment, it appears to the Court that while striking down the Corrigenda, the learned Tribunal has mainly relied upon the decisions in (i) ***Y.V.Rangaiah and others vrs. J.Sreenivasa Rao and others; (1983) 3 SCC 284***, (ii) ***A.A.Calton Vrs. Director of Education and another;(1983) 3 SCC 33***, (iii) ***State of Rajasthan Vrs. R.Dayal and others; (1997) 10 SCC 419***, (iv) ***B.L.Gupta and another vrs. M.C.D.; (1998) 9 SCC 223***, (v) ***A.Manoharan & others vrs. Union of India and others; (2008) 3 SCC 641*** and (vi) ***A.P.Public Service Commission vrs. B.Swapna and others; (2005) 4 SCC 154*****,** but in ***State of Himachal Pradesh and others vrs Raj Kumar and others; (2023) 3 SCC 773***, on a extensive survey of 15(fifteen) case laws holding the field of retrospective or prospective operation of the Rule, the Apex Court has distinguished the principle as laid down in ***Y.V.Rangaiah*** (supra) by holding in paragraphs-82.1 to 82.5 as under:-

> *"**82.1. There is no rule of universal application that vacancies must be necessarily filled on the basis of the law which existed on the date when they arose**, Rangaiah case must be understood in the context of the rules involved therein.*

> ***82.2****. It is now a settled proposition of law that a candidate has a right to be considered in the light of the existing rules, which implies the "rule in force" as on the date consideration takes place. The right to be considered for promotion occurs on the date of consideration of the eligible candidates.*
>
> ***82.3.*** *The Government is entitled to take a conscious policy decision not to fill up the vacancies arising prior to the amendment of the rules. The employee does not acquire any vested right to being considered for promotion in accordance with the repealed rules in view of the policy decision taken by the Government. There is no obligation for the Government to make appointments as per the old Rules in the event of restructuring of the cadre is intended for efficient working of the unit. The only requirement is that the policy decisions of the Government must be fair and reasonable and must be justified on the touchstone of Article 14.*
>
> ***82.4.*** *The principle in Rangaiah need not be applied merely because posts were created, as it is not obligatory for the appointing authority to fill up the posts immediately.*
>
> ***82.5.*** *When there is no statutory duty cast upon the State to consider appointments to vacancies that existed prior to the amendment, the State cannot be directed to consider the cases."*

In the aforesaid judgment in ***Raj Kumar (supra)***, while holding that the decision in ***Y.V.Rangaiah(supra)*** is impliedly overruled, the Apex Court has also distinguished the decision in ***B.L. Gupta (supra), A.A. Calton (supra), R. Dayal (supra)*** and further held in paragraph-85.1 as under:-

> *"**85.1.** The statement in Y.V. Rangaiah v. J. Sreenivasa Rao that, "**the vacancies which occurred prior to the amended Rules would be governed by the old Rules and not by the amended Rules", does not reflect the correct proposition of law** governing services under the Union and the States under Part XIV of the Constitution. It is hereby overruled."*

16. It is also equally settled that a candidate appearing in the examination has no vested right to be appointed against a post advertised, but certainly he has right to be considered fairly for appointment subject to the applicable rules. It is also not disputed that the State has right to stop recruitment process at any time before appointment, but it has to justify its action on the touchstone of Article 14 of the Constitution of India, if it adopts such a course. Further, the existence of vacancy does not give rise to a legal right to a selected candidate. Thus, it is to be understood in the light of aforesaid decisions that any accrued or vested right of the applicant has not been taken away by the amendment of the Rules since a candidate has a right to be considered in the light of existing rules namely Rules in force as on the date. In other words, the candidates who had appeared in the examination and passed the written examination has only legitimate expectation to be considered according to the Rules then in vogue and the Government is entitled to conduct selection in accordance with the amended Rules and make final recruitment.

17. Yet, another aspect which is linked in this case is that the applicants in the OAs had challenged the Corrigenda after appearing in the examination with full knowledge of the Corrigenda and the Corrigendum issued for age relaxation to bring participation of inservice candidates who were out of zone of consideration at the initial stage of advertisement. It is also not in dispute that the applicants had approached the Tribunal

after four to five months of the issuance of Corrigenda which is after consciously participating in the recruitment process pursuant to the advertisement issued for filling up the vacancies for the post of Assistant Executive Engineer, but this Court is conscious of the principle that a candidate can challenge the selection process, but once he having taken part in the selection process without any protest cannot after words normally challenge the same. In this regard, this Court considers it apt to refer to the decision in ***Tajvir Singh Sodhi and others vrs. State of Jammu and Kashmir and others; 2023 SCC Online 344***, wherein it has been held that candidates having taken part in the selection process without any demur or protest, cannot challenge the same after having being declared unsuccessful and candidates cannot approbate or reprobate at the same time. In the present case soon after issuance of Corrigenda, neither the applicants in the OAs had challenged the Corrigenda immediately nor had they protested the same by making representation either to the Department or to OPSC, but they had consciously applied to sit in the examination and sometime after appearing in the examination, they suddenly had challenged the Corrigenda before the Tribunal which only reflects their acquiescence to the Corrigenda by waiver and the interveners stand in much lesser footing than the applicants, since neither they had challenged the Corrigenda in the Tribunal nor before this Court which relegates them to be fence sitter watching the litigation between some of the examinee and the recruitment agency/ department and taking a calculative steps by filing intervention application in these writ petitions only to support the impugned order. However, the dicta of ***Tajvir Singh Sodhi (supra)*** would squarely applicable in the case of interveners, since they only dispute the issuance of Corrigenda after unsuccessfully appearing in the examination. Besides, the intervener, who has been impleaded as O.P. No.10 in W.P.(C) No.8290 of 2016 had filed O.A. No.2474 of 2015 with a prayer to direct OPSC to conduct recruitment test afresh, but the Tribunal having disposed of the same O.A. in the light of direction and observation passed in the impugned order and he having approached this Court in the year 2020 was added as O.P. No.10 to the writ petition, however, he has filed counter affidavit only to support the findings of the Tribunal, not withstanding to his claim and prayer to direct for conducting fresh recruitment test. More or less, is the case of the other intervener Rajiv Lochan Padhi, who has been impleaded as O.P. No.11 to the writ petition. On the other hand, the interveners in I.A. No.13534 of 2023 to the writ petition in W.P.(C) No.15877 of 2016 have never challenged the Corrigenda in any forum and for the first time, they have filed the aforesaid intervention application to interfere in the matter, but this Court, however, has afforded opportunity to the counsel for the aforesaid interveners to argue in the matter. In the aforesaid situation, the interveners in I.A. No.13534 of 2023 having approached to this Court after long lapse of issuance of advertisement/Corrigenda and that too, they having unsuccessful in the examination, their case is squarely covered by the principle enunciated in ***Tajvir Singh Sodhi (supra).***

18. In view of the discussions made hereinabove and on factual analysis, there appears no dispute that the learned Tribunal while striking down the Corrigenda has not only erroneously applied the law, but also has incorrectly considered that the Corrigenda were issued two days after the last date of submission for application which was in fact extended and the quashing of Corrigenda by the Tribunal would appear to be erroneous

in view of the law laid down by the Apex Court in ***Raj Kumar (supra)*** and the same cannot stand the legal scrutiny. Hence, the impugned order so far as it relates to quashing of the Corrigenda issued by OPSC being unsustainable in the eye of law is hereby set aside.

19. On coming to the rest of the findings of the Tribunal in the impugned order with regard to the limit of reservation, this Court has no hesitation to reiterate that the settled law is that the extent of reservation cannot exceed 50%, since the same has been held by various Constitutional Court and thereby, the direction of the Tribunal to limit the reservation up to 50% and not to exceed beyond that being constitutionally valid cannot be interfered with. Further, none of the writ petitioners have raised the issue to dispute the ceiling limit of 50% reservation. In respect of the other findings of the Tribunal with regard to excluding the incorrect question and out of syllabus questions from the purview of evaluation, it appears that the learned Tribunal has rightly taken into consideration the paragraph-2 of the counter affidavit of the OPSC filed in the OAs and thereby, passing of direction to prepare merit/select list by deleting the incorrect questions or questions out of syllabus and allotting pro-rata mark cannot be considered to be erroneous and this finding has never been challenged by any of the writ petitioners. In the net result, what is settled is that an employer cannot be forced to fill up all the existing vacancies under the old Rules. The employer may, in a given situation, withdraw an advertisement and issue a fresh advertisement in conformity with the new or amended Rules. Even otherwise, a candidate included in the merit/select list has no indefeasible right to appointment even if the vacancies exist.

20. On cumulative assessment of the materials placed on record and discussions made hereinabove, this Court only finds the direction of the Tribunal quashing the Corrigenda to be erroneous and accordingly, such finding of the Tribunal is directed to be set aside. Further, the consequent direction not to provide age relaxation to the inservice candidates in terms of Corrigendum as recorded in (i) of 2nd sub-para of paragraph-33 of the impugned order is also set aside.

21. In the result, both the writ petitions are allowed in part on contest, but no order as to costs. Consequently, the order impugned in these writ petitions stands quashed so far as it relates to quashing of the Corrigenda and the direction for not to provide age relaxation to inservice candidates, but rest of the directions in the impugned order of the Tribunal need no interference and are hereby confirmed.

—— o ——

2024 (II) ILR-CUT-473

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

W.P.(C) NO. 18071 OF 2020

M.D, S.B.I, MUMBAI & ANR. ……Petitioners

-V-

KUNDAN LUHA & ORS. ……Opp.Parties

CONSTITUTION OF INDIA, 1950 – Article 227 r/w Section 25-K of Industrial Disputes Act, 1947 – The petitioner/Bank had not taken any pleading before the tribunal that, the bank not being an industrial establishment, the chapter V-B do not apply to it – Whether it is permissible to raise such plea in the writ petition for the first time? – Held, No – The writ petition not being an appeal on merit, it cannot be said that a point of law can be raised at this stage. (Para 8)

Case Law Relied on and Referred to :-

1. (2009) 15 SCC 327 : Jagbir Singh v. Haryana State Agriculture Marketing Board.

For Petitioners : Mr. P.K. Mohanty, Sr. Adv.
For Opp.Parties : Mr. R.N. Debata.

JUDGMENT Date of Hearing & Judgment : 22.04.2024

ARINDAM SINHA, J.

1. Under challenge is award dated 30th October, 2019. It appears therefrom, the workman was disengaged from his service. He alleged, the disengagement was after 13 years of continuous service, in violation of sections 25-G and 25-N in Industrial Disputes Act, 1947. His contention, found in impugned order is, management-bank has more than 300 employees in the headquarters at Sambalpur.

2. Mr. Mohanty, learned senior advocate appears on behalf of petitioner (management). He submits, his client is the commercial branch of the bank in Sambalpur city. It obtained services from opposite party no.1 (workman) on an intermittent basis, as sweeper. His client is complying with provision in section 17-B of Industrial Disputes Act, 1947.

3. He draws attention to chapter V-B to submit, his client does not come within meaning of industrial establishment under section 25-K, when read with the Orissa Act 6 of 1983, effective 21st February, 1983. Furthermore, by impugned award dated 30th October, 2019 reinstatement was directed. The Supreme Court has settled the position on reinstatement, to be on exception.

4. Mr. Mohanty submits, there was no evidence adduced regarding number of employees in Sambalpur (SME) branch of his client, where the workman used to be engaged. He draws attention to several documents. Firstly, letter dated 11th August, 2006 from the workman. He stated therein he was working at the branch since its opening on 11th July, 1997. Relied upon sentence is reproduced below.

> *"A) That I am working at this Branch since the opening of the branch i.e. 11th July, 1997 as a sweeper on 1/3rd basis covering total of 18 working hours per week."*

5. Referring to section 25-K read with the Orissa amendment he submits, this section cannot be made applicable to his client operating the Branch. He draws attention to definition section 25-L in chapter V-B. He submits, the branch of his client does not come within meaning of industrial establishment given by the section. He then draws attention to definitions section 2 (ka) in the Act for definition of industrial establishment or undertaking. He places emphasis on sub-clause(ii) in section 25-L, clause(b) to submit,

in event it is held that section 25-K applies to his client's said branch, it must be treated as a separate unit. As such, there is no evidence there were 300 employees working in that branch, for the workman to have obtained direction for reinstatement, by perverse finding of violation of section 25-N. He submits, impugned order be set aside and quashed. On query from Court regarding whether his client will pay compensation he submits, huge amount of money has already been paid to the workman as relief under section 17-B. He relies judgment of the Supreme Court in ***Jagbir Singh v. Haryana State Agriculture Marketing Board***, reported in **(2009) 15 SCC 327**, *inter alia*, paragraph-7 (Manupatra print) reproduced below.

> *"7. It is true that earlier view of this Court articulated in many decisions reflected the legal position that if the termination of an employee was found to be illegal, the relief of reinstatement with full back wages would ordinarily follow. However, in recent past, there has been a shift in the legal position and in long line of cases, this Court has consistently taken the view that relief by way of reinstatement with back wages is not automatic and may be wholly inappropriate in a given fact situation even though the termination of an employee is in contravention to the prescribed procedure. Compensation instated of reinstatement has been held to meet the ends of justice."*

6. Mr. Debata, learned advocate appears virtually for opposite party no.1 (workman). He submits, his client was made permanent. He draws attention to pages-35 and 37 in the writ petition to demonstrate it. Subsequently he was retrenched. He then refers to his client's evidence-on-affidavit, paragraphs-8 and 9 to submit, evidence was adduced by his client on violation of section 25-N. Paragraphs-8 and 9 from the evidence-on-affidavit are produced below.

> *"8. That Shri Suresh Singh at SBI Evening Branch, Sambalpur, Shri Munu Lal at* ***SBI Maltigunderpur Branch, Sambalpur****, Shri Hiralal Bhoi,* ***at SBI Budharaja Branch****, Shri Mahadev Kalet****, at SBI Daily Market Evening Branch, Rourkela****, Shri Nila Madhab Dehuri,* ***at SBI Khetrajpur Branch*** *and many others were working like me as "Sweeper" and receiving 1/3rd salary. But they were given full time salary by the management from 2006. But I was discriminated by the management by not extending the full time salary benefits to me.*
>
> *9. That during 1999 Shri Ram Chandra Kachhap, Shri Ram Chandra Meher and Shri Ramesh Hara were appointed as messengers by the management. The post of "messenger" and "sweeper" are same rank. The said persons are working till date."*
>
> (Emphasis supplied)

On query from Court we have ascertained from Mr. Debata there was no evidence adduced before the Tribunal by his client regarding number of employees in SME branch of the bank.

7. Mr. Debata submits further, no contention was pleaded nor argued in the Tribunal, of the bank not being an industrial establishment for chapter V-B to not apply to it. Furthermore, cause of retrenchment was not disclosed to his client. Management witness in cross-examination alleged the cause. The award was duly made on there being no relevant cross-examination. The writ petition be dismissed.

8. We accept submission made on behalf of the workman that contention of the management regarding chapter V-B not applicable to it was not raised before the Tribunal

and cannot be raised before us in judicial review. We are to see that the award was duly made, as does not contain perversity. Accordingly, we cannot look for something that was not contended in the Tribunal, to interfere in judicial review. The writ petition, not being an appeal on merits, it cannot be said that a point of law can be raised at this stage. However, the finding on fact that management-bank has more than 300 employees in Sambalpur headquarter can be looked into in judicial review.

9. Regarding the workman's claim of having been made a permanent employee, same does appear from the documents disclosed. Page-35 in the writ petition is document dated 3rd March, 2006 of the bank in respect of conversion of part-time employees. Clause (c) under first paragraph talks about conversion of, *inter alia*, all part-time employees in 1/3rd scale of pay as on 31.12.2005. It falls in line that bio-data in respect of the workman (at page-37) says by serial no.7, scale wages drawn at the time of permanent appointment. In the facts we have to see the contention of the workman, upheld by the Tribunal that there was retrenchment by violation of provision in section 25-N.

10. As aforesaid the finding of fact regarding there being more than 300 employees in Sambalpur headquarter of management-bank can and is subject matter of this judicial review. We find omission of the workman to have adduced evidence regarding number of workmen working in the branch. It follows, there was no cross-examination. Accepting Mr. Mohanty's submission that the SME branch is to be treated as a unit under sub-clause (ii) in clause (b) of section 25-L, the finding of more than 300 employees in the branch appears to be based on no evidence. We appreciate the workman may not have had access to relevant records of the bank in respect of number of employees working at that branch. However, the workman was not remediless inasmuch as he could have applied to summon appropriate officer of the bank as his witness and also for the Tribunal to pass necessary order or direction for production of relevant documents at the trial.

11. Impugned award is set aside with direction of remand, for the Tribunal to ascertain on fact, number of employees working in SME branch of the bank at Sambalpur as on date of retrenchment (30th October, 2010). The Tribunal, upon finding the fact will then proceed to adjudicate on the allegation regarding violation of section 25-N. For the purpose the parties may adduce further evidence. Parties will forthwith produce website copy of this judgment before the Tribunal, for it to adjudicate on remand as directed. Considering our direction is for remand, it is not necessary for us to deal with **Jagbir Singh** (supra). It is expected that the case will be disposed of by the Tribunal within three months of communication. Registry will communicate website copy of this judgment and return original record of the Tribunal, to it.

12. The writ petition is disposed of.

—— o ——

2024 (II) ILR-CUT-477

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

W.P.(C) NO. 26815 OF 2023

(WITH W.P(C) NOS. 34660 & 35117 OF 2023)

SAILENDRA NARAYAN LENKA ……Petitioner

-V-

SANOFI INDIA LTD., MUMBAI & ORS. ……Opp.Parties

INDUSTRIAL DISPUTE ACT, 1947 – Section 36(4) r/w Section 30 of Advocates Act and Articles 14, 19(1)(g) of Constitution of India – Whether conditions referred in Section 36(4) of the 1947 Act put any restriction or violates the Article 19(1)(g) of the Constitution? – Held, No – Reason indicated with reference to case laws.

Case Laws Relied on and Referred to :-

1. (1977) 2 SCC 339 : Paradip Port Trust v. Their Workmen.
2. C.M.W.P. No.6116 of 1991 : I.C.I. India Ltd. v. Presiding Officer, Labour Court (IV) & Ors.
3. (2004) 6 SCC 254 : Kusum Ingots and Alloys Ltd. v. Union of India.
4. (2021) 15 SCC, 769 : ThyssenKrupp Industries India Pvt.Ltd. v. Suresh Maruti Chougule.
5. Civil Appeal No.6586 of 2019 : ThyssenKrupp Industries India Pvt.Ltd. & Ors. v. Suresh Maruti Chougule & others.
6. W.P(C) No.8929 of 2021 : A and B Fashions Pvt. Ltd. v. Ramesh Kumar & others.
7. W.P(C) No.20007/2013 :M/s.Orissa Forest Development Corporation Ltd v. Minati Behera.
8. 67 Law Weekly Part-2 54 : Rangaswamy v. Industrial Tribunal.
9. AIR 2016 All 23 : V.K. Gupta v. Presiding Officer, Central Government Industrial Tribunal - cum-Labour Court, Kanpur.
10. (1990) 4 SCC 406 : Asoka Marketing v. Punjab National Bank.

For Petitioner : Sailendra Narayan Lenka (In person),
Mr. Sashi Bhusan Jena, Mr. S.P. Jena.

For Opp. Parties : Mr. Goutam Mukherji, Sr. Adv.,
Mr. S. K. Das, (Amicus Curiae)
Mr. Satya Smruti Mohanty, Mrs. Suman Pattanayak, AGA.

JUDGMENT Dates of Hearing :16.01,22&23.04.2024 : Date of Judgment : 23.04.2024

ARINDAM SINHA, J.

1. Three writ petitions are before us for final hearing. First is, W.P.(C) no.26815 of 2023 (Sailendra Narayan Lenka v. Sanofi India Ltd., Mumbai). In it challenge has been made against order dated 1st August, 2023 of the Labour Court in I.D. Case no.10 of 2023, accepting Form-G filed by the management, for it being represented in said Court.

2. The tagged two writ petitions are by another workman of, we are told, a different company/management. The writ petitions are W.P.(C) no.34660 of 2023 and W.P.(C) no.35117 of 2023 (Biswojit Malla v. Presiding Officer, Labour Court, BBSR and others). Petitioner-workman in the tagged writ petitions has challenged orders both dated 18th September, 2023 passed by the Labour Court respectively in I.D. Case no.40 of 2019 and I.D. Misc. Case no.127 of 2019. Said orders dated 18th September, 2023 are similar, if not identical with aforesaid impugned order dated 1st August, 2023. Hence, the writ petitions were tagged.

3. Mr. Mukherji, learned senior advocate appears on behalf of opposite parties (management) in W.P.(C) no.26815 of 2023 and files affidavit dated 20th April, 2024, on leave obtained and copy served to petitioner, appearing in person. Petitioner had objected to the management being represented before the Labour Court and, by the writ petition, is following through with his objection. Mrs. Pattanayak, learned advocate, Additional Government Advocate appears on behalf of opposite party no.1 in the tagged writ petitions.

4. Mr. Mukherji relies on, *inter alia*, disclosure dated 21st March, 2024 in the affidavit filed today. In it is disclosed a letter written by one learned advocate of the Supreme Court and High Court of Judicature at Mumbai, addressed to, *inter alia*, Chief Executive Officer (CEO) and Managing Director (MD) of his client. This writ petition is mentioned in the letter, to support allegations of violation of fundamental rights at work by the company. He submits, information regarding this case having reached said learned advocate, must be presumed as had been given by petitioner himself. Such a person cannot be heard to object to his client being represented in the Labour Court. The writ petition be dismissed. Petitioner submits, he had nothing to do with writing of the letter. He has become aware of it now, in Court, on copy of the affidavit served. He submits, there be interference as prayed for in the writ petition.

5. Mr. Mukherji continues to submit. His client has only one office in the country, at Mumbai. A term of engagement of petitioner required him to seek adjudication of any dispute, in the competent Court at Mumbai. He having approached the Labour Court, here in Odisha, is all the more reason his client requires representation in said Court. Furthermore, petitioner had filed Form-G pursuant to rule-38 in Orissa Industrial Disputes Rules, 1959. Same stands disclosed at page 50 of disposed of WP(C) no.40518 of 2023 (M/s. Sanofi India Limited, Mumbai v. Sanofi Employees and Allied Workers Union, Ludhiana and others). Drawing attention to the document he demonstrates that petitioner thereby authorized the person mentioned, to represent him before Joint Labour Commissioner, Bhubaneswar. We deal with this submission here and now inasmuch as rule 38 requires a party to file Form-G regarding his representation in any proceeding under the Act. The form executed by petitioner, saying it was before Joint Labour Commissioner, Bhubaneswar cannot be taken as authorization for representation of petitioner before the Labour Court. Moreover, in event petitioner had authorized representation on his behalf, it would only be on consent of the management and leave of the Court, as things stand.

6. Mr. Mukherji submits, the Supreme Court by its judgment in ***Paradip Port Trust v. Their Workmen***, reported in **(1977) 2 SCC 339** did not deal with vires challenge to section 36(4) in Industrial Disputes Act, 1947. View expressed by the learned single Judge on **judgment dated 21st April, 1992** in ***C.M.W.P. no.6116 of 1991 (I.C.I. India Ltd. v. Presiding Officer, Labour Court (IV) and others*** was, *inter alia*, section 36(4) is unconstitutional. It was held to be void. Therefore, the view was independent of ***Paradip Port Trust*** (supra). On the view taken, it held the field. For the proposition he relies on judgment of the Supreme Court in ***Kusum Ingots and Alloys Ltd. v. Union of India*** reported in **(2004) 6 SCC 254**, paragraph 22. The paragraph is reproduced below.

> *"22. The court must have the requisite territorial jurisdiction. An order passed on writ petition questioning the constitutionality of a Parliamentary Act, whether interim or final keeping in view the provisions contained in Clause (2) of Article 226 of the Constitution of India, will have effect throughout the territory of India subject of course to the applicability of the Act."*

7. Above position on unconstitutionality of the provision was not considered nor noticed, when the Supreme Court directed reference in ***ThyssenKrupp Industries India Private Limited v. Suresh Maruti Chougule***, reported in **(2021) 15 SCC, 769**, to a larger Bench of said Court. Reproduced below is paragraph 11 (Manupatra print) directing the reference.

> *"11. The learned Senior Counsel for the appellants and the Bar Council of India submitted that the Advocates Act is a special Act and that the ID Act is a general Act.* ***According to them, Section 30 of the Advocates Act overrides Section 34 of the ID Act. As stated earlier, this Court in Paradip Port Trust, was of the opinion that*** *the ID Act is a special piece of legislation and* ***the Advocates Act is a general piece of legislation with regard to the subject matter of appearance of lawyers before the labour courts.*** *In the context of matters pertaining to industrial disputes and the mechanism provided for resolution of the disputes, we have no doubt that the ID Act is a special piece of legislation.* ***However, whether the Advocates Act is a general piece of legislation with respect to the subject matter of appearance of lawyers in labour courts, needs a detailed consideration.*** *Section 30 of the Advocates Act confers a right on an advocate to practice before any Tribunal****. Applying the test laid down by this court in Ashoka Marketing, it is doubtful whether the Advocates Act can be termed a general piece of legislation in respect of the subject matter in dispute.*** *As the judgement in Paradip Port Trust is by a Bench of 3 judges, and taking into account the importance of the issues raised in these cases, we are of the considered opinion that these matters be referred to a larger Bench."* (Emphasis supplied)

He also draws attention to paragraph 13 in the order to point out that the Supreme Court directed appellant before it (the management) be permitted representation by advocate. As such **ThyssenKrupp** (supra) covers the situation for upholding impugned order. Mr. Mukherji submits further, the reference was not answered by the larger Bench on **order dated 4th October, 2023** in, *inter alia*, ***Civil Appeal no.6586 of 2019 (ThyssenKrupp Industries India Private Limited and others v. Suresh Maruti Chougule and others)***. In the circumstances, the unconstitutionality viewed by the learned single Judge still holds the field. As a consequence, there can be no impediment for his client being represented in the Labour Court. Impugned order, therefore, is not required to be interfered with.

8. Without prejudice to his above contention regarding the view on unconstitutionality holding the field, Mr. Mukherji submits, his further contention is that the view is good. It is his contention in defence to the challenge against impugned order. It be considered by us. He draws attention to section 30 in Advocates Act, 1961. The provision is reproduced below.

> "*30.* ***Right of advocates to practise****.-- Subject to provisions of this Act, every advocate whose name is entered in the [State roll] shall be entitled as of right to practise throughout the territories to which this Act extends,--*
>
> *(i) in all Courts including the Supreme Court;*

(ii) before any tribunal or person legally authorised to take evidence; and

(iii) before any other authority or person before whom such advocate is by or under any law for the time being in force entitled to practise."

An advocate has right to practise, *inter alia*, in all Courts and before any tribunal or person legally authorised to take evidence. According to him, the Labour Court would come within clause (i) under section 13. In any event, an advocate's right to practise before any tribunal would otherwise cover the Labour Court. This is a statutory right of an advocate, to pursue his profession. He refers to article 19(1)(g) in the Constitution of India to submit, a fundamental right of a person is, *inter alia*, to practise any profession. Thus, the statutory right given to an advocate under the Advocates Act is in pursuance of the article and is his fundamental right. Any impediment would be an infringement of the fundamental right. Section 36(4) in the Act of 1947 is an impediment by the restriction imposed, on advocates' right to practise in the Labour Court/Tribunal dealing with industrial disputes. The provision is unconstitutional as violative of article 19(1)(g). More so because sub-article (2) in article 13 prohibits the State from making any law, which takes away or abridges the rights conferred by part-III in the Constitution and accordingly, section 36(4) in the Act of 1947 must be declared void by this Court as well.

9. He reiterates, neither in ***Paradip Port Trust*** (supra) was there any vires challenge regarding section 36(4) nor in the reference directed by ***ThyssenKrupp*** (supra) and according to him, not answered by ***order dated 4th October, 2023*** (supra). He takes us through the order to submit, the reference was said to be answered simply on reiteration of paragraphs 16, 23 and 24 in ***Paradip Port Trust*** (supra). He then draws attention to that part in the order which deals with WP(C) no.1169 of 2018 to submit, by said writ petition, vires challenge was laid before the Supreme Court but dismissed thereby. The dismissal was not on adjudication of the challenge. We reproduce below the part relied upon in ***order dated 4th October, 2023*** (supra).

"W.P.(C) No.1169/2018

Challenge has been laid to the provisions of Section 36(4) of the Industrial Disputes Act, 1947. ***We are conscious of the fact that the judgment in Paradip Port Trust, Paradip's case (supra) did not consider the aspect of constitutional validity****, but then in the separate order passed today in C.A. No.6586/2019 we have dealt with that aspect to some extent.* ***The substratum of the issue has been discussed in Paradip Port Trust, Paradip's case (supra) and merely because it is sought to be given a colour of a constitutional challenge to a provision makes no difference.***

We may also say that the constitutional challenge has to be examined within a very narrow compass and certainly those parameters are not satisfied.

The writ petition is accordingly dismissed." (Emphasis supplied)

10. Mr. Mukherji takes us back to ***ThyssenKrupp*** (supra), paragraph-12 (Manupatra print). He submits, the Supreme Court recorded fair submission made on behalf of the management that they will bear expenses of the lawyer, who can be engaged by the workman provided appellant is permitted to engage an advocate and accordingly by paragraph-13 (Manupatra print), the workman was given liberty to engage advocate on direction that fee of said advocate shall be paid by the management. In this connection

he refers to view taken by a learned single Judge of Delhi High Court on ***judgment dated 24th August, 2021 in W.P.(C) no.8929 of 2021 (A and B Fashions Pvt. Ltd. v. Ramesh Kumar and others)***, paragraph-17, elaborating on ThyssenKrupp (supra). The paragraph is reproduced below.

> *"17. Be that as it may, any litigation before the Labour Court has various stages. Initially, the pleadings and other procedural formalities are completed between the parties. At that stage, the management and the workmen may choose not to expend their resources by engaging Advocates. However, as the matter reaches trial, it would be inapt to say that the management or the workmen would not be entitled to engage Advocates or legal practitioners to represent them, in accordance with law. If the Management wishes to be represented by a legal practitioner, the Court can consider the question of whether the workman has given consent or not, whether impliedly or otherwise.* ***The Court, upon finding consent, may also award litigation expenses to permit the legal practitioner to appear for the Management. This is clearly the spirit of the judgment in Thyssen Krupp Industries India Private Limited (supra).***
>
> (Emphasis supplied)

11. To conclude Mr. Mukherji submits, no interference is warranted since the labour Court correctly relied upon view taken by a Division Bench of this Court on ***judgment dated 13th May, 2022 in W.P.(C) no.20007 of 2013 (M/s. Orissa Forest Development Corporation Limited v. Minati Behera)***. Following ***Kusum Ingots*** (supra) the Division Bench accepted the view on unconstitutionality. He reiterates, ***order dated 4th October, 2023*** (supra) did not consider constitutionality of the provision and therefore cannot be relied upon by petitioner to seek interference.

12. The two tagged writ petitions are W.P.(C) no.35117 of 2023 and W.P.(C) no.34660 of 2023. Mr. S.P. Jena, learned advocate appears on behalf of petitioner (workman) in both the writ petitions. His client has impugned identical orders of the Labour Court, allowing the management to have representation before it.

13. Mr. Jena relies firstly on view taken by a Division Bench of the Madras High Court in ***Rangaswamy v. Industrial Tribunal*** reported in ***67 Law Weekly Part-2 54*** and also ***AIR 1954 Madras 553*** to submit, said Court held the provision in section 36(4) to be valid and not an unconstitutional denial of right of an advocate to practise his profession or discriminatory and repugnant to article 14 in the Constitution. He then relies on view taken by a learned single Judge in the High Court of Allahabad on ***judgment dated 22nd December, 2015 in V.K. Gupta v. Presiding Officer, Central Government Industrial Tribunal -cum- Labour Court, Kanpur reported in AIR 2016 All 23***, paragraphs 29 to 32 and 39 to 44 (SCC Online print). He submits, constitutional validity of the provision was upheld. He lays special emphasis on paragraph-31 (SCC Online print), by which the learned Judge differed with view taken in ***I.C.I. India Ltd.*** (supra). In the circumstances, he submits, there be interference with impugned orders because his client did not and does not consent to the management being represented by legal practitioner.

14. Mr. Mohanty, learned advocate appears on behalf of the management against Mr. Jena's client. He adopts submissions made by Mr. Mukherji. He adds, view taken in ***I.C.I. India Ltd.*** (supra) was upon noticing ***Paradip Port Trust*** (supra). He relies on paragraph-7 in ***I.C.I. India Ltd.*** (supra) (Manupatra print), reproduced below.

"7. My attention has been invited to the decision of the Hon'ble Supreme Court in Paradip Port Trust v. Their Workmen MANU/SC/0309/1976 : AIR 1977 SC 36. This authority has no application because the vires of Section 36 (4) has not been decided in this case.

He submits, the learned single Judge found subterfuge, in lawyers resorting to create artificial employers or employees organizations, of which they claim to be the representatives or officers, to enable their appearance before the Labour Court/Tribunal, obviously with reference to ***Paradip Port Trust*** (supra). As such, this Court should not interfere with impugned order, tantamounting to upholding or restoring constitutionality of the provision.

15. Drawing attention to this Court's view in ***Minati Behera*** (supra) he demonstrates that the Bench was confronted with situation, where the management had objected to the workman being represented. In that case the workman had engaged assistance because she said she had no knowledge about the law and procedure of the Court, whereas authorized representative of the management happened to be a law knowing person. The coordinate Bench relied on ***Kusum Ingots*** (supra) to hold that earlier view taken by the learned single Judge in ***I.C.I. India Ltd.*** (supra) would apply to the State (Odisha) and accordingly, without doubt, said view of the learned single Judge would have full effect/application. In the circumstances, the Bench had no hesitation in coming to conclusion that the management cannot take the plea of sub-section (4) in section 36, to challenge impugned therein order because as per view taken in **I.C.I. India Ltd.** (supra), the provision already stood declared unconstitutional. He submits, it follows that whichever way the provision is looked at, either from point of view of the workman or from that of the management, consistent position in law prevailing after **I.C.I. India Ltd.** (supra) is that the provision is unconstitutional. This was not noticed by the Supreme Court in answering the reference on ***order dated 4th October, 2023*** (supra).

16. Mr. Das, learned advocate, Amicus Curiae appears and submits, the respective managements in opposing the writ petitions did not plead the vires challenge, as defence or otherwise. He submits further, we have already correctly taken view that Form-G executed by petitioner [workman in WP(C) no.26815 of 2023] cannot be deemed to be his consent, to estopp him from challenging impugned order because the form was executed for representation before the Joint Labour Commissioner and not the Labour Court. Lastly he submits, the contention regarding right to practise by section 30 in the Act of 1961 was dealt with in ***Paradip Port Trust*** (supra) and ***order dated 4th October, 2023*** (supra).

17. We are on notice that specific roster assignment regarding vires challenge is with the first Division Bench of this Court. The workmen, who are petitioners before us, have challenged impugned orders of the Labour Court, by which permission was given to the respective managements for them being represented before it. Amicus Curiae has pointed out that the respective managements did not plead the point in their counters. The contention of unconstitutionality of section 36(4) in the Act of 1947 has come in defence, as argument from the Bar on a point of law. The contention regarding unconstitutionality, argued as a defence, is not a challenge before us to be adjudicated.

Having said so we must proceed to adjudicate. In event we find substance in the point, the writ petitions will be released.

18. We reproduce below the relevant provisions. Firstly, sub-section (4) in section 36 in the Act of 1947.

> *"36. ... .(4) In any proceeding before a Labour Court, Tribunal or National Tribunal,* ***a party to a dispute may be represented*** *by a legal practitioner* ***with the consent of the other parties*** *to the proceedings* ***and with the leave of the Labor Court, Tribunal or National Tribunal****, as the case may be."* (Emphasis supplied)

Also reproduced below is section 30 in Advocates Act, 1961.

> *"30. Right of advocates to practise.—Subject to provisions of this Act, every advocate whose name is entered in the State roll shall be entitled as of right to practise throughout the territories to which this Act extends,--*
>
> *(i) in all Courts including the Supreme Court;*
>
> *(ii) before any tribunal or person legally authorized to take evidence; and*
>
> *(iii) before any other authority or person before whom such advocate is by or under any law for the time being in force entitled to practise."*

19. Having gone through above reproduced provisions we have also perused ***Paradip Port Trust*** (supra). The larger Bench of the Supreme Court, by the judgment, made a distinction regarding operation of the restriction by sub-section (4) in section 36. The distinction was that the restriction is not on the advocates/lawyers but the parties. As such, no question can arise or be raised by or on behalf of an advocate, on entitlement to practise in the Labour Court/Tribunal and by the restriction his/her right to profession, a fundamental right, stood infringed. We repeat, the distinction is that a party before a labour Court/Tribunal is restricted in obtaining representation, the restriction being consent had from the other party and leave of the Court. In this connection, we reproduce below paragraphs 7 and twice numbered paragraph 24 (Manupatra print) from ***Paradip Port Trust*** (supra).

> *"7. Industrial law in India did not commence with a show of cold shoulder to lawyers as such. There was an unimpeded entrance of legal practitioners to adjudication halls before tribunals when the Act first came into force on April 1, 1947.* ***Three years later when the Labour Appellate Tribunals were constituted under the Industrial Disputes (Appellate Tribunal) Act 1950, a restriction was imposed on the parties in engagement of legal practitioners before the Appellate Tribunal without consent of the parties and leave of the Tribunal.*** *When this was introduced in the appellate forum, the same restriction was imposed for the first time upon representation of parties by legal practitioners before the Industrial Tribunals as well [see Section 34 of the Industrial Disputes (Appellate Tribunal) Act, 1950]. In view of the recent thinking in the matter of preferring legal aid to the poor and weaker Sections of the people it may even be possible that the conditional embargo under Section 36(4) maybe lifted or its rigour considerably reduced by leaving the matter to the Tribunals' permission as has been the case under the English law."*
>
> XXX XXX XXX XXX XXX XXX
>
> *"24.* ***Second, the matter is not to be viewed from the point of view of legal practitioners but from that of the employer and workmen who are the principal contestants in an Industrial Disputes. It is only when a party engages a legal practitioner as such that the latter is enabled to enter appearance before courts or tribunals. Here, under the***

> ***Act, the restriction is upon a party as such and the occasion to consider the right of the legal practitioner may not arise."*** (Emphasis supplied)

20. By ***ThyssenKrupp Industries*** (supra) a Division Bench of the Supreme Court felt a question did arise because in ***Paradip Port Trust (***supra), Advocates Act, 1961 was referred to as a general piece of legislation with regard to subject matter of appearance of lawyers before all Courts, Tribunals and other authorities. Relying on another judgment of said Court in ***Asoka Marketing v. Punjab National Bank***, reported in ***(1990) 4 SCC 406***, the Bench said that applying the test laid down by said judgment, it is doubtful whether the Advocates Act can be termed a general piece of legislation and as such the direction for reference.

21. By ***order dated 4th October, 2023*** (supra) the larger Bench answered the reference, contended by the managements as on reiterating view taken in ***Paradip Port Trust*** (supra). Necessarily the reiteration was because, by ***Paradip Port Trust*** (supra), aforesaid distinction had been made regarding the restriction imposed on the party and not on advocates/lawyers. In the circumstances, contention based on section 30 in Advocates Act, 1961, leading to reference of the question on the legislation referred to as general, was obviously thought as not required to be dealt with specifically. The controversy giving rise to the question, resulting in the direction for reference, was not whether the Advocates Act is a special or a general piece of legislation. The controversy was regarding section 36(4) in Industrial Disputes Act, 1947, if placed a restriction on operation of section 30 in Advocates Act, 1961. Challenge before the Supreme Court was contention of appellants that section 30 of the Advocates Act overrides section 34 of the Industrial Disputes Act. In event it was found by the larger Bench that such restriction had been placed, it would have been necessary to specifically answer the question, as to which Act would prevail over the other or conversely, which one would give way. In the circumstances, we hold on the contention raised in defence by the respective managements that the reference had been answered by ***order dated 4th October, 2023*** (supra) and it was a complete answer. Here we may add, there was elaboration by the learned single Judge in ***A and B Fashions Pvt. Ltd.*** (supra), of the reference order by ***ThyssenKrupp*** (supra) to say, *inter alia*, sprit of the latter is, the (Labour) Court, upon finding consent, may also award litigation expenses to permit legal practitioner to appear. This was in reference to paragraph-12 and following direction paragraph (Manupatra print), in ***ThyssenKrupp*** (supra). Paragraph-12 is reproduced below.

> *"12. Mr. B.H. Marlapalle, learned senior counsel appearing for the workman in the appeal arising out of SLP (Civil) No.12632 of 2018 submitted that the reference has been pending in the Labour Court since 2009. In spite of there being no interim order by the High Court, the Labour Court did not proceed with the reference. There is an interim order passed by this Court staying the proceedings before the Labour Court on 13th November, 2018. He submitted that notwithstanding the pendency of the matter before this Court, the reference No.IDA No.121 of 2016 may be decided.* ***Mr. J.P. Cama, learned senior counsel appearing for the Management fairly submitted that they will bear the expenses of the lawyer who can be engaged by the workmen provided that the appellant is permitted to engage an advocate."*** (Emphasis supplied)

With respect we are unable to accept the view regarding sprit of ***ThyssenKrupp*** (supra). It was simply and merely record of a submission made to the Supreme Court. Direction in the following paragraph was not on adjudication as otherwise there would have been no reference. Furthermore, one party paying fees for counsel to be engaged by the other, to obtain consent for the paying party to be represented, if to be taken as a view on procedure of law declared then it may give rise to allegation of conflict of interest in event the party having his counsel paid for by the other, is unsuccessful in the proceeding.

22. We must also deal with contention regarding the provision having been held to be unconstitutional by ***I.C.I. India Ltd.*** (supra) and said to be holding the field since then. We reproduce below paragraph-4 (Manupatra print) from the judgment.

> *"4. The argument that lawyers will cause, delay is, in my opinion, wholly frivolous.* ***No doubt the aim of industrial adjudication is to expeditiously decide an industrial dispute because industrial friction affects not only the employer and the workmen, but also the public at large, but it is not understandable how the appearance of a lawyer will obstruct expeditious disposal.*** *On the contrary a lawyer who is trained in labour law can quickly focus the attention of the Labour Court/Tribunal to the main points of the dispute, and place the relevant case law so that the Labour Court can quickly dispose of the dispute.* ***Hence, debarring of lawyers, even with the proviso that a lawyer can appear if the other side gives consent, is in my opinion, wholly arbitrary. As a matter of fact, it is well known that this arbitrary provision*** *in the two Industrial Disputes; Act, viz. Section 36(4) in the Industrial Disputes Act and Section 6-I(2) of the U.P. Industrial Disputes Act,* ***has led to all sorts of subterfuges. Lawyers have had to resort to creation of artificial employer's or employees' organizations of which they claim to be representatives, or appear as officers of the concern.*** *This invites all sorts of objections and much time of the labour Court has to be wasted and devoted to first deciding this matter before proceeding to dispose of the dispute on merits.* ***The provision to my mind is clearly arbitrary, and hence violative of Article 14 of the Constitution of India."***
>
> (Emphasis supplied)

It is apparent from above extract that reason attributed for holding the provision to be unconstitutional was view of the learned Judge that a lawyer, who is trained in labour law, can quickly focus attention of the Labour Court/ Tribunal to the main points of dispute and place relevant case law so that the Labour Court can quickly dispose of the dispute. Restricting appearance by lawyers was thus found to be arbitrary. This reason coupled with further finding that the viewed arbitrary provision had led to all sorts of subterfuges were basis for holding the provision to be unconstitutional. Article 14 was invoked to hold as such. Article 19(1)(g) was not invoked.

23. For better understanding the position we have view of the Division Bench of Madras High Court in ***Rangaswamy*** (supra). It had affirmed constitutionality of the provision, albeit from point of view of provisions in Bar Councils Act, 1926 but also, article 14. The Bench said, *inter alia*, answer to the contention of violation of article 14 is, the article does not forbid classification provided it rests on some difference relevant to the subject. It cannot be assailed as repugnant to it. The Bench said, this is so well settled that there is no need to refer to authorities on the subject. The question to be decided is whether any ground exists for treating appearance before tribunals differently

from appearance before Courts. The Bench said, there can be little difficulty in answering the question. We reproduce below a passage from paragraph-7 (AIR report).

> *"The courts as we have them, are governed by certain rules in the matter of procedure, reception of evidence and so forth which have their roots in age long traditions.* ***The tribunals are comparatively recent institutions which owe their existence to statutes and the principles by which they are governed are not identical with those which courts observe.*** *The matters which they have got to decide may be purely administrative in which case, it is conceded, there is no question of appearance by lawyers.* ***Even when the dispute is of a character which involves the exercise of judicial functions, the tribunals would be more in the position of arbitral bodies, not bound by strict rules of procedure or of evidence. With reference to such tribunal, the Legislature which establishes them has also felt itself free to lay down the procedure which they should follow in the hearing of the disputes and it may generally be stated that subject to rules of natural justice they enjoy in the matter of procedure and trial a freedom which the courts do not possess. Thus, there are essential differences between courts and tribunals and the enactment of a special rule with reference to tribunals is, therefore, not open to attack as discriminatory under Article 14."*** (Emphasis supplied)

The Division Bench went on to say, there is considerable force in contention made that the section, as it stands, may result in hardship. It went on to further say, this, however, is a matter for the Legislature to consider and not a ground for holding that the section is unconstitutional, as it makes no distinction between the employers and the employees. There is, therefore, no discrimination. This view was not considered by the learned single Judge and as such per incurium. We may also point out, the Division Bench expressed its view prior to ***Paradip Port Trust*** (supra) making the distinction to imply, cause of action of advocates against the restriction was not had. Mr. Jena had also relied on ***V.K. Gupta*** (supra) in a learned single Judge not having accepted view taken by ***I.C.I. India Ltd.*** (supra). It will be sufficient for us to reproduce paragraph-43 (SCC online print).

> *"43. Article 19(1)(g) guarantees right to practise any profession or to carry any occupation, trade or business. This right of the petitioner is not infringed or affected by the impugned order which only debars him from appearing in a particular case that too for non-fulfillment of the statutory conditions. It does not prohibit the petitioner from practicing Law anywhere not even before the Tribunal."*

24. Facts of the case are as would appear from order sheets of the Labour Court. No consent was obtained by the respective managements, from their workmen, for them being represented in the Labour Court. The order sheets also do not give indication that on notice of the managements' intention of being represented, their workmen raised delayed objection. Impugned orders proceed on the basis of following ***Minati Behera*** (supra), at a time when the Supreme Court by its larger Bench had not yet answered the reference. The coordinate Bench was not called upon to test the view. ***I.C.I. India Ltd.*** (supra) was view taken by a learned single Judge, per incurium and anyway not binding on us.

25. We are in respectful agreement with the Madras view. There is no discrimination, thus no violation of article 14 by section 36(4) in the Act of 1947. It

applies to all parties to an industrial dispute, up for adjudication before a Labour Court/Tribunal. The provision also does not cause violation of article 19(1) (g), in respect of an advocate's right to practice under section 30 in the Act of 1961. We take our view, *inter alia*, by reason of subsequent answer given by the Supreme Court. ***Minati Behera*** (supra) stands distinguished.

26. We appreciate assistance rendered by Amicus Curiae, Mr. Das. We believe office of the Advocate General will cause the fee to be paid to him.

27. Impugned orders in the writ petitions are set aside and quashed. The writ petitions are accordingly disposed of.

—— o ——

2024 (II) ILR-CUT-487

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

MATA NO. 36 OF 2017

RASISH KUMAR PANIGRAHI ……Appellant

-V-

KALPANA PANIGRAHI ……Respondent

CIVIL PROCEDURE CODE, 1908 – Order XLI, Rule 22(4) – The marriage was dissolved in the civil proceeding, directing the payment of permanent alimony – The respondent/wife launched execution case – The husband filed an appeal challenging the impugned judgment – The respondent/wife entered appearance in appeal and filed cross objection – The husband complied the judgment and deposited the permanent alimony for which execution proceeding dropped – The husband withdraw the appeal – Whether the cross objection/cross appeal filed at the instance of wife maintainable? – Held, No – Respondent/wife had chosen to file petition for execution instead of preferring an appeal against impugned judgment, it will be inequitable thereafter to proceed on her grievance in cross appeal. (Para 11)

Case Law Relied on and Referred to :-

1. Civil Appeal arising out of S.L.P(C) No. 26491 of 2018 (dtd. 04.07.2023) : Dheeraj Singh v. Greater Noida Industrial Development Authority & Ors.

For Appellant : Mr. Ashok Das

For Respondent : Mr. Shanti Prakash Mohanty

JUDGMENT Dates of Hearing : 18.04& 08.05.2024 : Date of Judgment : 08.05.2024

ARINDAM SINHA, J.

1. The appeal was preferred by appellant-husband against judgment dated 6th February, 2017 of the Family Court. Grievance of appellant is that permanent alimony directed at ₹ 12,00,000/- was exorbitant and hence, interference sought.

Pursuant to respondent-wife having notice of the appeal, she filed cross-appeal, exercising her right provided under rule 22 in order XLI, Code of Civil Procedure, 1908.

2. On 4th April, 2024, Mr. Das, learned advocate appearing on behalf of appellant-husband had filed memo dated 2nd April, 2024, for dropping the proceeding in appeal. He had submitted, there was direction by impugned judgment for payment of ₹12,00,000/- as permanent alimony. The deposit was made. In the circumstances, nothing remains for adjudication, which was why the memo had been filed. Compliance had also been recorded by the Family Court on order dated 14th March, 2019, dropping the execution proceeding, to dispose of it.

3. Mr. Mohanty, learned advocate appearing on behalf of respondent-wife had submitted on 4th April, 2024 that his client having had duly filed cross-appeal, regarding quantum of permanent alimony directed, it required adjudication irrespective of appellant-husband not wanting to prosecute the appeal. He had obtained adjournment for relying on authority regarding his client being entitled to prosecute, where appellant wanted to withdraw.

4. Mr. Mohanty relies on **judgment dated 4th July, 2023** of the Supreme Court in, inter alia, **Civil Appeal arising out of Special Leave Petition (C) no.26491 of 2018 (Dheeraj Singh v. Greater Noida Industrial Development Authority and others),** paragraph 17.

5. We reproduce below sub-rule (4) in rule 22 of order XLI.

> *"(4) Where, in any case in which any respondent has under this rule filed a memorandum of objection**, the original appeal is withdrawn or is dismissed for default**, the objection so filed may nevertheless be heard and determined after such notice to the other parties as the Court thinks fit."* (Emphasis supplied)

In **Dheeraj Singh** (supra), Greater Noida Industrial Development Authority was appellant before the High Court, as appears from the judgment. We reproduce below paragraphs 7, 8 and 22 from it.

> *"7. As against this, the Respondent Greater Noida filed an appeal in the High Court, to which the appellants herein filed their cross appeals seeking a further enhancement.*
>
> *8. **Subsequently the High Court, vide order and judgment dated 04.01.2017**, confirmed the compensation determined by the Learned District Judge. It is the contention of the appellants herein that the High Court, while passing its judgment, did not consider the cross objections filed by them.*
>
> *xxx xxx xxx*
>
> *22. The abovementioned discussions and judgments, when contextualized to the present case, would show that the High Court was under an obligation to consider the cross objections filed by the Appellants herein. Since such an obligation was not discharged while passing the judgment in appeal, we are of the considered opinion that the matter is fit for remand to the High Court for fresh adjudication on the grounds raised in the cross objections during appeal by the appellants herein. Accordingly, the present appeals are therefore allowed to such an extent."* (Emphasis supplied)

It is sufficient for us to say that sub-rule (4) under rule 22 in order XLI stands attracted in this case because appellant-husband wants to withdraw his appeal or not prosecute it. The two instances given in sub-rule (4), wherein respondent in an appeal has right of adjudication of his cross-appeal filed is withdrawal or dismissal for default of the appeal.

6. Considering appellant-husband does not want adjudication of his appeal, we must decide on the cross-appeal of respondent-wife. For the purpose, the sequence of events becomes important.

(i) The civil proceeding was instituted in year 2014. In it, there was counter claim filed by respondent-wife. She had verified the counter claim on 6th January, 2015. Relevant prayers in the counter claim are reproduced below.

"a) Dismiss/Reject the petition of the Petitioner.
b) Pass a decree for judicial separation of the parties in the case.
c) Grant maintenance of Rs.20,000/- (Rupees twenty thousand only) per month as maintenance from the date of counter claim.
d) Direct the Petitioner to return the net cash of Rs-8,00,000/-(Rupees eight lakhs only) 17 tolas of gold ornaments and house hold articles of the Respondent which she took at the time of her marriage with out alienate the same.
e) ***If Hon'ble court deem to pass a decree of divorce then award appropriate amount as per monthly alimony for the Respondent but directing to return above sthree dhana properties."*** (Emphasis supplied)

(ii) As aforesaid, the civil proceeding was dealt with on impugned judgment dated 6th February, 2017, dissolving the marriage and directing payment of permanent alimony at ₹12,00,000/-.

(iii) Soon thereafter on 15th May, 2017 respondent-wife launched execution by EP no.21 of 2017.

(iv) Learned advocate for respondent-wife entered appearance in the appeal on 10th October, 2017. The cross-objection was filed by her on 11th December, 2017.

(v) As also aforesaid, by order dated 14th March, 2019, the execution proceeding was dropped. Text of the order is reproduced below.

"The record is put up today on the strength of Advance petition filed on behalf of judgment debtor. The learned Advocate filed a petition mentioning therein that the petitioner-judgment debtor has paid a sum of Rs. 12,00,000/- (Rupees Twelve lakh) to the decree holder towards permanent alimony. Such payment was made in the shape of bank draft vide no.596532 dated 22.02.2019. The decree holder has made an endorsement with her signature accepting receipt of the said bank draft at the body of order sheet of this case.

In view of above fact relating to compliance of Judgment and order passed in C.P. No.100/2014 dated 06.02.2017. I preferred to drop the proceeding. ***Accordingly, the case is disposed of to the full satisfaction of the decree holder****."* (Emphasis supplied)

Mr. Mohanty hands up petition dated 22nd February, 2019 of appellant-husband, filed in the Family Court tendering/depositing ₹12,00,000/- with prayer for necessary order. The petition bears endorsement made on behalf of respondent-wife saying she received the amount with objection but she had no objection to the execution case being closed. It bears signature of respondent-wife and her advocate.

7. Facts stated in last preceding paragraph clearly demonstrate respondent-wife had accepted impugned judgment and had filed for execution, soon after its pronouncement and the decree drawn up. It was conduct of her that corresponded with her accepting the judgment on prayer (e) in her counter claim and consequent thereto.

8. Subsequent conduct of respondent-wife in accepting the permanent alimony in the executing Court on 11th March, 2019 but with objection, not affecting closure of the execution proceeding is further indication that she had accepted impugned judgment. In it there was direction for payment of permanent alimony at ₹12,00,000/-. Respondent-wife had sought assistance of Court to enforce the decree. Upon her accepting the decretal due, there had to be and was execution, discharge and satisfaction of the decree. This was confirmed by her and her advocate, in endorsing that she had no objection to the execution case being closed. This further conduct is also in line with her prayer (e) in the counter claim, as dealt with by the Family Court on impugned judgment. It was only then that the executing Court dropped the proceeding.

9. Mr. Mohanty submits further, the acceptance was in a situation of dire need. His client was compelled to accept the money knowing that her claim for enhancement was pending in the cross appeal filed by her. We are unable to view aforesaid conduct of respondent-wife from the perspective as submitted. It is not unreasonable to expect that if she was aggrieved, she would have first assailed impugned judgment on not fully allowing her counter claim prayer (e). Instead she filed for execution and thereupon, on receiving notice of appeal, preferred cross objection.

10. Mr. Mohanty submits, the Family Court by impugned judgment did not at all consider his client's counter claim, except for making a mention. On perusal of paragraphs 3, 4 and 11 in impugned judgment we find that the Family Court dealt with the counter claim. It appears, the direction for payment of permanent alimony was in allowing prayer (e) in the counter claim, as to the Court deemed fit and proper. In doing so the Family Court exercised discretion, available to it under section 25 in Hindu Marriage Act, 1955, which enables the Court to direct payment for maintenance and support at such gross or monthly periodical sum. The Court awarded permanent alimony being a gross sum and answered question (ii) framed in paragraph-4 in the judgment.

11. We find respondent-wife had elected to petition for execution instead of preferring appeal against impugned judgment. As such and after she obtained execution, she cannot prosecute a grievance, not made on aforesaid election, simply because appellant-husband had preferred appeal, thereby giving birth to her right to file cross appeal. Where respondent-wife had exercised her choice of remedy to be enforcement of the direction for permanent alimony in impugned judgment, by execution, it will be inequitable to thereafter proceed to find on her grievance in cross appeal, which she had omitted to make in choosing her aforesaid remedy.

12. The cross appeal is dismissed.

—— o ——

2024 (II) ILR-CUT-491

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

W.P(C) NOS. 25751 OF 2020 & 17479 OF 2021

PABITRA MOHAN PANIGRAHY & ORS. ……Petitioners

-V-

THE MINISTER, LAW, ODISHA & ORS. ……Opp.Parties

&

W.P(C) NO. 17479 OF 2021

RADHA KRISHNA LALITA TEMPLE -V- STATE (DEPT.LAW) & ORS.

ODISHA HINDU RELIGIOUS ENDOWMENT ACT, 1951 – Section 19(5) – The appellate authority without any reason has reduced the upset price of auction which was determined by the learned Commissioner of Endowments – Whether the impugned order is sustainable? – Held, No – The state government reserves the right to revise the order only when the alienation is not necessary or beneficial to the religious institution, which thus empowers the authority to annul the sanction for sale given by the learned commissioner and when the consideration fixed for the transfer is inadequate then also the state government is empowered to increase the consideration fixed for transfer as would be so decided as adequate. (Para 24)

For Petitioners : Dr.Kedar Nath Tripathy & S. Mohapatra

For Opp.Parties : Mr.S.N. Das, Miss.Pratyusha Naidu, Mr.S.K. Choudhury, Mr.T.K. Mishra

JUDGMENT Date of Judgment : 22.04.2024

D. DASH, J.

One Reetanjali Sahu, as the original Petitioner, had filed this writ petition as at (A) invoking the jurisdiction of this Court under Articles 226 & 227 of the Constitution of India with a prayer to quash the order dated 01.03.2019 passed by the Government in the Department of Law in Appeal No.2 of 2019 in exercise of the power under sub-section 4 of section 19 of the Odisha Hindu Religious Endowments Act, 1951 (hereinafter, referred to as O.H.R.E. Act) and direct the learned Additional Assistant Commissioner of Endowments, Berhampur (Opposite Party No.5) to hold fresh auction of the immovable properties in question belonging to the Hindu Religious Institution, i.e., Radhakrishna Lalita Temple at Hinjili in the District of Ganjam (Odisha) following the modality as had been directed by the Commissioner of Endowments, Odisha (Opposite Party No.3) in his order dated 11.12.2018 passed in Original Application No.08 of 2004.

2. Said Petitioner Ritanjali Sahu had raised the following grievances for redressal:-

i) that the Appellate Authority by the impugned order without any reason has illegally reduced the upset price determined by the learned Commissioner of Endowments;

ii) that after that order of the Appellate Authority, the Interim Trustee, having not at all followed the procedures prescribed in law and the order of the learned Commissioner to

that effect, which was not varied or set aside in Appeal and rather flouting all those in collusion Opposite Party No.8 (auction purchaser) has gone ahead in auctioning the immovable property of the Religious Institution giving the same as a show in pen and paper and not as reality."

3. At this stage, it be stated that this Court, by order dated 08.10.2020, had disposed of the writ petition as at (A) by passing the following order

"In view of the above, since on the face of the order, it is apparent that the order under Annexure-1 is neither fair nor in the interest of the deity or beneficial to the institution and a nullity in the eye of law being not a reasoned/speaking one, this Court is inclined to quash the same. Accordingly, the order passed by opposite party no.1 dated 01.03.2019 under Annexure-1 is quashed. This Court restores the order passed by the learned Commissioner of Endowments dated 11.12.2018 in O.A. No.08 of 2004 and directs the opposite parties to proceed with the auction as per the procedure and upset price fixed by the learned Commissioner of Endowments and complete the entire exercise within a period of two months from today. Since this Court has quashed the order passed by the opposite party no.1 dated 01.03.2019 under Annexure-1, the process of auction started, if any, pursuant to such order under Annexure-1 is also quashed. Opposite party no.5 is directed to take fresh step as directed by the learned Commissioner of Endowments in its order dated 11.12.2018 in O.A. No.8 of 2004."

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

Challenging the said order, the Interim Trustee, Nilamadhab Sahoo, representing the Opposite Party No.7-Radha Krishna Lalita Temple along with the Opposite Party No.8, who claimed to be the auction purchaser of the land in question, had carried an Appeal to the Hon'ble Supreme Court.

The Hon'ble Supreme Court allowed the said Appeal and by setting aside the impugned order passed by this Court on 08.10.2020, restored the original proceeding before this Court and directed for fresh adjudication after hearing the parties including the Opposite Party No.8, who had not been given the opportunity of hearing when the writ petition had been disposed of.

The order of the Hon'ble Supreme Court reads as under:-

"xx xx xx

Xx xx xx

6. We are, therefore, inclined to allow the appeal and set aside the impugned order of the High Court and to restore the writ proceedings before the High Court for fresh consideration. We do so only on the ground that the second appellant who was an auction purchaser has not been heard by the High Court. We clarify that we have expressed no opinion on the respective rights and contentions of the parties which are kept open to be decided by the High Court.

7. The appeal is accordingly allowed by setting aside the impugned judgment and order of the High Court dated 8 October 2020. Writ Petition Civil No 25751 of 2020 is restored to the file of the High Court for disposal afresh. All the rights and contentions are kept open.

8. The applications for intervention, impleadment and transposition are disposed of. 9 Pending applications, if any, stand disposed of.

9. Pending applications, if any, stand disposed of."

4. When the matter stood thus, the Petitioners of the writ Petition as at (B) filed an Intervention petition in the writ Petition as at (A) and this Court on 11.08.2021 had directed as under:-

> "xx xx xx
> In the interim, it is directed that no sale deed will be executed on behalf of anybody by the Non-Hereditary Managing Trustee of the Temple, possession over the land in question shall not be handed over to anybody and nature and character of the land in question shall not be changed till disposal of the Writ petition."

In the meantime, the original Petitioner, namely, Ritanjali Sahu filed an application seeking permission to withdraw the writ petition. That petition as well as the intervention petition being heard together, this Court, by order dated 17.10.2023, has permitted the original writ Petitioner, namely, Ritanjali Sahu, to withdraw from the scenario of the proceeding and allowed the intervention of the present Petitioners for being transposed in place of the original writ Petitioner, Ritanjali Sahu.

5. **Facts necessary for the purpose are stated as follows: -**

Radha Krishna Lalita Temple at Hinjili, a Hindu Religious Institution through one person, namely, Mohan Sahu, who asserted himself as the fit person of the Religious Institution filed an application under section 19 of the OHRE Act seeking permission from the learned Commissioner of Endowment, Odisha for sale of the land measuring in total Ac7.871 decimal (Seven Acres and Eight Hundred and Seventy One decimals) under different plots appertaining to khata no.978 in Mouza Hinjili belonging to the Institution. Although, said application had been filed by the Religious Institution through one Mohan Sahu claiming himself as the fit person, it was, however, not stated as to what was his status vis-à-vis the Religious Institution.

It was simply stated as under: -

"That the applicant is the fit person of the above-named temple."

The ground for seeking permission for sale of land was the difficulty in managing the Temple with limited income that was being earned. Surprisingly, in that petition said Mohan Sahu as the fit person had even gone to propose the price to be fixed for sale of the immovable property of the Religious Institution. The petition when was lying as it is, on 15.01.2014, one Nilamadhab Sahu came up with an application through his lawyer for being substituted therein stating that he being appointed as Interim Managing Trustee on 31.05.2010 be substituted in place of the erstwhile Petitioner, namely, Mr. Mohan Sahu, who claiming to be the fit person, had filed the application on behalf of the Religious Institution seeking permission to sell the above land owned and possessed by the Religious Institution and asserted that he would then onwards pursue the said application on behalf of the Religious Institution.

By order dated 16.11.2015, that substitution was allowed and that Interim Managing Trustee namely, Nilamadhaba Sahoo thus prosecuted the application seeking the permission for sale of the immovable property of Hindu Religious Institution. The learned Commissioner of Endowment by his order dated 11.12.2018 granted the permission for sale of the land in question with the condition that the land would be put to public auction keeping the upset price at Rs. 70,00,000/- per Acre and fixed the

modalities/procedures to be followed while holding the said auction as also laying the plan for investment of the sale price which would be so received keeping in view the interest of the Institution and for its benefit.

6. That order of the learned Commissioner was challenged by carrying an appeal under section 19 (4) of the OHRE Act by none other than the Religious Institution represented by its Interim Managing Trustee, namely, Nilamadhab Sahu. The challenge in that Appeal was, however, confined only to the fixation of the upset price for auction sale of the land. The Appeal came to be heard by the Hon'ble Minister of Law, Odisha and stood disposed of on 01.03.2019, which is the subject matter in the writ petition originally filed by Ritanjali Sahu asserting herself as an intending purchaser of the said property directed to be put to auction sale pursuant to the order raising the ground that the auction of the immovable property had been conducted in gross violation and flouting the procedures prescribed under the Rules and orders.

7. The Appellate Authority, in seisin of the Appeal went through the Benchmark Valuation Report relating to different plots of land as had been submitted by the Sub-Registrar, Hinjli as being called for by order dated 23.02.2019. The report was post disposal of the original application by the learned Commissioner of Endowment on 11.12.2018. The said report had been called for during pendency of the Appeal. Then on going through that report as it reveals from the order, the Bench mark Valuation of each plot of the land as reported were quoted and the following short order has been passed:-

> "xx xx xx xx
>
> After hearing the appellant and the respondent present and the representative on behalf of the respondent no.1 and the Asst. Law Officer on behalf of the Commissioner of Endowments and perusal of the copy of the order dated 11.12.2018 passed by the Commissioner of Endowments along with the case record, the institution is not getting any income from those lands. The said proceeds fetch more income to the institution. If it will be deposited in any Nationalized bank in a long term fixed deposit scheme. It appears that there is legal necessity to sale the case land which will be beneficial to the deity and it appears to me that the price fixed by the learned Endowment Commissioner is very high about the Bench Mark Valuation. In the fitness of the things and to arrive at a reasonable price, the price is fixed enhancing 10% over the Bench Mark Valuation."

8. The above order passed in the Appeal is under the challenge in this writ petition.

It be stated at this stage, that in the meantime Radha Krishna Lalita Temple represented by its Non-Hereditary Trust Board (NHTB) as formed under the orders of the learned Commissioner of Endowment under section 27 of the OHRE Act filed W.P.(C) No.17479 of 2021 as at (B) with the prayers to quash the order dated 11.12.2018 passed by the learned Commissioner of Endowment in O.A No.8 of 2004 as well as the order passed by the Appellate Authority in Appeal No.2 of 2019 and all subsequent actions and proceedings which have taken place pursuant to those orders. Said writ petition had been heard with the writ petition as at (A) filed earlier, for their disposal together by this common judgment.

9. We have heard Dr. K. N. Tripathy, learned Counsel for the present Petitioners in both the writ petitions. We have also heard Mr. S.N. Das, learned Additional Standing

Counsel representing the State, Ms. P. Naidu, learned Counsel for the Commissioner of Endowment, Mr. S. K. Choudhury, learned Counsel for the then Interim Trustee, namely, Nilamadhab Sahu who prosecuted the application under section 19 of the OHRE Act and had carried the Appeal under section 19(4) of the Act representing the Religious Institution and is no more in the Non-Hereditary Trust Board of the Religious Institution. We have also heard Mr. T. K. Mishra, learned Counsel for the Opposite Party No.8, who is the auction purchaser in the auction said to have been held on 18.03.2020 and so far standing as the beneficiary in the entire process and claims to have derived the right, title, interest and possession over the property of the Religious Institution by virtue of the sale deed executed and registered on 03.09.2020 for a consideration of Rs.1,40,00,000/- (Rupees One Crore Forty Lakhs) paid by him under Fixed Deposit made in the name of the Religious Institution on 05.06.2020 in HDFC Bank.

We have carefully gone through the averments taken in the writ petition, counter affidavits and additional affidavits filed by the parties as well as all the documents annexed thereto which would be referred to as and when so required in course of our discussion to follow.

10. An application under section 19 of the OHRE Act was filed before the learned Commissioner Endowment on 20.01.2004. The Religious Institution at that time was represented by Mohan Sahoo, who had asserted himself as the fit person. Said application when was lying like that after about a decade, one Nilamadhab Sahu on 15.01.2014 stating to have been appointed as Interim Trustee of the Religious Institution, on 31.05.2010 filed an application for his substitution in place of Mohan Sahoo, the person who as the fit person had filed the Original Application under section-19 of the OHRE Act. Said application finally came to be disposed of on 11.12.2018 after lapse of around 4 years.

When said Nilamadhab Sahu, by filing the substitution petition, wanted to pursue the Original Application filed about a decade back, he, in his application or while amending the application later provided no such reason/justification as to if the sale of that large patch of land was then also necessary and beneficial to the Religious Institution indicating the financial condition of the Institution as regards its income and spending. Be that as it may, the learned Commissioner of Endowments, while according permission for sale of the land involving acreage of Ac. 7.871 decimal (Seven Acres and Eight Hundred Seventy One decimals), as ordained under the provision contained in section 19 of the Act fixed the upset price for the auction sale to be held for said land at Rs.70 lakh per Acre, which was found to be the minimum adequate market price of the land in that locality. It was also put as a condition that 30 days before the auction, there shall be advertisement by beat of drums in the locality as well as by publication in any Odia Daily Newspaper like “Dharitri”, “Samaj”, “Sambad”, “Samay” or English Daily like “The Times of India” having wide circulation in the locality. Further order in the interest and benefit of the deity was passed indicating as to how the fetched sale consideration would be invested. More importantly, it was put as a condition that the sale be effected within 6 (six) months after the expiry of the period of Appeal or Revision and if no Appeal or Revision is preferred in the meanwhile and in case of

Appeal or Revision as per the orders of the Appellate/Revisional Authority following the provisions contained in Section 19 (C) (1) of the OHRE Act that it shall be first offered to the State Government for purchase of the said land for public purpose which shall not be at the price less than the amount fixed as the adequate consideration of the land in question, meaning thereby the upset price so fixed.

That Interim Managing Trustee, namely, Nilamdhaba Sahoo on behalf of the Religious Institution then feeling aggrieved and dissatisfied by that order of the learned Commissioner whereby the permission for sale of that entire patch of land of Ac.7.871 (Seven Acre Eight Hundred Seveny One decimals) was allowed, carried an Appeal under section 19(4) of the Act to the Government in the Department of Law, which came to be heard and disposed of by the Hon'ble Minister of Law. He filed the Appeal only challenged/questioning the upset price as had been fixed by the learned Commissioner, Endowments for the auction sale of the property of the Religious Institution as to have been fixed on a higher side but not challenging any other condition/s.

It has to be borne in mind that by that time, the property was not even put to auction showing any such result that for such fixation of the up-set price by the learned Commissioner, there being no participation, the very purpose and objective behind the permission for sale of the land of the Religious Institution stood frustrated. The Appellate Authority calling for the Benchmark Valuation and Market Valuation report (as noted) from the concerned Sub-Registrar sat over to observe that it appeared from the Bench Mark Valuation report that the upset price fixed by the learned Endowment Commissioner was too high. So, the Appellate Authority fixed the upset price for the auction of the land giving enhancement of 10% (ten percent) over the Benchmark Valuation shown by the Sub-Registrar in holding that the same would be reasonable and accordingly, directed that the auction of the land with that upset price be held.

11. The upset price for sale of the land in public auction which had been set forth by the learned Endowment Commissioner was Rs.70 lakh per acre for auction sale of Ac.7.871 (Seven Acres and Eight Hundred Seven One decimals) thus was redetermined by the Appellate Authority in Appeal.

A table indicating Benchmark Price, the Adequate Price fixed by the Original Forum as well as the Appellate Forum is provided herein below for better appreciation of the matter.

Sl. No.	Plot No.	Benchmark Valuation (Per Acre)	Upset Price/Adequate Price determined by the learned Endowment Commissioner (Per Acre)	Upset Price/Adequate Price determined by The Hon'ble Minister of Law (Per Acre)
1.	838	Rs.3,51,000/-	Rs.70,00,000/-	Rs.3,86,100/-
2.	840	Rs.3,51,000/-	Rs.70,00,000/-	Rs.3,86,100/-
3.	857	Rs.6,50,000/-	Rs.70,00,000/-	Rs.7,15,000/-
4.	859	Rs.6,50,000/-	Rs.70,00,000/-	Rs.7,15,000/-
5.	879	Rs.3,75,000/-	Rs.70,00,000/-	Rs.4,12,500/-
6.	899	Rs.3,75,000/-	Rs.70,00,000/-	Rs.4,12,500/-
7.	3436	Rs.3,75,000/-	Rs.70,00,000/-	Rs.4,12,500/-
8.	3433	Rs.74,25,000/-	Rs.70,00,000/-	Rs.81,67,500/-

9.	3438	Rs.3,75,000/-	Rs.70,00,000/-	Rs.4,12,500/-
10	625	Rs.3,75,000/-	Rs.70,00,000/-	Rs.4,12,500/-
11	714	Rs.3,75,000/-	Rs.70,00,000/-	Rs.4,12,500/-
12	716	Rs.3,75,000/-	Rs.70,00,000/-	Rs.4,12,500/-

12. From the above, it thus appears that when the learned Commissioner of Endowment had found out the Adequate Price for the land in question at Rs.70,00,000/- per Acre as he was under the obligation to do so as provided under section 19 of the OHRE Act; in an Appeal, the Appellate Authority has held the Adequate Price of different plots of land differently and thereby there has been reduction in the adequate price for the land, which can be seen from the following table:-

Sl. No.	Plot Nos.	Upset price Fixed by learned Commissioner per Acre	Upset Fixed by Hon'ble Minister per Acre	Reduction made by Hon'ble Minister per Acre.	Percentage of reduction by Hon'ble Minister per Acre
1.	838	Rs.70,00,000/-	Rs.3,86,100/-	Rs.66,13,900/-	94.48%
2.	840	Rs.70,00,000/-	Rs.3,86,100/-	Rs. 66,13,900/-	94.48%
3.	857	Rs.70,00,000/-	Rs. 7,15,000/-	Rs.62,85,000/-	89.78%
4.	859	Rs.70,00,000/-	Rs. 7,15,000/-	Rs. 62,85,000/-	89.78%
5.	879	Rs. 70,00,000/-	Rs.4,12,500/-	Rs.65,87,500/-	94.10%
6.	899	Rs. 70,00,000/-	Rs.4,12,500/-	Rs. 65,87,500/-	94.10%
7.	3436	Rs. 70,00,000/-	Rs.4,12,500/-	Rs. 65,87,500/-	94.10%
8.	3438	Rs. 70,00,000/-	Rs.4,12,500/-	Rs. 65,87,500/-	94.10%
9.	625	Rs. 70,00,000/-	Rs.4,12,500/-	Rs. 65,87,500/-	94.10%
10.	714	Rs. 70,00,000/-	Rs.4,12,500/-	Rs. 65,87,500/-	94.10%
11.	716	Rs. 70,00,000/-	Rs.4,12,500/-	Rs. 65,87,500/-	94.10%

Only for the land under Plot No.3433, the upset price fixed by the Appellate Authority in Appeal came to be Rs.81,67,500/- as against the upset price fixed by the learned Commissioner at Rs.70,00,000/-. For this lone plot of land, as per order of the Appellate Authority, there has been enhancement of Rs.11,67,500.00 (Rupees Eleven Lakhs Sixty Seven Thousand Five Hundred).

Thus, for all the land covered under 12 plots, when the learned Commissioner had fixed the total upset price at Rs.5,50,97,000/- (Rupees Five Crores Fifty Lakhs Ninety Seven Thousand), the same has been fixed at Rs.1,25,03,411/- (Rupees One Crore Twenty Five Lakhs Three Thousand Four Hundred Eleven). In this way, the Hon'ble Minister, in the Appeal, has reduced the upset price for all those lands covered under 12 plots for their sale by Rs.4,25,93,589/- (Rupees Four Crores Twenty Five Lakhs Ninety Three Thousand Five Hundred Eighty Nine).

13. Under the Scheme of the OHRE Act, as provided under section 4 of the section therein, the State Government, by notification, appoints a person professing the Hindu religion who is a member of Odisha Superior Judicial Service to be the Commissioner of Endowments with the caveat that he would cease to hold the office as such when he ceases to profess that religion. The powers and duties of the Commissioner has been provided in Chapter-II of the said Act under section 7 of the Act, which reads as under:-

7. Powers and Duties of Commissioner: –

(1) Subject to the provisions of this Act, the general superintendence of all religious institutions and endowments shall vest in the Commissioner.;

(2) The Commissioner may do all things which are reasonable and necessary to ensure that the religious institutions and endowments are properly administered and that their income is duly appropriated for the purposes which they were founded or exist.

Explanation: – The Commissioner shall have power to pass such interim orders as he deems necessary for the proper maintenance of a religious institution, or the proper administration of a religious endowment including the power to pass such orders if and when necessary for the proper management of any institution when a dispute concerning the same is pending in a Court.

The above provision makes it clear that the learned Commissioner has the general superintendence over all the Hindu Religious Institutions and Endowments which vest in him and he may do all things which are reasonable and necessary to ensure that the Religious Institutions and Endowments are properly administered and their income is duly appropriated for the purpose for which they were founded and exist.

A bare reading of the above provision would show that when the Religious Institutions and Endowments are managed by the Officials in the field, the learned Commissioner has the power of general superintendence over them and for proper administration, providing income and utilization and the Commissioner may do all such things which are reasonable.

14. The OHRE Act in section 19 creates a bar for transfer by exchange, sale or mortgage and lease for a period exceeding five years of any immovable property belonging to, or given or endowed for the purpose of, any Hindu Religious Institution without the sanction of the learned Commissioner. The learned Commissioner while deciding the matter of sanction as per the provision is under the legal obligation to look into the necessity for such transfer and find that the same if is beneficial to the Religious Institution. Any transfer without the sanction as per the said section is not valid and operative.

15. At this stage, it would be apt and proper to give a careful reading to the said provision of section 19 of the O.H.R.E. Act, which runs as under:-

"**19. Alienation of immovable trust Property :–**

(1) Notwithstanding anything contained in any law for the time being in force **no transfer by exchange, sale or mortgage and no lease for a term exceeding five years of any immovable property belonging to, or given or endowed for the purpose of, any religious institution, shall be made unless it is sanctioned by the Commissioner as being necessary for beneficial to the institution and no such transfer shall be valid or operative unless it is so sanctioned.**

Explanation: – A lease for a term not exceeding five years but with a condition of renewal permitting continuance of the lease beyond five years shall, for the purpose of this Sub-Section, be deemed to be a lease for a term exceeding five years.

(1-a) The fact of execution of a lease deed with a condition for renewal or renewal of such a deed shall be communicated to the Commissioner by the Trustee not later than fifteen days from the date of execution.

(1-b) After expiry of the term of the lease, the lessee shall deliver possession of the leasehold land to the lessor, failing which, the Commissioner may take action in accordance with the provision of Section 68:

Provided that all structures, permanent or temporary, if any, constructed plants and machineries and other things installed and kept on the leasehold land, which is a subject-matter of a lease executed after commencement of the Odisha Hindu Religious Endowments (Amendment) Act 22 of 1989 by the lessee, his Servants or agents, shall become the property of the religious institution unless removed from the land within such period, as may be prescribed, after expiry of the term of lease, in respect of which the Commissioner shall take action under the provision of Section 68.

(1-c) Notwithstanding anything contained in the proviso to Sub-Section (1-b), no property belonging to a person other than the lessee shall be subjected to confiscation under the said proviso, unless such person fails to remove his property within a period of thirty days from the date of publication of a notice which shall be issued by the Trustee within such period as may be prescribed after the expiry of the term of lease:

Provided that any person whose property is affected under Sub-Section (1-c), may file an application to the Commissioner claiming the property whose decision shall, subject to the decision of the Civil Court, be final.

(2) **In according such sanction**, the Commissioner may declare it to be subject to such conditions and directions as he may deem necessary regarding the utilization of the amount raised by the transaction, the investment thereof and in the case of a mortgage, regarding the discharge of the same within a reasonable period.

(3) A Copy of the order made by the Commissioner under this section shall be communicated to the State Government and to the Trustee and shall be published in such manner as may be prescribed.

(4) The Trustee may, within thirty days from the date of receipt of a copy of the order and any person having interest may, within thirty days from the date of publication of the order, appeal to the State Government **to modify the order or set it aside**:

Provided that appeals from the orders communicated or published prior to the date of commencement of the Odisha Hindu Religious Endowment (Amendment) Act, 1980 shall lie within a period of three months from the date of communication or, as the case may be, publication of the order or within a period of thirty days from the commencement of the said Act whichever period of expires earlier.

(5) In any case where appeal has not been made to the State Government it appears to the State Government **that the alienation is not necessary or beneficial to the institution, or that the consideration fixed in respect of the transfer by exchange, sale, mortgage or lease for a term exceeding five years of any immovable property is inadequate, they may, within ninety days from the date of the receipt of the order communicated to them under** Sub-Section (3) or the date of the publication of the order, whichever date is later, call for the record of the case from the Commissioner and after giving an opportunity of hearing to the parties concerned, revise the order of the Commissioner:

Provided that in any case where the transfer has not been effected in pursuance of the order of the Commissioner under sub-Section (1), the State Government may exercise the aforesaid power even after the expiry of ninety days from the date of such order.

(6) The State Government may, by order, stay execution of the deed of transfer in respect of the immovable property which form the subject-matter of an appeal or revision till the disposal of the appeal, or as the case may be, the revision.

(7) The order of the Commissioner made under this Section shall, subject to orders, if any, passed in an appeal or revision, be final."

16. As provided in sub-section 2 of section 19 of the O.H.R.E. Act, the learned Commissioner while according such sanction is empowered to put any such conditions and give any directions as he may deem necessary regarding utilization of the amount raised by the transactions, the investment thereof and in case of mortgage even regarding discharge of the same within a reasonable period.

The learned Commissioner, being placed in the position as the super guardian, has to look into everything in these regards through the prism of the best interest of the Religious Institution for its optimum benefit and for that end being the paramount consideration since the Religious Institution is a perpetual minor in the eye of law. The above exercise, as mandated under law, has to be done by the learned Commissioner only after he takes a decision that there exists the necessity for transfer the immovable property of the Religious Institution and that is also needed for the benefit and to serve the best interest of the Religious Institution. As the action of the guardian in respect of the minor's person and property must satisfy the paramount test and consideration as to the welfare and benefit of the minor, the same is the case in respect of Religious Institution. By the above provision, the legislative intends that the learned Commissioner should do all the needful in that regard.

17. In the given case, the learned Commissioner has granted the sanction for sale of the immovable property of the Religious Institution by its judgment dated 11.02.2018 basing upon an application made in the year 2004 that is after about 14 years. Important to note the fact here is that the person claiming as fit person, who on behalf of Religious Institution had originally filed the application being no more there to pursue the same, the subsequent Interim Managing Trustee came to pursue the said application in the year 2015, which is after 11 years of filing of the original application, which came to be decided after lapse of 14 years.

Be that as it may, the learned Commissioner in its order has arrived at a conclusion that the sale of the lands in question is essential and would be beneficial to the said Religious Institution. Having held so, he has fixed the condition that the land in question shall be sold by way of public auction and in the manner as directed. The learned Commissioner, being ordained under law, in the best interest and for the benefit of the Religious Institution in order to see that when the Religious Institution would be loosing the land once for all, it must get the optimum consideration, fixed the upset price for the said auction to be held for the sale of the land at Rs.70,00,000/- per Acre.

18. At the risk of repetition, we find it very interesting and at the same time shocking to put that before the auction of the immovable property of the Religious Institution was held with the upset price as fixed by the learned Commissioner that Interim Managing Trustee, Nilamadhab Sahoo, representing the Religious Institution filed an Appeal under sub-section-4 of section-19 of the Act raising the objection in only opposing the fixation of the upset price of the land by the learned Commissioner and questioning that upset price to be excessively high in further praying that the upset price of all the plots except the one that is plot no. 3433 be reduced/lowered down. It is not

understood and rather highly baffling and disturbing to note that when his move as to sale of the immovable property has been accepted by grant of permission/sanction and the direction of the learned Commissioner has not at all been carried into action by even putting once to test, how there had arisen any reason or justification for the Interim Managing Trustee behind the move in Appeal seeking reduction of the upset price fixed by the learned Commissioner as the minimum adequate price/consideration for sale of the land of the immovable property of the Religious Institution. The Interim Managing Trustee is under legal obligation to do any/all such acts in relation to the Religious Institution, keeping the best interest of the Institution in mind and for its welfare and benefit. We fail to follow for a moment that this move of filing the Appeal by Interim Managing Trustee (O.P. No.7) how was in the interest of the Religious Institution and its welfare at that point of time when the fact remains that more the price is fetched by sale, the more it is beneficial to the Religious Institution in serving its better interest. Had it been said to be low, to move that it be enhanced would have been for the interest and benefit of the Religious Institution standing to reason which here is juxtaposition. The Interim Managing Trustee questioned the upset price where he had no concern at all and when the fixation of the upset price on a lower side as prayed for by him, would be highly detriment and against the interest of the Religious Institution. This very move by the Interim Managing Trustee of the Religious Institution makes it clear as to how he was keen to safeguard the Religious Institution in acting in that manner, which exposes that he acted adverse to that interest of the Religious Institution. Had there been the auction once and that if would have failed due to non-participation, automatically the matter being so reported to the learned Commissioner, he would have been legally obliged to take the call and revisit the matter in order to see that the immovable property of the Religious Institution required to be sold for the benefit and in the interest of the Religious Institution finally materialises and that the condition/direction as regards upset price does not stand as the impediment on the way of implementation of the order of sale and accordingly needs modification as deemed just and proper at that time point of time taking into consideration the surrounding circumstances then prevailing.

Furthermore, even though we say that the Interim Managing Trustee had then no say over the matter of fixation of the upset price for the auction sale of the immovable property of the Religious Institution, still that Interim Managing Trustee has nowhere indicated as to what should be the adequate market price so that the same be fixed as the upset price for the auction and more importantly, why he seeks for reduction.

19. The order of the learned Commissioner Endowments passed in O.A. No.08 of 2004 on 11.12.2018, being received in the Department of Law, Government of Odisha, as required under the provisions of the Act and Rules, Memorandum of Appeal was presented by Nilamadhaba Sahu, the said Interim Managing Trustee and came to be received.

The file, being placed before the Appellate Authority on 03.02.2019, he posted the Appeal to 08.02.2019 at 12.00 hours for hearing. Although the file for hearing was submitted before the Appellate Authority on 07.02.2019 and it was so received in his office, no such order, however, was passed on 08.02.2019. The Appellate Authority, then suddenly on 16.02.2019 ordered that the Bench Mark Valuation and the Market

Valuation of the concerned land be obtained from the Sub-Registrar, Hinjili, Ganjam within a week and the Appeal be put up for hearing. Then also no particular date was fixed. The Sub-Registrar, furnished the Bench Mark Valuation of the land and simultaneously intimated that no such transaction relating to the land in the nearby locality, having been made in his office, the Market Valuation of the land could not be ascertained at his end for being so reported as desired. The report was seen by the Appellate Authority on 08.03.2019, when the file had been submitted before him upon receipt of the said report of the Sub-Registrar on 28.02.2019 and received in his office on 01.03.2019. When the matter stood thus, on 13.03.2019, the Section Officer of the Department of Law received the copy of the order dated 01.03.2019 passed by the Appellate Authority in Appeal Case No.2 of 2019 and then communicated the same to the learned Commissioner of Endowment and returned the LCR. When the file reveals that Appellate Authority went through the report on 08.03.2019, it is curious enough to note that the final order in the Appeal had by then already been passed on 01.03.2019. The final order appears to have been made ready on the next day of receipt of the file with the said report without perusing the report although so noted in the final order to have been gone through. The file does not reveal that the Appeal at any point of time was heard and the Opposite Party No.7 (Appellant therein) had advanced his submission for reduction of upset price. The date, i.e., 08.02.2019, being fixed as the date of hearing, the entire file does not show as to if at all thereafter the Appeal has been heard. It is also interesting to note that when on receipt of the order of the learned Commissioner Endowments, the file was moved no such order has been passed in declining to initiate any suo motu Revision, which is mandated in law but then the Appeal filed by the Interim Managing Trustee only continued. When the Appellant of that Appeal, i.e., the present Opposite Party No.7 had not argued in the Appeal, how was it then kept alive for the Appellate Authority to pass an order on merit accepting the whole prayer in the Appeal by reducing the upset price. Viewing all these, it appears as if the Hon'ble Minister, suo motu reduced the upset price, which was not all within his competence and power as per law.

20. At this juncture, it is not understood that when the Appellate Authority after having disposed of the Appeal became functus officio, upon receipt of application dated 23.12.2019 from Iswar Das and others and letter dated 10.01.2020 from the Additional District Magistrate has passed specific order that when the period prescribed under sub-section 2 of section 19(C) of the O.H.R.E. Act has expired and no further extension has been made, "No Objection Certificate" (NOC) be issued to the concerned Sub-Registrar as well as the Trustee be intimated about it under intimation to the Collector. Such a direction was given on 06.02.2020, after lapse of about a year after disposal of the Appeal and that was when the Additional District Magistrate has expressed his concern as under:-

> "Further, I am to say that though from time to time this office is getting instruction to dispose of the cases, but due to certain shortcoming observed in the cases, this office could not dispose it of in time. Hence, you are requested to give necessary instruction/clarifications deity property-wise transmitted to Government vide above letters for taking necessary action at this end. However, in the meanwhile this office has

> processed the deity land of different religious institutions like (1) Radhakrishna Lalita Bije at Hinjili, (2) Sri Radha Mohan Mohaprabhu and Radha Damodar Mahaprabhu Bije at Radha Mohan Matha, Nuasahi, Digapahandi, (3) Sri Raghunath Mahaprabhu Bije at Nimakhandi and (4) Sri Jatadhareswar Swamy Bije at Khaspa street, Old Berhampur which will be hoisted in public domain for necessary information of all possible Government Department for processing the cases to give "No Objection Certificate" or willingness certificate for use of the deity property for public use.
> Xx xx xx xx"

Although Iswar Das and others claiming to be the Heriditary Trustee and the Managing Heriditary Trustee of some other Religious Institutions, in that application, had requested the Secretary, Department of Law to issue appropriate instruction/direction to the Sub-Registrar, Berhampur for registration of the land in question as the period of offer letter has crossed the stipulated time since long, it is not understood as to how these applications were at all entertained by the Appellate Authority when said applicants had no concern at all in the matter. The Appeal file contains the photocopy of the said application. There is absolutely no noting in the file regarding these applications and the file contains the photocopy of one note-sheet, which is said to be an extract taken from another file opened in the year 2018.

Furthermore, when the Appellate Authority, as per his order, had not received the report relating to the Market Value of the land from the Sub-Registrar and that report was only on the Bench Mark Valuation, nothing has been stated about the Market Valuation of the land and the Appellate Authority appears to have taken the approved Bench Mark Valuation to be the market value of the land so as to say what would be the adequate price, which is absolutely incorrect and fundamentally wrong; both being conceptually and contextually different.

21. The relevant provisions are contained in section-47-A of the Indian Stamp (Odisha Amendment) Act, 2008 read with the corresponding rules in the Odisha Stamp Rules, 1952 under Chapter-VI would throw the light on the matter. The Sub-section-(1) Section 47-A of the Indian Stamp Act (Odisha Amendment) provides as to how instruments under-valued to be dealt with. It says that where the Registering Officer under the Registration Act, 1908, while registering any instrument of conveyance , exchange, gift, partition or settlement has reasons to believe that the **market value of the property which is the subject matter of the instrument** has not been rightly set forth in the instrument or **is less than the minimum value determined in accordance with the rules made under the Act**, he shall, before registering such instrument, refer the matter to the Collector, with an intimation in writing to the person concerned, for determination of the market value of such property and the proper duty payable thereon.

Coming to the Odisha Stamp Rules, 1952, we find the market value to have been defined in Rule-2(f). So, the market value as finds mention in section-47-A of the Act is to be given the meaning as per the above rule. The market value as defined in the Rule-2(f) of the Odisha Stamp Rules, 1952 is as under:-

> "(i) the value of any property estimated to be the value which in the opinion of the Collector or the appellate authority, as the case may be, would have fetched or would fetch, if sold, in the market on the date of execution of the instruments; and

> (ii) the value of any property which is the subject matter of conveyance, exchange, gift, partition or settlement by or on behalf of the Central Government or the State Government or any authority or body incorporated by or under any law for the time being in force as shown in the instrument."

Rule-37 of Chapter-VI of Odisha Stamp Rules, 1952 refers to the constitution of the District Level Valuation Committee and Sub-District (Tahasil Level) Valuation Committee and Rule-38 provides the function of the District Level Valuation Committee, when Rule-39 describes the function of the Sub-District Valuation Committee. In Rule-40, it is stated that market value guidelines prepared under this Chapter shall be issued as soon as they are prepared and shall thereafter be revised biennially from the 1st April. It is also provided therein that in case, the Committee fails to revise the valuation, the Collector as Chairman would enhance the value by ten percent of the value so fixed. For preparation of the valuation, what have been stated in clause (a) of Rule-39 and the Appendix-II which provides principle for determination of market value and such other instructions issued by the Government and Inspector General of Registration (IGR), from time to time shall be taken into consideration. Under Rule-41-A, the State Government reserves the power to engage reputed professional agency to examine the procedure for fixation of market value guideline regarding proper value of the properties in any particular area or areas under such terms and conditions as considered proper for being taken into account by the Committee for such area/areas.

A conjoint reading of the provisions contained in sub-section 1 of section 47-A of the Stamp (Odisha Amendment) Act, 2008 and Orissa Stamp Rule made thereunder makes the following things clear:-

> "a. the Registering officer before registration of the instrument, has to arrive at a conclusion that valuation put-forth in the instrument is the proper value of the property, which is the subject matter of the instrument or in other-words that has not been undervalued.;
>
> b. for the purpose of registration, he must have the reasons to believe that the market value of property, which is the subject matter of the instrument, has been rightly set-forth in the instrument.; and
>
> c. where if not more at least the market value of the property determined under the said rules made in accordance with the Act has been set-forth as the market value of said property, which is the subject matter of the instrument, the Registering Officer would have all the satisfaction that the market value of the property has been rightly set-forth, then the scope for the Registering Officer to refer the matter to the Collector for determination of the proper duty payable thereon would no more be there."

This is because of the reason that the Collector himself is associated in determination of the market value of the property as provided in the rules. The market value has to be taken to mean so with reference to the objective set-forth in the Stamp Act in charging stamp duty and the fees for registration as the consequence. The market value thus determined under the rules is only for the purpose of acceptance of the document for registration by the Registering Officer by arriving at a satisfaction that the market value of the property, which is the subject matter of the instrument has been rightly set-forth in the instrument. The definition of the market value, as given in the

rules, thus is only confined for the purpose as aforesaid and not beyond that to say that the same would be the market value of the property in question for transfer of the property in open market when the property is offered in open market for transfer that would depend upon very many factors including the time when the transfer is being made, the market value meaning the reasonable consideration thereof can never be equated with the market value determined under the rules as above. That is the reasons the Sub-Registrar has very rightly stated that as such translations of the land in the locality has been registered in his office, he was not in a position to report about the market valuation of the land and he simply supplied the Bench Mark Valuation, i.e., the valuation of land fixed for satisfaction of the Registering Authority as to market value so as to charge the stamp duty and consequential collection of the fees for registration.

So, for the purpose of determining the adequate price at which the immovable property belonging to the Religious Institution for the transfer while according sanction under section 19 of the O.H.R.E. Act, said market value determined under Rule-2(f) and the other rules made under Chapter-VI of the Odisha Stamp Rules keeping in view the provisions contained in section 47-A of the Stamp (Odisha Amendment), 2008 can never so accepted and under no circumstance be held to be the adequate price. The Appellate Authority, in the present case, while going to pass the order by substantial reduction of the upset price, has not kept in mind the above fundamental and very common feature. The determination of the upset price being the adequate price has been done in an arbitrary manner detriment to the interest and welfare of the Religious Institution and not to benefit the Religious Institution.

The Appellate Authority has abruptly fixed the upset price by increasing 10% over the said Bench Mark valuation given by the Sub-Registrar as if offering one peanut more to the Religious Institution as of charity/grace. For all these aforesaid discussion; we are more than satisfied that the final order passed in Appeal which has been impugned in this proceeding before us is wholly unsustainable and should not be allowed to stand and as such liable to be quashed as nonest in the eye of law and so also any/all said actions taken/done in pursuance thereof and consequential thereto must not be allowed to stand. On this ground alone, the order of the Appellate Authority passed in the Appeals, being impugned in this proceeding before us, is also liable to be set aside.

Thus, it appears that no such effort has been made to ascertain the Market Value of the land in question to find out the adequate price for its sale for determining the upset price for the land in the auction sale.

22**.** Next turning our attention to Sub-section-3 of section 19, we find that it provides that the copy of the order made by the Commissioner under said section shall be communicated to the State Government and the Trustee and shall be published in such manner as may be prescribed. The OHRE Rules 1959 in sub-rule 2 of rule 4 prescribes that the copy of the orders in addition of being communicated to the State Government, the Trustee or Trustees and to the intended alienees, be also published by affixation on the notice Board or the front door of the Religious Institution concerned and in a conspicuous place of the village where the property in question situates. Both modes have to be complied with and in their absence, the inevitable conclusion would be

that there was no due publication of the order, and that order thus cannot be further carried into action and even if carried into action, all such actions would be null and void. What we mean here is to say that the very objective of all these is to protect and safeguard the interest of the Religious Institutions and Endowments and to do everything in a transparent manner in order to see that the Religious Institutions and Endowments are not exploited by any such unscrupulous person, even at times by the person/s in-charge having evil eyes and intention of their own standing detrimental to the interest and benefit of the Religious Institutions and Endowments, which thus can be prevented and dealt with stern hands under the law in palce. The other purpose is to bring everything to the notice of the general public who has the interest in the Religious Institutions/Endowments and thus their faith does not recede.

Sub-section 4 of section-19 provides that the Trustee or any person having interest may file an Appeal within the time period to the State Government to modify the order or seeking to set aside the order of the learned Commissioner sanctioning such transfer in the matter of such transfer of the immovable property of the Religious Institutions/Endowments. The State Government even without there being any Appeal when finds that the alienation is not necessary or beneficial to the Religious Institution or that the consideration fixed in respect of the transfer is inadequate may within 90 (ninety) days from the date of receipt of the order communicated under sub-section-3 or the date of publication of the order whichever is later, call for the record from the learned Commissioner and after giving opportunity of hearing to the parties concerned revise the order of the learned Commissioner.

Sub-section 7 of section -19 provides that the order of learned Commissioner made under section 19(1) shall be subject to orders, if any, passed in an Appeal or Revision which shall be final.

23. At this moment, it strikes to us, the legislative intent of providing the right of Appeal in this matter. The person aggrieved by an order of the learned Commissioner is given the right to question, the said order before Government on the ground that the transfer is not necessary and/or beneficial to or in the interest of the Hindu Religious Institutions/Endowments. The price component thus gets included to be retested only with reference to the benefit and the interest of the Religious Institutions/Endowments and keeping that angle in mind and only viewing in that light. The provisions have to be given a holistic reading in order to cull out the holistic approach to be made in Appeal. In the present case, when the prayer of the Interim Managing Trustee representing the Religious Institution for sale of the immovable property belonging to the Religious Institution had been allowed, the Appellant-Religious Institution represented by that Interim Trustee, had nothing at all to feel aggrieved. More so, as already stated when the property in question was not put to auction at the upset price of Rs.70,00,000/- per Acre as fixed by the learned Commissioner, the prayer of said Interim Trustee representing the Religious Institution only seeking reduction of the said upset price by carrying an Appeal is not understood as to how at all was to the benefit and in the interest of the Religious Institution.

24. Furthermore, when nothing is stated that the upset price so fixed was with a view to foil the move for sale and that it ultimately would not materialize without further indicating as what approximately should be the adequate price to be fixed as the upset price, the Appeal at the behest of that Interim Trustee ought to have been dismissed in limini as the Religious Institution when that Interim Trustee was representing had nothing to be aggrieved by said order as to the upset price fixed by the learned Commissioner for the auction sale of the immovable property of the Religious Institution. The right of appeal to modify the order or set it aside as finds mention in sub-section 4 of section 19 of the O.H.R.E. Act, being read harmoniously with all the other sub-sections thereunder; keeping in view the objective behind the insertion of section 19 in the OHRE Act, clearly spell out the intention of the legislature that it was so available to reconsider the view referred to in the orders by which the learned Commissioner has refused to grant sanction or if granted that is in part but not the whole but certainly not at all in respect of the conditions imposed/fixed and directions given unless any of those are asserted to be standing adverse to the interest of the Religious Institution or detriment to its interest without going to benefit but to cause sufferance and hardship. It becomes more clear when we find in sub-section-5 that the State Government reserves the right to revise the order only when the alienation is not "necessary or beneficial to the Religious Institution", which thus empowers the State Government to annul the sanction for sale given by the learned Commissioner and when the consideration fixed for the transfer is "inadequate", then also the State Government is empowered to increase the consideration fixed for transfer as would be so decided as adequate. Therefore, we are of the considered view that no right of Appeal is available and lies seeking modification of the directions and conditions fixed by the learned Endowment Commissioner while sanctioning the sale except as stated hereinabove. The provision of law having given the power to the learned Commissioner to fix any such directions or conditions whiling granting the sanction for transfer of immovable property belonging to the Religious Institution as it deems fit and proper and necessary in the interest of the Religious Institution and Endowments and as beneficial to the Religious Institution and Endowments, no Appeal lies to tinker with such directions or conditions unless it is shown to be arbitrary and unreasonable, being tested in the touchstone of the tests as afore-stated and being shown that those directions/conditions were so deliberately fixed in order to see that the purpose for which the permission/sanction has been accorded is in that way for such harsh, unreasonable and arbitrary conditions/directions becomes futile. Any such direction/condition on being found to be unworkable in the field and are unable to be pressed into service are permissible to be modified/substituted only by the learned Commissioner and none-else as it is the learned Commissioner, who as per law, is the Super Guardian sitting to exercise all such power of superintendence over the Trustees, who are the guardians of the Religious Institutions and Endowments in the field. The only exception remains that the consideration fixed by the learned Endowment Commissioner being inadequate the same can be sought to be enhanced by filing Appeal and on that score the Appeal very much lies as it certainly is in the interest of the Religious Institution and for its benefit.

We are of the firm view that the Religious Institution has no right of Appeal at all seeking reduction of consideration, as in the given case, the upset price and the Appeal

for that reason is not at all entertainable. The present Appeal by the Religious Institution being against such order of fixation of the upset price seeking to reduce it substantially which has huge financial implications (which has taken place in the given case) being not entertainable in the eye of law as per the view, which we have taken upon interpretation of the provision contained in section-19 of the OHRE Act, the order of the Hon'ble Minister, on this ground, is also nonest in the eye of law.

All these, being cumulatively viewed, the present Appeal does not appear to us to be one by the Religious Institution represented by that Interim Managing Trustee but on Appeal by the said Interim Managing Trustee in his individual capacity either for serving his own interest or for serving interest of some others and for their benefit but certainly not for the benefit and interest of the Religious Institution.

25. Before parting further, we feel it pertinent to make some observations, which we sincerely hope, will be of immense help to the Authority dealing with such cases and in our view those cannot be lightly brushed aside. Also, we are of the view that if examination is not made in the light of those, then the finding on the issue may not stand to the legal scrutiny made in the backdrop of the objective behind the enactment.

Presently in these matters of immovable property a catch twenty-two situation has arrived and, therefore, also in cases of necessity for sale, it has to be anxiously thought for a while whether looking at all the relevant factors, sale is necessary for the whole area or a part and then if in part, by utilizing a portion of the obtained sale consideration for preservation and protection of the rest part if would be in the better interest and serving more to the benefit of the Religious Institution/Endowments. The preservation when made if would fetch much more return, then the disposal of the immovable property belonging to the Religious Institutions/Endowments in entirety would not justifiably stand as a decision to test the legal scrutiny. These aspects cannot be overlooked and it is imperative to consider all those. If one thinks for a moment about sale of properties and deposit of sale proceeds viewing the rising trend of rate of inflation and simultaneously to check it, the decreasing trend of interest rate on deposits, it would be justified and reasonable to accept that in future a time may come when the sum that would be accruing towards interest would hardly be sufficient to meet the expenses for performance of even very few or even one of the Niti-Kantis and at that time certainly repentance may come that preservation and protection of property being made if the sale would have been withheld, that would have yielded the real benefit and the grave situation would have been so prevented. At that moment, the sale made in past would prove to be a foolish/wrong move, detriment to the interest of the Religious Institutions/Endowments. But then nothing would be left in the hands to put the clock the other way round. So, it is really the important need for due application of mind without being oblivious to the ground realities, the prevailing situation and accordingly thinking of future with a realistic approach.

Taking all these into consideration, a balance has to be struck. Simply because a land is likely to be encroached being in an important or upcoming/growing/developing locality or not fetching income, the necessity for sale be not the only option to be adopted/chosen. First of all where the Religious Institution/Endowment is having sustainable income, the examination should be to explore all such possibilities of

protection and preservation of the immovable properties for much more benefit in future before saying that necessity at said moment for sale exists. These being important observations taking into account the ground realities in the present days real estate development and user scenario, the authority ordained with such onerous responsibility and duty must keep in mind while in seisin of these types of proceeding, lest it may amount to improper exercise or gross failure to exercise the jurisdiction vested in them as per law. We cannot shut our eyes to the reality that when population explosion is continuing, in our march for development, employment generation and economic growth with establishment of large number of various industries in the anvil, there has been dearth shortage and availability of land and it is so happening at a faster pace than what used to take place in past years. This position is going to continue and in the days to come, it is expected to be more at much faster rate as is said by all noted futurist to which Authority cannot also turn deaf ears.

26. Further, while deciding to allow the sale the method to be adopted as to whether for sale of large patch of land in one go or in piecemeal is certainly standing as a requirement to be dealt, as a precondition in order to ensure optimum benefit to the Religious Institutions/Endowments by way of encouraging and increasing competition. These decisions of course will vary from case to case because of varying situations which cannot be exhaustively stated. But ignoring these, if the Authority proceeds, the days may not be too far to see the extinction of these Religious Institutions/Endowments having adverse affect on our social fabric and living which has their foundation deeply rooted to these Institutions which we have accepted as integral part of our society and life. The law makers keeping in mind that the Trustees may even honestly commit the mistake in taking a decision for alienation, have, therefore, put a rider to vest on them the power or authority in laying down that it can only be done with prior permission of the learned Commissioner appointed under section 4 of the O.H.R.E. Act prescribing the powers and duties under section 7 of the Act. So, the Authority permitting the same has a very responsible function to discharge and duty to perform in this regard. Once the permission is given, the same must be backed by all sorts of justifications including those in tune of our above observations which the Authority is called upon and rather mandated to consider in the present days scenario. All these aspects, however, have not been touched upon by the learned Commissioner and also in the order of the Appellate Authority in Appeal.

27. In the result, the writ petitions are allowed. The orders passed on 01.03.2019 in O.A. Appal No.2 of 2019 are hereby quashed.

Consequently, all said actions/deeds, which have taken place pursuant to and in consequence of the said order which we have quashed are hereby declared null and void and also quashed. The registered sale deed dated 03.09.2020 in respect of the land in question measuring Ac.07.871 decimals in favour of the Opposite Party No.8 is accordingly declared as void, inoperative and having no force in the eye of law.

The learned Commissioner Endowments is directed to take all such effective steps within a period of two months hence to ensure that the immovable property measuring Ac. 7.871 decimals (Seven Acre Eight Hundred Seventy One decimals)

belonging to the Religious Institution remains in the hands of the Religious Institution which is presently managed by the Non-hereditary Trust Board for the beneficial enjoyment of the Religious Institution in its best interest and in serving the same.

Since, by now more than four years have passed from the order of the learned Commissioner of Endowment and as it is said by the Non-hereditary Trustees that the requirement for sale of the immovable property of the said Religious Institution does no more stand as the need in view of flow of funds to the Religious Institution from other sources; said order dated 11.12.2018 passed by the learned Commissioner, Endowment in O.A. No.8 of 2004 permitting sale of the land in question is held to have spent its force and, therefore, it is declared that said order would no more hold the field so as to be having any force in the eye of law and as such does no more stand to be carried out.

Viewing the conduct of the Opposite Party No.7 that he, being the Interim Managing Trustee of the Religious Institution, as stated above, has acted in a manner and has been rigorously pursuing the matter even before us in this proceeding, which must have been at the expense of the very Religious Institution; which is highly detriment to the interest of the Religious Institution and running adverse to the Institution and thereby abusing his position as had been assigned, we hereby impose cost of Rs.5,00,000/- (Rupees Five Lakhs) to be deposited by him in the account of the said Religious Institution within a period of two (2) months hence; failing which it would be realized by the Commissioner Endowments as the outstanding dues payable to the Religious Institution as per law and invite other legal consequences.

The above deposit shall remain in an unencumbered Fixed Deposit in any Nationalized Bank for a period of ten (10) years further renewable from time to time as per the order of the learned Commissioner of Endowments and the interest earned therefrom shall pass on to the Savings Bank Account of the Religious Institution for being spent in the day-to-day affairs of the said Institution and performance of Nits-Kantis and Seva Puja.

The consideration amount of Rs.1,40,00,000/- (Rupees One Crore Forty Lakhs) kept by the Opposite Party No.8 in deposit on 05.06.2020 in the name of the Religious Institution under Annexure-R/8 remaining pledged to the learned Commissioner, Endowments, Bhubaneswar be refunded to the Opposite Party No.8 within two weeks hence observing the legal formalities.

28. The Writ Petitions are accordingly disposed of. The order be communicated to the Secretary to Government in the Department of Law and the Commissioner of Endowments, Odisha for onward communication to all concerned.

—— o ——

2024 (II) ILR-CUT-510

D. DASH, J

R.S.A. NO. 73 OF 2018

PRASANTA DEVI PADHI ……Appellant

-V-

ASISH KUMAR PADHI ……Respondent

(A) HINDU MARRIAGE ACT, 1955 – Section 25(1) – Whether separate application for permanent alimony is mandatory for maintenance while the Court is passing an order of dissolution of marriage ? – Held, No – When the court passes an order of dissolution of marriage, it carries the legal obligation to see that the party/parties in need are thereby not pushed to destitution and vagrancy when the law clearly provides that, a divorced wife is entitled to maintenance till she remarries. (Paras 10-11)

(B) INTERPRETATION OF STATUTE – Word "Or" – Meaning & implication of the word 'Or' reflected in Section 25(1) of the Hindu Marriage Act – Discussed. (Paras 8-9)

Case Laws Relied on and Referred to :-
1. (1944) 1 SCC 337 : V. Bhagat v. D. Bhagat (Mrs).
2. 1993(3) SCC 406 : Chand Dhawan V. Jawaharlal Dhawan.

For Appellant : Mr. D. K. Sahoo-1
For Respondent : Mr. T. K. Sahu

JUDGMENT Date of Hearing : 05.03.2024 : Date of Judgment : 12.03.2024

D.DASH, J.

The Appellant, by filing this Appeal under Section 100 of the Code of Civil Procedure (for short, 'the Code'), has assailed the judgment and decree passed by the learned Additional District Judge, Titilagarh, Bolangir, in R.F.A. No.21 of 2015.

The Respondent (husband) as the Petitioner had file¬d an application under section 13 of the Hindu Marriage Act, 1955 (for short, 'the H.M Act') arraigning the Appellant (wife) as the Respondent therein, praying for a decree for dissolution of their marriage. The said application stood numbered as C. S. No.32 of 2011 in the Court of Civil Judge, Senior Division, Titilagarh. The Trial Court decreed the suit and in dissolving the marriage between the parties directed the Respondent (husband) to pay a sum of Rs.7,00,000/- to the Appellant (wife) as permanent alimony. The Respondent (husband) being aggrieved by the said judgment and decree passed in the suit, carried an Appeal under section 28 the H.M Act. The First Appellate Court in that Appeal filed by the Respondent (husband) challenging the grant of permanent alimony to the Appellant (wife) has set aside the said order of the Trial Court as to the direction for payment of the permanent alimony by the Respondent (husband) to the Appellant (wife). Hence this Second Appeal is at the instance of the Appellant (wife) and here she has only questioned the refusal for grant of permanent alimony by 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 Suit.

3. The Appeal has been admitted to answer the following substantial question of law.

"Whether the Lower Appellate Court is right in setting aside the order passed by the courts below with regard to the payment of permanent alimony taking a view that for the purpose a separate application containing the prayer is the mandate of law which also in the case in hand is not factually correct as here there was an application to that effect?"

4. Mr. D. K. Sahoo, learned counsel for the Appellant (wife) submitted that the view taken by the First Appellate Court by giving a reading to the provision contained in section 25 of the H. M. Act that it is the mandate of law in a proceeding for divorce that in order to claim permanent alimony, an application has to be made in that regard is erroneous. He, further, submitted that this Appellant (wife) while giving her affidavit evidence before the Trial Court had clearly stated that in case, the Court passes the decree for divorce, she be paid with the permanent alimony of a sum of Rs.15, 00, 000/- so as to maintain herself for the rest of life and provide proper care and education to her son, which according to him ought to have been taken as the claim advanced from the side of the Appellant (wife). He, therefore, submitted that the judgment of the First Appellate Court setting aside the order of grant of permanent alimony of Rs.7,00,000/- by the Respondent (husband) to the Appellant (wife) is not sustainable in the eye of law.

5. Mr. T. K. Sahu, learned counsel for the Respondent (husband) submitted that the view taken by the First Appellate Court is wholly in consonance with the provision contained in section 25 of the H.M. Act, which says that for the purpose of grant of permanent alimony, the claimant has to file an application in that regard, and, therefore, when Respondent (husband) had initiated the proceeding for divorce since the Appellant (wife) had not given any application claiming permanent alimony, the Trial Court having committed error in granting the permanent alimony, the same has been rightly set aside by the First Appellate Court.

6. In order to answer the substantial question of law in addressing the rival submission, it would be apt to take note of the provision contained in section 25 of the H. M. Act, which reads as under:-

"Permanent alimony and maintenance-

(1) Any Court exercising jurisdiction under this Act may, at the time of passing any decree or at any time subsequent thereto, on application made to it for the purpose by either the wife or the husband, as the case may be, order that the respondent shall pay to the applicant for her or his maintenance and support such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant as, having regard to the respondent's own income and other property, if any, the income and other property of the applicant, (the conduct of the parties and other circumstances of the case), it may seem to the Court to be just, and any such payment may be secured, if necessary, by a charge on the immovable property of the respondent."

(2) xxxx xxxxx xxxx

(3) xxxx xxxxx xxxx

7. The Trial Court here while granting the decree for divorce as prayed for by the Respondent (husband) had directed the Respondent (husband) to pay the

permanent alimony. This has been set aside by the First Appellate Court as the Appellant (wife) had not filed an application in that regard.

8. A plain reading being given to the provision as quoted above, this Court is of the considered opinion that the First Appellate Court has failed to properly read and construe the provision contained in sub section 1 of section 25 of the H.M. Act. It says that any Court exercising jurisdiction under the H. M. Act may at the time of passing of the decree **Or** at any time subsequent thereto, an application made to it for the purpose by either the wife or the husband as the case may be……" The word "**or**" which finds place in between the word "decree" and "at any time subsequent thereto" clearly poses two situations one "at the time of passing of decree" and the second one "at any time subsequent thereto". When it comes to the position at any time subsequent thereto, an application is required to be filed whereas at the time of passing any decree, the Court exercising the jurisdiction under H. M. Act has all the power to pass an order as regards the permanent alimony for maintenance and support which may be gross sum or such monthly or periodical sum for such term not exceeding the life of the recipient. The words at the time of passing any decree and the words at any time subsequent thereto cannot be given conjoint reading but have to be read disjunctive of one another and that is the reason the word 'or' has been employed in between.

The provision of section 25 confers an enabling power upon the court itself while granting divorce or judicial separation to also pass an order for the maintenance of the wife. The contemplated application as noticed supra to be made by such parties has to be limited and confined to the case when the court, while disposing of the main petition has not thought of passing an order for grant of maintenance and was silent on the said issue and that therefore to be so considered and decided has to be placed through an application.

Thus to say that even the Court while exercising the jurisdiction under the H. M. Act at the time of passing any decree is required to have before it, an application in advancing the claim of permanent alimony will defeat the intention of the legislature which having purposely employed the word "or" in between the two situations; one "at the time of passing any decree" and the other "at any time subsequent thereto" has not so expressed to be the intendment that on both the situations an application is required to be filed.

9. The Supreme Court in case of ***V. Bhagat v. D. Bhagat (Mrs), (1944) 1 SCC 337*** dealt with the point on the interpretation of Section 25 read with Sections 9 to 13 read with Section 5 of the Act. In that case a joint petition filed by the spouses for grant of a decree of divorce by mutual consent failed as they withdrew their consent during the statutory waiting period. Thereafter the wife moved a petition for grant of maintenance under Section 25 of the Act. The Supreme Court held that Section 25 can be invoked by either of the spouses where a decree of any kind governed by Sections 9 to 13 has been passed and the marriage-tie is broken, disrupted or adversely

affected by such a decree of the Court. The view expressed is that where the marriage is not dissolved by any decree of the Court, resort to Section 25 of the Act is not allowed as any of the spouses whose marriage continues can resort to other provisions for seeking maintenance, like Section 125 of the Criminal Procedure Code or provisions of Hindu Adoptions and Maintenance Act.

10. In case of ***Chand Dhawan V. Jawaharlal Dhawan, 1993(3)SCC 406*** the Supreme Court categorically held that the expression at the passing of passing any decree, as has been used in Section 25, includes a decree of nullity of marriage. The relevant observations read thus:-

> *"On the other hand, under the Hindu Marriage Act, in contrast, her claim for maintenance pendente lite is curated on the pendency of a litigation of the kind envisaged under sections 9 to 14 of the Hindu Marriage Act, and her claim to permanent maintenance or alimony is based on the supposition that either her marital status has been strained or affected by passing a decree for restitution of conjugal rights or judicial separation in favour or against her, or her marriage stands dissolved by a decree of nullity or divorce, with or without her consent. Thus when her marital status is to be affected or disrupted the court does so by passing a decree for or against her. On or at the time of the happening of that event, the court being seisin of the matter, invokes its ancillary or incidental power to grant permanent alimony. Not only that, the court retains the jurisdiction at subsequent stages to fulfill this incidental or ancillary obligation when moved by an application on that behalf by a party entitled to relief. The court further retains the power to change or alter the order in view of the changed circumstances. Thus the whole exercise is within the gambit of a diseased or a broken marriage. And in order to avoid conflict of perceptions the legislature while codifying the Hindu 'Marriage Act preserved the right of permanent maintenance in favour of the husband or the wife, as the case may be, dependent on the court passing a decree of the kind as envisaged under sections 9 to 14 of the Act. In other words without the marital status being affected or disrupted by the matrimonial court under the Hindu Marriage Act the claim of permanent alimony was not to be valid as ancillary or incidental to such affectation or disruption. The wife's claim to maintenance necessarily has then to be agitated under the Hindu Adoptions and Maintenance Act, 1956 which is a legislative measure later in point of time than the Hindu Marriage Act, 1955, though part of the same socio-legal scheme revolutionizing the law applicable to Hindus.*
>
> ……
>
> *We have thus, in this light, no hesitation in coming to the view that when by court intervention under the Hindu Marriage Act, affection or disruption to the marital status has come by, at that juncture, while passing the decree, it undoubtedly has the power to grant permanent alimony or maintenance, if that power is invoked at that time. It also retains the power subsequently to be invoked on application by a party entitled to relief. And such order, in all events, remains within the jurisdiction of that court, to be altered or modified as future situations may warrant.*
>
> *On the husband's petition, a decree declaring the second marriage as null and void was granted. The Supreme Court held that, as has been held by it in Chand Dhawan's case (supra), the expression used in the opening part of Section 25 enabling the 'Court exercising jurisdiction under the Act' at the time of passing any decree or at any time subsequent thereto to grant alimony or maintenance cannot be restricted only to decree of judicial separation under section 10 or divorce under Section 13. When thelegislature*

has used such wide expression as at the time of passing of any decree, it encompasses within the expression all kinds of decrees such as restitution of conjugal rights under Section 9, judicial separation under Section 10, declaring marriage as null and void under section 11, annulment of marriage as voidable under Section 12 and Divorce under Section 13.

It is well known and recognized legal position that customary Hindu Law like Law permitted bigamous marriages which were prevalence in all Hindu families and more so in royal Hindu families. It is only after the Hindu Law was codified by enactments including the Hindu Marriage Act that bar against bigamous marriages was created by Section 5(i) of the Act. Keeping into consideration the present state of the statutory Hindu Law, a bigamous marriage may be declared illegal being in contravention of the provisions of the Act but it cannot be said to be immoral so as to deny even the right of alimony or maintenance to a spouse financially weak and economically dependent. It is with the purpose of not rendering a financially dependent spouse destitute that Section 25 enables the court to award maintenance at the time of passing any type of decree resulting in breach in marriage relationship.

Moreover, in the given situation when the Court passes an order of dissolution of marriage, it carries the legal obligation to see that the party/ parties in need are thereby not pushed to destitution and vagrancy when even the law clearly provides that a divorced wife is entitled to maintenance till she remarries. After reading the provisions contained in section 24 of the Act alongside with section 25, the reason assigned by the First Appellate Court that without there being a separate application on record during the course or at the time of passing the decree for the permanent alimony and maintenance, the Trial Court could not have ordered the payment of permanent alimony under section 25 of the Act is incorrect and untenable.

11. In that view of the matter, this Court is of the considered opinion that the First Appellate Court has committed the grave error of law in setting aside the order as to the grant of permanent alimony to the Appellant (wife) to be paid by the Respondent (husband) as had been ordered by the Trial Court while accepting the prayer of the Respondent (husband) in dissolving his marriage with the Appellant (wife).

Above being the answer to the substantial question of law, the judgment and decree passed by the First Appellate Court in denying the permanent alimony to the Appellant (wife) are set aside and those passed by the Trial Court are thus restored in its entirety.

12. Resultantly, the Appeal stands allowed. There shall, however, be no order as to cost.

—— o ——

2024 (II) ILR-CUT-515

D. DASH, J.

R.S.A. NO. 220 OF 2020

CHHABINDRA MALLICK ……Appellant

-V-

ASIS KUMAR DAS & ORS. ……Respondents

PERMANENT INJUNCTION – Plaintiff claiming natural right of way over the strip of government land running from their gate point to the public road – The suit seeking the relief of permanent injunction against the defendants placing them in the position of obstructions over the rest portion of the government land, whether maintainable? – Held, No – Reason indicated. (Para 11)

For Appellant : Mr. Ashutosh Mishra
For Respondents : Mr. N.K. Barik

JUDGMENT Date of Hearing : 19.03.2024 : Date of Judgment : 15.04.2024

D. DASH, J.

The Appellant, by filing this Appeal under Section-100 of the Code of Civil Procedure, 1908 (for short, 'the Code'), has assailed the judgment and decree dated 7th March 2020 and 21st March 2020 respectively passed by the learned District Judge, Puri in R.F.A. No.19 of 2019.

The Respondent No. 1 to 4 as the Plaintiffs had filed the suit (Civil Suit No.16 of 2017) in the Court of learned Civil Judge (Junior Division), Pipili. The suit is for permanent injunction against the Appellant (Defendant No.1) restraining him to make any interference over the suit land which provides the access to the Plaintiffs and for their passing and repassing in approaching the main public road and from making fence, installing wooden cabins and thereby making any sort of blockage over the suit land. The suit stood decreed permanently injuncting the Appellant (Defendant No.1) to make any interference with the right of access and passing and repassing of the Plaintiffs over the suit land under Plot No.176 from all points of the land under Plot No.174 with further direction to vacate the land.

The Appellants as the Defendant Nos.1 and 2 since suffered from the said judgment and decree passed by the Trial Court, carried the Appeal under section-96 of the Code. That Appeal has also been dismissed. Hence, in the present Second Appeal the Appellant (Defendant No.1) has called in question the judgments and 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 southern adjacent land to the suit land belongs to the Plaintiffs and Defendant Nos.3 to 5. Originally, said land belongs to one Nabin Ch. Das standing recorded under consolidation Khata No.53, Chaka No.74 assigned with Plot No.174 measuring Ac.0.88 decimals. Nabin Chandra in order to meet legal necessity sold the western portion measuring Ac.0.08 decimals out of Ac.0.88 decimals to Defendant Nos.3 to 5, who are in possession of their land since that time onwards and have mutated the said land in their names. The suit land which is a piece of Government land has been shown being marked in 'Green' in the sketch map appended to the schedule of the plaint. The recorded tenant-Nabin Chandra died

in the year 2014. The Plaintiffs being their legal heirs and successors inherited the suit land together with other immovable properties and became the owners of the same. The suit land under Plot No.176 is a road-side land. The Plaintiffs placed about ten cabins over the end of the northern portion of their land under Plot No.174 for renting out those to the persons for running business. Tenants have been inducted; they are in occupation in those cabins. Their customers are coming to and returning from the cabins by passing and repassing over the suit land from the road.

The main road for the Plaintiffs to come over is situated on the side intervened by the suit land belonging to the Government under Plot No.176. The Plaintiffs have their house on the western side of their land and three pucca and asbestos roofed houses have been constructed. The Defendants are in no way connected with the suit land. It is stated that they without having any right wanted to construct shed over the suit land. As a result of which, the Plaintiffs being the abutting owner faced a lot of problem as their right of access to the road from all points of their land was infringed. Such right of ingress and egress from all points of their land to the road by-passing over the suit land was substantially interfered with by such overt act of the Defendant Nos.1 and 2, so also the tenants in occupation of the cabins faced the difficulty and lot of problem for running their business. When the Defendant Nos.1 and 2 tried to make fence over the suit land, the matter was reported to the local police by the Plaintiff No.1. However, the local police being gained over by the Defendant Nos.1 and 2 did not take any step. It is stated that the Defendant Nos.1 and 2 have already blocked the main gate of the Plaintiffs by putting stones and sands thereon and thereby they did not permit the Plaintiffs to have the entry to their land. The Defendant No.1 has his own house in the said mouza over the land under Plot No.175/223. Defendant No.2's parental house is over the land under Plot Nos.226 and 227 under Khata No.2 in mouza Jayapur Hat.

Be that as it may, the Defendants colluded with each other and encroached suit land which is a road-side land having the kisam as 'Nayanjori'. They wanted to install certain temporary wooden sheds forcibly over the suit land. So, ultimately the Plaintiffs were compelled to file the suit seeking relief as aforestated.

4. The Defendant Nos. 1 & 2 in their written statement while traversing the plaint averments stated that the Plaintiffs have absolutely no right, title, interest and possession over the suit property. They state that no obstruction has been caused over the portion of the land under Plot No.174 owned the Plaintiffs. The Plaintiffs have raised boundary wall on the northern extreme boundary of the land under Plot No. 174 keeping a gate of 15 feet width on the said boundary wall towards west facing to the north and to the further north of northern boundary wall, the Plaintiffs have no land. It is next stated that as the Plaintiffs have raised their boundary wall to the north of the land under Plot No.174 leaving no space to the further north of the boundary wall, their plea as to placing the cabins over their plot of land is false. The Defendant No.1 has got the residential house and shop room over a portion of the suit property for last 50 years. The Plaintiffs were / are not using the entire frontage

of suit land under Plot No.174 on the northern side in coming over the public road. The Plaintiffs have been using the 15 feet width passage leading from their main gate to the public road which remains open without any obstruction. The Plaintiffs have raised boundary wall of 5 feet on the north of their land over Plot No.174 running east to west without leaving any space to the further north. It is further stated that beyond the grill gate fixed on the northern boundary wall towards the west by the Plaintiffs, there is 15 feet width of passage over a portion of the suit land which lies is front of their iron grill gate and that adjoins the public road on the north. The Plaintiffs have been using said 15 feet passage to approach their land through the main gate from their house standing over western portion of the land under Plot No.174. There is absolutely no obstruction over that passage. With these pleadings, the Defendant brought to non-suit the Plaintiffs.

5. The Trial Court on the above rival pleadings framed as many as three (3) issues. The core issue framed by the Trial Corut is whether the Plaintiffs have any right, title and interest over the suit land and if so then the extent of their interest. When the Plaintiffs do not claim right, title and interest over the suit land which is a piece of Government land which adjoins the public road at one side and land of the Plaintiffs on the other; they claim the right of approach / access to the public road through the suit land. The proper issue ought to have been whether Plaintiffs are having the right of natural way over the suit land in order to approach from each point northern side of their land to the public road by passing over the suit land. And if the Defendants have caused any obstruction over that right of the Plaintiffs and thereby the Plaintiffs right in that way has been infringed for which a decree for injunction is to be passed.

Be that as it may, the Trial Court upon examination of evidence and their evaluation has concluded that the Plaintiffs has the natural right of way over the suit land to approach the Pipili-Jatni road from their own land under Plot No.174. This conclusion has led the Trial Court to decree the suit in granting the reliefs as aforesaid.

6. Defendant Nos.1 and 2 having carried the First Appeal; the First Appellate Court has affirmed the said finding and thereby confirmed the judgment and decree passed by the Trial Court.

7. Admittedly, the suit land is a piece of Government land. Nobody deny the fact that the suit land is situated in between the land of the Plaintiffs under Plot No.174 and the Pipili-Jatni road. on the date of hearing, the learned Counsels for the parties being heard for the sometime, this Court upon perusal of the plaint and written statement and on going through the evidence tendered by the parties, reframed the substantial question of law which reads as under:-

> "Whether the Plaintiffs with their own showing in the plaint as also the evidence tendered in support of the said facts concerning user of their own land which is adjacent to the piece of Government land abutting the road could have maintained the suit when

on the date of institution of the suit, they by their own acts and conduct even without any obstruction being there from the side of the Defendants were not in a position to exercise the natural right over that land to approach the main road and when in fact they had not exercised that right even in near past?"

8. Heard Mr. A. Mishra, learned Counsel for the Appellant and Mr. N.K. Barik, learned Counsel for the Respondent Nos. 1.

Mr. Mishra, learned Counsel for the Appellant (Defendant No.2) placing the plaint and inviting the attention of this Court to the sketch map provided in the plaint which is a part of the plaint as also the evidence of the Plaintiff No.1 examined as P.W.1 submitted that the Plaintiffs by their own conduct and act, when had never exercised such natural right over the suit land since long, they could not have maintained the suit claiming that natural right of way over the suit land which had long since been voluntarily abandoned or waived.

Mr. Barik, learned Counsel for the Respondents (Plaintiffs) submitted that in view of the positioning of the suit land, when the Plaintiffs have the natural right of using the suit land as their way of approach from each point of their frontage of their land to the public road as they claim that the Defendants are infringing said right, which is not denied by the Defendants, the Courts below have rightly decreed the suit.

9. Keeping in view the submissions made, I have carefully read the judgments passed by the Courts below. I have also gone through the plaint and written statement filed by the parties as well as the evidence, both oral and documentary, let in by them.

10. As already stated, the positioning of the suit land under Plot No.176 which is a piece of Government between the Pipili-Jatni road and the land of the Plaintiffs under Plot No.174 stands undisputed. In fact that has been shown in the red sketch map appended to the plaint forming part of it. It has been the case of the Plaintiffs that to the northern side of their land under Plot No.174, this suit land under Plot No.176 is situated and to its further north, the Pipili-Jatni road run. This sketch map given in the plaint further indicates that towards the western side of land under Plot No.174, the house of the Plaintiffs situates and in front of the house, they have the opening to the suit land and that opening is through main gate fixed by them. The major portion of the frontage of the land under Plot No.174 as per the case of the Plaintiffs has a boundary wall up till the gate point and the rest small portion of the northern to the further west of the gate frontage, there also stands the boundary wall. Thus, it is seen that as per the case of the Plaintiffs, they have the opening from their land to the suit land only through the main gate and over the rest portion of the northern frontage of their land under Plot No.174 they have erected the boundary wall.

It is not stated by the Plaintiffs that Defendants are causing obstruction over the land which is situated beyond the main gate of the Plaintiffs on its northern side in having their access to Jatni-Pipili road. The Plaintiffs assert that the obstruction is

over the land under Plot No.176 which is situated adjoining the boundary wall of the Plaintiff on the north side of their land running east to west. It is not specifically stated that in front of their gate, there is any obstruction.

The Plaintiff No.1 examined as P.W.1 in his evidence has admitted the following facts:-

> "It is a fact that there is a boundary while situated in the norther side of my Plot No.174. One 15 feet wide road was also attached to northern side boundary wall which is adjoining to the Pipili-Jatni road. I have also fixed the iron grill gate on the boundary wall which is approaching to the said road. I have constructed the boundary wall along with the iron grill gate prior to the filing of this case. I have installed 10 nos. of cabins in the southern side of my boundary wall which is facing towards north. I have not installed the cabins over the suit land. I have installed the cabins prior to filing of the suit."

Thus, here is a case, where the Plaintiffs prior to the filing of the suit was not exercising his natural right of way over that portion of the Government land under Nayanjori kisam situated on the northern side of their land which abuts Pipili-Jatni road. Their case is that having put pucca boundary wall over the major portion of their land on the northern side adjoining the suit land under Plot No.176 they have only kept a small portion vacant and over there they have put the iron grill gate and through that gate by using the portion of the land under Plot No.176 which is Government land, on the north they have been approaching the Pipili-Jatni road to the further north of the suit land.

11. It is no doubt the settled position of law that where the land of a person adjoins a piece of road-side land belonging to the State which abuts the road, he has the right of access to the road from all points of the frontage of his land through that road-side land. But here as it is seen that the Plaintiffs prior to the filing of the suit had constructed the boundary wall over major portion of their frontage adjoining the suit land which joins the main road, keeping some opening towards the suit land under Plot No.176 in order to approach the public road by crossing over that portion or stretch of the land under Plot No.176. The Plaintiff does not allege that the Defendant Nos.1 and 2 are causing any obstruction on that patch of land under Plot No.176 running from the main gate of the Plaintiffs uptill Pipili-Jatni road. So, even though the Plaintiffs could have exercised their natural right of way to approach the Pipili-Jatni road from each point of their frontage there on the northern side of their land, they by their own conduct and acts have voluntarily abandoned and waived to exercise that natural right of way over that land from their frontage as on the northern side of their the land under Plot No.174, they have put pucca boundary wall putting a permanent divide between their land and the suit land exhibiting thereby that they do not intend to exercise such right of natural way over the land under Plot No.176. The Plaintiffs thus are found to have voluntarily chosen or opted not to exercise the natural right of way over the entire land under the Plot No.176 except that patch of land under Plot No.176 running from their gate on the northern side frontage towards the western side of their land uptill the Pipili-Jatni road and only

through that to approach the said road. The right they were having and could have exercised having thus been abandoned / waived prior to the suit, the Plaintiffs cannot be allowed to suddenly rise to exercise the said right as per their convenience at any time they desire.

In a suit where the Plaintiffs claim their natural right of way over a road-side land and seeks to injunct the person complaining that he has infringed their natural right of way over the piece of Government land in front of their land abutting the road and in order to approach the public road have to plead and prove that had there been no obstruction from the side of those persons over that piece of Government land, they would have been in position to exercise their natural right of way over that portion of the Government land in order to approach the public road which they had been so exercising but are not in a position to so exercise only for the obstructions caused.

In the case at hand on the face of the pleading as also the evidence of the Plaintiff No.1 himself examined as P.W.1 when prior to the suit even before the alleged obstruction by the Defendant Nos. 1 & 2, the Plaintiffs were not exercising natural right of way over that portion of the land under Plot No.176 over which now they claim that the Defendants are causing obstruction and on the other hand, they having their gate with the opening towards the Government there are exercising their natural right of way over that strip of Government land running from their gate point to the public road; the suit seeking the relief of permanent injunction against the Defendant Nos.1 and 2 placing them in the position of obstructionist over the rest portion of the land under Plot No.176 has no foundation in the eye of law. Therefore, the present suit against the Defendant Nos. 1 and 2 seeking the reliefs could not have been maintained at the instance of the Plaintiffs. The Trial Court as well as the First Appellate Court being oblivious of such an important position appears to have gone wrong in decreeing the suit.

12. For the wake of aforesaid, the substantial question of law is answered against the plaintiffs and that paves the way for this Court to set aside the judgments and decrees passed by the Trial Court confirmed by the First Appellate Court.

13. In the result, the Appeal is allowed. The judgments and decrees passed by the Trial Court as well as the First Appellate Court are hereby set aside. Consequently, the suit filed by the Plaintiffs (C.S. No.16 of 2017) stands dismissed.

In the peculiar facts and circumstances of the case, there shall, however, no order as to cost is passed.

It is, however, made clear that the dismissal of the suit of by the Plaintiffs in declining them to grant the reliefs as prayed for, shall in no way stand on the way of the lawful owner of the land under Plot No.176 (State of Odisha) to proceed against the Defendant No.1 and take action as per law in exercising its right of ownership.

—— o ——

2024 (II) ILR-CUT-522

S.K. SAHOO, J. & R.K. PATTANAIK, J.

DSREF NO. 04 OF 2019 & CRLA NO. 817 OF 2019

STATE OF ODISHA. ……Appellant

-V-

MOHAMMED MUSTAK ……Respondent

(A) INDIAN PENAL CODE, 1860 – Section 302 – The learned Trial Court has awarded death sentence to the appellant for committing the offence U/s. 302 holding that, abject monstrosity of the crime indubitably renders its categorization as rarest of rare case – When a death sentence can be imposed as an alternative option to the imposition of life sentence – Discussed with reference to case laws.

(Para 12.1)

(B) INDIAN PENAL CODE, 1860 – Section 376-AB – According to evidence of Doctor no injuries can be seen on the private part of the deceased except mild redness at the inner aspect of the inner labial folds close to the vaginal opening – He opined that an attempted sexual assault or sexual manipulation cannot be denied, was a possibility and not a definite opinion – Whether the offence U/s. 376-AB would make out against the appellant? – Held, No – The ingredients of offence U/s. 354 of IPC, i.e assault or use of criminal force with intent to outrage the modesty of the deceased is squarely made out.

(C) INDIAN PENAL CODE, 1860 – Section 354 – Ingredients of offence U/s. 354 and essence of women's modesty discussed.

(D) CRIMINAL TRIAL – Plea of alibi – Burden of proof – The prosecution has proved the circumstance relating to last seen evidence beyond reasonable doubt – Effect of – Held, the burden on the accused in such circumstances is rather heavy and strict proof is required for establishing the plea of alibi and non-establishment by the accused provides an additional link to the chain of circumstances.

Case Laws Relied on and Referred to :-

1. A.I.R. 1984 Supreme Court 1622 : Sharad Birdhichand Sarda -Vrs.- State of Maharashtra.
2. (1980) 2 Supreme Court Cases 684 : Bachan Singh -Vrs.- State of Punjab.
3. A.I.R. 1983 Supreme Court 957 : Machhi Singh & Ors. -Vrs.- State of Punjab.
4. (2011) 7 SCC 421 : Bhajan Singh @ Harbhajan Singh & Ors. -Vrs.- State of Haryana
5. (2005) 3 SCC 114 : State of Uttar Pradesh -Vrs.- Satish.
6. (2017) 6 SCC 631 : Vasanta Sampat Dupare -Vrs.- State of Maharashtra.
7. A.I.R. 1963 Supreme Court 200 : M.G. Agarwal -Vrs.- State of Maharashtra.
8. (1976) 4 SCC 369 : Sarwan Singh & Ors. -Vrs.- State of Punjab.
9. (1972) 2 SCC 640 : Pala Singh -Vrs.- State of Punjab.
10. (2005) 9 SCC 315 : Ravi Kumar -Vrs.- State of Punjab.

11. (2011) 49 OCR (SC) 485 : Sheo Shankar Singh -Vrs.- State of Jharkhand.
12. A.I.R. 1998 S.C. 1850 : Ram Bihari Yadav -Vrs.- State of Bihar & Ors.
13. (2000) 8 SCC 382 : State of West Bengal -Vrs.- Mir Mohammad Omar & Ors.
14. (1981) 2 SCC 166 : Dudh Nath Pandey -Vrs.- State of U.P.
15. (2019) 4 SCC 771 : Pattu Rajan -Vrs.- State of Tamil Nadu.
16. (2017) 6 SCC 1 : Mukesh and another -Vrs.- State (NCT of Delhi) & Ors.
17. (1976) 1 SCC 828 : Mohmed Inayatullah -Vrs.- State of Maharashtra.
18. (2005) 7 SCC 714 : A.N. Venkatesh & Ors. -Vrs.- State of Karnataka.
19. A.I.R. 1977 S.C. 45 : State of Andhra Pradesh -Vrs.- Rayavarapu Punnayya & Ors.
20. (1999) 5 SCC 96 : State of Haryana -Vrs.- Bhagirath & Ors.
21. A.I.R. 1967 S.C. 63 : State of Punjab -Vrs.- Major Singh.
22. (2004) 1 SCC 339 : Parkash -Vrs.- State of Haryana.
23. (2009) 6 SCC 498 : Santosh Kumar Satishbhushan Bariyar -Vrs.- State of Maharashtra.
24. (2021) 20 SCC 162 : Mofil Khan & Ors. -Vrs.- The State of Jharkhand.

For Appellant : Mr. Janmejaya Katikia, A.G.A

For Respondent : Mr. Ramanikanta Pattanaik, Mr. Bikash Chandra Parija.

JUDGMENT Date of Hearing : 19.04.2024 : Date of Judgment :06.05.2024

BY THE BENCH

The reference under section 366 of the Code of Criminal Procedure, 1973 has been submitted to this Court by the learned 3rd Additional Sessions Judge -cum- Presiding Officer, Children's Court, Cuttack (hereinafter 'the trial Court') in Special G.R. Case No.44 of 2018 for confirmation of death sentence imposed on Mohammad Mustak (hereinafter 'the appellant') by the judgment and order dated 18.09.2019/ 19.09.2019 and accordingly, DSREF No.04 of 2019 has been instituted. CRLA No.817 of 2019 has been filed by the appellant challenging the self-same judgment and order of conviction passed by the learned trial Court.

The appellant faced trial in the trial Court for commission of offences under sections 363/364/376AB/302 of the Indian Penal Code (hereinafter 'the IPC') read with section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter 'POCSO Act') on the accusation that on 21.04.2018 evening at about 6.30 to 7.00 p.m. in village Jagannathpur under Salipur police station, he kidnapped the minor granddaughter of the informant (hereinafter the 'deceased'), aged about six years from the lawful guardianship of her parents in order that she might be murdered and that he committed rape on the deceased on the verandah of Jagannathpur Nodal U.P. School (hereinafter 'the school') and also committed her murder.

The learned trial Court vide impugned judgment and order dated 18.09.2019/19.09.2019 though acquitted the appellant of the charge under section 364 of the I.P.C., but found him guilty for the offences punishable under sections 363/ 376AB/ 302 of the I.P.C. read with section 6 of the POCSO Act and awarded him death sentence for the offence under section 302 of the I.P.C. so also for the offence under section 376AB of the I.P.C. and sentenced him to undergo R.I. for a period of seven years and to pay a fine of Rs.20,000/- (rupees twenty thousand), in default, to undergo further R.I. for one year for the offence under section 363 of the I.P.C., however no separate sentence was awarded for the offence under section 6 of the POCSO Act in view of the section 42 of the said Act. The sentences awarded to the appellant were directed to run concurrently.

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

Prosecution Case:

2. The prosecution case, as per the first information report (hereinafter F.I.R.) (Ext.7) lodged by P.W.4 Masud Ahmed, is that on 21.04.2018, while he had been to read Namaz in the evening, there was a power cut in his village Jagannathpur. After reading the Namaz, he returned home and found that his deceased granddaughter was not there in the house for which he asked his daughter-in-law about the deceased, to which the daughter-in-law replied that the deceased might be wandering nearby. The daughter-in-law of P.W.4 herself went to search for the deceased but could not locate her and accordingly, she informed P.W.4. In order to find out the deceased, P.W.4 searched here and there and also informed the neighbours about the non-availability of the deceased for which the neighbours also joined him to trace out the deceased but they could not get her. At that time, three young boys came on a motor cycle and informed P.W.4 that the deceased was lying in a naked condition on the school veranda with bleeding injuries. Getting such information, the villagers rushed to the school and shifted the deceased to the Salipur Hospital and then the deceased was referred to S.C.B. Medical College & Hospital, Cuttack (hereafter 'S.C.B.M.C.H, Cuttack') for treatment. P.W.4 suspected that after committing sexual assault on the deceased, someone had left her in the injured condition.

By the time P.W.4 arrived at the spot, the deceased had already been shifted to the hospital. P.W.4 then came to Salipur police station with P.W.11 Sayed Nayan Faique. P.W.11 scribed the F.I.R. as per the narration of P.W.4 which was read over and explained to P.W.4 by P.W.11 and on the written report, P.W.4 put his signature and accordingly, the F.I.R. was lodged before the Inspector in-charge of Salipur police station, namely, Debendra Kumar Mallick (P.W.23), who registered Salipur P.S. Case No.81 dated 21.04.2018 under sections 376(2)(i)(m)/307 of I.P.C. and section 6 of POCSO Act against unknown person and he himself took up the investigation of the case.

During the course of investigation, P.W.23 examined the witnesses and visited the spot at 10.25 p.m. which was the verandah of the school along with his staff. Since it was pitch dark at the spot, he engaged two police officials to guard the spot till the arrival of the scientific team and sniffer dog. He also examined some of the witnesses including P.W.7 Rina @Premalata Ojha and came to know that the deceased was last seen in the company of the appellant while purchasing chocolates from her shop. He examined some more witnesses and also intimated the I.I.C. of Mangalabag police station to attend the treatment of the deceased at S.C.B.M.C.H, Cuttack. On 22.04.2018, he came to the spot village and searched for the appellant and got the information that the appellant was proceeding towards Kajihat and accordingly, he apprehended the appellant at Kajihat Bazar and brought him to the police station. He made requisition to the Superintendent of Police for engagement of scientific team. The Scientific Officials arrived at the spot along with sniffer dog and took photographs. The Scientific Officer collected exhibits from the spot and prepared spot visit report vide Ext.33. The exhibits

were sealed and handed over to the I.O. (P.W.23) for sending the same to the Director, S.F.S.L. for chemical examination. P.W.23 seized all those exhibits as per seizure list Ext.14. He visited the grocery shop of P.W.7 and she produced one plastic jar containing some meethi malai chocolates and another plastic jar containing Cadbury Perk chocolates from which chocolates were sold to the appellant on the date of occurrence as per seizure list Ext.13. P.W.23 also seized some other articles as per seizure list Ext.14. He visited the S.C.B.M.C.H, Cuttack and when he came to know the condition of the deceased has become critical, he made a prayer to the Sub-Collector for deputing an Executive Magistrate for recording dying declaration of the deceased. The blue colour half pant of the deceased suspected to be containing blood stain and two meethi malai chocolates which were found in the left side pant pocket of the victim were seized by P.W.23 on production by the doctor as per seizure list Ext.20. Since the condition of the deceased was not stable, her dying declaration could not be recorded. The appellant was arrested on 22.04.2018 at 6.00 p.m. observing formalities of the arrest, his pair of chappals was seized as per seizure list Ext.42 and the seized articles were kept in P.S. malkhana of Salipur police station. The appellant was sent on 23.03.2018 to the Department of F.M.T., S.C.B.M.C.H, Cuttack through escort party for his medical examination and P.W.23 seized the shirt of the appellant having blood stain on it on being produced by the doctor as per seizure list Ext.21. The biological samples of the appellant collected by the doctor which were produced by the escort party along with the wearing apparels of the appellant were seized as per seizure list Ext.18 which was kept in P.S. malkhana and on 23.04.2018, the appellant was forwarded to the Court. On 24.04.2018, the biological samples of the deceased collected by the doctor were seized by P.W.23 as per seizure list Ext.19 which was also kept in P.S. malkhana. Prayer was made by the I.O. (P.W.23) to the Court for recording the statements of P.W.5 Sk. Jiaul Haque, P.W.7 Premalata Ojha @ Reena and P.W.13 Gulzar Ahmed under section 164 of Cr.P.C. and accordingly, the same was recorded on 26.04.2018. The I.O. also made a prayer to the Court for sanction of victim compensation to the family of the deceased. On 27.04.2018 prayer was made to send the exhibits to S.F.S.L. for chemical examination and accordingly, the learned J.M.F.C., Salipur forwarded the exhibits to S.F.S.L., Bhubaneswar through constables. The I.O. also made a prayer to the Court for getting the D.N.A. profiling, which was allowed. The injury reports of the deceased and the appellant were collected and the same were submitted to the Court. On 29.04.2018, the I.O. received information from the I.I.C., Mangalabag police station that the deceased expired while undergoing treatment and one U.D. case has already been instituted at Mangalabag police station and step has been taken for conducting inquest and post mortem over the dead body of the deceased. The I.O. intimated to the Court about the death of the deceased and also made a prayer to convert the case to one under sections 376(2)(i)(n)/302 of the I.P.C. read with section 6 of the POCSO Act on 30.04.2018. On the prayer of the I.O., the statement of P.W.18 Sk. Afzal Jama was recorded on 01.05.2018. On 02.05.2018, the I.O. made a query to the Executive Engineer, CESU to ascertain the power failure time in the village Jagannathpur on the date of occurrence in the evening hours and received the reply that the load shedding time was in between in 6.20 p.m. to 7.21 p.m. on 21.04.2018 as per the written instruction given vide Ext. 49. The U.D. case record from I.I.C. Mangalabag police

station along with some material objects were seized by the I.O. (P.W.23) on 04.05.2018. The bed head ticket of the deceased was also seized from the record keeper of the S.C.B.M.C.H, Cuttack as per seizure list Ext.29. The appellant was brought on remand on 05.05.2018 and he was interrogated and the statement was recorded and the appellant led the police party to different places in connection with the commission of offences and accordingly, the I.O. prepared a map of spots vide Ext.52. The I.O. received the report from S.F.S.L. He also seized a camera, memory card and some photographs as per seizure list Ext.34 and handed over the same in the zima of Scientific Officer.

On completion of investigation, P.W.23 submitted charge sheet dated 10.05.2018 under sections 363/376AB/302 of the I.P.C. and section 6 of the POCSO Act against the appellant before the learned trial Court on 11.05.2018 and accordingly, the learned trial Court took cognizance of offences under sections 363/376AB/302 of the I.P.C. and section 6 of the POCSO Act.

Framing of Charge:

3. The learned trial Court framed charges as aforesaid against the appellant on 23.05.2018 and since the appellant refuted the charges, pleaded not guilty and claimed to be tried, the sessions trial procedure was resorted to prosecute him and establish his guilt.

Prosecution Witnesses, Exhibits & Material Objects:

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

P.W.1 Dr. Amarendra Nayak was working as Associate Professor, Department of F.M. & T. attached to S.C.B.M.C.H, Cuttack, who conducted post mortem over the dead body of the deceased on 29.04.2018 and proved his report vide Ext.1.

P.W.2 Dr. Shreeja Jajodia was working as Medical Officer attached to Salipur C.H.C., who treated the deceased at the first instance on 21.04.2018 and referred her to S.C.B.M.C.H, Cuttack. She proved her report marked as Ext.2.

P.W.3 Dr. Rajanikanta Swain was the Associate Professor, Department of F.M. & T. attached to S.C.B.M.C.H, Cuttack, who examined the appellant on police requisition on 23.04.2018 and proved his report as per Ext.3.

P.W.4 Masud Ahmed is the grandfather of the deceased and also the informant in the case. He supported the prosecution case and proved the F.I.R. marked as Ext.7.

P.W.5 Sk. Ziaul Haque is a co-villager of both the appellant and the deceased. He stated to have seen the deceased playing with her elder brother Gullu (P.W.13) in the evening hours on the date of occurrence and the presence of the appellant in the vicinity.

P.W.6 Dr. Jyotish Chandra Choudhury was the Associate Professor, Department of F.M. & T. attached to S.C.B.M.C.H, Cuttack and he examined the deceased as per the direction of the Professor & H.O.D. of Pediatric Department of S.C.B.M.C.H, Cuttack on 22.04.2018 and proved his report Ext.9. He also proved the query report vide Ext.11/1.

P.W.7 Premalata Ojha @ Reena was an Asha Karmi and she was having a grocery shop at village Jagannathpur. She stated about the appellant coming with the deceased to her shop in the evening hours on the date of occurrence, purchased chocolates and then proceeded towards the school with the deceased. She is also a witness to the seizure of two plastic containers containing chocolates as per seizure list marked as Ext.13.

P.W.8 Ajit Kumar Ojha @ Babuni @ Ajaya is one of the co-villagers who searched for the deceased and ultimately found the deceased lying on the school veranda in a naked condition with bleeding injury. He further stated that they called the people who were present near the school gate and also they proceeded near the house of the deceased and informed about the incident.

P.W.9 Sk. Aslam and P.W.10 Sk. Azimul Haque, who are the co-villagers of both the appellant and the deceased, are the post-occurrence witnesses. They both took the deceased to Salipur Hospital on the moped of P.W.10, where the doctor after giving an injection, referred her to S.C.B.M.C.H, Cuttack. P.W.10 stated that while they were near his house, P.W.8 and two boys came and informed them that the child was lying on the school verandah.

P.W.11 Sayed Nayan Faique is a co-villager of both the appellant and the deceased, who accompanied P.W.4 to the police station and scribed the F.I.R. marked as Ext.7. He stated that hearing that someone had killed the deceased and thrown her at the school verandah, he proceeded to village Jagannathpur on his motorcycle and saw a gathering in the village and on enquiry, came to know that the deceased had been shifted to Salipur hospital and he came to Salipur hospital and on the way, he picked up P.W.4 and proceeded to Salipur P.H.C. He is also a witness to the seizure as per seizure list vide Ext.14.

P.W.12 Ifte Khan Ahemed @ Soni is the father of the deceased and also the son of the informant (P.W.4). He stated that on the date of occurrence, he was at Hyderabad and on getting information from villagers about the incident, he came to his village and then he came to S.C.B.M.C.H, Cuttack where the deceased was under treatment. He is also a witness to the inquest over the dead body of the deceased marked as Ext.15.

P.W.13 Gulzar Ahemad, who is the elder brother of the deceased, stated about that the deceased was last seen in the company of the appellant. He further stated he along with the deceased was playing near the car parked at canal embankment and watching news in the mobile phone of Babulu (P.W.5). He also stated that the appellant took the deceased towards the school.

P.W.14 Nimai Charan Mohapatra was working as A.S.I. of Police of Salipur police station, who accompanied the scientific team to the spot of occurrence and he is also a witness to the report of the dog master as per Ext.17, seizure of Cadbury Perk chocolate and meethi malai chocolate, the biological samples of the appellant and the victim as per seizure lists marked as Ext.14, Ext.18 and Ext.19 respectively.

P.W.15 Sayed Rajat Alli is the uncle of the victim and also a witness to the seizure of one blue colour panty of the victim and two nos. of chocolates and blue-red colour striped T-shirt with a chain at the Pediatric Department of S.C.B.M.C.H, Cuttack as per seizure list marked as Ext.20 and Ext.21 respectively.

P.W.16 Parth Sarathi Behera was the Dog Master, who had taken the sniffer dog to the spot of occurrence for detection of the crime and proved his report marked as Ext.17.

P.W.17 Anupama Biswal was the Anganwadi Karmi at Jagannathpur, who proved the register maintained at the Anganwadi Centre where the deceased was prosecuting her studies and the date of birth of the deceased was mentioned as 02.05.2012 in such register and on the date of occurrence, the deceased was aged about five years and eleven months. She stated about the seizure of register vide seizure list Ext.23 and taking the same in zima as per zimanama Ext.24.

P.W.18 Sk. Afzal Jama is a witness to the last seen of the deceased with the appellant on 21.04.2018 in between 6.00 to 6.30 p.m. when he was present in his grocery shop. He stated that after about 45 minutes, the appellant returned alone and went inside his house in a disturbed condition and after some time, the mother of the deceased and other family members searched for the deceased as she was found missing and subsequently, the deceased was found on the school verandah with bleeding injuries and she was shifted to the hospital.

P.W.19 Gangadhar Saseni was the S.I. of Police attached to the Medical outpost, S.C.B.M.C.H, Cuttack. He took up inquiry of Mangalabag P.S. U.D. Case No.769 of 2018. He proved the command certificate vide Ext.26, dead body challan as per Ext.27, seizure of bed head ticket as per seizure list Ext.29, the sealed envelopes as per seizure list Ext.28 and other connected documents which were seized by the I.O. as per seizure list Ext.30.

P.W.20 Maheswar Mishra, who was the A.S.I. of police, Medical Outpost, S.C.B.M.C.H, Cuttack, is a witness to the seizure of bed head ticket of the deceased and two sealed packets as per seizure lists marked as Ext.29 and Ext.30 respectively.

P.W.21 Minar Behera, who was an Instructor, I.T.I., Salipur, is a witness to the confessional statement made by the appellant in the police station as per Ext.31. He is also a witness to the spot visit memorandum as per Ext.32.

P.W.22 Sandhyarani Bhuyan was the Scientific Officer, D.F.S.L., Cuttack and she was a member of the scientific team who visited the spot. She proved her report vide Ext.33. During the course of scientific examination, she prepared the digital photographs of the scene and handed over the same to the I.O. which was seized as per seizure list Ext.34. She also took the zima of digital camera as per zimanama Ext.36.

P.W.23 Debendra Kumar Mallick was the Inspector in-charge of Salipur police station and he is the Investigating Officer of the case.

The prosecution exhibited fifty five documents. Ext.1 is the post mortem report, Ext.2 is the report of P.W.2, Ext.3 is the medical examination report of the appellant, Ext.4 is the police requisition in respect of the appellant, Ext.5 is the report of the blood bank and opinion report of P.W.3, Ext.6 is the report of the blood bank, Ext.7 is the F.I.R., Ext.8 is the 164 Cr.P.C. statement of P.W.5, Ext.9 is the medical examination report of the deceased, Ext.10 is the medical requisition of the deceased, Ext.11 is the requisition received by P.W.6 from the I.O., Ext.12 is the 164 Cr.P.C. statement of P.W.7, Ext.13 and Ext.14 are the seizure lists, Ext.15 is the inquest report, Ext.17 is the

report prepared by P.W.16, Ext.18 is the seizure list of the biological samples of the appellant, Ext.19 is the seizure list of biological sample of the deceased, Ext.20 is the seizure list in respect of one blue colour panty of the deceased and two numbers of chocolates, Ext.21 is the seizure list in respect of blue red colour striped T-shirt with a chain, Ext.22 is the report submitted by P.W.17 regarding the age of the deceased, Ext.23 is the seizure list in respect of the register maintained at the Anganwadi, Ext.24 is the zimanama of the Anganwadi register in favour of P.W.17, Ext.25 is the register in which the relevant entry of the victim, Ext.26 is the command certificate issued in favour of Manoj Kumar Swain, Ext.27 is the dead body challan, Ext.28 is the seizure list, Ext.29 is the seizure list of bed head ticket of the deceased, Ext.30 is the seizure list, Ext.31 is the statement sheet, Ext.32 is the memorandum, Ext.33 is the spot visit report, Ext.34 is the seizure list, Ext.35 is the certificate issued by P.W.22, Ext.36 is the zimanama, Ext.37 is the forwarding letter issued by S.O., D.F.S.L., Cuttack, Ext.38 is the seizure list in respect of photographs, Ext.39 is the crime details form, Ext.40 is the seizure list, Ext.41 is the letter issued to the Sub-Collector, Cuttack for recording the dying declaration, Ext.42 is the seizure list in respect of chappal of the appellant, Ext.43 is the intimation given to the appellant's family member regarding his arrest, Ext.44 is the command certificate issued in favour of S.I. Asit Ranjan Jena, Ext.45 is the prayer made for sending the exhibits to S.F.S.L. for chemical examination, Ext.46 is the forwarding report, Ext.47 is the command certificate, Ext.48 is the acknowledgement receipt receiving the exhibits at S.F.S.L., Bhubaneswar, Ext.49 is the reply of CESU, Salipur Electrical Division to the query made by I.O., Ext.50 is the zimanama, Ext.51 is the seizure list in respect of sealed packet containing the photographs of the deceased, Ext.52 is the spot map, Ext.53 is the report of S.F.S.L., Ext.54 is the prayer of the I.O. sending the biological samples of the deceased to S.F.S.L. and Ext.55 is the report received from the S.F.S.L.

The prosecution also proved nine material objects. M.O.I is the upper part of wearing apparels akin to a 'T' shirt having a Zip liner on the neck portion, M.O.II is the sealed plastic container containing one Perk chocolate, M.O.III is the another sealed plastic jar containing meethi malai chocolate, M.O.IV is the SDHC card of 'Sandisk' make of 8 GB storage, M.O.V is the envelope from which the card was brought out, M.O.VI is the C.D. along with a forwarding letter issued by S.O., DFSL, Cuttack, M.O.VII is the pant of victim, M.O.VIII is the shirt of appellant and M.O.IX is the pant of the appellant.

Defence Plea:

5. The defence plea of the appellant is one of denial and it is pleaded that he has been falsely implicated in the case.

The defence has examined one witness. D.W.1 Laxmidhar Sathua Mohapatra is the Psychiatrist attached to Circle Jail, Choudwar who stated to have treated the appellant in the Mental Ward and prescribed medicines to him. He proved the medical papers and reports of the appellant relating to his depressive disorders.

The defence exhibited seven documents. Ext.A is the treatment papers of the appellant, Ext.B and Ext.C are the medical reports of the appellant proved by D.W.1, Ext.D, Ext.E, Ext.F and Ext.G are the certified copies of final forms in different cases.

Findings of the Trial Court:

6. The learned trial Court after analysing the oral as well as the documentary evidence on record and taking into account the evidence of P.W.17, the Anganwadi Karmi, her report (Ext.22) furnished to the I.O., Anganwadi Register (Ext.25) entry wherein the date of birth of the deceased was mentioned to be 02.05.2012 and further considering the age of her elder brother (P.W.13), who was of seven years, has been pleased to hold that the deceased was a girl below twelve years of age.

Learned trial Court emphasised on the answer given by the doctor (P.W.6) to the query made by the I.O. (P.W.23) vide Ext.11/1 and came to hold that the deceased was subjected to sexual assault attracting the penal provision under the POCSO Act.

Taking into account the evidence of the doctor (P.W.6), the report of the Scientific Officer vide Ext.53, the medical examination report of the appellant vide Ext.3, the Court came to hold that the irresistible conclusion is that the deceased, a girl below twelve years was subjected to 'rape' as defined under section 375 of I.P.C. and 'aggravated penetrative sexual assault' as defined under section 5(m) of the POCSO Act which is punishable under section 376AB and section 6 of the POCSO Act.

Learned trial Court further considered the evidence of the doctor (P.W.1) who conducted post mortem examination and the report (Ext.1) submitted by him and came to hold that the deceased died a homicidal death and that the opinion of the doctor regarding ante mortem injuries on the person of the deceased suggested so.

The learned trial Court observed that the case is based on circumstantial evidence and relied upon eight circumstances emerging from the records which are as follows:

(i) The deceased was playing in front of her house at about 6.30 to 7.30 p.m. on 21.04.2018 and there was power failure in the locality. P.W.5, P.W.13, the deceased and the appellant were present at that time at the relevant place;

(ii) Missing of the deceased from the place where she was playing;

(iii) The appellant was last seen with the deceased;

(iv) The deceased was found lying on the veranda of Jagannathpur Nodal U.P. School in an injured condition;

(v) Absence of the appellant from the occurrence village soon after the occurrence;

(vi) Finding of the chocolates from the pocket of the deceased;

(vii) Availability of blood on the shirt of the appellant (which he was putting on the relevant day) that matched with the blood group of the deceased;

(viii) Appellant pointed out the places to which he took the deceased to accomplish the crime.

So far as the circumstance no. **(i)** is concerned, the learned trial Court held that the fact that there was power failure in the occurrence locality has been well proved. Considering the evidence of P.W.5 and P.W.13, the reply given by the Executive Engineer vide Ext.49, it was held that at the relevant time there was a power failure and the deceased was playing in front of her house where a car was parked which belonged to the father of the deceased and that P.W.5, P.W.13, the deceased and the appellant were present at that time.

So far as the circumstance no. **(ii)** is concerned, taking into account the evidence of P.W.4, P.W.5, P.Ws. 8 to 11, P.W.13 and P.W.18, it was held that the deceased was found missing in the evening hours on the date of occurrence which has been proved by leading adequate evidence.

So far as the circumstance no. **(iii)** is concerned, taking into account the evidence of P.W.5, P.W.7, P.W.13 and P.W.18, it was held that their evidence is clinching, trustworthy and it inspires confidence of the Court and the circumstance has been proved by the prosecution beyond all reasonable doubt and since the appellant in his statement recorded under section 313 of Cr.P.C. has not explained the same, this lack of explanation by the appellant was held to be a very strong circumstance against him.

So far as the circumstance no. **(iv)** is concerned, taking into account the evidence of P.W.8, P.W.9, P.W.10, P.W.18 so also the physical clue collected by the Scientific Officer (P.W.22) from the spot, it was held that their evidence has remained unimpeached as nothing has been brought out from their evidence to raise any doubt on their veracity.

So far as the circumstance no. **(v)** is concerned, taking into account the evidence of the I.O. (P.W.23) that the appellant was found missing from his house and absence of any material to prove the plea of alibi taken by the appellant in the accused statement under section 313 of Cr.P.C. that he had been to see the opera at Gangeswar, it was held that the appellant fled away from the occurrence village.

So far as the circumstance no. **(vi)** is concerned, taking into account the evidence of P.W.7, P.W.10, P.W.14 and the seizure list prepared by the I.O. vide Ext.20, it was held that chocolates were found from the pocket of the deceased.

So far as the circumstance no. **(vii)** is concerned, taking into account the S.F.S.L. report vide Ext.53 and the evidence of the I.O. (P.W.23), the seizure list of the wearing apparels of the appellant vide Ext.18, it was held that the blood available on the shirt of the appellant which he was putting on the relevant day matched with the blood group of the deceased.

So far as the circumstance no. **(viii)** is concerned, the learned trial Court held that the appellant making confession before the police while in custody consequent upon which the places where the appellant took the deceased were discovered is not relevant under section 27 of the Evidence Act as by that time, the places were already known to the I.O. who had prepared the spot map in the crime detail form which came to be marked as Ext.39/2. However, it was held that in view of the knowledge of the appellant that those were the places where the deceased was playing, the shop from which the appellant purchased the chocolates and the school where the deceased was found in an injured condition, are admissible under section 8 of the Evidence Act as the conduct of the appellant.

Learned trial Court came to hold that the forensic evidence on record is available abundantly to come to a conclusion that the deceased was assaulted in the school and she was raped and was killed by the appellant. No importance was given to the evidence of D.W.1, the doctor of Circle Jail, Choudwar.

It was further held that all the proved circumstances provided a complete chain and no link was found missing and the Court came to the conclusion that the case

against the appellant has been proved to the hilt and accordingly, the appellant was found guilty under sections 363/376AB/302 of the I.P.C. and section 6 of the POCSO Act, however it was held that the offence under section 364 of the I.P.C. could not be substantiated and accordingly, the appellant was acquitted of such charge.

Submission of Parties:

7. Mr. Ramanikanta Pattanaik, learned Senior Counsel being ably assisted by Mr. Bikash Chandra Parija, Advocate appearing for the appellant emphatically contended that the non-mention of name of the appellant as a suspect in the F.I.R. in the factual scenario of the case which was lodged two hours after the deceased was traced out in an injured condition on the school varandah, particularly when the last seen of the appellant with the deceased had come to the fore, is a damaging feature of the prosecution case. The conduct of P.W.7, who stated to have seen the appellant taking the deceased towards the school after purchasing chocolates for her, in not disclosing about the same before the family members of the deceased even after she came to the spot hearing commotion and saw the deceased being shifted on a motor cycle with bleeding injury, creates a grave doubt about her veracity. Moreover P.W.7 is a stock witness of the Police Department and she has been cited as a witness in many other cases as admitted by her. He further argued that the evidence of P.W.18 to have seen the appellant taking the deceased in the evening hours on the date of occurrence by the side of the canal embankment and after sometime the appellant returning alone in a disturbed condition and going inside his house, should not be relied upon as he had not intimated the mother and grandfather (P.W.4) of the deceased about the last seen of the appellant with the deceased even though he was well-known to the family of the deceased so also P.W.4. Learned counsel further argued that though the learned trial Court relied upon the circumstance of the absence of the appellant from the occurrence village soon after the incident but except the evidence of the I.O. (P.W.23), there is no other clinching evidence in that respect. Though P.W.23 stated that he apprehended the appellant from Kajihat Bazaar but the appellant had stated in his accused statement to the question no.77 that he was not arrested at Kajihat Bazaar rather he was apprehended from his house and was taken to the police station. P.W.18 has stated that the appellant went inside his house in a disturbed condition and thereafter no one had seen him leaving the village and no one had searched for the appellant in his house which would have been very natural, had anyone doubted about the involvement of the appellant in the crime committed and thus the absconding theory is not at all believable. It is further argued that the prosecution has miserably failed to prove that the shirt from which the blood stain was detected and found to be matched with the blood group of the deceased was worn by the appellant while he was in the company of the deceased. It is further argued that the investigation is perfunctory and no explanation has been offered by the prosecution as to why the F.I.R., which was stated to have been lodged on 21.04.2018 at 10.15 p.m., reached the Court of learned J.M.F.C., Salipur on 23.04.2018 when the Court was merely at a distance of 500 metres away from the police station. Learned counsel further argued that the I.O. admitted that while forwarding the appellant to the Court, he had already recorded the statements of twenty one witnesses which were very material to the case but he had sent only two sheets of 161 Cr.P.C. statements of the

witness and the arrest memo to the Court at that time. In the forwarding report, there is no mention that who were the witnesses examined by him and what were their statements, which was very much necessary in view of the provision under section 167 of Cr.P.C. to allow the prayer of the I.O. to remand the appellant to judicial custody and such conduct of the I.O. (P.W.23) pre-supposes that neither the F.I.R. was lodged when it was shown to have been lodged nor the statements were recorded when those were shown to have been recorded and it was all ante-dated. He further argued that three persons namely, Hedad Alli, Sania @ Sushant Kumar Das and Ajay @ Ajit Kumar Ojha (P.W.8) first noticed the deceased in a nude condition on the corridor of Jagannathpur U.P. School but the other two witnesses were not examined. Similarly though the I.O. (P.W.23) stated to have recorded the statement of the mother of the deceased, but she was not cited as a witness in the charge sheet nor examined during trial and thus, the prosecution deliberately withheld the vital witnesses from the witness box, for which adverse inference should be drawn against the prosecution. Learned counsel further argued that P.W.1, the Associate Professor in the Department of F.M.T., S.C.B.M.C.H., Cuttack, who conducted the post-mortem examination over the dead body of the deceased did not detect any external or internal injury in the genital of the deceased and he had also not explicitly mentioned in the post-mortem report (Ext.1) as to whether the death of the deceased was homicidal or accidental. The doctor (P.W.6), who examined the deceased on 22.04.2018, has mentioned in his report (Ext.9) that hymen was intact and there was no inflammation or discharge or bleeding in the private part of the deceased and the vulvovaginal samples and anal samples, which were preserved and tested, did not reveal any physical clue of recent sexual intercourse. He also did not detect any physical clue of sexual offence over the wearing apparels of the deceased except mild redness at the inner side folds of labia minora, which though according to him on account of attempted sexual assault or sexual manipulation, but he has clarified in the cross-examination that his opinion was a 'possibility' and not a 'definite opinion' and the redness noticed could be caused by self-infliction due to itching and therefore, there is no conclusive evidence that rape has been committed on the deceased and that the appellant committed her murder as she died after eight days of the date of occurrence, and the doctor (P.W.1) has stated that he had not explicitly mentioned if the death was homicidal or accidental and therefore, it is a case where benefit of doubt should be extended in favour of the appellant and even otherwise since rape and murder has not been proved, it is not a fit case for imposing the extreme penalty of death. Learned Senior Counsel for the appellant relied upon the decisions of the Hon'ble Supreme Court in the cases of **Sharad Birdhichand Sarda -Vrs.- State of Maharashtra reported in A.I.R. 1984 Supreme Court 1622, Bachan Singh -Vrs.- State of Punjab reported in (1980) 2 Supreme Court Cases 684, Machhi Singh & others -Vrs.- State of Punjab reported in A.I.R. 1983 Supreme Court 957**.

Mr. Janmejaya Katikia, learned Additional Government Advocate, on the other hand, supported the impugned judgment and argued that the last seen of the deceased in the company of the appellant in the evening hours on the date of occurrence when there was darkness on account of power cut, just prior to she was found in an injured condition on the school verandah, is a very clinching evidence which has not been explained by the appellant. Learned counsel further argued that the chemical examination

report marked as Ext.53, which carries summary and conclusion of D.N.A. test indicates that the blood stains of the victim were found on the wearing apparels of the appellant and no explanation has come from the appellant as required under section 106 of the Evidence Act. It was argued that the appellant has taken plea of alibi being present at Gangeswar Yatra and also that he has been falsely implicated on account of property dispute, due to political rivalry and even the jail doctor was examined to show that he was suffering from psychiatric disorder, however, no such plea has been clearly established. It is argued that the absconding of the appellant from the village since the night of occurrence, where her family members were residing, is another relevant feature, which reflects the conduct and the same is admissible under section 8 of the Evidence Act. Learned counsel submitted that the evidence of the doctor (P.W.6) coupled with his query report (Ext.11/1) clearly establishes the charge under section 376AB I.P.C. against the appellant. It is further argued that the doctor (P.W.1), who conducted the post-mortem examination over the dead body of the deceased, stated that he noticed several external injuries on the person of the deceased and two injuries, i.e. injury nos. (v) & (vii) along with corresponding internal injuries to brain were fatal to cause death in ordinary course of nature and the death was due to coma as a result of blunt trauma injury to head and corresponding brain injury coupled with effects of hypoxic brain injury and therefore, when the appellant inflicted such injuries during commission of sexual offence, which ultimately proved fatal and the deceased remained in coma for eight days and ultimately died, the definition of 'murder' as mentioned under section 300 of I.P.C. is squarely attracted. It is argued that the learned trial Court has rightly held the appellant guilty and since it is a rarest of rare case, imposed death sentence. He has relied upon the decisions of the Hon'ble Supreme Court in the cases of **Bhajan Singh @ Harbhajan Singh and Ors. -Vrs.- State of Haryana reported in (2011) 7 Supreme Court Cases 421, State of Uttar Pradesh -Vrs.- Satish reported in (2005) 3 Supreme Court Cases 114 and Vasanta Sampat Dupare -Vrs.- State of Maharashtra reported in (2017) 6 Supreme Court Cases 631.**

Principle for appreciating the circumstantial evidence:

8. There is no dispute that the case is based on circumstantial evidence. Firstly, we proceed to discuss the law on the appreciation of circumstantial evidence.

A Constitution Bench of the Hon'ble Supreme Court in the case of **M.G. Agarwal -Vrs.- State of Maharashtra** reported in **AIR 1963 S.C.200** has observed as under:

> ".....It is a well established rule in criminal jurisprudence that circumstantial evidence can be reasonably made the basis of an accused person's conviction if it is of such a character that it is wholly inconsistent with the innocence of the accused and is consistent only with his guilt. If the circumstances proved in the case are consistent either with the innocence of the accused or with his guilt, then the accused is entitled to the benefit of doubt. There is no doubt or dispute about this position. But in applying this principle, it is necessary to distinguish between facts which may be called primary or basic on the one hand and inference of facts to be drawn from them on the other. In regard to the proof of basic or primary facts, the Court has to judge the evidence in the ordinary way, and in the appreciation of evidence in respect of the proof of these basic or primary facts there is no scope for the application of the doctrine of benefit of doubt. The Court considers the evidence and decides whether that evidence proves a particular

> fact or not. When it is held that a certain fact is proved, the question arises whether that fact leads to the inference of guilt of the accused person or not, and in dealing with this aspect of the problem, the doctrine of benefit of doubt would apply and an inference of guilt can be drawn only if the proved fact is wholly inconsistent with the innocence of the accused and is consistent only with his guilt. It is in the light of this legal position that the evidence in the present case has to be appreciated."

Five golden principles which has been named as 'Panchsheel' curled out by the Hon'ble Supreme Court in the case of **Sharad Birdhichand Sarda** (supra) which must be fulfilled before a case against an accused can be said to be fully established on circumstantial evidence are as follows:-

> **(i)** the circumstances from which the conclusion of guilt is to be drawn should be fully established;
> **(ii)** 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;
> **(iii)** the circumstances should be of a conclusive nature and tendency;
> **(iv)** they should exclude every possible hypothesis except the one to be proved, and
> **(v)** 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 case of **Mohd. Arif -Vrs.- State (NCT of Delhi)** reported in **(2011) 13 Supreme Court Cases 621**, it is held as follows:-

> "190. There can be no dispute that in a case entirely dependent on the circumstantial evidence, the responsibility of the prosecution is more as compared to the case where the ocular testimony or the direct evidence, as the case may be, is available. The Court, before relying on the circumstantial evidence and convicting the accused thereby has to satisfy itself completely that there is no other inference consistent with the innocence of the accused possible nor is there any plausible explanation. The Court must, therefore, make up its mind about the inferences to be drawn from each proved circumstance and should also consider the cumulative effect thereof. In doing this, the Court has to satisfy its conscience that it is not proceeding on the imaginary inferences or its prejudices and that there could be no other inference possible excepting the guilt on the part of the Accused.
>
> 191....At times, there may be only a few circumstances available to reach a conclusion of the guilt on the part of the accused and at times, even if there are large numbers of circumstances proved, they may not be enough to reach the conclusion of guilt on the part of the accused. It is the quality of each individual circumstance that is material and that would essentially depend upon the quality of evidence. Fanciful imagination in such cases has no place. Clear and irrefutable logic would be an essential factor in arriving at the verdict of guilt on the basis of the proven circumstances."

Analysis of evidence on each circumstance:

9. Keeping in view the principles laid down, we will now proceed to examine the circumstances chalked out by the learned trial Court and see whether the findings arrived at were legally justified.

9.1. **First Circumstance:**

The first circumstance relied upon by the learned trial Court is that the deceased was playing in front of her house at about 6.30 to 7.30 p.m. on 21.04.2018 and there was a power failure in the locality at that time and P.W.5, P.W.13 and the appellant were present at that place.

To find out as to whether there was power failure in the locality at the time of occurrence, the learned trial Court has relied upon Ext.49 i.e. the reply of the Executive Engineer, CESU, Salipur Electrical Division to the query made by the I.O. (P.W.23) that there was load shedding in village Jagannathpur on the date of occurrence i.e. 21.04.2018 in the evening hours from 6.20 p.m. to 7.21 p.m.

The I.O. (P.W.23) has stated that he made a query to the Executive Engineer, CESU to ascertain about power failure in village Jagannathpur on the date of occurrence in the evening and received a reply that the area Lineman had taken a shut down from 6.20 p.m. to 7.21 p.m. on 21.04.2018 which occasioned a power failure in village Jagannathpur. He proved the reply which was marked as Ext.49. The extract of the register maintained in CESU office dealing with the load shedding duration has been marked as Ext.49/2. The witnesses like P.W.4, P.W.5, P.W.7 and P.W.8 have also stated about power failure at the locality of the occurrence in the evening hours, which has not been challenged by the defence in any manner. Thus, we are of the view that the learned trial Court rightly held that there was a power failure in the locality at the time of occurrence.

The learned trial Court further relied upon the evidence of P.W.5 and P.W.13 and came to the conclusion that the evidence of both these witnesses clearly showed that at the relevant time, the victim was playing in front of her house where a car was parked and P.W.5, P.W.13, the deceased and the appellant were present at that time.

P.W.5 Sk. Ziaul Haque has stated that on 21.04.2018 during the evening hours, while he was watching news in his mobile phone by the road side by leaning against an Ambassador car, the deceased, her elder brother Gullu (P.W.13) were playing and the appellant was wandering nearby. He further stated that when he received a call in his mobile phone and went inside the house, at that time near the Ambassador car, the deceased, P.W.13 and the appellant were present. He further stated that when he heard hullah (commotion), he came to know that the deceased was missing and subsequently he heard that the deceased was lying on the school veranda in an unconscious condition sustaining bleeding injuries. He stated in the cross-examination that he watched news in the mobile phone from 6.15 p.m. to 6.20 p.m. i.e. for five minutes and it was a summer day and at that time there was a power failure and about half an hour after reaching his house, he heard about missing of the deceased and after hearing about the missing of the deceased, he did not disclose to have seen the appellant in the company of the deceased and P.W.13 to the informant (P.W.4).

The learned counsel for the appellant Mr. Pattanaik contended that the conduct of P.W.5 in not disclosing before P.W.4, the informant and the family members of the deceased to have seen the deceased in the company of the appellant and also with P.W.13 even after knowing that the deceased was missing, is a highly suspicious feature as it was expected of him to communicate the same to the family members of the deceased. The learned counsel for the State, on the other hand, argued that P.W.5 might

not have suspected the appellant's role in connection with the missing of the deceased merely because he was in the vicinity where the deceased was playing with her elder brother (P.W.13) when he himself left for his house on receiving a call on his mobile phone.

Adverting to the contentions raised by the learned counsel for both the parties, we are of the humble view that the evidence of P.W.5 cannot be doubted or disbelieved merely because he did not choose to disclose before the family members of the deceased the fact that he had seen the appellant near the deceased while she was playing with P.W.13 even after coming to know about the missing of the deceased. The appellant was a co-villager and he was a family man having wife and children and there was nothing on record that the appellant had any criminal antecedents in the past or he was a licentious person and therefore, not to raise any suspicion against the appellant in connection with the missing of the deceased was very natural on the part of P.W.5. Though suggestion has been given to P.W.5 that his father wanted to purchase a piece of land which the father of the appellant purchased at a higher price for which his family bore grudge against the family of the appellant, P.W.5 has outrightly denied such suggestion. Nothing further has been elicited in the cross-examination to disbelieve the evidence of P.W.5 and thus, his evidence on the first circumstance has remained consistent and unshaken.

P.W.13 is a child witness, who was aged about seven years when he deposed in Court and he was the elder brother of the deceased. The learned trial Court put some formal questions to him about his name, name of his school, class in which he was studying, what he had taken in the breakfast on that day, who was standing by his side in the Courtroom on that day etc. in order to ascertain whether he was competent to testify and after noting down the questions and the respective answers thereto, the learned trial Court was of the view that the witness understood the questions put to him and gave rational answers and therefore, he was held to be a competent witness. No challenge has been made to the competency of P.W.13 to depose by the learned counsel for the appellant. In the case of **P. Ramesh -Vrs.- State reported in (2019) 20 Supreme Court Cases 593**, the Hon'ble Supreme Court held as follows:-

> "16. In order to determine the competency of a child witness, the Judge has to form her or his opinion. The Judge is at the liberty to test the capacity of a child witness and no precise rule can be laid down regarding the degree of intelligence and knowledge which will render the child a competent witness. The competency of a child witness can be ascertained by questioning her/him to find out the capability to understand the occurrence witnessed and to speak the truth before the court. In criminal proceedings, a person of any age is competent to give evidence if she/he is able to (i) understand questions put as a witness; and (ii) give such answers to the questions that can be understood. A child of tender age can be allowed to testify if she/he has the intellectual capacity to understand questions and give rational answers thereto. A child becomes incompetent only in case the court considers that the child was unable to understand the questions and answer them in a coherent and comprehensible manner. If the child understands the questions put to her/him and gives rational answers to those questions, it can be taken that she/he is a competent witness to be examined."

After going through the evidence of P.W.13 and the manner in which he withstood the long gruelling cross-examination and gave minute details of the incident clearly indicates that he had attained a measure of mature understanding and there is no infirmity in his understanding of the facts perceived and his ability to narrate the same correctly. Thus, we are of the view that the learned trial Court has rightly held P.W.13 to be a competent witness.

P.W.13 has stated that he along with his sister (the deceased) was playing near the car and P.W.5 was watching news in his mobile phone. When P.W.5 received a phone call and left the place, he asked the deceased to return home but the deceased stated that she would come later and asked him to go home. He further stated that the appellant was present near the vehicle at that time. Though he stated in the examination-in-chief that the appellant took the deceased towards the school and the deceased did not return home, but in the cross-examination, he has admitted not to have stated so before the Magistrate. P.W.13 has stated in the cross-examination that people were passing through the spot while they were playing near the vehicle. This witness like P.W.5 has stated about the presence of the appellant near the car parked at the canal embankment where the victim was playing and his evidence inspires confidence.

Thus, the learned trial Court on the basis of the evidence of P.W.5 and P.W.13 has rightly held that the first circumstance regarding the presence of the appellant at the canal embankment where the deceased was playing on the date of occurrence in the evening hours when there was a power failure in the locality, has been proved by the prosecution.

9.2. **Second Circumstance:**

The second circumstance that has been relied upon by the learned trial Court is the missing of the deceased from the place where she was playing.

The learned trial Court has relied upon the evidence of P.W.4, P.W.5, P.W.7, P.W.8, P.W.9, P.W.10, P.W.11, P.W.13 and P.W.18 and came to hold that this circumstance has been proved by leading adequate evidence.

P.W.4, the informant has stated in his examination-in-chief that on 21.04.2018 during the evening hours, he had been to read Namaz in Masjid and came home at about 6.17/6.18 p.m. and at that time, there was a power failure and he enquired the whereabouts of the deceased from his daughter-in-law i.e. the mother of the deceased, but she did not find the deceased in the house and asked him to search for her outside and he searched for the deceased in the neighbourhood houses but failed to get her. In the cross-examination, P.W.4 has stated that his daughter-in-law told him that the deceased might be near the canal side and by saying so, she herself went in search of the deceased and after sometime, she returned and told him (P.W.4) that she could not find the deceased and accordingly, he went to search for the deceased. P.W.4 further stated that he went to the canal side and searched for the deceased in three to four houses situated nearby the canal side but could not get the deceased for which he returned home.

P.W.7 has also stated that while she was in her shop, the basti people came to her looking for the deceased and enquired about her.

P.W.8 has stated that on the date of occurrence at about 7.30 to 8.00 p.m. while he along with one Sania and one Hedad was sitting in the village school field, he heard that a girl of their village was missing since power failure.

P.W.9, P.W.10, P.W.11, P.W.13 and P.W.18 have also stated about the missing of the girl child in the evening hours on the date of occurrence and nothing has been brought out in the cross-examination of these witnesses by the defence to disbelieve this part of the evidence.

Therefore, the learned trial Court has rightly held that the second circumstance has been proved by the prosecution by leading adequate evidence.

9.3. **Third Circumstance:**

The third circumstance relied upon by the learned trial Court is that the appellant was last seen with the deceased.

The learned trial Court has relied upon the evidence of four witnesses i.e. P.W.5, P.W.7, P.W.13 and P.W.18.

P.W.5 has stated that on 21.04.2018 during the evening hours, while he was watching news in his mobile phone by the roadside by leaning against an Ambassador car, the deceased along with her elder brother Gullu (P.W.13) were playing and the appellant was wandering nearby and when he went inside the house on receipt of a call in his mobile phone, the appellant was found present with the deceased and P.W.13 near the Ambassador car. As already discussed under circumstance no.(i), nothing has been elicited in the cross-examination to disbelieve the evidence of P.W.5 and his evidence has remained consistent and unshaken.

P.W.13, the elder brother of the deceased has also stated about the presence of the appellant while he was playing with the deceased near the car parked at the canal embankment and further stated that P.W.5 was also watching news in his mobile phone and when P.W.5 left the place, he asked the deceased to return back home but the deceased told him that she would come later and asked him to go home and he further stated that when he departed from that place, the deceased and the appellant were present at that place. As already discussed under circumstance no.(i), the evidence of P.W.13 inspires confidence.

Two other important witnesses examined by the prosecution for proving the last seen of the appellant with the deceased are P.W.7 and P.W.18.

P.W.7 has stated that she was an Asha Karmi and she was having a grocery shop in the village Jagannathpur and on 21.04.2018 in the evening hours, while she was present in her shop, there was a power cut and she had kept emergency light in her shop. The appellant came to her shop at that time with the deceased and asked for chocolates of Rs.10/- and accordingly, she gave one Perk chocolate and five numbers of meethi malai chocolates which cost Rs.1/- each to the appellant and accordingly, the appellant paid her Rs.10/- towards the cost of the chocolates. She further stated that the appellant removed the wrapper of one of the Rs.1/- chocolates and gave the same to the deceased and on suspicion, when she asked the appellant as to how he had come to her shop with the deceased, the appellant told her that he had brought her as she was crying and then the appellant proceeded towards the school along with the deceased. She further stated

that after some time, the basti people came to her looking for the deceased and enquired about her to whom she stated that the appellant had come to her shop with the deceased and then proceeded towards the school with her. She further stated that a little later, she heard a commotion and came out of the house and saw the people running here and there and she asked the people as to what had happened and came to know from them that a child was lying at the school with bleeding injury for which she proceeded towards the place where there was commotion and she saw the deceased, who had sustained bleeding injury, being taken on a motor cycle.

The learned counsel for the appellant challenging the evidence of P.W.7 argued that not only she is a stock witness as she had deposed in other cases but also her statement that she had not visited the house of the deceased to intimate about the fact that was within her knowledge concerning the victim and the appellant creates a grave doubt about her veracity. It was further argued that if according to P.W.7, she had disclosed before the basti people about the appellant coming to her shop with the deceased for purchasing chocolates and then proceeded towards the school with her, it would have spread like wild fire and immediately come to the knowledge of the family members of the deceased including P.W.4 and in such a scenario, P.W.4 would not have missed naming the appellant as a suspect in the F.I.R. which was lodged at Salipur police station on that night at about 22.15 hours against unknown persons.

Learned counsel for the State, on the other hand, submitted that since P.W.7 has specifically stated not to have met P.W.4, the informant on the date of occurrence nor the family members of the deceased on that day, it might not be within the knowledge of P.W.4 before he lodged the F.I.R. that the appellant took the deceased to the grocery shop of P.W.7, purchased chocolates and gave it to the deceased and then took her towards the school and therefore, non-mentioning the name of the appellant as a suspect in the F.I.R. cannot be a ground to disbelieve the evidence of P.W.7.

P.W.18 Sk. Afzal Jama has stated that he had seen the deceased on 21.04.2018 in between 6.00 to 6.30 p.m. while the appellant was taking her towards Kamar Sahi by the side of canal embankment and he was then present in his grocery shop. He further stated that after about forty five minutes, the appellant returned alone and went inside his house and he was seen in a disturbed condition. He further stated that after some time, the mother of the deceased and other family members searched for the deceased as she was found missing and subsequently, the deceased was found in the school verandah with bleeding injuries for which she was taken to the hospital. He stated to have narrated the occurrence before the police so also before the Magistrate at Salipur Court.

Learned counsel for the appellant argued that P.W.18 has stated that after coming to know from the discussion of the co-villagers that P.W.4 so also the mother of the deceased were searching for her, he had not intimated them what he knew and therefore, his non-disclosure regarding the appellant's role immediately creates suspicion about the truthfulness of his version and there was every possibility on his part to make such statement at a belated stage when the police arrived at the scene of occurrence suspecting the appellant's involvement in the crime in question.

Learned counsel for the State, on the other hand, argued that suggestion has been given to P.W.18 that his family had enmity with the family of the appellant and that he was deposing falsehood to put the appellant in trouble and that he had been tutored to falsely depose against the appellant to which he has denied. Learned counsel for the State further argued that the I.O. arrived in the occurrence village on the night of the date of incident at 10.45 p.m., visited the spot, took steps for guarding the spot as it was pitch dark and also examined some witnesses. P.W.7 was examined in that night itself and P.W.18 on the next day i.e. on 22.04.2018. Therefore, there is no delayed disclosure of these two witnesses before the police. The learned counsel further argued that the knowledge of P.W.7 and P.W.18 about the occurrence cannot be disbelieved merely because the F.I.R. is lodged against unknown person. It is his argument that F.I.R. is not an encyclopaedia which must disclose all facts and details relating to the offence so also the name of the accused and therefore, non-mention of the name of the appellant in it cannot be a ground to disbelieve the prosecution case.

Adverting to the contentions raised by the learned counsel for the respective parties relating to the evidence of P.W.7 and P.W.18, we are of the view that when the appellant was not only a co-villager of the deceased but also a married person having children and there was nothing on record that he had got any criminal antecedents or he was a licentious person, merely because the deceased accompanied him to the shop of P.W.7 where the appellant purchased chocolates for her or she was seen going with him towards the school could not have raised any suspicion in the minds of these two witnesses regarding his involvement in the crime in question. It was a power cut time in the village and a summer season. Most of the people must have been out of their house or on the canal embankment to get some cool air and it would have hardly raised any suspicion when the deceased was seen in the company of the appellant. Even if P.W.7 has disclosed before some of the co-villagers, who were searching for the deceased, that she had seen the appellant going towards the school with the victim after purchasing chocolates, that might not have raised suspicion against the conduct of the appellant in their minds. There is no material on record that anyone disclosed before the informant (P.W.4) that the deceased had accompanied the appellant to the shop of P.W.7 where the appellant purchased some chocolates for her and gave it to her and then the deceased accompanied the appellant towards the school and that after some time, the appellant returned alone and he was seen disturbed. The materials on record rather indicate that the moment the deceased was found lying in an injured condition on the school verandah, she was immediately shifted to Salipur Hospital and P.W.4, upon coming to know about the same, rushed to the spot but since he found that by that time, the deceased had already been shifted to Salipur Hospital, he came to the police station and lodged the F.I.R., which was scribed by P.W.11. Therefore, there was hardly any time on the part of P.W.4 to ascertain the appellant's role in the crime and therefore, non-mentioning of the name of the appellant as a suspect cannot be a ground to discard the evidence of P.W.7 and P.W.18. There is also no such delay on the part of the Investigating Officer (P.W.23) in recording the statements of these two material witnesses. In the case of **Ganesh Bhavan Patel and others -Vrs.- State of Maharashtra reported in A.I.R. 1979 Supreme Court 135**, it is held that normally in

a case where the commission of crime is alleged to have been seen by witnesses who are easily available, a prudent investigator would give to the examination of such witnesses precedence over the evidence of other witnesses. It was further held that when there was an inordinate delay in recording the statements of material witnesses, it would inevitably lead to the conclusion that the prosecution story was conceived and construed after a good deal of deliberation and delay in a shady setting, highly redolent of doubt and suspicion. Mere delay in examination of witnesses cannot in all cases be termed to be fatal so far as prosecution is concerned.

Delay in recording statements of the witnesses by the I.O. can occur due to various reasons and can have several explanations. It is for the Court to assess the explanation and if satisfied, accept the statement of the witness. In the case in hand, we find that there is hardly any delay in recording the statements of the material witnesses like these four witnesses i.e. P.W.5, P.W.7, P.W.13 and P.W.18 by the I.O. (P.W.23). As already stated, P.W.7 was examined on the date of occurrence after the spot visit was made by the I.O. in that night itself. Even P.W.5 Sk. Ziaul Haque was also in that night. Since it was already late in the night, the other two witnesses i.e. P.W.13 Gulzar Ahmed and P.W.18 Sk. Afzal Jama were examined on the next day i.e. 22.04.2018. Merely because P.W.5 did not disclose what was within his knowledge before P.W.4 prior to giving statement before the I.O. or P.W.7 did not visit the house of the deceased to intimate about the fact within her knowledge concerning the deceased and the appellant or P.W.18 did not intimate the mother or P.W.4 what he knew cannot be a ground to disbelieve the evidence of these witnesses, particularly in view of the short time within which they gave their statements before the police. Nothing has been asked to P.W.13 by the defence whether anyone asked him about his knowledge of the occurrence or he disclosed before his family members voluntarily. Therefore, it cannot be said that the witnesses remained silent for a long time even after having knowledge about a gravely incriminating circumstance against the appellant.

Delay in sending F.I.R. to the Court of learned J.M.F.C., Salipur, non-sending of important statements like P.W.7 and P.W.18 recorded to the Court while forwarding the appellant are argued to be fatal to the prosecution case. It is argued that neither the F.I.R. was lodged when it was shown to have been lodged or the statements were recorded when those were shown to have been recorded and it was all ante-dated.

Adverting to the contentions, it appears that the F.I.R. was lodged in Salipur police station on 21.04.2018 at 10.15 p.m. The General Diary Reference Entry No.03 dated 22.04.2018 has been made on 22.04.2018 at 11.15 a.m. which was a Sunday. The Court of learned J.M.F.C., Salipur situates at a distance of 500 metres away from the police station. The F.I.R. reached the Court on 23.04.2018 and placed before Magistrate. Similarly, the I.O. admitted to have recorded the statements of twenty one witnesses which were very material to the case by the time the appellant was forwarded to the Court, however, he sent only two sheets of 161 Cr.P.C. statements of the witness and the arrest memo to the Court at that time.

It seems from the materials on record that after the receipt of F.I.R. on 21.04.2018 night, the I.O. was busy in investigation, examining the witnesses, visiting the spot, engaging police officials to guard the spot, intimating the I.I.C. of Mangalabag

police station to attend the treatment of the deceased at S.C.B.M.C.H, Cuttack, searching for the appellant, apprehending the appellant at Kajihat Bazar, sending requisition to the Superintendent of Police for engagement of scientific team, seizing the exhibits collected by Scientific Officers, seizing different articles, visiting the S.C.B.M.C.H, Cuttack coming to know about the critical condition of the deceased, making prayer to the Sub-Collector for deputing an Executive Magistrate for recording dying declaration of the deceased, arresting the appellant after observing formalities of the arrest and taking steps for keeping the seized articles in P.S. malkhana etc.

In the case of **Sarwan Singh and Ors. -Vrs.- State of Punjab reported in (1976) 4 Supreme Court Cases 369**, it was held that mere delay in dispatch of the F.I.R. is not a circumstance which can throw out the prosecution case in its entirety. In the case of **Pala Singh -Vrs.- State of Punjab reported in (1972) 2 Supreme Court Cases 640**, it is held that where the F.I.R. was actually recorded without delay and the investigation started on the basis of that F.I.R. and there is no other infirmity brought to the notice, then, however improper or objectionable the delayed receipt of the report by the Magistrate concerned, it cannot by itself justify the conclusion that investigation was tainted and the prosecution insupportable. In the case of **Ravi Kumar -Vrs.- State of Punjab reported in (2005) 9 Supreme Court Cases 315**, it is held that sending the copy of the special report to the Magistrate as required under section 157 of the Cr.P.C. is the only external check on the working of the police agency, imposed by law which is required to be strictly followed. The delay in sending the copy of the F.I.R. may by itself not render the whole of the case of the prosecution as doubtful, but shall put the Court on guard to find out as to whether the version as stated in the Court was the same version as earlier reported in the F.I.R. or was the result of deliberations involving some other persons who were actually not involved in the commission of the crime. Immediate sending of the report mentioned in section 157 Cr.P.C. is the mandate of law. Delay wherever found is required to be explained by the prosecution. If the delay is reasonably explained, no adverse inference can be drawn but failure to explain the delay would require the Court to minutely examine the prosecution version for ensuring itself as to whether any innocent person has been implicated in the crime or not. In the case of **Bhajan Singh @ Harbhajan Singh** (supra), it is held that it is not that as if every delay in sending the report to the Magistrate would necessarily lead to the inference that the F.I.R. has not been lodged at the time stated or has been ante-timed or ante-dated or investigation is not fair and forthright. Every such delay is not fatal unless prejudice to the accused is shown. The expression 'forthwith' mentioned therein does not mean that the prosecution is required to explain delay of every hour in sending the F.I.R. to the Magistrate. However, unexplained inordinate delay in sending the copy of F.I.R. to the Magistrate may affect the prosecution case adversely. An adverse inference may be drawn against the prosecution when there are circumstances from which an inference can be drawn that there were chances of manipulation in the F.I.R. by falsely roping in the accused persons after due deliberations. Delay provides legitimate basis for suspicion of the F.I.R., as it affords sufficient time to the prosecution to introduce improvements and embellishments. Thus, a delay in dispatch of the F.I.R. by itself is not a circumstance which can throw out the prosecution's case in its entirety, particularly when the prosecution furnishes a cogent explanation for the delay in dispatch of the

report or prosecution case itself is proved by leading unimpeachable evidence. It is further held that the defence did not put any question on the delay either in lodging the F.I.R. or in sending the copy of the F.I.R. to the Magistrate while cross-examining the Investigating Officer providing him an opportunity to explain the delay, if any and therefore, the Hon'ble Court did not give any importance to the submission.

We are of the view that in the factual scenario, there is no delay either in lodging the F.I.R. or in sending the copy of the F.I.R. to the Magistrate. It may be pertinent to point out that defence did not put any question on these issues while cross-examining the I.O. (P.W.23), providing him an opportunity to explain the delay, if any. Thus, we do not find any force in the submission made by the learned counsel for the appellant in this regard.

Section 167 of Cr.P.C. mandates that when any person is arrested and detained in police custody and the investigation cannot be completed within the period of twenty-four hours from the time of arrest and detention of person in custody, and the accusation or the information against such person appears to be well founded, then the officer in-charge of the police station or the police officer making investigation, shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary at the time of forwarding the accused to the Magistrate. This provision has a salutary purpose inasmuch as the Magistrate has to verify the same to see whether there is any cogent and prima facie material to detain the person in custody. Rule 164 of Odisha Police Rules provides that a carbon copy of the case diary relating to each day's investigation along with copies of the statements that might have been recorded under section 161 of Cr.P.C. shall be dispatched to the Circle Inspector on the following day. It is incumbent upon the Magistrate before making an order or remand to examine the copies of the case diary submitted under section 167 of Cr.P.C. In the case in hand, if according to the I.O. (P.W.23), statements of as many as twenty one witnesses which were material to the case were recorded by the time the appellant was forwarded to the Court, it was incumbent on the part of the I.O. to send such statements along with the forwarding report and the arrest memo etc. but the I.O. has only sent two sheets of 161 Cr.P.C. statement of the witness and not the rest. The defence has put specific questions to the I.O. in this regard and suggested that he did not mention the names of material witnesses whom he stated to have already examined in the forwarding report of the appellant as he had not examined such witnesses nor had recorded their statements under section 161 of Cr.P.C. except the one which he had sent along with the forwarding report till the appellant was forwarded to the Court and that the witnesses were set up subsequently and that he manipulated the statements in order to suit the prosecution at a belated stage.

Fairness in the investigation into crime is an integral facet of rule of law and one of the essential features of the criminal justice delivery system. Mere delay in sending the statements of the witnesses already recorded to the Court while forwarding the accused would not make their evidence unacceptable unless something glaring is brought to the notice of the Court or proved otherwise that such statements were non-existent and subsequently created and ante-dated. Law is well settled that deficiencies in investigation by way of omissions and lapses on the part of the investigating agency cannot in themselves justify a total rejection of the prosecution case **(Ref : Sheo Shankar**

Singh -Vrs.- State of Jharkhand : (2011) 49 Orissa Criminal Reports (SC) 485). In the case of **Ram Bihari Yadav -Vrs.- State of Bihar and others reported in A.I.R. 1998 S.C. 1850**, it is held that if primacy is given to a designed or negligent investigation, to the omissions or lapses created as a result of faulty investigation, the faith and confidence of the people would be shaken not only in the law enforcing agency, but also in the administration of justice. In the case of **State of West Bengal -Vrs.- Mir Mohammad Omar and others reported in (2000) 8 Supreme Court Cases 382**, it is held that it is almost impossible to come across a single case wherein the investigation was conducted completely flawless or absolutely foolproof. The function of the criminal Courts should not be wasted in picking out the lapses in investigation or by expressing unsavoury criticism against investigating officers. If offenders are acquitted only on account of flaws or defects in investigation, the cause of criminal justice becomes the victim. Efforts should be made by Courts to see that criminal justice is salvaged despite such defects in investigation.

We are of the view that non-sending of all the statements recorded while forwarding the appellant to the Court cannot be a ground to disbelieve the evidence of the witnesses examined to prove the last seen of the appellant with the deceased even though it was a lapse or omission on the part of the I.O. (P.W.23) who seems to have remained busy in the investigation of a sensational case like this.

The submission made that P.W.7 is a stock witness for police department is to be addressed here. P.W.7 has stated that on previous occasions, she deposed in other cases apart from giving statements before Magistrate. The I.O. (P.W.23) has denied the suggestion given by the defence that P.W.7 was a stock witness for the police and that she had been used to connect the link to circumstantial evidence. There is nothing on record in what type of cases she deposed earlier and whether as a prosecution witness or not. It is no doubt the duty of police to free the processes of investigation and prosecution from the contamination of concoction through the expediency of stockpiling of stock witnesses. The word ‘stock’ means something which is stored or kept in for future use as per availability. Stock witness is a person who remains at the back and call of the police and comes in front as per the directions of the police. Such kinds of witnesses are generally prosecution-favoured witnesses and therefore, they are highly disfavoured by the Judges and ordinarily the Courts use to make possible attempts to sustain the prosecution case on other pieces of evidence excluding stock witness evidence. When the evidence of P.W.7 is clinching, trustworthy and reliable and it has not been shattered in the cross-examination, the same cannot discarded on the ground of ‘stock witness’ without any specific material to that effect.

In our humble view, the learned trial Court has rightly held that the evidence of four witnesses P.W.5, P.W.7, P.W.13 and P.W.18 are clinching, trustworthy and it inspires confidence and further held that the third circumstance i.e. the last seen of the deceased in the company of the appellant has been proved by the prosecution beyond all reasonable doubt.

Needless to say that the last seen evidence which has been adduced by the four witnesses have been put to the appellant in his statement recorded under section 313 of

Cr.P.C. at question nos.6, 14, 15, 60 and 63, but he has not offered any explanation to the same.

While answering to question no.6, which was put in connection with the evidence of P.W.5 regarding last seen, the appellant has stated that he had been to witness Gangeswar Yatra. Law is well settled that plea of alibi postulates the physical impossibility of the presence of the accused at the scene of offence by reason of his presence at another place. The plea can therefore succeed only if it is shown that the accused was so far away at the relevant time that he could not be present at the place where the crime was committed **(Ref.: Dudh Nath Pandey -Vrs.- State of U.P. : (1981) 2 Supreme Court Cases 166)**. It is incumbent upon the accused, who adopts the plea of alibi, to prove it with absolute certainty so as to exclude the possibility of his presence at the place of occurrence. When the presence of the accused at the scene of occurrence has been established satisfactorily by the prosecution through reliable evidence, normally the Court would be slow to believe any counter evidence to the effect that he was elsewhere when the occurrence happened, but if the evidence adduced by the accused is of such a quality and of such a standard that the Court may entertain some reasonable doubts regarding his presence at the scene when the occurrence took place, the accused would, no doubt, be entitled to the benefit of that reasonable doubt. The burden on the accused in such circumstances is rather heavy and strict proof is required for establishing the plea of alibi. **(Ref.: Binay Kumar Singh -Vrs.- State of Bihar : (1997) 1 Supreme Court Cases 283)**

In the case in hand, except taking a plea while answering to question no.6 that he had been to watch Gangeswar Yatra, nothing has been proved from the side of the appellant to substantiate such plea. No witness including his own family members have been examined to say that the appellant had been to watch Gangeswar Yatra. Even the witnesses, who stated about the presence of the appellant in the village in the evening hours of the date of occurrence, have also not been suggested that the appellant was not present in the village at that time and he had been to watch Gangeswar Yatra. Therefore, the learned trial Court has rightly not placed any reliance on this defence plea.

The examination of an accused under section 313 of Cr.P.C. is not a mere formality. The questions put and the answers given are of great use. The accused is to be given opportunity to explain each and every circumstance appearing in evidence against him. It is obligatory on the part of the accused, while being examined under section 313 of Cr.P.C., to furnish explanation with respect to the incriminating circumstances associated with him and the Court must take note of such explanation. Law is also well settled that when an incriminating fact has not been put to the accused under section 313 of Cr.P.C., the said circumstance cannot be used against the accused. In the case of **Pattu Rajan -Vrs.- State of Tamil Nadu reported in (2019) 4 Supreme Court Cases 771**, it has been held that when the prosecution has proved the circumstance relating to last seen evidence beyond reasonable doubt, no explanation, much less any plausible explanation, has come from the accused in the statement recorded under section 313 of Cr.P.C. The burden had shifted onto the accused to explain such circumstance as to when they left the company of the deceased and such non-explanation by the accused provides an additional link in the chain of circumstances.

Therefore, we are of the view that the appellant has failed to establish the plea of alibi. The learned trial Court has rightly held that the third circumstance i.e. the appellant was last seen with the deceased on the date of occurrence in the evening hours before a short time when the deceased was found in an injured condition on the school verandah, has been proved by the prosecution.

9.4. **Fourth Circumstance:**

So far as circumstance no.(iv) noted down by the learned trial Court on the basis of fact emerged from the prosecution case is that the deceased was found lying on the verandah of Jagannathpur Nodal U.P. School in an injured condition.

Reliance has been placed by the learned trial Court on the evidence of P.W.5, P.W.7, P.W.8, P.W.9, P.W.10, P.W.18 and the evidence of the Scientific Officer (P.W.22).

P.W.5 has stated that he heard that the deceased was lying on the school verandah in an unconscious condition sustaining bleeding injuries, but he has not stated to have visited the school verandah after hearing the same. Therefore, the evidence of P.W.5 is no way helpful for the prosecution so far as this circumstance is concerned.

P.W.7 has stated that hearing commotion that a child was lying at the school with bleeding injury, she proceeded towards the place where there was commotion and saw the deceased with bleeding injury being taken on a motorcycle. In the cross-examination, she has stated that the distance between the gate of the school in question was about 100 meters from her shop and there were three houses situated in between the school gate and her shop. She further stated that there was no boundary wall of the school in question and anyone can enter the school premises from any side.

P.W.8 has stated that on 21.04.2018 in the evening hours, he along with Sania and Hedad was sitting in the village school field and he heard that a girl of his village was missing since the power failure and while searching, Raquib asked him to search for the victim near the school and he along with Sania and Hedad went inside the school premises and took the assistance of torch light available in the mobile phone of Sania for the search and saw the deceased was lying on the school verandah naked with bleeding injury. They called the people being present near the school gate and some residents of Samal Sahi also came to the spot. In the cross-examination, he has stated that the field where they were sitting was adjacent to the school and due to electricity failure and heat, people were roaming outside their house. Nothing has been brought out in the cross-examination to disbelieve his evidence to have noticed the deceased lying in a nude condition on the school verandah.

P.W.9 has stated that when three boys informed him that a child was lying near the school, he along with Azim (P.W.10) came to the spot on a Luna moped and at the spot, they found some other persons had gathered and the child was lying on the verandah of the school with bleeding injury. P.W.10 picked up the child from the verandah and gave her to him and holding the child, he sat on the Luna and being driven by P.W.10, he came to Salipur Hospital. In the cross-examination, he has stated that he received information about missing of the deceased at 7.00 p.m. and he along with his co-villagers looked for the deceased from 7.00 p.m. to 8.00 p.m. There was gathering of

co-villagers and movement by them here and there with the spreading of news of missing of the deceased.

P.W.10 has corroborated the evidence of P.W.9 and stated that he along with P.W.9 entered the gate first followed by others with the torch light in the mobile phones and found the deceased lying on the verandah of the school in a serious condition and she was also found naked. A Mithi Chocolate was lying nearby and there was blood coming out from the nose and other parts of the body of the deceased and then he along with P.W.9 shifted the deceased in his moped to Salipur Hospital. Nothing has been brought out in the cross-examination to disbelieve his evidence.

P.W.18 has stated that the deceased was found on the school verandah with bleeding injury and she was taken to the hospital. In the cross-examination, he has stated to have heard that the deceased was lying on the school verandah after about forty-five minutes of the completion of the Namaz. He has not stated to have visited the school and noticed the deceased there. Therefore, the evidence of P.W.18 is not much helpful for proving the circumstance.

The Scientific Officer (P.W.22) has stated that when she visited the spot on 22.04.2018, she noticed blood stain on the verandah of the Jagannathpur Nodal U.P. School, Salipur near the southern side wall in front of Bapuji Kakshya and she also noticed one Cadbury Perk Extra Chocolate lying on the cemented floor in front of Bapuji Kakshya at a distance of two feet from the southern side wall of the school towards the north. One Meethi Malai Kulfipop chocolate was noticed at some distance from the Perk Chocolate on the cemented floor. He also seized Green Colour Sprite Plastic Bottle containing some liquid noticed at a distance from the iron door of Bapuji Kakshya towards west. She took photographs of scene of crime and prepared rough sketch map of the spot.

The learned counsel for the appellant argued that though it is the prosecution case that three persons were sitting on the school field outside the school i.e. P.W.8, one Sania and one Hedad, but the other two witnesses were not examined. Such submission is not acceptable as it is the settled principle of law of evidence that it is not the quantity, but the quality of evidence that has to be taken into consideration by the Court for determining the guilt or innocence of the accused. If the testimony of a sole witness is confidence-inspiring and beyond suspicion, the same can be acted upon by the Court.

In view of the evidence adduced by P.W.7, P.W.8, P.W.9, P.W.10 and the Scientific Officer (P.W.22), we are of the view that the learned trial Court has rightly come to the conclusion that the fourth circumstance i.e. the deceased was found lying on the verandah of the school in an injured condition has been proved by the prosecution by the required standard of proof.

9.5. **Fifth Circumstance:**

The learned trial Court has formulated this circumstance to be the absence of the appellant from the occurrence village soon after the occurrence.

The relevant witness on this point is the I.O. (P.W.23) who has stated that on 21/22.04.2018 while he was present at the spot village at midnight, he searched for the

suspect, but did not find him and at about 5.00 a.m. on 22.04.2018, he received information from his source that the suspect (appellant) was proceeding towards Kajihat and accordingly, he proceeded to Kajihat and found him near Kajihat Bazar and apprehended the appellant and brought him to the police station and kept him under guard for his interrogation.

In the cross-examination, the I.O. (P.W.23) has stated that he had gone to the house of the appellant on the night of occurrence and when he asked the whereabouts of the appellant to his brother, he could not able to say anything. He stated not to have examined any other members of the family of the appellant to ascertain about the presence of the appellant in the occurrence village on the very night though he remained in the occurrence village for about seven hours on that day. He further stated that he did not know the appellant earlier and caught him in Kajihat and his investigation did not reveal as to who identified the appellant to him. He further stated that he simply asked the name of the appellant at Kajihat and rest of the interrogation was made at the police station.

The appellant has taken a stand while answering to question no.6 in the accused statement relating to the evidence of P.W.5 regarding his presence in the occurrence village in the evening hours on 21.04.2018 that he had been to watch Gangeswar Yatra, whereas while answering to question no.77 relating to the evidence of the I.O. (P.W.23) regarding his apprehension at Kajihat Bazar that he was in his house when police took him to the police station. According to the I.O. (P.W.23), the apprehension time of the appellant was on 22.04.2018 early morning at 5 O' clock at Kajihat Bazar. If according to the appellant, he had been to watch Gangeswar Yatra on 21.04.2018 in the evening hours then it is not clear when he returned back to his house so that he was arrested in the early morning on 22.04.2018 as per the defence plea. No one has stated that the appellant was apprehended from his house. Even the family members of the appellant have not been examined by the defence to depose in that respect. As already discussed under circumstance no. (iii), the appellant has failed to establish the plea of alibi. The said circumstance of absconding from the village immediately after the offence was committed, is admissible as relevant 'conduct' under section 8 of the Indian Evidence Act. Absconding by itself may not be a positive circumstance consistent only with the hypothesis of guilt of the accused because it is not unknown that even innocent person may run away for fear of being falsely involved in a criminal case and arrested by the police, but coupled with the other circumstances, the absconding of the accused assumes importance and significance.

Thus the fifth circumstance i.e. the absence of the appellant from the occurrence village soon after the occurrence has been rightly held to have been proved by the prosecution by the learned trial Court.

9.6. **Sixth Circumstance:**

According to the learned trial Court, the sixth circumstance against the appellant is the finding of the chocolates from the pocket of the deceased.

The learned trial Court, while analyzing this circumstance, has relied upon the evidence of P.W.7, P.W.10, P.W.14, P.W.15 and the I.O. (P.W.23).

P.W.7 has stated that the appellant came with the deceased to her shop on 21.04.2018 in the evening hours when there was power cut and she was having an emergency light in the shop and the appellant purchased chocolates of Rs.10/- and removed the wrapper of one of the chocolates and gave it to the deceased. She also stated about the seizure of Perk chocolate and meethi malai chocolates along with plastic containers from her shop by the police as per seizure list Ext.13. In the cross-examination, she stated that she used to purchase chocolates from the sales representatives. She has denied the suggestion given by the defence counsel that she was not having any grocery shop in which she was selling chocolates.

P.W.10 has stated that when he noticed the deceased lying naked in an injured condition on the school verandah, he found a meethi chocolate was lying nearby. It has been confronted to P.W.10 and proved through the I.O. (P.W.23) that he had not stated before police in his 161 Cr.P.C. statement that meethi chocolate was lying near the spot. Mere omission of stating to have found a meethi chocolate lying near the spot cannot be said to be an improvement worthy of disbelieving his statement. If the I.O. tells to record every minute detail about the occurrence what the witness knows but records what according to him are relevant for the case, the same cannot be a ground to disbelieve the testimony of the witness or to conclude that it was a case of perfunctory investigation. Only such omissions which amount to contradiction in material particulars can be used to discredit the testimony of the witness. Minor contradictions are bound to appear in the statements of even truthful witness. Omissions in the earlier statement of a witness if found to be in trivial details, cannot be a ground to raise doubt about his credibility. As such minor omission would not cause any dent in the testimony of P.W.10.

P.W.14 who was the A.S.I. of Salipur Police Station stated that on 22.04.2018 at about 8.00 a.m., he had accompanied the I.O. (P.W.23) to village Jagannathpur and reached there at about 8.30 a.m. and found the spot was on guard by one A.S.I. and one Havildar and scientific team reached at the spot and took photographs and the sniffer dog took the smell of blood and chocolate and it was left to proceed and they followed it and the dog proceeded after crossing the canal and entered into the house of the appellant and again returned to the spot. The dog master (P.W.16) prepared the report (Ext.17). He further stated that the Scientific Officer handed over the materials collected to P.W.23 in his presence which were seized as per seizure list Ext.14. Ext.14 indicates about the seizure of chocolates. The witness has denied the suggestion given by the learned defence counsel that he had given his signature on Ext.14 at the instance of P.W.23 without having any knowledge about the seizure therein.

P.W.15 stated that on 22.04.2018 the police seized one blue colour panty of the deceased and two numbers of chocolates being produced by the Medical Officer which were seized as per seizure list Ext.20. He has denied the suggestion given by the learned defence counsel that being the paternal uncle of the deceased, he had later given his signature on Ext.20.

P.W.23, the I.O. has stated that on 22.04.2018 at about 1.45 p.m., he seized and sealed one blue colour half pant of the deceased suspected to contain blood stain, two numbers of meethi malai chocolates which were there in the pant pocket of the victim on production of Dr. Sourabh Kumar Upadhya and he prepared the seizure list vide Ext.20.

As already stated P.W.15 has also stated about such seizure. Nothing has been brought out in the cross-examination for doubting such seizure.

In our humble view, the learned trial Court has rightly held the sixth circumstance i.e. finding of the chocolates from the pocket of the deceased to have been proved by the prosecution.

9.7. **Seventh Circumstance:**

The seventh circumstance available on record according to the learned trial Court is the availability of the blood on the shirt of the appellant which he was putting on the relevant day that matched with the blood group of the deceased.

The learned trial Court has taken into account the report of the S.F.S.L., Bhubaneswar vide Ext.53, the seizure list Ext.18 relating to the seizure of wearing apparels of the appellant and the evidence of the doctor (P.W.3) for appreciating this particular circumstance.

The I.O. (P.W.23) has stated that on 22.04.2018 at 5.00 a.m. on receipt of information that the appellant was proceeding towards Kajihat, he proceeded there and apprehended the appellant near Kajihat Bazar, brought him to the police station and kept him under guard for interrogation. After the appellant was interrogated, he was arrested on 22.04.2018 at 6.00 p.m. observing formalities of arrest and on 23.04.2018, the appellant was sent to Department of F.M. & T., S.C.B. Medical College and Hospital, Cuttack for his medical examination.

P.W.3, the Asst. Professor of Department of F.M. & T., S.C.B. Medical College and Hospital, Cuttack who examined the appellant on 23.04.2018 on police requisition, stated that on examination of the wearing apparels, the appellant was found to be wearing, inter alia, yellow colour full shirt with tag i.e. 'Jam Jam XL' with reddish brown colour stains above the pocket on left anterior and right lower part of the anterior aspects and after examination, the clothings were handed over to the accompanying escort party in a parcel under seal and label.

The I.O. (P.W.23) has further stated that the escort party returned to the police station with the appellant after his medical examination and produced, inter alia, one sealed packet containing wearing apparels of the appellant including yellow colour full shirt collected and sealed by the Medical Officer at the time of examination of the appellant, which was seized as per seizure list Ext.18. He further stated that he kept the seized mal items in P.S. malkhana separately.

The I.O. (P.W.23) seized the biological samples of the deceased on 24.04.2018 on being produced by S.I. of police Asit Jena from S.C.B. Medical College and Hospital, Cuttack where the victim was undergoing treatment which was seized as per seizure list Ext.19.

The I.O. (P.W.23) has stated that on 27.04.2018, he made a prayer to the Court for sending the exhibits to S.F.S.L., Rasulgarh, Bhubaneswar for chemical examination and report. The exhibits were sent to the S.F.S.L. with the forwarding report of J.M.F.C., Salipur.

The D.N.A test report indicates that the human female D.N.A. profiles generated from Ext.O2-X (cut portion of blood stain from the full shirt of the appellant) and O2-Y (cut portion of blood stain from full shirt of the appellant) matched with female D.N.A. profile generated from Ext.N i.e. the sample blood of deceased on FTA card.

The attention of the appellant has been drawn to this part of evidence in his accused statement in question nos.129, 131 and 132, but the appellant pleaded his ignorance.

In the case of **Mukesh and another -Vrs.- State (NCT of Delhi) and others reported in (2017) 6 Supreme Court Cases 1**, it is held that D.N.A. technology as a part of forensic science and scientific discipline not only provides guidance to investigation but also supplies the Court accrued information about the tending features of identification of criminals. D.N.A. evidence is being increasingly relied upon by Courts. After the amendment in Cr.P.C. by the insertion of section 53-A by Act 25 of 2005, D.N.A. profiling has now become a part of the statutory scheme. Section 53-A of Cr.P.C. relates to the examination of a person accused of rape by a medical practitioner. Section 164-A of Cr.P.C. inserted by Act 25 of 2005 indicates that for medical examination of the victim of rape, the description of material taken from the person of the woman for D.N.A. profiling is a must. It is further held that D.N.A. report deserves to be accepted unless it is absolutely dented and for non-acceptance of the same, it is to be established that there had been no quality control or quality assurance. If the sampling is proper and if there is no evidence as to tampering of samples, the D.N.A. test report is to be accepted.

The learned counsel for the appellant argued that P.W.5, P.W.7 and P.W.18 who have stated to have seen the appellant in the company of the deceased have not stated whether that particular shirt which was sent for chemical examination was worn by the appellant and therefore, finding of blood stain of the deceased on such shirt is immaterial.

We are not at all impressed by such submission. Since it was evening time and there was power cut in the locality, it would not have been possible on the part of the aforesaid three witnesses to identify the shirt that the appellant was wearing. However, the appellant was apprehended on the early morning on 22.04.2018 which was within twelve hours of the occurrence. The appellant has not taken any plea that the I.O. gave him some other shirt to wear before sending him for medical examination. Thus, the very shirt which the appellant was wearing at the time of his apprehension was collected by the doctor (P.W.3) and kept in a packet under seal and label and handed over to the escort party which was subsequently seized by the I.O. and sent for chemical examination.

The learned trial Court has rightly held that the seventh circumstance i.e. availability of the blood on the shirt of the appellant which he was putting on the relevant day that matched with the blood group of the deceased, has been proved satisfactorily by the prosecution

9.8. **Eighth circumstance:**

The eighth circumstance according to the learned trial Court, is that while in police custody, the appellant after confessing his guilt showed some places voluntarily where he had taken the deceased to accomplish the crime.

According to the I.O. (P.W.23), on 23.4.2018 he forwarded the appellant to the Court. He has stated that on 05.05.2018 at 02.10 p.m., he brought the appellant on remand from the judicial custody on a prayer being allowed by the Court and interrogated him in presence of the witnesses and recorded his statement vide Ext.31. The appellant disclosed that he would show the places where he had taken the deceased and then led the police and the witnesses to the spot where the deceased was playing and then to the shop of Rina Ojha (P.W.7) and then led to the verandah of spot school. The I.O. (P.W.23) prepared a memorandum of the discovery of the fact which is the places shown by the appellant and the same is marked as Ext.32. P.W.21 Minar Behera who is a witness to Ext.32 has corroborated the evidence of P.W.23.

The learned trial Court while discussing this evidence, came to hold that the showing of places by the appellant to the I.O. is no way relevant under section 27 of the Evidence Act as those places had already been discovered and the I.O. had prepared spot map in crime detail form which is marked as Ext.39/2, however it is admissible under section 8 of the Evidence Act as the conduct of the appellant which showed that the appellant was aware of the places where the crime was committed by him.

Section 27 of the Evidence Act is an exception to the general rule that a statement made before the police is not admissible in evidence is not in doubt. However, vide section 27 of the Evidence Act, only so much of the statement of an accused is admissible in evidence as distinctly leads to the discovery of a fact. Therefore, once the fact has been discovered, section 27 of the Evidence Act cannot again be made use of to 're-discover' the discovered fact. It would be a total misuse, even abuse of the provisions of section 27 of the Evidence Act. **[Ref: Sukhvinder Singh and Ors. -Vrs.- State of Punjab : (1994) 5 Supreme Court Cases 152]**

The discovery of the fact resulting in recovery of a physical object exhibits knowledge or mental awareness of the person accused of the offence as to the existence of the physical object at the particular place. Accordingly, discovery of a fact includes the object found, the place from which it was produced and the knowledge of the accused as to its existence. To this extent, therefore, factum of discovery combines both the physical object as well as the mental consciousness of the informant accused in relation thereto. In the case of **Mohmed Inayatullah -Vrs.- State of Maharashtra reported in (1976) 1 Supreme Court Cases 828**, elucidating on section 27 of the Evidence Act, it has been held that the first condition imposed and necessary for bringing the section into operation is the discovery of a fact which should be a relevant fact in consequence of information received from a person accused of an offence. The second is that the discovery of such a fact must be deposed to. *A fact already known to the police will fall foul and not meet this condition*. The third is that at the time of receipt of the information, the accused must be in police custody. Lastly, it is only so much of information which relates distinctly to the fact thereby discovered resulting in recovery of a physical object which is admissible. Rest of the information is to be excluded. The word 'distinctly' is used to limit and define the scope of the information and means

'directly', 'indubitably', 'strictly' or 'unmistakably'. Only that part of the information which is clear, immediate and a proximate cause of discovery is admissible. It has been further held that section 27 of the Evidence Act pertains to information that distinctly relates to the discovery of a 'fact' that was previously unknown, as opposed to fact already disclosed or known. **[Ref: Perumal Raja -Vrs.- State, Rep. by Inspector of Police : A.I.R. 2024 S.C. 460]**.

In the case of **A.N. Venkatesh and Ors. -Vrs.- State of Karnataka reported in (2005) 7 Supreme Court Cases 714**, it is held that by virtue of section 8 of the Evidence Act, the conduct of the accused person is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact. The evidence of the circumstance, simplicitor, that the accused pointed out to the police officer, the place where the dead body of the kidnapped boy was found and on their pointing out the body was exhumed, would be admissible as conduct under section 8 of Evidence Act irrespective of the fact whether the statement made by the accused contemporaneously with or antecedent to such conduct falls within the purview of section 27 or not as held in **Prakash Chand -Vrs.- State : 1979 Criminal Law Journal 329**. Even if it is held that the disclosure statement made by the accused-appellants is not admissible under section 27 of the Evidence Act, still it is relevant under section 8. The Hon'ble Court held that the evidence of the investigating officer and the spot mazahar witnesses that the accused had taken them to the spot and pointed out the place where the dead body was buried, is an admissible piece of evidence under section 8 as the conduct of the accused.

In the Indian Parliament attack case that took place on 13th December 2001 i.e. **State (N.C.T. of Delhi) -Vrs.- Navjot Sandhu and Ors. reported in (2005) 11 Supreme Court Cases 600**, it is held that Afzal led the police to the shop of P.W.40 and identified the proprietor which fact is relevant and admissible under section 8 of the Evidence Act. It is further held that about the purchase of silver powder, P.W.76 recorded in Ext.42/1 that Afzal disclosed having purchased the silver powder from the shop of P.W.42. It may be stated that on the packets of silver powder (Ext.P/51), the name and address 'Tolaram & Sons, 141, Tilak Bazar' was written. Thus, the name and address of the shop was already known to the police. Therefore, section 27 cannot be pressed into service. However, the conduct of Afzal in pointing out the shop and its proprietor (P.W.42) would be relevant under section 8 of the Evidence Act.

In the accused statement, question nos.143, 144, 145 and 146 were put to the appellant regarding the evidence adduced by P.W.21 and P.W.23 in respect of his pointing out different places and preparation of memorandum vide Ext.32, but he has simply stated it to be false. Even if the places were known to the police, but when the appellant was taken on remand by police and he showed those places, his conduct becomes relevant under section 8 of the Evidence Act, as a conduct to be relevant under section 8 need not be contemporaneous, it may be antecedent or subsequent to the fact in issue or relevant fact. Under section 8, only the conduct of the accused is admissible and relevant for which he has no reasonable explanation. The explanation of any conduct on the part of the appellant must come from him and the Court would not imagine, an explanation which an accused himself had not chosen to give. The appellant wasrequired

to explain as to from which source, he came to know about those places particularly when he was not available in the locality after the crime was detected.

Therefore, the learned trial Court was justified in holding that the eighth circumstance i.e. conduct of the appellant in showing some places voluntarily where he had taken the deceased after confessing his guilt is admissible under section 8 of the Evidence Act which shows that the appellant was aware of the places where the crime was committed.

Circumstances summed up:

10. We may now usefully summarise the facts and factors established by the prosecution beyond doubt on record which are as follows:

i) that the deceased was playing on the canal embankment of his village in the evening hours on the date of occurrence with his brother when there was power cut and the appellant was present nearby;
ii) that after the brother of the deceased left her and came to his house, at that time also the appellant was nearby and thereafter the deceased was found missing;
iii) that the appellant had taken the deceased with him in the evening hours on the date of occurrence during the power cut time to the shop of P.W.7 and purchased chocolates for her;
iv) that the appellant was last seen with the deceased going towards the school;
v) that the deceased was found lying in an injured condition on the school verandah within a short time of such last seen from where she was shifted to the hospital;
vi) that the Scientific Officer found blood stain on the school verandah and also noticed chocolates lying there;
vii) that the appellant was found absent from the village after the occurrence and he was apprehended by the I.O. at Kajihat Bazar next day on the early morning;
viii) that some chocolates were found from the pocket of the deceased by the Medical Officer;
ix) that the blood stain found on the shirt of the appellant matched with the blood group of the deceased;
x) that the appellant on being taken on remand after confessing his guilt showed some places connected with the crime to the I.O. voluntarily.

We are of the view that all these ten circumstances cumulatively taken together form a complete chain that lead to the only irresistible conclusion that it is the appellant who had perpetrated the crime.

Discussion on various charges:

11. Now, we are to discuss whether material evidence brought on record by the prosecution is sufficient to substantiate various charges framed against the appellant.

11.1. **Charge under section 302 of I.P.C.:**

The death of the deceased was homicidal is disputed by the learned counsel for the appellant in view of the absence of specific finding of the doctor (P.W.1) in the post mortem report (Ext.1). According to the learned counsel for the appellant, the deceased died after eight days of the occurrence and the doctor has stated that he had not explicitly mentioned in his report if the death was homicidal or accidental.

Learned counsel for the State on the other hand argued that the doctor (P.W.1) has stated that he noticed several external injuries on the person of the deceased and two of the injuries, i.e. injury nos. (v) & (vii) along with corresponding internal injuries to brain were fatal to cause death in ordinary course of nature and the death was due to coma as a result of blunt trauma injury to head and corresponding brain injury coupled with effects of hypoxic brain injury and therefore, when the appellant inflicted such injuries during commission of sexual offence, which ultimately proved fatal and the deceased remained in coma for eight days and ultimately died, the definition of 'murder' as mentioned under section 300 of I.P.C. is squarely attracted.

The doctor (P.W.1) has stated that on 29.4.2018 he along with doctor Prabin Kumar Pradhan conducted post-mortem examination over the dead body of the deceased and found the following external injuries:-

i. A scratch abrasion of size 1 cm x 0.5 cm on left scapular region with scab formation;
ii. An abrasion with scab of size 0.25 cm on the left index finger knuckle;
iii. Imprint abrasion with regular interrupted pattern of width 3 cm starting from a point 4 cm below right mastoid tip on the right lateral neck, extending obliquely downwards and to the front of neck upto 2 cm left to mid-line on thyroid prominence. From 2 cm prior to the left end of this mark, there starts another such mark from thyroid prominence passing obliquely upward and backward towards the left lateral neck upto 4 cm below the left ear root. After a discontinuous gap of 3 cm, the mark is again evident within the hair line in the same disposition for a length of 5 cm towards occiput. The mark shows brownish black scab formation;
iv. Another similar imprint abrasion along the lower border of right lower jaw of size 3.5 cm x 0.3 cm;
v. Laceration of size 1 cm x 0.5 cm x soft tissue depth and surrounding abraded contusion with dry clotted blood base under the chin, 1cm left to mid line;
vi. Contused both lips of mouth on its inner aspects looking bluish in colour, with bruised gum tissues against the central incisor teeth;
vii. Bluish black looking contusion on mid forehead in patches. There is black eye on both sides, more evident on the right than the left;
viii. There are three small bluish black looking bruises on the shin of right leg.

On dissection, the doctor found that the scalp was contused on both frontal region and right parietal eminence. The skull was intact. The brain surface was deeply congested, with multiple streak hemorrhages into pons and mid-brain part of the brain. There were punctate intracerebral haemorrhages present in the corpus callosum, both temporal lobe base and both frontal lobe bases. Internal neck structures were intact. The hyoid bone, thyroid cartilages, strap mussels of neck were intact. The lungs were intact, congested and deeply edematous. Few segments of lower lobe of lungs on both sides were pale, pinkish. The internal genital organs like uterus are small, infantile, intact and the vaginal canal was intact. The external genitalia revealed no abnormality or injuries. The hymen was deep sheeted and was fleshy in type. No injury of any form could be appreciated on the genitalia.

The doctor gave the following opinion:-

i. The above detailed injuries were of antemortem in nature. The injury no.(iii) & (iv) are imprints of some metallic/hard object (mimicking the zip of garments) caused during struggle, pressure, dragging or holding the garment. The external injury nos.(i),

(ii), (v), (vii) & (viii) are due to hard and blunt force trauma. The injury no.(vi) can be due to medical intervention like intubation or trauma;

ii. Injury nos.(v) & (vii) along with corresponding internal injuries to brain are fatal to cause death in ordinary course of nature;

iii. Death is due to coma as a result of blunt trauma injury to head and corresponding brain injury coupled with effects of hypoxic brain injury;

iv. The time since death at the time of PM examination was within 0-6 hours;

In the cross-examination, he stated that there was no visible fingerprint over any part of the body of the deceased and hyoid bone and thyroid cartilage of the deceased were intact and that the internal neck structure of the deceased was also intact. The doctor has further stated that the cause of death as per his examination was due to coma as a result of blunt trauma injury to head and corresponding brain injury coupled with effects of hypoxic brain injury. He further stated that hypoxic brain injury results in brief deprivation of brain from the supply of blood and indirectly oxygen. He admitted not to have mentioned in his report whether the death of the deceased was homicidal or accidental.

Since in view of the findings recorded on the circumstantial evidence, the appellant can be said to be responsible for causing the injuries as noticed on the deceased by the doctor (P.W.1) as per his post mortem report (Ext.1) which resulted in the death of the deceased, we are to find out whether the ingredients of 'murder' as defined under section 300 of the I.P.C. are satisfied or not.

Section 299 of the I.P.C. states, inter alia, that whoever causes death by doing an act with the intention of causing such bodily injury as is likely to cause death, can be said to have committed the offence of 'culpable homicide'. Clause thirdly of section 300 of I.P.C. states that culpable homicide is murder, if the act by which the death is caused is done with the intention of causing such bodily injury to any person and bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. All 'murder' is 'culpable homicide' but not vice versa. 'Culpable homicide' is genus and 'murder' its species. 'Culpable homicide' sans 'special characteristics of murder', is 'culpable homicide not amounting to murder'. The words 'bodily injury…..sufficient in the ordinary course of nature to cause death' as appears in clause thirdly of section 300 of I.P.C. mean that death will be the most probable result of the injury having regard to the ordinary course of nature. For cases to fall within clause 'thirdly', it is not necessary that the offender intended to cause death, so long as death ensues from the intentional bodily injury or injuries sufficient to cause death in the ordinary course of nature. In order to bring a case under clause 'thirdly' of section 300 of I.P.C., firstly, it must be established by the prosecution that a bodily injury was present; secondly, the nature of the injury must be proved which is purely objective investigation; thirdly, it must be proved that there was an intention to inflict that particular injury. Once these three elements are proved to be present, then it is to be proved that injury of the type was sufficient to cause death in the ordinary course of nature and this part of enquiry is purely objective and inferential and has nothing to do with the intention of the offender. Even if the intention of the accused was limited to the infliction of a bodily injury sufficient to cause death in the ordinary course of nature and did not extend to the

intention of causing death, the offence should be murder. Illustration (c) appended to section 300 of I.P.C. clearly brings out this point. (Ref: **State of Andhra Pradesh -Vrs.- Rayavarapu Punnayya and others: A.I.R. 1977 S.C. 45**)

Since the appellant is responsible in causing various bodily injuries noticed on the person of the deceased and according to P.W.1, out of such injuries, injury nos.(v) and (vii) along with corresponding internal injuries to brain were fatal to cause death in the ordinary course of nature and death was due to coma as a result of blunt trauma injury to head and corresponding brain injury coupled with effects of hypoxic brain injury, in view of site and effect of injuries, it is sufficient to draw an inference that the appellant intended to cause such bodily injuries as was sufficient to cause death and thus, we are of the view that clause 'thirdly' of section 300 of I.P.C. is satisfied and the act of the appellant comes within 'murder' and therefore, the learned trial Court is quite justified in holding the appellant guilty under section 302 of the I.P.C., as such finding of fact is based on evidence available on record which is neither perverse nor contrary to record.

11.2. **Charge under sections 376-AB of I.P.C. and section 6 of POCSO Act:**

376-AB of I.P.C. prescribes punishment for rape on a woman under twelve years of age. 'Rape' has been defined under section 375 of I.P.C. and it is stated that a man is said to commit 'rape' if he-

> **(a)** penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person;
>
> **(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;
>
> **(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;
>
> **(d)** applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person.

In the Explanation 1 to section 375 of I.P.C., it is stated that for the purposes of this section, 'vagina' shall also include labia majora.

Section 6 of the POCSO Act deals with punishment for 'aggravated penetrative sexual assault', which is defined under section 5 of the POCSO Act. Section 5(m) of the POCSO Act states that whoever commits 'penetrative sexual assault' on a child below twelve years is said to commit aggravated penetrative sexual assault. 'Penetrative sexual assault' has been defined in section 3 of the POCSO Act which is similar to clauses (a) (b) (c) and (d) of section 375 of I.P.C.

At this stage, it would be appropriate to discuss about the age of the deceased at the time of occurrence as the same has got link with both the offences.

P.W.17 Arnapurna Biswal was the Anganwadi worker at village Jagannathpur who has stated that the deceased was studying in the Anganwadi and on the basis of the letter issued by Salipur police, she submitted the information vide Ext.22 basing on the entry made in the Anganwadi register (Ext.25) that the date of birth of the deceased was

02.05.2012 and as such by 21.04.2018, she was aged about five years and eleven months. She proved the relevant register which she had taken in zima after it was seized by the I.O. under seizure list Ext.23. In the cross-examination, she has stated to be working in the Anganwadi of Jagannathpur since 2002. She denied the suggestion that Exts.22 to 25 were all manufactured for the purpose of the case. The elder brother of the deceased has been examined as P.W.13 who was aged about seven years and his age has not been challenged by the defence. Therefore, the learned trial Court has rightly come to the conclusion that the deceased was below twelve years of age at the time of occurrence.

P.W.8 has stated that the deceased was lying on the school verandah naked with bleeding injury.

P.W.9 who shifted the deceased lying on the school verandah with bleeding injury to Salipur hospital with P.W.10 has not stated that the deceased was in a naked condition.

P.W.10 who shifted the deceased with P.W.9 from the school verandah in a serious condition has stated that the deceased was lying naked.

P.W.2, the doctor of Salipur C.H.C. referred the deceased to S.C.B.M.C.H., Cuttack as her condition was found to be critical.

P.W.6, the Associate Professor who examined the deceased on 22.04.2018 has stated that on examination of the private parts, he found mild redness at the inner side of the folds of labia minora, more so towards the upper half. All other structures in the private part were found to be intact without any discharge or bleeding. He has further stated that no physical clue of alleged sexual offence could be detected over the wearing apparels of the deceased and no injuries could be seen on the private parts of the deceased except mild redness which was seen at the inner aspect of the inner labial folds close to the vaginal opening. He has further stated that the vulvovaginal samples and anal samples which were preserved and tested at State Bacteriological and Pathological Laboratory, Cuttack did not reveal any physical clue of recent sexual intercourse, however, from the genital findings, it was opined that an attempt of sexual act or manipulation could not be denied. He further stated that on 03.05.2018, vide letter no.957(2) dated 02.05.2018 of Salipur police station, the I.I.C. placed a query and he gave his opinion that the redness that was detected at the inner side of the folds of labia minora of the deceased could be possible if an erect male organ/finger/any other object was pushed or thrust over the private parts or external genitalia of the deceased. The redness was also possible if the labial folds were forcibly stretched or roughly handled or roughly manipulated during an attempted sexual assault. In the cross-examination, P.W.6 however stated that in his report Ext.9, he has mentioned that the hymen was intact and there was no inflammation or discharge or bleeding and that sub-column under (g) regarding admissibility of finger was left blank and in column (h), he has mentioned that the hymen was intact and hence the vaginal canal could not be examined. He further stated that no injuries could be seen on the private part of the deceased except mild redness at the inner aspect of the inner labial folds close to the vaginal opening. He admits that his opinion that ‘an attempted sexual assault or sexual manipulation cannot

be denied' was a possibility and not a definite opinion. He further stated that in absence of any other sign and symptoms or injury apart from redness found in the inner folds of the private part, the possibility of penetration is ruled out but attempt cannot be denied. He further stated that as the redness was noticed towards the upper part of the labial folds, the same being caused by self-infliction due to itching could not be denied.

P.W.1, the doctor who conducted post-mortem examination on 29.04.2018 has stated that the internal genital organs like uterus were intact and the vaginal canal was intact. The external genitalia revealed no abnormality or injuries. The hymen was deep-seated and was fleshy in type and no injury of any form could be seen on the genitalia. He has further stated that minor superficial genital injury like redness in the genitalia might not be found if examined after a gap of few days. In the cross-examination, he has stated that on examination and dissection of the body, he did not detect any external or internal injury in the genital of the deceased and he had examined the vaginal canal of the deceased and it was found intact.

Ext.53 is the report of S.F.S.L. which consisted of ten pages wherein after examining the blue colour half pant of the deceased which was wrapped in a paper in sealed condition and marked as Ext.J, it was opined that vaginal secretion stain could be detected in the exhibit marked as J. So far as other exhibits are concerned, neither blood and semen stains nor semen vaginal secretion or saliva stain could be detected.

Thus, except mild redness at the inner side fold of labia minora towards the upper half, no other injuries were noticed on the private part of the deceased to suggest that the act committed by the appellant would come as enumerated under clauses (a) (b) (c) and (d) of section 375 of I.P.C. At this stage, it is felt proper to quote the query made by the I.O (P.W.23) to P.W.6, the doctor which is as follows:-

> "It is opined that, the labia minora shows mild redness. Considering the age of the deceased/victim who was six years old at the time of alleged sexual assault, please opine that whether such redness in the labia minora is possible if the perpetrator pushes/thrusts his penis or any other object over the private part/genitalia of the victim girl despite her resistance".
>
> On such query, P.W.6 has opined as follows:-
>
> "On perusal of the documents relating to the case, I am of the opinion that, the redness that was detected at the inner side of the folds of labia minora of the victim child, can be possible if an erect male organ/finger/any other object is pushed or thrust over the private part or external genitalia of the girl or if the labial folds are forcibly stretched or roughly handled or manipulated during an attempted sexual assault".

According to P.W.6, this opinion is a possibility and not a definite opinion and that redness as noticed towards the upper part of the labial folds of the deceased could be caused by self-infliction due to itching.

In the case of **State of Haryana -Vrs.- Bhagirath and others reported in (1999) 5 Supreme Court Cases 96**, it is held that the opinion given by a medical witness need not be the last word on the subject. Such opinion shall be tested by the Court. If the opinion is bereft of logic or objectivity, Court is not obliged to go by that opinion. After all, opinion is what is formed in the mind of a person regarding a fact situation. If the opinion was given by a doctor is not consistent with the probability, the

Court has no liability to go by that opinion merely because it is said by the doctor. In the case of **Mayur Panabhai Shah -Vrs.- State of Gujarat reported in (1982) 2 Supreme Court Cases 396**, it is held that even where a doctor has deposed in Court, his evidence has to be appreciated like the evidence of any other witness and there is no irrebuttable presumption that a doctor is always a witness of truth.

In view of the foregoing discussion, when there is no other material available on record including circumstances to satisfy the ingredients of 'rape' or 'aggravated penetrative sexual assault' committed on the deceased, it would be too risky to convict the appellant either under section 376-AB of the I.P.C. or under section 6 of the POCSO Act. However, the manner in which the deceased was found in a nude condition on the school verandah after being taken there by the appellant, we are of the view that the ingredients of offence under section 354 of I.P.C. i.e. assault or use of criminal force with intent to outrage the modesty of the deceased is squarely made out. In the case of **State of Punjab -Vrs.- Major Singh reported in A.I.R. 1967 S.C. 63**, it is held that the essence of a woman's modesty is her sex. Young or old, intelligent or imbecile, awake or sleeping, the woman possesses modesty capable of being outraged. The culpable intention of the accused is the crux of the matter. The reaction of the woman is very relevant, but its absence is not always decisive, as for example, when the accused with a corrupt mind stealthily touches the flesh of a sleeping woman. She may be an idiot, she may be under the spell of anaesthesia, she may be sleeping, she may be unable to appreciate the significance of the act, nevertheless, the offender is punishable under the section. It is further held that a female of tender age stands somewhat on a different footing. Her body is immature and her sexual powers are dormant. Nevertheless from her very birth, she possesses the modesty which is the attribute of her sex.

In the case of **Tarkeshwar Sahu -Vrs.- State of Bihar reported in (2006) 8 Supreme Court Cases 560**, it is held that the accused was charged with sections 376/511 I.P.C. only. In absence of charge under any other section, the question arose whether the accused should be acquitted; or whether he should be convicted for committing any other offence pertaining to forcibly outraging the modesty of a girl. The Court invoked section 222 of the Code of Criminal Procedure, which provides that in a case where the accused is charged with a major offence and the ingredients of the major offence are missing and ingredients of minor offence are made out then he may be convicted for the minor offence even though he was not charged with it.

Accordingly, the conviction of the appellant under section 376-AB of the I.P.C. and section 6 of the POCSO Act, is hereby set aside, instead he is found guilty under section 354 of I.P.C.

11.3. **Charge under section 363 of I.P.C.:**

Section 363 of I.P.C. prescribes punishment for kidnapping, which includes kidnapping from lawful guardianship, which is defined under section 361 of I.P.C.

The object of this section seems as much to protect the minor children from being seduced for improper purposes as to protect the rights and privileges of guardians having the lawful charge or custody of their minor wards. The gravamen of this offence lies in the taking or enticing of a minor under the ages specified in this section, out of the

keeping of the lawful guardian without the consent of such guardian. The words "takes or entices any minor.....out of the keeping of the lawful guardian of such minor" in section 361, are significant. The use of the word "keeping" in the context connotes the idea of charge, protection, maintenance and control; further the guardian's charge and control appears to be compatible with the independence of action and movement in the minor, the guardian's protection and control of the minor being available, whenever necessity arises. On plain reading of this section, the consent of the minor who is taken or enticed is wholly immaterial; it is only the guardian's consent which takes the case out of its purview. Nor is it necessary that the taking or enticing must be shown to have been by means of force or fraud. Persuasion by the accused person which creates willingness on the part of the minor to be taken out of the keeping of the lawful guardian would be sufficient to attract the section. (Ref: **Parkash -Vrs.- State of Haryana : (2004) 1 Supreme Court Cases 339**)

In view of the evidence adduced by P.W.7 that the appellant purchased chocolates for the deceased from her shop and went towards the school with the deceased so also the evidence of P.W.18 that on the date of occurrence, the appellant was found taking the deceased towards Kamar Sahi by the side of canal embankment and that the age of the deceased at the time of occurrence which was six years and since the consent of the family members was not taken, we are of the view that the appellant lured the deceased by giving chocolates and took her out of the lawful guardianship and therefore, the learned trial Court has rightly held the appellant guilty under section 363 of the I.P.C.

11.4. **Conclusion:**

In view of the foregoing discussions, we are of the view that the prosecution has failed to establish the charges under section 376-AB of I.P.C. so also section 6 of the POCSO Act and accordingly the appellant is acquitted of such charges, however he is found guilty under section 354 of I.P.C. The conviction of the appellant under section 302 of I.P.C. and section 363 of I.P.C. stands confirmed.

Sentence:

12. Now, we are to discuss what sentence is required to be imposed on the appellant for the offences under sections 302, 354 and 363 of I.P.C. Sentencing has always been a vexed question as part of the principle of proportionality. The punishment should not be disproportionately great is a corollary of just deserts and it is dictated by the same principle that does not allow punishment of the innocent, for any punishment in excess of what is deserved for the criminal conduct is punishment without guilt.

12.1. **Sentence for the offence under section 302 of I.P.C.:**

The learned trial Court has awarded death sentence to the appellant for committing the offence under section 302 of I.P.C. holding that abject monstrosity of the crime indubitably renders its categorization as rarest of rare case. It was held that a six year old child who relished little pleasures like chocolates, would have hardly even imagined that the said joy would snatch her first basic right i.e. right to live. The little childish brain of her was not trained to doubt people, especially those who happened to

be known to her. It was her innocence that led her to establish a trust which here was perniciously breached. The child who would have once dreaded her teacher's punishment was bludgeoned to death, in a merciless and demoniacal way. Both the devilish conjuring of the crime and callous execution are an anathema to a society that boasts upon civility and a culture that preaches love and compassion. The learned here would comport that it is not only the family but the society at large which is the trustee of a child. Such abhorrent acts not only has egregiously violated a child's trust and innocence but also has dehumanized society's conscience. The commission of such bestiality sans any apparent compunction is a rarity and thus any laxity in punishment would only be a travesty of justice. The pall of trepidation that has been cast can only be mitigated through a sentence which would be rarest of rare as horrendous was the crime.

Submission was made by the learned counsel for the appellant that the appellant is a young man and he has got no criminal antecedent and nothing adverse is reported against him during detention period and he hails from a poor background and he is a married person having children and moreover, the case is based on circumstantial evidence and therefore, death sentence is not justified and it may be commuted to life imprisonment.

The learned counsel for the State, on the other hand, argued that the offence was committed against a girl child aged about six years though the appellant was himself a married person and having children. The appellant was known to the deceased for which the deceased reposed confidence on him and accompanied him to the shop of P.W.7 where he purchased chocolates for the deceased and then took her and committed the crime in a most horrendous, devilish and barbaric manner and therefore, the death penalty is quite justified.

Chapter XVIII of Cr.P.C. deals with trial before a Court of Session. Sub-section (2) of section 235 of Cr.P.C. which comes within such chapter states that if the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of section 360, hear the accused on the question of sentence and then pass sentence on him according to law. Chapter XXVII of Cr.P.C. deals with the judgment. Sub-section (3) of section 354 which comes within such chapter states that when the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence. The provision of section 354(3) of Cr.P.C. must be read conjointly with section 235(2) of Cr.P.C. Special reasons can only be validly recorded if an effective opportunity of hearing contemplated under section 235(2) of Cr.P.C. is genuinely extended and is allowed to be exercised by the accused who stands convicted and is awaiting the sentence. Except in 'rarest of rare cases' and for 'special reasons', death sentence cannot be imposed as an alternative option to the imposition of life sentence.

In the case of **Satish** (supra), it is held that the principle of proportion between crime and punishment is a principle of just deserts that serves as the foundation of every criminal sentence that is justifiable. The relevant paragraphs are reproduced below:-

> "29. The criminal law adheres in general to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct. It

> ordinarily allows some significant discretion to the judge in arriving at a sentence in each case, presumably to permit sentences that reflect more subtle considerations of culpability that are raised by the special facts of each case. Judges in essence affirm that punishment ought always to fit the crime; yet in practice sentences are determined largely by other considerations. Sometimes it is the correctional needs of the perpetrator that are offered to justify a sentence. Sometimes the desirability of keeping him out of circulation, and sometimes even the tragic results of his crime. Inevitably these considerations cause a departure from just deserts as the basis of punishment and create cases of apparent injustice that are serious and widespread.
>
> 30. Proportion between crime and punishment is a goal respected in principle, and in spite of errant notions, it remains a strong influence in the determination of sentences. Anything less than a penalty of greatest severity for any serious crime is thought to be a measure of toleration that is unwarranted and unwise. But in fact quite apart from those considerations that make punishment unjustifiable when it is out of proportion to the crime, uniformly disproportionate punishment has some very undesirable practical consequences."

In the case of **Vasanta Sampat Dupare** (supra), it is held as follows:-

> "20. It is thus well settled, "the Court would consider the cumulative effect of both the aspects (namely aggravating factors as well as mitigating circumstances) and it may not be very appropriate for the Court to decide the most significant aspect of sentencing policy with reference to one of the classes completely ignoring other classes under other heads and it is the primary duty of the Court to balance the two." Further, "it is always preferred not to fetter the judicial discretion by attempting to make excessive enumeration, in one way or another; and that both aspects namely aggravating and mitigating circumstances have to be given their respective weightage and that the Court has to strike the balance between the two and see towards which side the scale/balance of justice tilts."

In the oft-quoted decision of **Bachan Singh** (supra) and **Machhi Singh** (supra), the Hon'ble Supreme Court held that life imprisonment is the rule and death sentence is an exception. Death sentence must be imposed only when life imprisonment appears to be inadequate punishment having regard to the relevant circumstances of the crime. A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised. The law laid down in **Bachan Singh** (supra) requires meeting the standard of 'rarest of rare' for award of the death penalty which requires the Courts to conclude that the convict is not fit for any kind of reformatory and rehabilitation scheme.

In the case of **Santosh Kumar Satishbhushan Bariyar -Vrs.- State of Maharashtra reported in (2009) 6 Supreme Court Cases 498**, it is held that life imprisonment can be said to be completely futile, only when the sentencing aim of reformation can be said to be unachievable. Therefore, for satisfying the second exception to the rarest of rare doctrine, the Court will have to provide clear evidence as to why the convict is not fit for any kind of reformatory and rehabilitation scheme. This analysis can only be done with rigour when the Court focuses on the circumstances relating to the criminal, along with other circumstances.

In the case of **Mofil Khan and Ors. -Vrs.- The State of Jharkhand reported in (2021) 20 Supreme Court Cases 162**, it is held that the possibility of reformation and rehabilitation of the convict is an important factor which has to be taken into account as a mitigating circumstance before sentencing him to death. There is a bounden duty cast on the Courts to elicit information of all the relevant factors and consider those regarding the possibility of reformation, even if the accused remains silent.

During course of argument, we enquired specifically from the learned State Counsel as to whether there is any criminal antecedent against the appellant, whether there is anything adverse against the conduct of the appellant during his detention in jail custody, to which he answered in negative. It is not disputed that the appellant is a married person and having children. No material has been produced before us by the learned State counsel that there is no possibility of reformation and rehabilitation. '*Every saint has a past and every sinner has a future*' - strikes a note of reformatory potential even in the most ghastly crime. Human endeavour should be to hate the sin and not the sinner. There is still life in life sentence and only death in death sentence. Therefore, we are not inclined to impose death sentence for the offence under section 302 of I.P.C. particularly when we have acquitted the appellant of the charges under section 376-AB of I.P.C. so also section 6 of the POCSO Act.

Accordingly, while confirming the conviction of the appellant under section 302 of I.P.C., we commute the death sentence imposed on the appellant to life imprisonment with a rider that he shall undergo minimum sentence of twenty years and if any application for remission is moved on his behalf, the same shall be considered on its own merits only after he has undergone actual sentence of twenty years. If no remission is granted, it goes without saying that as laid down by the Hon'ble Supreme Court in the case of **Gopal Vinayak Godse -Vrs.- State of Maharashtra reported in A.I.R. 1961 S.C. 600**, the sentence of imprisonment for life shall mean till the remainder of his life.

12.2. **Sentence for the offence under section 354 of I.P.C.:**

So far as the offence under section 354 of I.P.C. is concerned, taking into account the age of the deceased which was about six years at the time of occurrence, the manner in which she was found on the school verandah in a nude condition with injuries, we impose the maximum sentence of five years provided for such offence on the appellant and also direct him to pay a fine of Rs.10,000/- (rupees ten thousand), in default, to undergo further R.I. for six month for such offence.

12.3. **Sentence for the offence under section 363 of I.P.C.:**

The sentence awarded by the learned trial Court for the offence under section 363 of I.P.C. i.e. to undergo R.I. for a period of seven years and to pay a fine of Rs.20,000/- (rupees twenty thousand), in default, to undergo further R.I. for one year, stands confirmed.

All the substantive sentences awarded to the appellant are directed to run concurrently. In case of realization of fine amount, the same shall be disbursed to the parents of the deceased.

Victim Compensation:

13. The learned trial Court has observed in the judgment that for the purpose of the provision under section 357-A of Cr.P.C., the matter be referred to the District Legal Services Authority, Cuttack for consideration of awarding compensation to the victim and accordingly sent the extract of the order to the District Legal Services Authority, Cuttack for information. State of Odisha in exercise of powers conferred by the provisions of section 357-A of Cr.P.C. has formulated Odisha Victim Compensation Scheme, 2017. If the compensation amount has not yet been disbursed to the parents of the victim, the District Legal Services Authority, Cuttack shall take immediate steps to pay the appropriate compensation within four weeks from today.

14. Accordingly, Death Sentence Reference is answered in negative. Criminal appeal is allowed in part.

Before parting with the case, we would like to put on record our deep appreciation to Mr. Ramanikanta Pattanaik and Mr. Bikash Chandra Parija, learned counsel for the appellant for the preparation and presentation of the case and assisting the Court in arriving at the decision above mentioned. This Court also appreciates the extremely valuable assistance provided by Mr. Janmejaya Katikia, learned Addl. Govt. Advocate.

—— o ——

2024 (II) ILR-CUT-566

K.R. MOHAPATRA, J.

CMP NO. 1247 OF 2022

ANANTRAM BHOTRA ……Petitioner

-V-

PRATIMA BHOTRA & ORS. ……Opp.Parties

CIVIL PROCEDURE CODE, 1908 – Order XXII, Rule 4(2) of CPC – Whether the substituted defendants can take any independent stand by filing additional written statement when the deceased defendant had already filed his written statement? – Held, No – The substituted legal representative can take a defence appropriate to its/their character as a legal representative but inappropriate to take an independent stand by filling an additional written statement. (Paras 8-10)

Case Laws Relied on and Referred to :-

1. 2016 (Supp.-II) OLR 245 : Niranjan Sahu –v- Gauri Sahu & Ors.
2. AIR 2007 SC 3166 : Sumtibai & Ors. –v- Paras Finance Co. REGD. Partnership Firm.

For Petitioner : Mr. Debasis Tripathy, Mr. M.Panigrahi

For Opp.Parties : Mr. Basudev Mishra

JUDGMENT Heard & disposed of on : 28.03.2024

K.R. MOHAPATRA, J.

1. This matter is taken up through hybrid mode.

2. Order dated 17th October, 2022 (Annexure-5) passed by learned Senior Civil Judge, Nabarangpur in C.S. No.17 of 2013 is under challenge in this CMP, whereby written statement filed by the legal heirs of deceased Defendant No.1 has been accepted.

3. Mr. Tripathy, learned counsel submits that the Petitioner as Plaintiff filed a suit for declaration that the Registered Sale Deed dated 16th January, 1969 is null and void, declaration that the ROR vide Khata No.56 of Bangapalli Mouza in the name of the Defendants is also null and void and also to declare right, title and interest of the Plaintiffs over the suit land as well as for permanent injunction. During pendency of the suit, Defendant No.1 died and was substituted by his legal heirs, namely, Opposite Party Nos. 1 to 4. Before death, Defendants had filed a written statement. But, the legal heirs of Defendant No.1 on being substituted filed another written statement taking independent stand describing a different story. Hence, the Plaintiff-Petitioner filed an application on 17th January, 2019 with a prayer not to accept the said written statement. Learned trial Court without considering the petition in its proper perspective, dismissed the same and accepted the written statement filed by the legal heirs of Defendant No.1 subject to payment of cost of Rs.300/-.

4. While discussing the case of the parties, learned trial Court has categorically observed as under:

> *"On perusal of the concerned additional written statement filed on dated 27.11.2018 it is appeared that the legal representatives of the deceased defendants have pleaded a new fact that, Ghenua had three sons namely, Dasmu, Narasing and Birasingh whereas Saradu was the only son of Birasingh contrary to the pleading of the plaintiff that Saradu was the only son of Dasmu and it was also not specifically denied by the deceased defendants in their earlier pleadings."*

4.1 He, therefore, submits that the additional written statement filed by the substituted Defendants with an independent stand, which was not available in the original written statement, should not have been accepted in view of the provision under Order XXII Rule 4(2) CPC. In support of his submission, Mr. Tripathy, learned counsel for the Petitioner relied upon the case of ***Niranjan Sahu –v- Gauri Sahu and others***, reported in 2016 (Supp.-II) OLR 245, wherein this Court has held as under:

> *"10. From the decisions cited (supra), it is pellucid that sub-rule (2) of Rule 4 of Order 22 authorizes the legal representative of a deceased defendant to file an additional written statement raising all pleas which the deceased-defendant had or could have raised except those which were personal to the deceased-defendant or respondent. If the legal representative has an independent right, title and interest over the property, then he has to get himself impleaded in the suit as a party defendant and set up his own independent right, title and interest or challenge the decree that may be passed in the suit. He cannot take contrary plea diametrically opposite to the deceased-defendant. The rights which the dead man can no longer own or exercise in propria persona, and the obligations which he can no longer in propria persona fulfil, he owns, exercises, and fulfils in the person of a living substitute. To this extent, it may be said that the legal*

personality of a man survives his natural personality, until his obligations being duly performed, and his property duly disposed of, his representation among the living is no longer called for. When a party to a suit dies and his legal representatives are substituted, the rights and liabilities of the original party have to be considered, but not those of legal representatives. It is not permissible on the part of the legal representative to make a prayer to ignore the written statement filed by the deceased-defendant and accept his written statement, which is a complete departure from the written statement filed by defendant no.2."

5. He, therefore, submits that if the legal representatives claim to take any independent stand, they have to take steps to be impleaded as parties under Order 1 Rule 10 CPC. Being substituted under Order XXII Rule 4(2) CPC, they are bound by the pleadings of the party to whom they are representing. They cannot take any independent stand in filing their additional written statement. Learned trial Court however failed to appreciate the same and observed that merely because there was no specific denial to the pleading of the Plaintiff by the original Defendants, the substituted legal representatives could not be prevented to file any independent written statement which is neither a new nor a contradictory pleading. It is his submission that such an observation is not sustainable in the eyes of law and is liable to be set aside.

6. Mr. Mishra, learned counsel for Opposite Parties vehemently objects to the same. It is his submission that since the Opposite Parties have been impleaded as Defendants, they have right to file their written statement independently. He also relied upon the case of ***Sumtibai and others –v- Paras Finance Co. REGD. Partnership Firm***, reported in AIR 2007 SC 3166, in which it is held as under:

"4. The appellants are the legal representatives of late Kapoor Chand. A suit was filed by the respondent herein against Kapoor Chand for specific performance of a contract for sale. It was alleged that Kapoor Chand had entered into an agreement to sell the property in dispute to the plaintiff- respondent, M/s. Paras Finance Co. In that agreement Kapoor Chand stated that the property in dispute was his self acquired property. During the pendency of the suit Kapoor Chand died and his wife, sons etc. applied to be brought on record as legal representatives. After they were impleaded they filed an application under Order 22 Rule 4(2) read with Order 1 Rule 10 CPC praying inter alia, that they should be permitted to file additional written statement and also be allowed to take such pleas which are available to them. The trial court rejected this application against which a revision was filed by the appellant which was also dismissed by the High Court. Hence this appeal by special leave.

5. We are of the opinion that a party has a right to take whatever plea he/she wants to take, and hence the view taken by the High Court does not appear to be correct."

7. He, therefore, submits that a party has a right to take whatever plea he/she wants to take in the written statement. It is further submitted that the plea taken by the substituted Defendants is not contradictory to the stand taken in the original written statement. Thus, the Plaintiffs are no way prejudiced for acceptance of the additional written statement filed by the substituted Defendants-Opposite Party Nos.1 to 4. He, therefore, submits that learned Trial Court has committed no error in

rejecting the petition filed by the Petitioner with a prayer not to accept the written statement filed by the substituted Defendants.

8. Taking note of the submissions made by learned counsel for the parties, this Court is of the considered opinion that the legal representative of a deceased party only steps into the shoes of the deceased. They are legally bound by the pleadings taken by the deceased. If any party wants to take an independent stand, he has to seek permission of the Court to be impleaded as a party to the suit by filing an application under Order 1 Rule 10 CPC. The legal representative may, however, seek permission for amendment of the pleading filed by the deceased. In the instant case, no such application has been filed by the legal heirs of the Defendant No.1 either to be impleaded as parties under Order 1 Rule 10 CPC or to amend the pleading in the written statement.

9. Order XXII Rule 4 CPC provides the procedure for substitution of legal representative in case of death of sole defendant or several defendants in a suit. Sub-rule (2) of Rule 4 provides that "*any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant*." In view of the provision under Order XXII Rule 4(2) CPC, the substituted legal representative(s) can take a defence appropriate to its/their character as a legal representative. Thus, it is inappropriate for them to take an independent stand by filing an additional written statement. In the case of ***Sumtibai and others*** (supra) relied upon by Mr. Mishra, learned counsel for Opposite Parties, an application was filed under Order 1 Rule 10 read with Order XXII Rule 4(2) CPC. The said application was rejected by learned trial Court. Hon'ble Supreme Court adjudicating the matter observed that the parties are at liberty to take any stand as they wish. The ratio decided in the said case is not applicable to the present one, as the parties had filed an application under Order 1 Rule 10 read with Order XXII Rule 4(2) CPC to be impleaded as parties and filed written statement independently.

10. The ratio in the case of ***Niranjan Sahu*** (supra) is squarely applicable to this case. This Court discussing the scope of Order XXII Rule 4(2) CPC held that the substituted Defendants cannot take any independent stand by filing additional written statement when the deceased Defendant had already filed his written statement. In the instant case, learned trial Court in the impugned order observed that the legal representatives of the deceased Defendant No.1 have taken a new plea in their written statement denying the pleadings of the Plaintiffs, which was not denied by the original Defendants in their written statement. Thus, such a stand in the written statement will certainly prejudicial to the Plaintiffs and is contrary to law. As such, the written statement filed by the substituted Defendants could not have been accepted.

11. Accordingly, the impugned order under Annexure-5 is set aside. The written statement filed by the substituted Defendants shall not be taken into consideration while adjudicating the suit.

12. The CMP is allowed to the aforesaid extent.

13. Since the suit is of the year, 2013, steps should be taken for early disposal of the same in accordance with law. Parties are directed to cooperate with learned trial Court for early disposal of the suit. If any of the parties does not cooperate, learned trial Court may take coercive measure in accordance with law.

—— o ——

2024 (II) ILR-CUT-570

K.R. MOHAPATRA, J.

W.P.(C) NO. 36825 OF 2023

M/s. AES (INDIA) PVT. LTD, NEW DELHI ……Petitioner

-V-

STATE OF ODISHA & ORS. ……Opp.Parties

(A) MICRO, SMALL & MEDIUM ENTERPRISES DEVELOPMENT ACT, 2006 – Section 18(2), 18(3) r/w Section 65 to 81 of Arbitration & Conciliation Act – The council initiated the conciliation proceeding and directed the Opp.Party to file detailed spread sheet disclosing item wise claim from the petitioner – The council also directed the petitioner to file counter against the rejoinder affidavit filed by the Opp.Party – Further, rest of the Opp.Parties were also directed to file their counter against the claim petition of Opp.Party before the council – None of the parties have submitted any proposal for conciliation – Whether the order of council is vitiated on the ground that, it did not follow the provision U/ss. 65 to 81 of the Act? – Held, No – The council proceeded with arbitration only after it recorded failure of conciliation.

(B) CONSTITUTION OF INDIA, 1950 – Article 227 r/w Section 34 of Arbitration Act & Section 19 of MSMED Act – Whether the order passed by the council (Arbitration) can be challenged in writ jurisdiction? – Held, No – It can only be raised in a properly constituted petition U/s. 34 of Arbitration Act as provided U/s. 19 of MSMED Act and not in a proceeding under Article 227 of the Constitution of India.

Case Laws Relied on and Referred to :-

1. 2021 SCC OnLine SC 3436 : Vijeta Construction vs. Indus Smelters Ltd. & Anr.
2. 2021 SCC OnLine SC1257 :Jharkhand Urja Vikas Nigam Ltd. vs State of Rajasthan & Ors.
3. C.A.No.7491/2023 (dt.06.11.2023) : M/s India Glycols Ltd. & Anr. Vs. MSEFC, Medchal – Malkajgiri & Ors.
4. S.L.P(Civil) Diary No.39899 of 2023: M/s S.M.Solar Products Ltd. Vs. Bajaj Auto Ltd.&Ors.
5. (2023) 6 SCC 401 : Gujarat State Civil Supplies Corpn. Ltd. Vs. Mahakali Foods Pvt. Ltd. (Unit 2) & Anr.
6. (2005) 7 SCC 791: Harshad Chiman Lal Modi Vs. DLF Universal Ltd. & Anr.

For Petitioner : Mr. Prafulla Kumar Rath, Sr. Adv.
Mr. S. Satyakam & Miss Adyasha Kar.

For Opp.Parties : Mr. Manoj Mishra, Sr. Adv., Mr. Digambara Mishra,
Mr. Amiya Kumar Mishra, AGA

JUDGMENT Date of Judgment : 28.03.2024

K.R.MOHAPATRA, J.

IA No. 17789 of 2023 & W.P.(C) No. 36825 of 2023

1. This matter is taken up through hybrid mode.

2. Award dated 7th September, 2023 (Annexure-1) passed by Micro and Small Enterprises Facilitation Council, Cuttack (for brevity 'the Council') in MSEFC Case No.50 of 2022 is under challenge in this writ petition.

2.1 The IA has been filed for with a prayer to stay operation of the impugned award under Annexure-1.

Facts of the Case :-

3. The Petitioner is a Company registered under the Companies Act, 2013. Award under Annexure-1 is assailed on the ground that it has been passed by the Council without following the mandatory provisions of the Micro, Small and Medium Enterprises Development Act, 2006 (for brevity 'the MSMED Act'). The matter came up for admission on 4th December, 2023. By that date, the Opposite Party No.3, namely, M/s Kalinga Industries had entered appearance. Entertaining IA No.17789 of 2023 filed with a prayer to stay operation of the impugned award under Annexure-1, this Court passed an interim order staying operation of the award till the next date of posting, i.e., till 3rd January, 2024, the date to which the matter was posted. The said order was assailed by the Opposite Party No.3 before the Hon'ble Supreme Court in Special Leave to appeal bearing SLP(Civil) No.27607 of 2023. Hon'ble Supreme Court disposed of the said Special Leave to Appeal on 15th December, 2023 with the following order:-

> *"The impugned order is in the nature of ad interim order and the High Court is yet to apply its mind on the question of granting interim order. Hence, no interference is called for at this stage. In fact, time has been granted to the petitioner to file a reply as indicated in the impugned order. Therefore, it is always open for the petitioner to oppose the continuation of ad interim order on all permissible grounds. Needless to add that the High Court will hear the prayer for interim relief independently as the observations made in the impugned order are only tentative observation.*
>
> *Subject to what is observed above, the Special Leave Petition is disposed of.*
> *Pending application(s), if any, shall stand disposed of accordingly."*

3.1 The matter was taken up on the date fixed, i.e., on 3rd January, 2024 when the aforesaid order passed by the Hon'ble Supreme Court was brought to the notice of this Court. On the said date, counter affidavit was filed by Opposite Party No.3 serving copy thereof on learned counsel for the Petitioner. On receipt of copy of the counter affidavit, learned Senior Advocate, Mr. Rath for the Petitioner sought for an adjournment to go through the counter affidavit and take instruction. Accordingly,

the matter was posted to 20th February, 2024. On the said date, further adjournment was sought for on behalf of Mr. Rath, learned Senior Advocate appearing for the Petitioner and the matter was accordingly posted to 22nd February, 2024. IA No.17789 of 2023 was taken up for consideration on that date. However, learned Senior Advocates appearing for the parties made a submission that notice need not be issued to Opposite Party Nos.2, 4 and 5 because their presence is not necessary for adjudication of the interim application as well as the writ petition. It was also submitted by learned Senior Advocates for the parties that interest of justice will be best served if the writ petition is disposed of finally.

3.2 Accordingly, the matter was taken up on 26th February, 2024 for further hearing. During the aforesaid period, interim order was allowed to continue; and on 26th February, 2024, the matter was finally heard and judgment was reserved.

Legal submissions on behalf of the Petitioner :-

4. Mr. Rath, learned Senior Advocate submitted that no conciliation much less in terms of Sections 65 to 81 of the Arbitration and Conciliation Act, 1996 (for convenience 'the Arbitration Act') as mandated by Section 18(2) of the MSMED Act was undertaken by the Council. Therefore, the Council lacks jurisdiction to initiate any arbitration proceedings under Section 18(3) of the MSMED Act. He further submitted that the framework of Section 18 of the MSMED Act does not permit clubbing up of conciliation and arbitration proceedings by the Council to pass the impugned award under Annexure-1.

4.1 Elaborating his submission, it was submitted that Section 18 of the MSMED Act envisages a two-tier dispute resolution mechanism. Section 18 (2) of the MSMED Act mandates that on receipt of a reference, the Council shall either conduct a conciliation itself or seek assistance of an institution or center for conducting such conciliation. While undertaking the conciliation, provisions under Section 65 to 81 of the Arbitration Act have to be followed. It is only in the event the conciliation between the parties fails or is terminated without any settlement; the Council can initiate arbitration proceedings under Section 18 of the said Act. In the instant case, the Council undertook the so-called conciliation by itself. While undertaking conciliation, the Council was required to request the parties to submit their statements elucidating the general nature of dispute and to point out the issue as well as additional statements elucidating their position as well as the facts and grounds thereof along with supporting documents as mandated under Section 65 of the Arbitration Act. Further, Section 67 of the Arbitration Act provides that the role of Conciliator is only to assist the parties in an independent and impartial manner in their attempt to reach at an amicable settlement. Further, Section 76 of the Arbitration Act prescribes four modes for terminating the conciliation proceedings, such as. —

i) by signing settlement agreement;
ii) by written declaration that further efforts at conciliation are no longer justified after consultation with the parties;

iii) by a written declaration by the parties addressed to the Conciliator that the conciliation proceeding has been terminated;

or

iv) by written declaration by one of the parties to the other and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated.

Admittedly, none of the above mandatory provisions and requirements were either followed or complied with by the Council.

4.2 Following observation of the Council makes it clear that the conciliation proceeding was initiated on 17th November, 2022; it reads as follows: -

"In the above circumstances, the Council initiates the conciliation process under Section 18(2) of the Act, 2006 for amicable settlement of the disputes among the erring parties."

On the very next sitting, the Council, vide its order dated 27th December, 2022 recorded that conciliation between the parties had failed, although there was no conciliation proceedings or sitting of the Council at all. Relevant portion of order dated 27th December, 2022 is as follows: -

"In the above circumstances, the Council declares that conciliation process under Section 18(2) has failed and invoked arbitration proceeding under Section 18(3) of the MSMED Act, 2006 for settlement of disputes between the parties."

Thus, it appears that no attempt was ever made by the Council for amicable settlement of the matter in dispute. Therefore, there was no conciliation, much less following provisions under Sections 65 to 81 of the Arbitration Act, was ever undertaken.

5. It was further submitted that parties were not required to submit their written statement during course of conciliation as would be apparent from Section 65 of the Arbitration Act. In addition to the above, the Council in the impugned award under Annexure-1 observed that neither of the parties came up with any proposal for conciliation, for which the conciliation between the parties deemed to have failed. Thus, it appears that the Council has left the parties to reach at an amicable settlement without providing any assistance in an independent and impartial manner in their attempt to reach at an amicable settlement. He also drew attention to the following observations of the Council in support of his submission.

"This Council initiated the conciliation proceeding under Section 18 for amicable settlement of the issues between the parties. Since parties did not come up with any proposal by way of conciliation, this Council upon failure of conciliation process initiated the arbitration proceeding on 27th December, 2022 under Section 18(2) of the MSMED Act, 2006."

Case Laws relied upon :-

6. In support of his submissions, Mr. Rath, learned Senior Advocate placed reliance on the following judicial pronouncements.

i) ***Vijeta Construction vs. Indus Smelters Ltd. and another***, reported in 2021 SCC OnLine SC 3436;

ii) ***Jharkhand Urja Vikas Nigam Limited vs State of Rajasthan and others***, reported in 2021 SCC OnLine SC 1257.

6.1 In ***Vijeta Construction (supra)***, the Hon'ble Supreme Court held as follows:

"13. As per Sub-Section (3) of Section 18 after conciliation fails under Sub-Section (2) of Section 18 of the MSMED Act, and conciliation initiated under sub-section (2) is not successful, conciliation stands terminated without any settlement between the parties, the Council shall either itself take up the dispute for arbitration or refer it to any institution or centre providing ADR services for such arbitration and the provisions of the Arbitration and Conciliation Act, 1996 shall then apply to the dispute as if the arbitration was in pursuance of an arbitration agreement referred to in subsection (1) of section 7 of that Act. Therefore, only after the procedure under Sub-Section (2) of Section 18 is followed and the conciliation fails and then and then only the arbitration proceedings commences and thereafter the provisions of the Arbitration Act shall then apply.

14. ……. It is required to be noted that at the initial stage the Facilitation Council was performing the duty as a Conciliator for which the provisions of Sections 65 to 81 shall be applicable. It is true that at the stage of conciliation, the role of the conciliator (Facilitation Council) is to assist the parties to reach an amicable settlement of their dispute as provided under Section 67 of the Arbitration Act. At that stage the parties are not required to lead the evidence and at that stage the role of the conciliator is not to adjudicate the dispute between the parties, but to reach an amicable settlement of the dispute between the parties. Once the conciliation fails thereafter as per Sub-Section (3) of Section 18 of the MSMED Act, the arbitration proceedings commences and the conciliation proceedings stands terminated and thereafter the Facilitation Council shall either itself take up the dispute for arbitration or refer it to any institution or centre providing ADR services for such arbitration and the provisions of the Arbitration Act shall then apply to the dispute as if the arbitration is in pursuance of an arbitration agreement referred to Sub-Section (1) of Section 7 of the Arbitration Act. At that stage and thereafter the Facilitation Council shall act as an Arbitrator and the provisions of Arbitration Act shall then apply to the dispute as if arbitration was in pursuance of an arbitration agreement referred to Sub-Section (1) of Section 7 of the Arbitration Act including the appeal under Section 34 to the district court against the award declared by the Facilitation Council or any institution or centre providing alternate dispute resolution (ADR) services to whom the dispute is referred for arbitration."

6.2 In ***Jharkhand Urja Vikas Nigam Limited (supra)***, wherein the Hon'ble Supreme Court held as follows:-

"12. There is a fundamental difference between conciliation and arbitration. In conciliation the conciliator assists the parties to arrive at an amicable settlement, in an impartial and independent manner. In arbitration, the Arbitral Tribunal/ arbitrator adjudicates the disputes between the parties. The claim has to be proved before the arbitrator, if necessary, by adducing evidence, even though the rules of the Civil Procedure Code or the Indian Evidence Act may not apply. Unless otherwise agreed, oral hearings are to be held.

13. If the appellant had not submitted its reply at the conciliation stage, and failed to appear, the Facilitation Council could, at best, have recorded the failure of conciliation and proceeded to initiate arbitration proceedings in accordance with the relevant provisions of the Arbitration and Conciliation Act, 1996, to adjudicate the dispute and make an award. Proceedings for conciliation and arbitration cannot be clubbed.

xx *xx* *xx*

> *15. The order dated 06.08.2012 is a nullity and runs contrary not only to the provisions of MSMED Act but contrary to various mandatory provisions of Arbitration and Conciliation Act, 1996. The order dated 06.08.2012 is patently illegal. There is no arbitral award in the eye of law. It is true that under the scheme of the Arbitration and Conciliation Act, 1996 an arbitral award can only be questioned by way of application under Section 34 of the Arbitration and Conciliation Act, 1996. At the same time when an order is passed without recourse to arbitration and in utter disregard to the provisions of Arbitration and Conciliation Act, 1996, Section 34 of the said Act will not apply. We cannot reject this appeal only on the ground that appellant has not availed the remedy under Section 34 of the Arbitration and Conciliation Act, 1996……."*

6.3 He also submitted that the Council in its order dated 17th November, 2022, while initiating the conciliation, also directed the Opposite party No.1 to file counter against the rejoinder affidavit of the Petitioner. In order to justify his submission, he placed reliance upon the following observations of the Council in the impugned award: -

> *"The Council directed the Petitioner to file details spread sheet incorporating OP wise, Bill wise/ Date wise claim made & payment received against such claims before next sitting of the next Sitting of the Council.*
>
> *The Opposite Party No.01 is directed to file counter against the rejoinder affidavit of the Petitioner before the next Sitting of the Council & send the copy of the same directly to the petitioner under intimation to the Council. Further, the O.P. Nos.02 &O.P. No.03 3 are directed to file counter against the claim petition of the petitioner in the Council & sent the copy of the same to the petitioner directly under intimation to the Council."*

6.4 Direction of the Council to parties to file their statement of claims and written statement to the same, after initiation of the conciliation proceeding implied that it initiated the arbitration proceeding and the conciliation proceeding simultaneously by clubbing up both the proceedings, which is not permissible in law as has been held at para-13 in ***Jharkhand Urja Vikas Nigam Limited (supra)***.

7. It is, thus, submitted by Mr. Rath, learned Senior Advocate that the Council having failed to conduct conciliation proceeding in terms of mandatory provisions of Section 65 to 81 of the Arbitration Act, it had no jurisdiction to initiate the proceeding under Section 18(3) of the said Act.

8. Mr. Rath, learned Senior Advocate further submitted that ratio in the case of ***M/s India Glycols Ltd. and another Vs. MSEFC, Medchal - Malkajgiri and others***, (Civil Appeal No.7491 of 2023 decided on 6th November, 2023) is not applicable to the facts of this case, as in the said case, the issue involved was in respect of a time-barred claim, which is a mixed question of fact and law whereas the present case is based on pure question of law with regard to jurisdiction of the Council to initiate arbitration is under challenge. He further submitted that Hon'ble Supreme Court in the case of ***M/s S.M. Solar Products Limited Vs. Bajaj Auto Limited and others*** [Special Leave Petition (Civil) Diary No.39899 of 2023] considered the decision in ***M/s India Glycols Ltd.*** *(supra)* and did not interfere with the order of the High Court

passed in exercise of writ jurisdiction. He, therefore, submits that the impugned award under Annexure-1 is not sustainable and is liable to be set aside being without jurisdiction.

Submissions on behalf of contesting Opposite Party No.3

9. Mr. Mishra, learned Senior Advocate appearing for Opposite Party No.3 opened his argument submitting that the writ petition against an award passed under Section 18 of the MSMED Act is not maintainable in view of Section 19 of the said Act. It is his submission that the Petitioner has a statutory remedy under Section 19 of the said Act to assail the award if it is so aggrieved. It is submitted that Section 18 of the MSMED Act has three stages, namely, existence of a dispute, conciliation and lastly switching over to arbitration when conciliation is not successful and stands terminated without any settlement. When first two stages are mandatory, third stage is consequential to stage one and stage two. In the instant case, admittedly there is dispute between the parties and it has been referred at the instance of Opposite Party No.3 to the Council under Section 18 (1) of the MSMED Act. Admittedly, the conciliation proceeding was also initiated by the Council under Section 18(2) of the said Act for amicable settlement of the disputes between the parties. But the Council recorded that "*since parties did not come up with a proposal by way of conciliation, the conciliation proceeding was terminated with '**failure**'*". Although it is alleged by the Petitioner that the Council did not follow the provisions under Section 65 to 81 of the Arbitration Act while proceeding with the conciliation, but on a plain reading of the award under Annexure-1, it is crystal clear that the Petitioner did not submit any proposal for conciliation. As directed, the Opposite Party No.3 submitted its written statement as well as spread sheet for conciliation. The submission of Mr. Rath, learned Senior Advocate that the Council could not have asked the parties to submit their written statement does not hold good, as the tenor of the orders recorded by the Council during the process of conciliation clearly indicates that during conciliation, the Council had made attempts for amicable settlement of dispute between the parties. Although the Council has not recorded orders in terms of Section 65 of the Arbitration Act during conciliation proceeding, but it cannot be denied that the Council has scrupulously followed the procedure laid down under Sections 65 to 81 of the Arbitration Act during conciliation proceeding. It is also submitted that the stand taken by the Petitioner that it was not given an opportunity of hearing is also not correct, which is borne out from the record itself. Irregularity, if any, in the conciliation proceeding could not render the award a nullity, as alleged by learned counsel for the Petitioner. An award becomes a nullity, if it suffers from lack of inherent jurisdiction. No such case has been made out by the Petitioner in this case. The conciliation proceeding was terminated by the written declaration of the Conciliator (Council) under Section 76 (b) of the Arbitration Act. When the Council recorded a finding that the conciliation proceeding was terminated with failure, it had no other option than to proceed with the arbitration. At no stage during the arbitration proceeding, the Petitioner had raised any objection either to the

invocation or to the continuation of the proceeding in terms of Section 16 of the Arbitration Act. Thus, the objection raised in the writ petition with regard to validity of the arbitration proceeding before the Council is not sustainable. In the case of ***Gujarat State Civil Supplies Corporation Limited Vs. Mahakali Foods Private Limited (Unit 2) and another***, reported in (2023) 6 SCC 401, it is held as under :-

> *"48. When the Facilitation Council or the institution or the centre acts as an Arbitrator, it shall have all powers to decide the disputes referred to it as if such arbitration was in pursuance of the arbitration agreement referred to in sub-section (1) of Section 7 of the Arbitration Act, 1996 and then all the trappings of the Arbitration Act, 1996 would apply to such arbitration. It is needless to say that such Facilitation Council/institution/ centre acting as an arbitral tribunal would also be competent to rule on its own jurisdiction like any other arbitral tribunal appointed under the Arbitration Act, 1996 would have, as contemplated in Section 16 thereof."*

Thus, the Petitioner was required to raise objection with regard to the jurisdiction and competence of the Council to proceed with the arbitration before the Council itself. It is too late to raise such objection, as the Petitioner by its conduct has waived its right to object to the jurisdiction of the Council to proceed with the arbitration in view of Section 4 of the Arbitration Act. Had the objection been raised with regard to jurisdiction of the Council in terms of Section 16 of the Arbitration Act, any finding on the same could only be challenged along with the award following procedure laid down therein. Thus, the legality of the award together with question of jurisdiction of the arbitration (Council) can only be challenged in a proceeding under Section 34 of the Arbitration Act (in the instant case under Section 19 of the MSMED Act). Thus, in any case, a writ petition assailing the legality of the award including the question of jurisdiction is not maintainable. The Petitioner is only a fence sitter, as it participated in the arbitration proceeding without raising any objection under Section 16 of the Arbitration Act. Thus, at this stage, it cannot turn around and challenge the jurisdiction of the Council in a proceeding under Article 227 of the Constitution of India. The Council has made several attempts for conciliation between the parties; as the Petitioner did not cooperate, it ended in a failure. If in the instant case, a writ petition is entertained after an award is passed by the Council, it may be an abuse of process of the Court, as the Petitioner has efficacious statutory remedy under Section 34 of the Arbitration Act read with Section 19 of the MSMED Act, which is a special legislation and provides only ninety days for disposal of the reference. The said provision prevails over provisions of the Arbitration Act, as held in ***Gujarat State Civil Supplies Corporation Limited (supra)***. Mr. Mishra, learned Senior Advocate, therefore, submitted that the writ petition being not maintainable is liable to be dismissed and the interim order should be vacated forthwith.

Analysis by the Court

10. Heard learned counsel for the parties at length; perused the materials on record, including the case laws cited.

11. For better appreciation of fact and law, provisions of Sections 17 and 18 of the MSMED Act are very much necessary to be discussed.

11.1 Section 17 of the MSMED Act provides that for any goods supplied or services rendered by the supplier, the buyer shall be liable to pay the amount with interest thereon as provided under section 16 of the said Act.

11.2 Section 18 of the MSMED Act provides remedial measure. It provides that if there is a dispute with regard to the amount due under Section 17 of the said Act, any party may make a reference to the Council.

11.3 Sub-section (2) and (3) of Section 18 provides the procedure for dispute resolution. Sub-section (2) provides that on receipt of a reference under Sub-section (1), the Council shall either itself conduct conciliation in the matter or seek the assistance of any institution or center providing alternate dispute resolution services by making a reference to such an institution or center, for conducting conciliation and the provisions of Sections 65 to 81 of the Arbitration Act shall apply to such a dispute as if the conciliation was initiated under Part-III of the said (Arbitration) Act.

11.4 Sub-section (3) provides that when the conciliation under Sub-Section (2) of Section 18 of the MSMED Act fails being not successful, conciliation proceedings stand terminated and thus, the Council has only option either to take up the dispute for arbitration itself or refer it to any institution or centre providing ADR services for such arbitration and the provisions of the Arbitration Act shall then apply to the dispute as if the arbitration was in pursuance of an arbitration agreement referred to in Sub-section (1) of Section 7 of that Act.

11.5 In the instant case, the reference was made at the instance of Opposite Party No.3 to the Council and admittedly conciliation was taken up by the Council itself without referring to any institution or centre. It is alleged by Mr. Rath, learned Senior Advocate for the Petitioner that after initiation of the conciliation proceeding, the Council did not follow the provisions of Sections 65 to 81 of the Arbitration Act in conducting the conciliation. No conciliation was at all conducted by the Council, which is the mandate of Section 18(2) of the MSMED Act. He categorically submitted that as per Section 65 of the Arbitration Act, the Conciliator is required to request the parties to submit documents elucidating the general nature of dispute and points at issue as well as additional statement elucidating their position, the facts and the grounds along with supporting documents. In the instant case, it is apparent that in the 97th sitting of the Council held on 17th November, 2022, the Council after discussing the rival contentions of the parties opined to initiate the conciliation process by itself for settlement of the dispute between the Petitioner and Opposite Party No.3 and directed the parties to file their respective statements, which cannot be said to be compliance of Section 65 of the Arbitration Act. Such a direction could only be made during arbitration under Section 18(3) of MSMED Act. It is further submitted the role of a Conciliator under Section 67 of the Arbitration Act is only to

assist the parties in an independent and impartial manner in order to arrive at an amicable settlement. Mr. Rath, learned Senior Advocate alleged that no such attempt appears to have been made by the Council. Thus, he claims that the arbitration proceeding under Section 18(3) of the MSMED Act is without jurisdiction. Such a submission cannot be accepted, more particularly when none of the parties came up with any proposal for conciliation. Thus, there was no occasion on the part of the Council to assist them to arrive at an amicable settlement. As such, no exception can be taken to the procedure adopted by the Council while performing its role as a Conciliator.

12. Mr. Rath, learned Senior Advocate further submitted that Section 76 of the Arbitration Act prescribes four modes for termination of a conciliation proceeding, i.e.,—

> *(a) by singing the settlement agreement;*
> *(b) by a written declaration that further efforts at conciliation are no longer justified, after consultation with the parties;*
> *(c) by a written declaration of the parties addressed to the Conciliator that conciliation proceeding has been terminated; or*
> *(d) by a written declaration by one party to the other party and the Conciliator to the effect that conciliation proceedings are terminated.*

12.1 It is alleged that none of the aforesaid modes was adopted by the Council while recording termination of the conciliation proceeding without any amicable settlement. In the instant case, it has been categorically observed by the Council that the parties did not come up with proposal for conciliation. Thus, it recorded that the conciliation proceeding has ended in failure and proceeded to initiate arbitration under Section 18(3) of the MSMED Act. Although the Council has not recorded any finding strictly in terms of Section 76 of the Arbitration Act, but tenor of the order indicates that the Council recorded a finding that further efforts for conciliation was no longer justified as the parties did not come forward with any proposal for conciliation. Thus, it cannot be said that the entire award is vitiated or without jurisdiction in view of non-compliance of Section 76 of the Arbitration Act, as alleged.

12.2 It is further alleged that the Council proceeded with the conciliation proceeding as well as arbitration proceeding simultaneously. Mr. Rath, learned Senior Advocate for the Petitioner contended that the Council in its order dated 17th November, 2022, while initiating conciliation, also directed the Petitioner as well as Opposite Party No.3 to file their respective statements of claim/ written statement, which is not the procedure in a conciliation proceeding under Section 18(2) of MSMED Act. The Council is only authorised to issue such a direction during the arbitration proceeding, in the event the conciliation is terminated without any amicable settlement. Relying upon the ratio in the case of ***Jharkhand Urja Vikas Nigam Limited (supra)***, it is submitted that clubbing up both the conciliation and arbitration proceedings is illegal. To test the veracity of such submission, this Court

went through the impugned award under Annexure-1. From the award, it is apparent that in its 97th meeting on 27th November, 2022, the Council initiated the conciliation proceeding and directed the Opposite Party No.3 to file detailed spread sheet disclosing item wise claim from the Petitioner. The Council also directed the Petitioner to file counter against the rejoinder affidavit filed by the Opposite Party No.3. Further, rest of the Opposite Parties were also directed to file their counter against the claim petition of Opposite Party No.3 before the Council. Only because the Council directed the parties to submit their respective claims/defence, it cannot be said that the Council proceeded with the conciliation as well as arbitration proceeding simultaneously. In order to understand the rival claims of the parties, the Council for an effective conciliation has issued such a direction. The tenor of the impugned award under Annexure-1 makes it abundantly clear that the Council proceeded with arbitration only after it recorded failure of conciliation.

12.3 Mr. Rath, learned Senior Advocate also submitted that the Council abruptly closed the conciliation proceeding without affording any opportunity and proceeded with the arbitration under Section 18(3) of the MSMED Act. He, therefore, submitted that the impugned award under Annexure-1 is a nullity for which the writ petition is maintainable. As discussed earlier, this Court has already held that the procedures provided under Sections 65 to 81 of the Arbitration Act are made to facilitate an effective conciliation proceeding. It appears from record that none of the parties have submitted any proposal for conciliation. Thus, it cannot be said that the Council did not follow the provisions under Sections 65 to 81 of the Arbitration Act.

13. It is, however, submitted that in view of ***Vijeta Construction (supra)*** and ***Jharkhand Urja Vikas Nigam Limited (supra)***, the award is a nullity. Mr. Rath, learned Senior Advocate for the Petitioner relied upon the case law in the case of ***Harshad Chiman Lal Modi Vs. DLF Universal Ltd. and another***, reported in (2005) 7 SCC 791 in which it is held at para-30 as under:-

> *"30. We are unable to uphold the contention. The jurisdiction of a court may be classified into several categories. The important categories are (i) Territorial or local jurisdiction; (ii) Pecuniary jurisdiction; and (iii) Jurisdiction over the subject matter. So far as territorial and pecuniary jurisdictions are concerned, objection to such jurisdiction has to be taken at the earliest possible opportunity and in any case at or before settlement of issues. The law is well settled on the point that if such objection is not taken at the earliest, it cannot be allowed to be taken at a subsequent stage. Jurisdiction as to subject matter, however, is totally distinct and stands on a different footing. Where a court has no jurisdiction over the subject matter of the suit by reason of any limitation imposed by statute, charter or commission, it cannot take up the cause or matter. An order passed by a court having no jurisdiction is nullity."*

13.1 On a plain reading of the case law, it is clear that the jurisdiction of a Court may be classified into several categories, which are broadly described as (i) territorial or local jurisdiction; (ii) pecuniary jurisdiction and (iii) jurisdiction over the subject matter.

13.2 So far as the territorial and pecuniary jurisdictions are concerned, objection to such jurisdiction has to be raised at the earliest possible opportunity and in any case at or before the settlement of issues. If objection with regard to territorial or pecuniary jurisdiction is not raised at the earliest possible opportunity, it cannot be allowed to be taken at a subsequent stage. The aforesaid case law also makes it clear that jurisdiction as to the subject matter is however totally distinct and stand on a different footing. Where the Court has no jurisdiction over the subject matter of the dispute by reason of any limitation imposed by the statute, charter or commission, it cannot take up the cause or matter. An order passed by a Court having no jurisdiction is a nullity. Endeavour was made by Mr. Rath, learned Senior Advocate for the Petitioner to bring the instant case under the third category stating that the Council had no jurisdiction to proceed with the arbitration without conducting an effective conciliation under Section 18(2) of the MSMED Act. As discussed earlier, this Court has already held that there is no infirmity in the process of conciliation. Further, no objection with regard to the jurisdiction of the Council to proceed with the arbitration was raised, as required under Section 16 of the Arbitration Act. In any event, the proceeding of arbitration before the Council having all characteristics of an arbitration proceeding under the Arbitration Act, the objection with regard to competence or jurisdiction of the Arbitrator can only be challenged in a proceeding under Section 34 of the Arbitration Act and not before that. Thus, the issue with regard to competence of the Arbitrator (the Council) can only be raised in a properly constituted petition under Section 34 of Arbitration Act as provided under Section 19 of MSMED Act and not in a proceeding under Article 227 of the Constitution of India, as in the instant case.

14. Accordingly, this Court is constrained to hold that the writ petition in the present form is not maintainable and hence stands dismissed. However, in the facts and circumstances, there shall be no order as to costs.

15. Interim order dated 4th December, 2023 passed in IA No.17789 of 2023 stands vacated.

—— o ——

2024 (II) ILR-CUT-581

K.R. MOHAPATRA, J.

W.P.(C) NO.7927 OF 2013

NABAGHANA PARIDA ……Petitioner

-V-

A.O-CUM-ASST.CONSERVATOR OF FORESTS, CUTTACK DIVISION & ANR. …..Opp.Parties

ODISHA FOREST ACT, 1972 – Section 2g(ii)(d) r/w Rule 5 of Orissa Timber and other Forest Produce Transit Rule, 1980 – Whether "Murram" is coming under the definition of minor 'Forest Produce' and

does not require TT permit while being transported within district? – Held, No – Murram is a mineral, not a forest produce as per definition U/s. 2g(ii)d of the Act & as such TT permit is required.

For Petitioner : Mr. Rabinarayan Nayak
For Opp.Parties : Mr. Swayambhu Mishra, ASC

JUDGMENT Heard & disposed of on :16.04.2024

K.R. MOHAPATRA, J.

1. This matter is taken up through hybrid mode.

2. Judgment dated 2nd February, 2013 (Annexure-10) passed in FAO No.132 of 2011 is under challenge in this writ petition, whereby learned District Judge, Cuttack dismissing the appeal under Section 56 (2-e) of the Odisha Forest Act, 1972 (for brevity 'the Act') confirmed the order of confiscation dated 23rd November, 2011 passed by the Authorized Officer-cum-Assistant Conservator of Forests, Cuttack Division, Cuttack in OR Case No.47-D of 2011-12 confiscating the Tractor and Trolley bearing Registration No. OR-05-AM-9780/9781 (for brevity 'the offending vehicle') along with Murram loaded in the said vehicle.

3. The prosecution story in brevity as revealed from the record is that the offending vehicle was seized from the proposed reserve forest while it was lifting Murram. The Forster, Chandikhole Section seized the offending vehicle and booked UD Case keeping the seized articles in his custody. Subsequently, OR Case No.47-D of 2011-12 was initiated and the offending vehicle along with the seized articles Murram was directed to be confiscated under Section 56 of the Act vide order dated 23rd November, 2011 (Annexure-7) passed by the Authorized Officer-cum-Assistant Conservator of Forests, Cuttack Division. Assailing the same, the Petitioner preferred FAO No.132 of 2011, which was also dismissed vide order under Annexure-10. Hence, this writ petition has been filed assailing the orders under Annexures-7 and 10.

4. Mr. Nayak, learned counsel for the Petitioner submits that from the seizure list, it appears that only 5 Cft. of Murram was seized from the offending vehicle. If it is spread over the trolley, it is very difficult to ascertain its quantity. He further submits that Murram, being a minor forest produce, no TT permit under the provisions of Orissa Timber and other Forest Produce Transit Rules 1980 (for brevity ' OTT Rules') is required if it is transported within the district in view of the provision under Rule 5 of the said Rules. He further submits that there is no material on record to come to a conclusion that the Murram was seized from a forest area. No document could be filed by the forest officials that the spot from which the offending vehicle was seized was declared as a forest. It is further submitted that a concocted story has been made out to seize and confiscate the offending vehicle, which belongs to the Petitioner. He, therefore, prays for setting aside the impugned orders under Annexure-7 and 10.

5. Mr. Mishra, learned Additional Standing Counsel vehemently objects to the submission made by learned counsel for the Petitioner and contends that the driver of the offending vehicle categorically admitted in his statement recorded by the Authorized Officer that he had left the Tractor inside the forest area. Admittedly, the offending vehicle was seized while being loaded with Murram. The forest guards and Madhav Chandra Nayak, the Forester of the Asia Charinangala proposed reserve forest was recorded. They have stated in their statement that they detected the labourers were loading Murram in the offending vehicle. Seeing the forest officials, all of them fled away. On assessment of evidence and materials on record, the Authorized Officer and learned District Judge, Cuttack came to hold that the offending vehicle was seized from forest area. Since the finding has been arrived on assessment of evidence, this Court while exercising power under Article 227 of Constitution of India, should be slow in interfering with the same. He drew attention to the provision under Section 2-g of the Act which defines '*forest produce'*. Clause-(d) of Section 2-g of the Act provides that, surface oil, rock, sand and minerals including limestone, laterite; mineral oils and all products of mines or quarries are forest produce. Murram being a mineral is a forest produce and was being loaded on the offending vehicle without any TT permit, when seized. Hence, a forest offence has been committed. There is no illegality in the impugned orders under Annexures-7 and 10. The offending vehicle was loaded with Murram and was seized while the same was standing in the proposed forest violating Rule 4 of the OTT Rules. As such, the writ petition, being devoid of any merit, should be dismissed.

6. Taking note of the rival contentions of learned counsel for the parties, this Court feels it proper to discuss the relevant provisions of the Act and OTT Rules for discussion.

6.1 Rule 2 (h) of the OTT Rules defines 'Minor Forest Produce' which reads thus:

> *"Minor Forest Produce" means forest produce other than timber, fire-wood, charcoal and bamboos."*

6.2 Rule 5 of the OTT Rules provides circumstances where no TT Permit is required for transportation. Rule 5 (1) (i) is relevant for our discussion, which reads as under:

> *(1) No transit permit shall be required to cover transit of forest produce in the following cases, namely:*
>
> *xxx xxx xxx*
>
> *i- for transport of minor forest produce within the district except lac, tassar, myrabolans, gums and resin, root or patalagaruda, sal seed, tamarind and hill brooms, subject to such limit of transport and storage without transit permit as may be notified by State Government in the Official Gazette for different items."*

7. Thus, it is contended by Mr. Nayak, learned counsel for the Petitioner that Murram being covered under the definition of minor forest produce does not require TT Permit while being transported within the district.

8. Mr. Mishra, learned Additional Standing Counsel drew attention to Section 2 (g) (ii) (d) which defines '*forest produce'*. It provides that forest produce includes:

xxx xxx xxx xxx

"ii- The following when found in or brought from a forest that is to say;

xxx xxx xxx xxx

d- Peat, surface oil, rock, sand and minerals (including limestone, laterite; mineral oils and all products of mines or quarries)."

9. Admittedly, Murram is a mineral. Thus, as per the definition under Section 2(g)(ii)(d) of the Act, it is a forest produce. It was seized from forest area, as admitted by the driver of the offending vehicle in his statement before the Authorized Officer as well as the forest officials/staffs who seized the offending vehicle. An attempt is made by Mr. Nayak, learned counsel for the Petitioner to bring the seized article in minor forest produces. Although, it is defined under Rule 2 (h) of the OTT Rules that forest produces other than timber, firewood, Charcoal are minor forest produce, but the provisions under Rule 5 of the OTT Rules are not absolute. The provisions made therein are to be read in harmony with other provisions of the said Rules as well as the Act to achieve the object of the Act and Rules framed thereunder. A conjunctive reading of the provisions of the Act and Rules framed thereunder is always necessary so that any of the provision either under the Act or Rules framed thereunder does not become otiose or ineffective. Rule 5(1)(e) of the OTT Rules provides that no TT permit is necessary for removal of forest produce other than timber, bamboos and mineral of any description required by transits, having recognised rights under any law in force for their *bona fide* domestic use but not trade or barter subject to the condition that Tribals can transport or possess up to 50 Kgs. of tamarind and ten bundles of bamboos without transit permit. Murram being a mineral is not covered under the exception as provided in the aforesaid provision. No material is also available on record to show that it was being transported for domestic use that too within the district. Thus, Rule 5(1)(i) has no application to the instant case. To the contrary, the definition under Section (2) (g) (ii) (d) of the Act is apt in the instant case to take within its ambit the seized article Murram as a forest produce. As such, a TT Permit was required for transport of Murram in the offending vehicle.

10. Although, Mr. Nayak, learned counsel for the Petitioner submits that no material was produced to arrive at a conclusion that the area from which the offending vehicle was seized was a forest area, but taking into consideration the material available on record the Authorized Officer as well as learned District Judge, Cuttack came to a categorical finding that the spot from which the offending vehicle was seized comes under the forest area. No case is made out to arrive at a conclusion that the findings recorded by the Authorised Officer as well as learned District Judge is perverse. Only because a different view may be possible by re-appreciating the evidence, this Court by exercising the power under Article 227 of the Constitution of India, should not substitute the same with its own finding.

11. A bleak argument is made that it is highly improbable to seize only Murram, more particularly when allegation is made that Murram was being loaded in the offending vehicle. Only because the tools used for loading the Murram were not seized, it cannot be said that no forest offence has been committed.

12. On a cumulative assessment of the materials available on record, this Court finds no infirmity in the orders under Annexures-7 and 10. Accordingly, the writ petition, being devoid of any merit, stands dismissed. In the facts and circumstances of the case, there shall be no order as to cost.

—— o ——

2024 (II) ILR-CUT-585

B.P. ROUTRAY, J.

MACA NO. 423 OF 2023

BABEYA DORA & ANR. ……Appellants

-V-

DHARINIDHAR NAYAK & ANR. ……Respondents

MOTOR VEHICLE ACT, 1988 – Section 166 – The claim application of claimant was dismissed by the tribunal on the ground of limitation without granting any compensation – Whether the impugned order is sustainable? – Held, No – After deletion of sub-Section 3 of Section 166 vide amendment Act 1994, the rejection of claim application on the ground of limitation is held to be bad in the eyes of law.

Case Law Relied on and Referred to :-

1. 2004 (1) T.A.C. 10 (S.C.) : New India Assurance Co. Ltd. Vrs. C.Padma & another.

For Appellants : Mr. P.K.Mishra.

For Respondents : Mr. M.R.Mishra, Mr.S.K.Sarangi.

JUDGMENT Date of Judgment :15.05.2024

B.P. ROUTRAY, J.

1. Present appeal by the claimants is directed against the judgment dated 27th March 2023 of 2nd Additional District Judge-cum-3rd MACT, Bhubaneswar passed in M.A.C. Case No.113 of 2012, wherein the claim application was dismissed on the ground of limitation without granting any compensation.

2. Heard Mr.P.K.Mishra, learned counsel for Appellants and Mr.S.K.Sarangi, learned counsel for the Insurer-Respondent No.2 as well as Mr.M.K.Mishra, learned counsel for Respondent No.1.

3. The accident took place on 21st February 1994 and the claim application was filed on 6th July 2012. The M.V. Amendment Act 1994 came into force on 14th November 1994 by deleting sub-section 3 of Section 166 of the M.V.Act. Prior to its deletion, sub-section 3 of Section 166 was read as under:

> "166(3); No application for such compensation shall be entertained unless it is made within six months of the occurrence of the accident.

> Provided that the claim tribunal may entertain the application after the expiry of the said period of six months but not later than 12 months, if it is satisfied that the applicant was prevented by sufficient cause from making the application in time."

4. A bare reading of aforesaid provision reveals that a claim application, prior to coming into force Amendment Act, 1994 could be filed within a period of six months from the date of accident without any limitation and for next six months subject to satisfaction of the Court on prevalence of sufficient cause for not filing the application within first six months.

5. Now coming to the facts of the present case, the accident took place on 21st February 1994 and adding six months, the date would be 21st August 1994 without counting any limitation. But further six months time was available to the claimants to present the claim application subject to satisfaction on the question of limitation, i.e. about sufficient cause preventing him from making the application. Therefore, it was open for the claimant to present the claim application on or before 20th February 1995, had the amended provision (1994) not brought into to force. When the amended provision came into force on 14th November 1994 deleting the provisions counting limitation under Section 166(3), then the question of limitation in presenting the claim application did not exist after 14th November 1994. So the option was open for the claimant to present the claim application at any time after 14th November 1994 without any bar of limitation.

6. The Supreme Court in ***New India Assurance Co. Ltd. vrs. C.Padma and another, 2004 (1) T.A.C. 10 (S.C.),*** analyzing the effect of omission of sub-section 3 of Section 166, have observed as follows:

> "10. The ratio laid down in *Dhannalal's case (supra)*, applies with full force to the facts of the present case. When the claim petition was filed sub-section (3) of Section 166 had been omitted. Thus, the Tribunal was bound to entertain the claim petition without taking note of the date on which the accident took place. Faced with this situation, Mr Kapoor submitted that *Dhannalal case* does not consider Section 6-A of the General Clauses Act and therefore, needs to be reconsidered. We are unable to accept the submission. Section 6-A of the General Clauses Act, undoubtedly, provides that the repeal of a provision will not affect the continuance of the enactment so repealed and in operation at the time of repeal. However, this is subject to "unless a different intention appears". In *Dhannalal case* the reason for the deletion of sub-section (3) of Section 166 has been set out. It is noted that Parliament realized the grave injustice and injury caused to heirs and legal representatives of the victims of accidents if the claim petition was rejected only on the ground of limitation. Thus "the different intention" clearly appears and Section 6-A of the General Clauses Act would not apply.
>
> xxx xxx xxx
>
> 12. The learned counsel for the appellant, next contended that since no period of limitation has been prescribed by the legislature, Article 137 of the Limitation Act may be invoked, otherwise, according to him, stale claims would be encouraged leading to multiplicity of litigation for non-prescribing the period of limitation. We are unable to countenance the contention of the appellant for more than one reason. Firstly, such an Act like the Motor Vehicles Act is a beneficial legislation aimed at providing relief to

> the victims or their families, if otherwise the claim is found genuine. Secondly, it is a self-contained Act which prescribes mode of filing the application, procedure to be followed and award to be made. The Parliament, in its wisdom, realised the grave injustice and injury being caused to the heirs and legal representatives of the victims who suffer bodily injuries/die in accidents, by rejecting their claim petitions at the threshold on the ground of limitation, and purposely deleted sub-section (3) of Section 166, which provided the period of limitation for filing the claim petitions and this being the intendment of the legislature to give effective relief to the victims and the families of the motor accidents untrammeled by the technicalities of the limitation, invoking of Article 137 of the Limitation Act would defeat the intendment of the legislature.
>
> 13. In the result, we do not find any infirmity in the order under challenge, which would warrant our interference. This appeal, being devoid of merits, is, accordingly dismissed with no order as to costs."

7. In the afore-cited case, the accident took place on 18th February 1989 and the claim application was filed on 2nd November 1995.

8. In the case at hand, the observation of the tribunal to reject the claim application on the ground of limitation, after deletion of sub-section 3 of Section 166, is held bad in the eye of law. On this score, the impugned award is set aside and the matter is remitted back to the tribunal for fresh adjudication on merits.

9. At this stage, learned counsel for Respondent No.1 submits that he was not the owner of the offending vehicle on the date of accident and therefore should be deleted from the array of the parties.

10. Since the matter is remitted back to the tribunal for decision afresh on merit, present Respondent No.1 is at liberty to raise all his contentions before the tribunal.

11. In the result, the impugned judgment dated 27th March 2023 is set aside and the MAC Case No.113 of 2012 is remanded back to the tribunal i.e. 2nd Additional District Judge-cum-3rd MACT, Bhubaneswar for decision afresh in accordance with law on merits of the claim application. Since this appears to be a year old matter, learned tribunal shall do well to dispose of the same within a period of six months from the date of production of certified copy of this order.

12. The appeal is disposed of.

—— o ——

2024 (II) ILR-CUT-587

Dr. S.K. PANIGRAHI, J.

CRLREV NO. 662 OF 2023

T. WAPANG AO ……Petitioner

-V-

STATE OF ODISHA & ANR. ……Opp.Parties

(A) CRIMINAL PROCEDURE CODE, 1973 – Section 197 – The Court has taken cognizance of the offence against the petitioner for the offences

punishable U/ss. 500 & 506 of the IPC – At the time of making the remark for which the offences are drawn up the petitioner was operating within the legal capacity of SDM as specified U/s. 20(4) Cr.P.C – The entire act revolves around the official duties and on the official capacity of the petitioner – Whether the court could take cognizance without an order of sanction from the competent authority? – Held, No – There could have been no question of further proceedings being taken up without an order of sanction.

(B) INDIAN PENAL CODE, 1860 – Sections 499, 500 – Essential ingredients to attract the offences – Explained. (Paras 19-20)

Case Laws Relied on and Referred to :-

1. (2008) 14 SCC 504 : Palwinder Singh vs. Balwinder Singh & Ors.
2. (2020) 2 SCC 217 : Bhawna Bai v. Ghanshyam.
3. 2022 SCC OnLine SC 1057 : Manendra Prasad Tiwari v. Amit Kumar Tiwari.
4. (2012) 9 SCC 460 : Amit Kapoor v. Ramesh Chander.
5. 2023 SCC OnLine All 33 : Ramji Prasad v. State of U.P.
6. (1899) ILR 26 CAL 653 : Girish Chunder Mitter vs Jatadhari Sadukhan
7. 1966 SCR (1) 210 : Baijnath Gupta vs. State of Madhya Pradesh.
8. (1973) 2 SCC 701 : Pukhraj v. State of Rajasthan.

For Petitioner : Mr. Manoj Kumar Mishra, Sr. Adv. & Associates.

For Opp.Parties : Mr. Dhananjaya Mund, AGA
Mr. Jugala Kishore Panda.

JUDGMENT Date of Hearing: 09.02.2024 : Date of Judgment: 28.03.2024

Dr. S.K. PANIGRAHI, J.

1. The Petitioner has filed this criminal revision challenging the order dated 06.12.2023 passed by the learned S.D.J.M. Malkangiri, in l.C.C. Case No.20 of 2023, rejecting the application for discharge under Section 227 of Cr.P.C. for commission of offences under Section(s) 500/506 of I.P.C.

I. CASE OF THE PROSECUTION:

2. The prosecution's case can be summarized as follows:

(i). On 05.08.2003, at approximately 11:30 am, Gobinda Patra ("the complainant"), an Advocate affiliated with the local bar, appeared before the SDM ("the petitioner") to argue his case. During the course of the proceedings, the petitioner/accused requested the presentation of evidence from the second party, a proposition to which the complainant raised objections. The complainant articulated that such a request contradicted procedural norms and requested the opportunity to present evidence from the first party for subsequent cross-examination. In response to this objection, the petitioner raised his voice, stating, "*Shut up, Tu Jaa re, Tu Kia Mote Procedure Sikhayibu*!?"

(ii). The complainant expressed dissent and took a seat. Additionally, the accused/petitioner being the Presiding Officer of the SDM court instructed the complainant to leave the courtroom. According to the complaint, the accused/petitioner directed the involved party to engage a different advocate instead of the complainant,

assuring a favorable outcome in return. Furthermore, the accused/petitioner allegedly threatened the complainant, prohibiting their presence in the courtroom and instructing the Clerk not to grant the complainant access.

(iii). The S.D.J.M., Malkangiri took cognizance of offences under Section 500/506 I.P.C. Later, the S.D.J.M rejected the discharge petition dated 16.08.2023 and posted the case to 20.12.2023 for framing of charge.

II. REVISIONIST'S ARGUMENT:

3. The counsel for the revisionist urged the following submissions:

(i). The accusations presented in the complaint petition are unequivocally untrue and concocted, driven by a personal vendetta against the petitioner.

(ii). The baseless, frivolous nature of the allegations is refuted, emphasizing that at no point has there been any utterance intended to tarnish the complainant's prestige or status, nor has there been any instance of defamation or abuse directed at the complainant.

(iii). On basis of such allegation, the cognizance of offence has been illegally taken by the S.D.J.M. Malkangiri without considering the materials from its proper perspective and by erroneously not rejecting the complaint petition sans the pre-requisite of sanction under Section 197 of Cr.P.C.

(iv). The complainant, an Advocate and Officer of the Court, disrupted proceedings during the petitioner's lawful role as Sub-Divisional Magistrate (SDM). Operating within the legal capacity of SDM as specified under Section 20(4) Cr.P.C., the petitioner, who was also the Sub-Collector, held court and discharged official duties on 05.08.2003, in Malkangiri. It is evident that, if any incident occurred, it transpired during a case hearing and while fulfilling official duties as SDM in Malkangiri, it was within legal boundary.

(v). Section 197 of the Cr.P.C explicitly states that no court shall take cognizance of offenses allegedly committed while discharging official duties without proper sanction. This safeguard of sanction is crucial for honest and sincere officers to perform their duties without fear of performing public duty. While this protection does not extend to criminal activities camouflaged as official duties; This case does not qualify for an exception based on the given circumstances. It is, therefore, imperative to assess whether the charged act or omission has a reasonable connection to the discharge of duties, making it official and subject to the applicability of Section 197, Cr.P.C.

(vi). The complainant petition itself indicates the connection between the alleged act and the due discharge of official functions as Sub Collector-cum-SDM, Malkangiri, inherently linked to the post. If the petitioner, in the course of official duties, committed an act or omission as a public servant, Section 197, Cr.P.C mandates the need for sanction.

(vii). Hence, the impugned order of 06.12.2023, issued by the learned S.D.J.M., Malkangiri, is illegal and contrary to well-established legal principles, warranting its setting aside.

III. EXAMINATION OF RELEVANT LEGAL MATRIX

4. Before averting to the submissions made by both the parties, this Court deem it appropriate to discuss the law of charge and discharge.

5. As far as statutory law on framing of charge and discharge is concerned, the same is governed by Section 228 and 227 of Cr.P.C. respectively. These provisions read as under:

> ***"227. Discharge.***
>
> *If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing.*
>
> ***228. Framing of Charge.***
>
> *(1) If, after such consideration and hearing as aforesaid, the Judge is of opinion that there is ground for presuming that the accused has committed an offence which—*
>
> *(a) is not exclusively triable by the Court of Session, he may, frame a charge against the accused and, by order, transfer the case for trial to the Chief Judicial Magistrate or any other Judicial Magistrate of the first class and direct the accused to appear before the Chief Judicial Magistrate, or, as the case may be, the Judicial Magistrate of the first class, on such date as he deems fit, and thereupon such Magistrate shall try the offence in accordance with the procedure for the trial of warrant-cases instituted on a police report;*
>
> *(b) is exclusively triable by the Court, he shall frame in writing a charge against the accused.*
>
> *(2) Where the Judge frames any charge under clause (b) of Sub-Section (1), the charge shall be read and explained to the accused and the accused shall be asked whether he pleads guilty of the offence charged or claims to be tried."*

6. Now, it is the settled law that while framing charge, the court concerned has to go through the allegations made in the F.I.R. and also the evidence collected by the I.O. during investigation, and if from the same, there are sufficient materials to proceed for the trial; the court ought to frame the charge. If the Court is of definite opinion that the allegations made in the F.I.R. are not corroborated with any cogent evidence and there is no trustworthy material to proceed against the accused, the court should not decline to allow the discharge application. It is also the settled law that while framing charge, the Court is not required to scrutinize or appreciate the evidence. The marshalling of the evidence is not permissible and the Court is not to conduct a mini trial while framing charge. So far as the defence version adduced on behalf of the accused is concerned, the same can be taken into consideration only if the defence case totally overrules the prosecution story such that any suspicion is inevitably quelled and the evidence collected by the I.O., otherwise the defence case cannot be taken into consideration by the court while framing the charge or disposing of the discharge application.

7. Considering the case akin to the present one, the Supreme Court in the case ***of Palwinder Singh vs. Balwinder Singh & Ors.***[1] has held that:

> *"13. Having heard the learned counsel for the parties, we are of the opinion that the High Court committed a serious error in passing the impugned judgment in-so-far as it*

1. (2008) 14 SCC 504

entered into the realm of appreciation of evidence at the stage of the framing of the charges itself. The jurisdiction of the learned Sessions Judge while exercising power under Section 227 of the Code of Criminal Procedure is limited. ***Charges can also be framed on the basis of strong suspicion.*** *Marshalling and appreciation of evidence is not in the domain of the Court at that point of time."* (Emphasis supplied)

8. Further, the apex Court in ***Bhawna Bai v. Ghanshyam***[2], has reiterated its stance and observed as under:

"13. ...At the time of framing the charges, only prima facie case is to be seen; whether case is beyond reasonable doubt, is not to be seen at this stage. At the stage of framing the charge, the court has to see if there is sufficient ground for proceeding against the accused. While evaluating the materials, strict standard of proof is not required; only prima facie case against the accused is to be seen."

9. In fact, Section 397 of the Cr.P.C. confers jurisdiction to the High Court (and the Sessions Court) to call for and examine the records of any proceedings before an inferior criminal court situated within its local jurisdiction for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order rendered in such proceedings. The said provision is extracted hereunder:

"397. Calling for records to exercise powers of revision.—

(1) The High Court or any Sessions Judge may call for and examine the record of any proceeding before any inferior Criminal Court situate within its or his local jurisdiction for the purpose of satisfying itself or himself; to the correctness, legality or propriety of any finding, sentence or order, recorded or passed, and as to the regularity of any proceedings of such inferior Court, and may, when calling, for such record, direct that the execution of any sentence or order be suspended, and if the accused is in confinement that he be released on bail or on his own bond pending the examination of the record.

Explanation.—All Magistrates, whether Executive or Judicial, and whether exercising original or appellate jurisdiction, shall be deemed to be inferior to the Sessions Judge for the purposes of this sub-section and of section 398.

(2) The powers of revision conferred by sub-section (1) shall not be exercised in relation to any interlocutory order passed in any appeal, inquiry, trial or other proceeding.

(3) If an application under this section has been made by an person either to the High Court or to the Sessions Judge, no further application by the same person shall be entertained by the other of them."

10. In another case, in ***Manendra Prasad Tiwari v. Amit Kumar Tiwari***,[3] the apex Court has explained the well settled law on charge which is as under:

"21. The law is well settled that although it is open to a High Court entertaining a petition under Section 482 of the CrPC or a revision application under Section 397 of the CrPC to quash the charges framed by the trial court, yet the same cannot be done by weighing the correctness or sufficiency of the evidence. In a case praying for quashing of the charge, the principle to be adopted by the High Court should be that if the entire evidence produced by the prosecution is to be believed, would it constitute an offence or not. The truthfulness, the sufficiency and acceptability of the material produced at the

2. (2020) 2 SCC 217 **3.** 2022 SCC OnLine SC 1057

time of framing of a charge can be done only at the stage of trial. To put it more succinctly, at the stage of charge the Court is to examine the materials only with a view to be satisfied that prima facie case of commission of offence alleged has been made out against the accused person. It is also well settled that when the petition is filed by the accused under Section 482 CrPC or a revision Petition under Section 397 read with Section 401 of the CrPC seeking for the quashing of charge framed against him, the Court should not interfere with the order unless there are strong reasons to hold that in the interest of justice and to avoid abuse of the process of the Court a charge framed against the accused needs to be quashed. Such an order can be passed only in exceptional cases and on rare occasions. It is to be kept in mind that once the trial court has framed a charge against an accused the trial must proceed without unnecessary interference by a superior court and the entire evidence from the prosecution side should be placed on record. Any attempt by an accused for quashing of a charge before the entire prosecution evidence has come on record should not be entertained sans exceptional cases.

22. The scope of interference and exercise of jurisdiction under Section 397 of CrPC has been time and again explained by this Court. Further, the scope of interference under Section 397 CrPC at a stage, when charge had been framed, is also well settled. ***At the stage of framing of a charge, the court is concerned not with the proof of the allegation rather it has to focus on the material and form an opinion whether there is strong suspicion that the accused has committed an offence, which if put to trial, could prove his guilt.*** *The framing of charge is not a stage, at which stage the final test of guilt is to be applied. Thus, to hold that at the stage of framing the charge, the court should form an opinion that the accused is certainly guilty of committing an offence, is to hold something which is neither permissible nor is in consonance with the scheme of Code of Criminal Procedure.*

23. ***Section 397 CrPC vests the court with the power to call for and examine the records of an inferior court for the purposes of satisfying itself as to the legality and regularity of any proceedings or order made in a case. The object of this provision is to set right a patent defect or an error of jurisdiction or law or the perversity which has crept in the proceeding."*** (Emphasis supplied)

11. Further, in ***Amit Kapoor v. Ramesh Chander***,[4] the Supreme Court has elucidated on the revisional powers of the Court under Section 397:

"12. Section 397 of the Code vests the court with the power to call for and examine the records of an inferior court for the purposes of satisfying itself as to the legality and regularity of any proceedings or order made in a case. The object of this provision is to set right a patent defect or an error of jurisdiction or law. There has to be a well-founded error and it may not be appropriate for the court to scrutinise the orders, which upon the face of it bears a token of careful consideration and appear to be in accordance with law. ***If one looks into the various judgments of this Court, it emerges that the revisional jurisdiction can be invoked where the decisions under challenge are grossly erroneous, there is no compliance with the provisions of law, the finding recorded is based on no evidence, material evidence is ignored or judicial discretion is exercised arbitrarily or perversely.*** *These are not exhaustive classes, but are merely indicative. Each case would have to be determined on its own merits."*

(Emphasis supplied)

4. (2012) 9 SCC 460

12. Finally, it is pertinent, here, to cite the judgment of the Allahabad High Court in ***Ramji Prasad v. State of U.P.***,[5] wherein the court held as under:

> *".....*
> *If on the basis of materials on record, the courts comes to the conclusion that commission of offence is a probable a case for framing charge exist.* ***An order of discharge would be warranted only in those cases where the court is satisfied that there are no chances of conviction and the trial court would be an exercise in futility."***
> (Emphasis supplied)

13. In light of the aforementioned legal precedents concerning the law of charge and discharge, it is reiterated by the Supreme Court that during the stage of framing charges, the primary focus is on establishing a prima facie case against the accused. It is imperative to underscore that, during the charge framing phase, the Court is not obligated to delve into the determination of whether the case has been proven beyond a reasonable doubt.

14. However, the High Court may interfere in a case to set right a patent defect or an error of jurisdiction or law or in a case where going forward with the proceeding might result in the miscarriage of justice.

IV. COURT'S ANALYSIS AND REASONS:

15. It is trite that criminal prosecution is a serious matter; it affects the liberty of a person, therefore, in cases where this Court finds that permitting further proceedings would become an abuse of process of law or would result in miscarriage of justice, exercise of jurisdiction under Section 397 of the Cr.P.C. to obliterate such proceedings would become imperative. This case, in my opinion, mandates the inference of this Court.

16. I have given my anxious consideration to the submissions of the counsel appearing for both the parties.

17. The petitioner and the opposite party no.2 are feathers of the same flock. One is an advocate; a member of the bar. While another is the Sub-Divisional Magistrate/Sub-Collector, to the extent of this case, clothed with the powers of a judicial magistrate.

18. Amidst the bustle of the court and in the heat of the moment, the revisionist uttered the words "*Shut up, Tu Jaa re, Tu Kia Mote Procedure Sikhayibu*!?" (shut up, you go from here, you cannot teach me procedure). I do not know how this statement can at best be categorized a snarky remark, be said to have been defamatory. For prosecution under Section 500 of the IPC, the defamatory statement should be specific and not very vague and general.

19. The essential ingredient of Section 499/500 of the I.P.C. is that the imputation made by the accused should have the potential to harm the reputation of the person against whom the imputation is made. No reasonable person can affirm

5. 2023 SCC OnLine All 33

that the aforementioned remark by itself has the propensity to harm the reputation of the Opposite Party No.2. Therefore, I am of the view that the statement made by the revisionist cannot be considered to be an imputation intending to harm or knowing or having reason to believe that it could harm the reputation of the Opposite Party No.2. I would, therefore, answer the question embodied in the reference by expressing the view that abusive and insulting language, not amounting to defamation, is not actionable.

20. Similar issue has been confronted by the High Court of Calcutta in ***Girish Chunder Mitter vs Jatadhari Sadukhan***[6]. The High Court has held that:

> *"Section 95 of the IPC indicates that harm of a trumpery nature, i.e., "so slight that no person of ordinary sense and temper would complain of it," is not to be treated as an offence. If mere vulgar abuse, uttered in a moment of anger, abuse to which no person of ordinary sense and temper would attach the slightest importance, is, if it cause mental distress, to afford a ground of action, it is lamentable to think to what an alarming extent the floodgates of litigation would, in this country, become open."*

21. It must also be taken into consideration that the revisionist is from the north-eastern state of Nagaland. It must be understood that his background and upbringing have shaped his language habits, and he may occasionally express himself differently. The revisionist might not be fully acquainted with the 'tume' (ତୁମେ) 'apana' (ଆପଣ) trope of the odia language. Ergo, his remarks which might seem hurtful; might only have been an outward expression from a person who is not so well-conversant with the Odia language.

22. Next, it also cannot be in dispute that, at the time of making the remark, the revisionist was operating within the legal capacity of SDM as specified under Section 20(4) Cr.P.C. Therefore, the entire act revolves around the official duties and on the official capacity of the petitioner. If any act being performed by a public servant in the official capacity has been alleged to have a colour of crime and criminal law is to be set in motion, on such allegations sanction for setting such criminal law in motion in terms of Section 197 is imperative. Sub-section (1) of Section 197 of the Cr.P.C. reads as follows:

> ***"197. Prosecution of Judges and public servants.—***
>
> *(1) When any person who is or was a Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction save as otherwise provided in the Lokpal and Lokayuktas Act, 2013 (1 of 2014)—*
>
> *(a) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the Union, of the Central Government;*

6. (1899) ILR 26 CAL 653

(b) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of a State, of the State Government:

Provided that where the alleged offence was committed by a person referred to in clause (b) during the period while a Proclamation issued under clause (1) of article 356 of the Constitution was in force in a State, clause (b) will apply as if for the expression "State Government" occurring therein, the expression "Central Government" were substituted.

Explanation.—For the removal of doubts it is hereby declared that no sanction shall be required in case of a public servant accused of any offence alleged to have been committed under section 166A, section 166B, section 354, section 354A, section 354B, section 354C, section 354D, section 370, section 375, section 376, section 376A, section 376C, section 376D or section 509 of the Indian Penal Code (45 of 1860)."

*(*Emphasis supplied)

23. Section 197 of the Cr.P.C. which deals with prosecution of public servants mandates that no Court shall take cognizance of the offence except with the previous sanction of the Competent Authority.

24. It is an admitted fact that the Court has taken cognizance of the offence against the petitioner for offences punishable under Sections 500 and 506 of the IPC. Without doubt, they are offences punishable under the Code and the Court could not have taken cognizance without an order of sanction from the hands of the Competent Authority being placed before the Court. There could have been no question of further proceedings being taken up without an order of sanction.

25. In ***Baijnath Gupta vs. State of Madhya Pradesh***[7] the Supreme Court held the following:

"It is not every offence committed by a public servant that requires sanction for prosecution under S. 197(1) Cri.P.C., nor even every act done by him while he is actually engaged in the performance of his official duties; but if the act complained of is directly concerned with his official duties so that, if questioned, it could be claimed to have been done by virtue of his office then sanction would be necessary."

26. In ***Pukhraj v. State of Rajasthan***,[8] the Supreme Court elucidated the jurisprudence and legislative intent behind the provision:

*"**The intention behind the section is to prevent public servants from being unnecessarily harassed. The section is not restricted only to cases of anything purported to be done in good faith, for a person who ostensibly acts in execution of his duty still purports so to act, although he may have a dishonest intention.** Nor is it confined to cases where the act, which constitutes the offence, is the official duty of the official concerned. Such an interpretation would involve a contradiction in terms, because an offence can never be an official duty. The offence should have been committed when an act is done in the execution of duty or when an act purports to be done in the execution of duty. The test appears to be not that the offence is capable of being committed only, by a public servant and not anyone else, but that it is committed*

7. 1966 SCR (1) 210 **8**. (1973) 2 SCC 701

by a public servant in an act done or purporting to be done in the execution of his duty. The section cannot be confined to only such acts as are done by a public servant directly in pursuance of his public office, though in excess of the duty or under a mistaken belief as to the existence of such duty,. Nor need the act constituting the, offence be so inseparably connected with the official duty as to form part and parcel of the same transaction. What is necessary is that the offence must be in respect of an act done or purported to be done in the discharge of an official duty. It does not apply to acts done purely in a private capacity by a public servant. Expressions such as the "capacity in which the act is performed", "Cloak of office" and "professed exercise of office" may not always be appropriate to describe or delimit the scope of the section. An act merely because it was done negligently does not cease to be one done or purporting to be done in execution of a duty." (Emphasis supplied)

27. A judge, of any class or hierarchy, plays a critical role in maintaining order and discipline within the courtroom. Their duty extends beyond legal interpretation; they are also responsible for ensuring that proceedings run smoothly. When faced with unruly behavior from the crowd, judges must strike a balance between upholding justice and maintaining decorum. They have the authority to issue warnings, reprimand disruptive individuals, and even remove them from the courtroom if necessary. By doing so, judges create an environment conducive to fair hearings, protect the rights of all parties involved, and uphold the dignity of the judicial process. In this case, the reprimand or snarky remark made by the petitioner seems to have been made in this context sans any *mens rea* to harm the reputation of the complainant.

28. Insofar as non-obtaining of sanction from the hands of the Competent Authority prior to the Court taking cognizance, it is an admitted fact that in the case at hand, no sanction is sought or accorded by the Competent Authority. Therefore, any proceeding of taking cognizance and setting of criminal law in motion thereon without sanction will lose its legs to stand and would, therefore, suffer from want of tenability.

29. Ergo, in the light of the aforementioned discussion, it is clear that no offence under Sections 500 and 506 of the IPC can be made out for such remark as has been alleged in the present case.

V. CONCLUSION:

30. In my considered opinion, the complaint filed under Sections 500 and 506 of the IPC lacks basic ingredients and no useful purpose would be served in permitting the trial court to proceed with the complaint which lacks the basic ingredients and sanction to bring home the charges.

31. I also wish to express my deep concern regarding the protracted litigation surrounding what can only be described as a trivial case. It is disheartening to witness legal proceedings stretch over two decades, consuming valuable time, resources, and judicial bandwidth.

32. Here, let's pause to reaffirm the role of various actors within the court system. As individuals within the legal field, it is important to acknowledge that we are obligated to adhere to the principles of justice, fairness, and respect. Central to the effective functioning of our judicial system is the relationship between presiding judges and advocates within the courtroom. It is imperative that we uphold standards of comity, mutual respect, and tolerance for occasional disagreements to ensure the fair administration of justice.

33. Comity, defined as mutual courtesy and civility, is the cornerstone of the interactions between judges and advocates. In fostering comity, both parties recognize and appreciate each other's roles and responsibilities in the courtroom. Judges preside over proceedings, ensuring fairness and upholding the rule of law, while advocates represent the interests of their clients within the bounds of legal ethics and professional conduct.

34. Judges must respect the expertise, dedication, and advocacy skills of legal practitioners. Likewise, advocates must demonstrate respect for the authority and decisions of the court, regardless of personal opinions or outcomes. By treating each other with dignity and professionalism, judges and advocates set an example for all participants in the courtroom.

35. Tolerance for occasional quarrels or disagreements is a natural aspect of legal proceedings. Advocates may vigorously argue their positions, challenge evidence, or contest legal interpretations, all within the framework of respectful discourse. Judges, in turn, must maintain decorum and impartiality while managing contentious exchanges, ensuring that the focus remains on the merits of the case rather than personal conflicts. Therefore, I must ensure that such cases are infrequent occurrences and are only pursued under exceptional circumstances.

36. The impugned proceedings pending before the learned S.D.J.M., Malkangiri stands quashed.

37. Accordingly, this Criminal Revision is allowed.

38. A case as ludicrous as this necessitates the imposition of costs against such a frivolous complaint. However, in alignment with the principles of comity and tolerance discussed earlier, no costs shall be ordered.

—— o ——

2024 (II) ILR-CUT-597

Dr. S.K. PANIGRAHI, J.

W.P.(C) NO.12405 OF 2015 WITH BATCHES

[W.P.(C) NOS.9792,12529,12532,12535, 25483 OF 2012, 15200 OF 2013, 11470, 15053, 15054, 20798, 20799 OF 2015, 7886,7887 OF 2017, 7116 OF 2019,15533, 21575, 21576 OF 2020 & 6692 OF 2023]

HEMA PRADHAN & ANR. ……Petitioners

-V-

UNION OF INDIA & ORS. ……Opp.Parties

(A) RAILWAY ACT, 1989 – Section 124-A – Compensation – The death of the deceased was not caused due to any untoward accident – The evidence presented indicates that, the deceased perished as a result of being struck by a Train while traversing the railways tracks – Whether in the given facts, the Railway/Opp.Parties were negligent or had failed to discharge their duty of care towards the trespass of the deceased? – Held, No – The tragic incident did not take place on a level crossing or at a place where the railway tracks crossed a well-used path. (Paras 7-11,14-16)

(B) WORDS & PHRASES – *"Res ipsa loquitur"* – Applicability of the same – Explained with reference to case laws. (Paras 12-15)

Case Laws Relied on and Referred to :-

1. AIR 2012 ORISSA 38 : Shyam Naik v. General Manager, East Coast Railway.
2. 1997 SCC OnLine Del 22 : Klaus Mittelbachert v. East India Hotels Ltd.
3. 2015 SCC OnLine Del 10229 : Mohd. Quamuddin & Ors. vs Union Of India.

For Petitioners : Ms. D. Mohapatra, Mr. Amit Pr. Bose, Mr. S. Sourav, Mr. S. K. Nanda, Mr. G. C. Swain, Mr. G. P. Dutta, Mr. D. Mund, Mr. A.S. Nandy, Mr. S.K. Pradhan-3, Mr. Santosh Ku. Nanda, Mr. S.B. Mohanty.

For Opp.Parties : Mr. P. K. Parhi, DSGI, Mr. A. Routray, CGC, Mr. B. S. Rayaguru, CGC, Mr. D. Gocchayat, CGC, Mr. M. K. Pati, CGC.

JUDGMENT Date of Hearing : 21.03.2023 : Date of Judgment : 19.04.2024

Dr. S.K.PANIGRAHI, J.

1. Given the comparable factual situations present in W.P.(C) No.12405 of 2015 the connected cases could be consolidated and are jointly addressed in this judgment. The Court's ruling shall apply directly to all the cases without exception. In fact, the issues involved in all the cases are pertaining to deaths occurred in unmanned railway crossings in different forms and shape but are purely on account of their own negligence while crossing the railway track. Despite the presence of some minor incongruity in facts, the principle involved in the cases is the same.

2. In this Writ Petition, the Petitioners have prayed for a direction to the State (Railway Authorities) to pay compensation against the unnatural death of the kin of the petitioners in a railway accident.

I. FACTUAL MATRIX OF THE CASE:

3. The brief facts are summarized as follows:

(i) In the first case i.e. in W.P.(C) No.12405 of 2015, Biswanath Pradhan, serving as the Station Master at Jujumura Railway Station, issued a report to the Jujumura Police Station on 20th July, 2011 at 1.30 PM, notifying the discovery of a deceased male individual lying on railway track No.43/7 near Andhari village.

(ii) The deceased was identified as Bhakta Pradhan, approximately 40 years old, who happened to be the offspring of the petitioners. It was disclosed that the deceased was mentally challenged, and while he was traversing towards the railway track near Andhari village, a passing train collided with him, resulting in his demise.

(iii) In a similar unfortunate occurrence, the petitioner's son, Sri Diptikanta Padhy, encountered a fatal incident where he was struck by a goods train at Soro railway station on 18.02.2020, leading to his demise due to the sustained injuries.

4. The arguments put forth by the legal representatives of the petitioners and the opposing parties are being considered concurrently.

II. SUBMISSIONS ON BEHALF OF THE PETITIONERS:

5. Learned counsel for the Petitioners earnestly made the following submissions in support of their contentions:

(i) Section 124-A of the Railways Act, 1989, provides for compensation against untoward incidents. This provision specifies that if there is any wrongful act, negligence, or default on the part of the Railway administration resulting in injury or death to a passenger, compensation is liable to be paid. This compensation is applicable solely for losses caused by the death, regardless of any other laws in place.

(ii) The petitioners have a very genuine grievance as there has been a death. The dependents of the deceased should receive the necessary compensation. There is a legal principle, "*Ubi jus ibi remedium*," which means where there is a right, there must be a remedy. The death of the petitioner's son did not occur naturally; rather, it was a negligent, irresponsible, and blatant act on the part of the Opp. Party Nos.1 to 3. In this writ petition, compensation is warranted for the death of the deceased.

(iii) If the Opp. Party Nos.2 and 3 had acted diligently and with prudence in this case, the accident that resulted in the death of the petitioner's son could have been avoided. Since irreparable damage has occurred, it should be remedied through compensation. As there has been a loss of life, and the deceased was the sole breadwinner for the family, responsible for supporting his wife and parents, it is imperative that the petitioners receive adequate compensation for the damages incurred. Without such compensation, there would be a disregard for the law of the land. Considering the pecuniary position of the Opp. Parties, it is both equitable in the eyes of law and essential for justice to rectify the harm caused by their negligent actions.

(iv) In the case of **Shyam Naik v. General Manager, East Coast Railway**[1], this Court adjudicated a matter pertaining to fatalities occurring at railway crossings and was benevolent enough to award compensation to the kin of the deceased due to the negligence of the railway authorities.

III. SUBMISSIONS ON BEHALF OF THE OPPOSITE PARTIES :

6. In reply, learned counsel for the Opposite Parties earnestly made the following submissions in support of his contentions:

(i) In the first case, it was observed that the incident occurred at Railway Kilometer 43/7-8, situated between Charmal and Jujumura Railway Station, where neither manned nor unmanned level crossings exist. The area is characterized by a conventional railway

1 . AIR 2012 ORISSA 38

track, and it was determined that the deceased had unlawfully trespassed onto the railway line, contravening Section 147 of the Railway Act, 1989.

(ii) In the second case, the accident trespassed at the Soro Railway Station, where the deceased intentionally placed himself in the path of an oncoming Goods Train. The deceased deliberately positioned himself on the railway track just before the train's engine, which could potentially be interpreted as an act of suicide, attempted suicide, or self-inflicted harm. This action may have been influenced by factors such as negligence, intoxication, or mental incapacity, rendering it legally unsustainable. Despite the presence of a Foot Over Bridge at Soro Railway Station, the deceased's entry onto the railway track is deemed unlawful and constitutes a criminal offence punishable by law.

(iii) The deceased was neither a passenger nor authorized to go over the railway line. The spot in question belonged to the railway, and any unauthorized access to such land without precaution can be termed as criminal trespass, a violation of Aection 147 of the Railway Act, 1989. Hence, the instant case is a clear case of trespass and refusal to desist from trespass, which is a violation under Section 147 of the Indian Railway Act, 1989. Therefore, the railway cannot be held responsible for the said loss of life.

(iv) Section 124 of the Railway Act, 1989 pertains to the no-fault liability of passengers who expire in railway accidents. However, in the instant case, the same does not apply. This provision cannot be extended to the present case because the death occurred due to the deceased's own negligence/fault, and the deceased violated Section 147 of the Railway Act, 1989. As such, the above Writ Petition is devoid of merit and liable to be dismissed.

IV. COURT'S REASONING AND ANALYSIS:

7. In the present case(s), inter alia, the provisions of Section 124A of the Railway Act, 1989 must be expressly considered which provides for payment of compensation on account of any untoward incident, resulting in injury or death of a passenger, irrespective of whether there has been any wrongful act, negligence or default on the part of the Railway Administration. The Section is produced hereinbelow:

"124A. Compensation on account of untoward incidents-
When in the course of working a railway an untoward incident occurs, then whether or not there has been ***any wrongful act, neglect or default on the part of the railway administration*** *such as would entitle a passenger who has been injured or* ***the dependant of a passenger*** *who has been killed to maintain an action and recover damages in respect thereof, the railway administration shall, notwithstanding anything contained in any other law, be liable to pay compensation to such extent as may be prescribed and to that extent only of loss occasioned by the death of, or injury to, a passenger as a result of such untoward incident:*

Provided that no compensation shall be payable under this section by the railway administration if the passenger dies or suffers injury due to—

(a) suicide or attempted suicide by him;
(b) self-inflicted injury;
(c) his own criminal act;
(d) any act committed by him in a state of intoxication or insanity;
(e) any natural cause or disease or medical or surgical treatment unless such treatment becomes necessary due to injury caused by the said untoward incident.

Explanation.--For the purpose of this section, ***"passenger" includes--***

(i) a railway servant on duty; and

(ii) a person who has purchased a valid ticket for travelling, by a train carrying passengers, on any date or a valid platform ticket and becomes a victim of an untoward incident.] (Emphasis Supplied)

8. Now, there is little dispute as to the essential facts. The death of the deceased persons was not caused due to 'untoward accident'. The evidence presented indicates that the deceased individuals perished as a result of being struck by a train while traversing the railway tracks, a fact which remains uncontested by the Petitioners. It is, thus, clear that the deceased is not a 'passenger' under the provisions of Section 124A of the Railway Act. The principal question to be considered is whether in the given facts, it is established that the Opposite Parties had been negligent or had failed to discharge their duty of care towards the trespass of the deceased. The deceased was allegedly mentally challenged but this fact is immaterial to the question of computation of compensation.

9. Railways, like any entity responsible for maintaining public safety, have a degree of responsibility towards trespassers. While they may not owe the same duty of care to trespassers as they do to authorized users or passengers, they still have a legal obligation to take reasonable steps to prevent foreseeable harm.

10. Railway operators often implement safety measures such as fencing, warning signs, and gates to deter trespassing and minimize the risk of accidents. However, if someone does trespass and gets injured, the railway may not be held liable if it can be shown that they took reasonable precautions to prevent trespassing and accidents. It is relevant to refer to Section 13 of the Indian Railway Act, 1890 which reads as under:-

"13. Fences, screens, gates and bars.*-The Central Government may require that, within a time to be specified in the requisition, or within such further time as it may appoint in this behalf,-*

(a) Boundary-marks or fences be provided or renewed by the railway administration for the railway or any part thereof and for roads constructed in connection therewith;

(b) any works in the nature of a screen near to or adjoining the side of any public road constructed before the making of a railway be provided or renewed by a railway administration for the purpose or preventing danger to passengers on the road by reason of horses of other animals being frightened by the sight or noise of the rolling-stock moving on the railway;

(c) suitable gates, chains, bars, stiles or hand-rails be erected or renewed by a railway administration at places where a railway crosses a public road on the level;

(d) persons be employed by a railway administration to open and shut such gates, chains, or bars."

11. In cases where it is found that the Railways were in breach of their duty to take adequate measures for safety, the railway authorities could be held liable for payment of damages. But, no hard and fast or absolute rule can be laid down in this behalf. The question of erecting a fence or gate would depend on the situation of the

crossing, visibility of the rail track from the road, any sharp turns or curves and the extent of the road traffic etc. However, it must be noted that, in the present case, the tragic incident did not take place on a level crossing or at a place where the railway tracks crossed a well-used path. Thus, there is no question of any frequent traffic at the site of the accident.

12. In ***Klaus Mittelbachert v. East India Hotels Ltd.***,[2] the Delhi High Court has explained the conditions required for the applicability of the principle of *res ipsa loquitur*. The relevant passage from the said judgment reads as under:-

> *"Under the doctrine of res ipsa loquitur a plaintiff establishes a prima facie case of negligence where:*
>
> *(1) it is not possible for him to prove precisely what was the relevant act or omission which set in train the events leading to the accident, and;*
>
> *(2) on the evidence as it stands at the relevant time it is more likely than not that the effective cause of the accident was some act or omission of the defendant or of someone for whom the defendant is responsible, which act or omission constitutes a failure to take proper care for the plaintiff's safety.*
>
> *There must be reasonable evidence of negligence. However, where the thing which causes the accident is shown to be under the management of the defendant or his employees, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care.*
>
> ***Three conditions must be satisfied to attract applicability of rest ipsa loquitur****: (i) the accident must be of a kind which does not ordinarily occur in the absence of someone's negligence; (ii) it must be caused by an agency or instrumentality within the exclusive control of the defendant;* ***(iii) it must not have been due to any voluntary action or contribution on the part of the plaintiff.*** *(See Ratanlal & Dhirajlal on Law of torts, edited by Justice G.P. Singh, 22nd edition 1992, pp 499-501 and the Law of Negligence by Dr Chakraborti, 1996 edition, pp 191-192.)"* (Emphasis supplied)

13. In the present case(s), the aforementioned criteria would not be met, given that the deceased was clearly trespassing and demonstrated negligence by hurrying onto the tracks in front of an approaching train. In the second case, the deceased was trespassing on the railway tracks at the railway station, despite the availability of a Foot Over Bridge designed for pedestrian use.

14. The Opposite Parties cannot be held to have failed in its duty to take adequate care. In view of the paucity of evidence on these points in the present case, this Court is unable to hold that the failure of the railway administration to erect a gate and post a gateman amounted to an actionable negligence by itself.

15. In this regard, the Delhi High Court in ***Mohd. Quamuddin & Ors. vs Union Of India***[3] has held as under:

> "***Clearly, there is no obligation on the respondent to fence the entire length of railway tracks and the question whether non-fencing of railway tracks amounts to negligence***

2. 1997 SCC OnLine Del 22 **3.** 2015 SCC OnLine Del 10229

> ***or a failure to take due care would depend on the probability of persons crossing the tracks and also the number of persons so crossing the tracks.*** *In cases of accidents on an unmanned railway crossing, the duty of care expected of the railway administration is much higher as compared to tracks at other places because public are expected to cross the railway track at level crossings. The same standard of safeguards, as required in an unmanned crossing, are not necessary to be placed across the entire length of the tracks, since public are not permitted to cross the tracks except at the designated crossing."*

16. The counsel representing the petitioner(s) have cited the judgment of this Court in the case of ***Shyam Naik v. General Manager, East Coast Railway*** (supra), wherein compensation was awarded to the family members of the deceased following his demise at an unmanned railway crossing. However, it is evident that the factual circumstances of the aforementioned case differ significantly from those of the present cases.

17. In ***Shyam Naik*** (supra), the Court acknowledged the negligence of the Railway Authorities in overlooking unmanned crossings, thereby subjecting numerous individuals to the perilous task of crossing busy railway lines without adequate safety measures provided by the authorities. Conversely, in the present case, the petitioners' counsel has failed to substantiate any claims regarding the negligence of the railway authorities, instead relying solely on appeals for the Court's sympathy. While this Court extends its deepest sympathies to the family of the deceased, it is imperative to note that mere sympathy cannot serve as a basis for compensating the family in the absence of a compelling legal argument.

18. Railways often emphasize the importance of safety around railway tracks, but it is true that trespassing on tracks is a significant safety concern. While railways implement safety measures and regulations to prevent accidents, ultimately, individuals who trespass on railway tracks are responsible for their own safety. Railway tracks are designed for the safe passage of trains and are not intended for pedestrian use.

19. Trespassing on tracks poses serious risks, including the danger of being struck by trains or encountering other hazards associated with the railway environment. Therefore, individuals who choose to cross railway tracks unlawfully assume the risk of potential accidents and cannot blame the railways for the consequences of their actions.

20. The Indian Railways stands as the backbone of the nation, with an extensive network of railway tracks spanning thousands of kilometers, catering to the diverse needs of the Indian populace. As a crucial mode of transportation, it plays an indispensable role in connecting remote areas, facilitating economic activities, and enabling the movement of millions of passengers and freight across the country. In true sense, it is the lifeline of the nation.

21. However, alongside its pivotal role, the Indian Railways also grapples with a concerning issue– the occurrence of rail accidents. In 2021, a total of 1,752 rail deaths

took place of which 1,114 were due to line crossing, 277 due to falling off trains and 258 due to natural causes. Out of the 1,752 deaths, 1,557 victims (89 per cent) were men. A majority of the deaths every year on the railway tracks occur due to crossing the tracks, which is an illegal act.[4] Despite stringent safety measures and continuous efforts to enhance infrastructure and operational protocols, these accidents persist, posing risks to the lives and well-being of passengers and railway staff alike.

22. These incidents not only result in tragic loss of lives but also inflict economic losses and disrupt the smooth functioning of the railway system. Addressing the root causes of such rail accidents in India requires a multifaceted approach, encompassing aspects such as infrastructure modernization, technology integration, robust maintenance practices, rigorous safety regulations, and effective participation of the stakeholders. By prioritizing these initiatives and fostering a culture of safety and accountability, the Indian Railways can strive towards mitigating the incidence of accidents and ensuring the continued safety and reliability of this vital lifeline of the nation.

23. For the reasons recorded above, W.P.(C) No.12405 of 2015 is dismissed. Accordingly, all the connected Writ Petitions are dismissed. No order as to costs.

4. 'GRP files FIRs against commuters who die while crossing rail tracks' (June 1, 2022) <https://indianexpress.com/article/cities/mumbai/grp-files-fir-commuters-who-die-while-crossing-rail-tracks-7946473/>

—— o ——

2024 (II) ILR-CUT-604

MISS. SAVITRI RATHO, J.

CRLREV NO. 123 OF 2024

RINKI @ TAPASWINI BEHERA ……Petitioner

-V-

STATE OF ORISSA ……Opp.Party

(A) CRIMINAL PROCEDURE CODE, 1973 – Section 319 – Scope & ambit of the Court U/s. 319 of the code – Discussed.

(B) CRIMINAL PROCEDURE CODE, 1973 – Section 223 – What is mean by "same transaction" – Discussed.

Case Laws Relied on and Referred to :-

1. 2007 Vol-II OLR 394 : 2007 (4) SC : 773 : Y. Saraba Reddy vs. Puthur Rami Reddy.
2. AIR 1963 SC 1850 : State of A.P. vs. Cheemalapati Ganeswara Rao.
3. (2000) 1 SCC 285 : Balbir vs. State of Haryana.

For Petitioner : Mr. D.P.Pattnaik.

For Opp.Party : Mr. M.R. Mishra, A.S.C.

JUDGMENT Date of Judgment : 10.04.2024

SAVITRI RATHO, J.

This application under Section 401 of the Code of Criminal Procedure has been filed with the following prayer:

> *"That the petitioner prays that your lordship be graciously pleased to consider the facts stated in the petition and pass appropriate order in calling for the records from the court below and after hearing the counsels, set aside order dated 23.2.2024 and 28.2.2024 passed by the learned ADJ-CUM-Special Court under POCSO ACT, Cuttack in SPL GR case No. 28 of 2020 vide Annexure -1 series.*
>
> *And pass appropriate order dropping the proceeding in respect of the petitioner in SPL GR case no. 28/2020 pending in the court of learned ADJ-cum-Special Court under POCSO ACT, Cuttack.*
>
> *And may further be pleased to pass any other order(s) or direction(s) as deem fit and proper in the facts and circumstances of the case;*
>
> *And for this act of kindness, the petitioner as in duty bound shall ever pray."*

But perusal of the two impugned orders reveal that both the orders have been passed by the learned Ad-hoc Addl. District and Sessions Judge, F.T.S.C.-II, Cuttack in Special G.R. Case No. 28 of 2020. Order dated 23.02.2024 has been passed rejecting the application of the petitioner to drop the proceeding against her and the order dated 28.02.2024 has been passed framing charge against the petitioner for commission of offences punishable under Sections 363, 366, 342, 328, 120-B of the IPC.

2. For purpose of deciding his Criminal Revision, I do not consider it necessary to bring on record the details of the prosecution allegations and only the portions relating to the petitioner have been referred to. The names of the victim as well as the CICL who is the main accused in the case are also not mentioned to protect their identity.

3. The prosecution allegation in brief is that FIR has been registered on 02.11.2019 at the Tangi Police Station, on the information of the father of the victim, against one CICL and one Hari Behera under Section 363, 34 of IPC stating that his daughter (the victim) aged about 16 years who had gone to College on 01.11.2019 did not return. On enquiry, he learned that she had gone with the CICL. When he went to the house of the CICL, his uncle Hari Behera did not co-operate for which he suspected that they had taken his daughter and kept her concealed.

4. The victim was rescued from Jammu on in the month of January 2020 and returned to her village being accompanied by her father. Her statement under Section – 164 Cr.P.C. was recorded where she has given details of the manner in which she was taken to Jammu and the role played by the present petitioner. She has interalia stated that on the date of occurrence at about 11.30 a.m. after attending College while she was standing in the local bus stand to return home, the present petitioner who happens to be a distant cousin of the CICL (main accused), enquired as to where she was going, she replied that she was going to Tangi. The petitioner said that she was also going to Tangi to her friend's place and gave her prasad

(Ladu) to eat and then called an auto rickshaw and said that both could go together. She went with the petitioner. On the way she felt dizzy. The petitioner attributed her condition to not taking food and asked her to go to sleep. She went to sleep and when she woke up, she found herself in a room with her hands and legs tied with ropes and three other girls were also lying there with their hands and legs tied with ropes. She saw the CICL and the present petitioner alongwith three boys. When she tried talking with one of the girls, the petitioner gagged their mouths. The CICL came and cut the ropes on her hands with a knife. All of them were talking about getting money from her father. The CICL then took her to a room and raped her. She kicked him and the CICL assaulted her with a knife by inflicting bleeding injury on her hand and threatened to kill her if she struggled. Thereafter she has recounted as to how she was taken to Jammu by the CICL with the help of others and how she was ultimately rescued.

5. I have heard Mr. D.P. Patnaik, learned counsel for the petitioner and Mr. M.R. Mishra, learned Additional Standing Counsel for the State, perused the statement of the victim recorded under Section 164 Cr.P.C. filed by the learned counsel for the petitioner and also available in the case diary. I had called for the scanned copy of the ordersheet from the learned trial Court as some of the orders passed by the learned trial Court had not been annexed with the Criminal Revision. The scanned copy of the ordersheet received from the Court of learned Ad-hoc Addl. District and Sessions Judge, FTSC-II, Cuttack and tagged to the digital record. I have gone through the ordersheet as well as the orders and documents filed by the learned counsel for the petitioner.

6. As stated earlier, FIR was registered on 02.11.2019 at the Tangi Police Station, on the information of the father of the victim, against the CICL and one Hari Behera under Section 363, 34 of IPC. They were arrested on 06.06.2020 and forwarded to the Court on 07.06.2020. Co accused Hari Behera was granted bail on 08.06.2020. Preliminary charge sheet dated 04.08.2020 was been submitted against the CICL for commission of offences punishable under Sections 363, 366, 370, 342, 376, 341, 506, 323, 324, 328, 120-B of IPC and against the co-accused Jayanta Behera @ Haria under Section 6 of POCSO Act and Sections 341, 406, 120-B of IPC. On 05.08.2020, the learned Addl. District Judge cum Special Court under POCSO Act, Cuttack (in short "POCSO Court") took cognizance of the offences under Section 363/366/370/342/376/341/506/323/ 324/328/ 120B of IPC read with Section 6 of POCSO Act and as the CICL was in custody, summons was issued to Haria @ Jayanta Behera. On 12.08.2021, the latter was allowed to continue on previous bail.

ORDERS PASSED BY THE TRIAL COURT

7. On 08.09.2021 charge was framed against the CICL under Sections 363/366/370/342/376/341/S06/323/324/328/120B of IPC 6 of POCSO and charge under Sections 341/506 of I.P.C was framed against co-accused Haria @ Jayanta

Behera by the POCSO Court. On 02.11.2021 the POCSO Court disposed of the application filed on behalf of the CICL holding that age of the CICL as per his HSC certificate was to be taken as 17 years 8 months on 01.11.2019 i.e. the date of occurrence but as he was mature he could be tried as an adult by the same Court which had been declared as Children's' Court as per the provisions of Cr.P.C. as envisaged under Section 19(l) of JJ CPC. On 26.05.2022, while considering another application of the accused to refer the CICL to the JJ Board for proper adjudication, the POCSO Court found under Section 18 (3) of the JJ CPC Act, preliminary enquiry as envisaged under Section 15 of the Act is required to be done by the JJ Board to assess whether the accused /CICL will be tried as a CICL or as an adult by the Children's Court as per the provision under Section 19 of the Cr.P.C and pass necessary order. The Court also observed that similar application had been rejected on 2.11.2021 but as the order was not in conformity with Section 15 of the JJ Act, the order was liable to be recalled as it is the mistake of the Court. On 19.06.2022, the application of the Spl. P.P. to add the victim as CSW No. 29 was allowed. The case record in respect of the CCL was sent to the PM JJB, Cuttack to proceed according to law. On 02.03.2023, the prayer for issuance of NBW against the present petitioner was made by the I.O. on the allegation that the petitioner has committed offences under Sections 363, 366, 342, 328, 120-B of IPC and was absconding for avoiding arrest in spite of several raids conducted to apprehend her. The prayer of the I.O. was allowed and NBW was issued against the petitioner. On 10.3.2023, supplementary charge sheet was submitted against the petitioner for commission of offences punishable under Sections 363, 366, 342, 328, 120-B of IPC and the case was posted to 15.03.2023 for further order as the P.O. was absent. On 15.03.2023, the learned Addl. District Judge-cum-Special Court under POCSO Act, Cuttack found that charge sheet dated 10.03.2023 has been submitted against the three accused persons and previously on 05.08.2020 cognizance of offences under Sections 363, 366, 370, 342, 376, 341, 506, 323, 324, 328, 120-B of IPC and Section 6 of POCSO Act has been taken and no new Sections have been added by the I.O. in the present charge sheet so there was no need to take further cognizance and the charge sheet was kept in the case record. And the case posted to 17.04.2023 for hearing. On 01.08.2023 the case was transferred to the newly created court of the Fast Track Special Court (FTSC-II), under POCSO Act, Cuttack, for disposal and it was received in that Court. On 16.01.2024, the petitioner was produced in Court pursuant to execution of NBW and a petition was filed to drop the proceedings against her. The petition was heard and rejected on 18.01.2024 and the case was posted to 28.02.2024 for consideration of charge and charge has been framed against the petitioner for commission of offences punishable under Section 363, 366, 342, 328 and 120-B of the IPC.

As stated earlier, the orders dated 18.01.2024 and 28.02.2024 have been challenged in this revision. On e revision application may not be maintainable against multiple (two) order, but as order dated 28.02.2024 is a consequence of the first order passed on 18.01.2024 and no defect was pointed out by the Stamp Reporter, the matter was heard.

SUBMISSIONS

8. Mr. D.P. Pattnaik, learned counsel for the petitioner has submitted that the learned Fast Track Court should have allowed the application of the petitioner for dropping the proceeding should not have framed charge against the petitioner inasmuch as after submission of preliminary charge sheet the Court had proceeded in the matter and already framed charge against the co-accused persons. Thereafter, only at the stage of Section 319 of Cr.P.C., the Court could have proceeded against the petitioner if material had surfaced against her after recording of evidence of witnesses. In the present case as no witness had been examined in the trial, the learned Fast Track Court could not have proceeded against the petitioner and framed charge against her merely because a supplementary charge sheet was filed against her when cognizance of offences against the co accused persons had only been taken on the basis of the preliminary chargesheet. He relied on paragraph -9 the decision of the Apex Court in the case of ***Y. Saraba Reddy vs. Puthur Rami Reddy*** reported in ***2007 Vol-II OLR 394 : 2007 (4) SCC 773***, in support of his submission.

He reiterated that the learned Court below adopted a procedure which is foreign to the Code of Criminal Procedure by proceeding against the petitioner after charge has been framed against the co-accused persons and before the stage of Section 319 of Cr.P.C. had arrived, for which the impugned orders refusing to drop the proceedings and framing charge against the petitioner are liable for interference.

9. Mr. M.R. Mishra, learned Addl. Standing Counsel for the State supports the impugned order stating that there was sufficient materials against the petitioner in the preliminary charge sheet, but since she was absconding could not be arrested during investigation and the specified period under Section 167 of Cr.P.C. was going to be completed, the I.O. has submitted preliminary charge sheet against the co-accused persons keeping the investigation open for arrest of the petitioner. Thereafter, although the learned POCSO Court had framed charged against the coaccused persons. As evidence had not been recorded, the learned Court below has not committed any error by proceeding against the petitioner and framing charge against her since cognizance of the offences have already been taken and the stage of Section 319 had not reached as no witness has been examined during the trial. He finally submits that in view of the nature of allegations against the petitioner, as a prima facie case is made out against her for framing charge against her, the proceeding against her should not be dropped.

10. The provisions of Section 223 and Section 319 of the Code of Criminal Procedure (in short "Cr.P.C) are relevant for deciding this Criminal Revision and are therefore extracted below :

> "**Section 223**. What persons may be charged jointly.- The following persons may be charged and tried together, namely:-
>
> *(a) persons accused of the same offence committed in the course same transaction;*
>
> *(b) person accused of an offence and persons accused of abetment of, or attempt to commit, such offence;*

(c) person accused of more than one offence of the same kind, within the meaning of section 219 committed by them jointly within the period of twelve months;

(d) persons accused of different offences committed in the course of the same transaction;

(e) persons accused of an offence which includes theft, extortion, cheating, or criminal misappropriation, andpersons accused of receiving or retaining, or assisting in the disposal or concealment of, property possession of which isalleged to have been transferred by any such offence,committed by the first named persons, or of abetment of or attempting to commit any such last-named offence;

(f) persons accused of offences under sections 411 and 414 ofthe Indian Penal Code (45 of 1860) or either of thosesections in respect of stolen property the possession of whichhas been transferred by one offence;

(g) persons accused ofany offence under Chapter XII of the Indian Penal Coderelating to counterfeit coin and persons accused of any otheroffence under the said Chapter relating to the same coin, or ofabetment of or attempting to commit any such offence; andthe provisions contained in the former part of this Chaptershall, so far as may be, apply to all such charges: Providedthat where a number of persons are charged with separateoffences and such persons do not fall within any of thecategories specified in this section, the Magistrate or Court of Session may, if such persons by an application in writing, sodesire, and if he or it is satisfied that such 12 persons would not be prejudicially affected thereby, and it is expedient so todo, try all such persons together."

*"**Section–319**. Power to proceed against other persons appearing to be guilty of offence. - (1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed. (2)Where such person is not attending the Court, he may bearrested or summoned, as the circumstances of the case may require, for the purpose aforesaid. (3) Any person attending the Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.(4) Where the Court proceeds against any person under subsection (1), then - (a) the proceedings in respect of such person shall be commenced afresh, and the witnesses reheard;10(b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced."*

11. From a careful reading of the provision of Section 223 of IPC, it is forthcoming that if a particular offence concerns two or more people which arise out of the same transaction, they can be tried together in terms of Section 223 of the Crl.P.C. In the present case the CICL, the co accused and the petitioner have allegedly committed offences which arise out of the same transaction, hence the learned trail Court has not committed any error in refusing to drop the proceedings against the petitioner and framing charge against her.

12. The expression "same transaction" in Section 239 of the 1898 Code which is parimateria with Section 223(d) of the 1973 Code was considered by the Supreme Court in ***State of A.P. vs. Cheemalapati Ganeswara Rao : AIR 1963 SC 1850*** , where the test was stated to be as follows :

"What is meant by "same transaction" is not defined anywhere in the Code. Indeed, it would always be difficult to define precisely what the expression means. Whether a transaction can be regarded as the same would necessarily depend upon the particular facts of each case and it seems to us to be a difficult task to undertake a definition of that which the Legislature has deliberately left undefined. We have not come across a single decision of any Court which has embarked upon the difficult task of defining the expression. But it is generally thought that where there is proximity of time or place or unity of purpose and design or continuity of action in respect of a series of acts, it may be possible to infer that they form part of the same transaction. It is, however, not necessary that every one of these elements should co-exist for a transaction to be regarded as the same. But if several acts committed by a person show a unity of purpose or design that would be a, strong circumstance to indicate that those acts form part of the same transaction. The connection between a series of acts seems to us to be an essential ingredient for those acts to constitute the same transaction and, therefore, the mere absence of the words "so connected together as to form" in clauses (a), (c) and (d) of Section 239 would make little difference. Now a transaction may consist of an isolated act or may consist of a series of acts. The series of acts which constitute a transaction must of necessity be connected with one another and if some of them stand out independently they would not form part of the same transaction but would constitute a different transaction or transactions."

In ***Balbir vs. State of Haryana : (2000) 1 SCC 285***, the Supreme Court has explained that *'in the course of the same transaction'* was not the same as *'in respect of the same subject-matter'*, and the test which is to be applied is that for several offences to be part of the same transaction, the test which has to be applied is whether they are so related to one another in point of purpose or of cause and effect, or as principal and subsidiary, so as to result in one continuous action. Where there is a commonality of purpose or design, where there is a continuity of action, then all those persons involved can be accused of the same or different offences *'committed in the course of the same transaction'*.

13. There can be no quarrel over the position of law that power under Section 319 of the Code can be exercised by the Court suo motu or on an application by the prosecution or even by an accused already before the Court, if the evidence adduced by the witnesses in the trial reveal that any person other than the accused already facing the trial has/have committed the offence. The trial Court has the power to direct that such a person can be tried alongwith the accused already facing trial. The power is discretionary and such discretion must be exercised judiciously having regard to the facts and circumstances of the case and the nature of evidence adduced in the trial.

The Supreme Court in the case of ***Y. Saraba*** (supra) in ***2007 Vol-II OLR SC 394*** : has observed as follows:

"The scope and ambit of Sec. 319 of the Code have been elucidated in several decisions of this Court. In ***Joginder Singh and another v. State of Punjab*** *and* ***another (AIR 1979 SC 339)****, it was observed:*

"6. A plain reading of Sec. 319 (1) which occurs in Chapter XXIV dealing with general provisions as to inquiries and trials, clearly shows that it applies to all the Courts

including a Sessions Court and as such a Sessions Court will have the power to add any person, not being the accused before it, but against whom there appears during trial sufficient evidence indicating his involvement in the offence, as an accused and direct him to be tried along with the other accused"

"Power under Section 319 of the Code can be exercised by the Court suo motu or on an application by someone including accused already before it. If it is satisfied that any person other than accused has committed an offence he is to be tried together with the accused. The power is discretionary and such discretion must be exercised judicially having regard to the facts and circumstances of the case. Undisputedly, it is an extraordinary power which is conferred on the Court and should be used very sparingly and only if compelling reasons exist for taking action against a person against whom action had not been taken earlier. The word "evidence" in Section 319 contemplates that evidence of witnesses given in Court. Under Sub-section (4)(1)(b) of the aforesaid provision, it is specifically made clear that it will be presumed that newly added person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced. That would show that by virtue of Sub-section (4)(1)(b) a legal fiction is created that cognizance would be presumed to have been taken so far as newly added accused is concerned."

14. In a catena of decisions of the Supreme Court and various High Court including this Court on the interpretation of the term "taking cognizance", it is now the settled position of law that cognizance is taken of the offence and not of the accused. In the present case, the learned trial Court committed no error when it stated that cognizance of offences had already been taken and no new offence has been added so the petitioner could be proceeded against. Although specific reference to the provisions of Section 233 of the Cr.P.C. has not been made by the trial Court, but they lend credence to the impugned order to proceed against the petitioner alongwith the co accused. The provision of Section 233 Cr.P.C. as well as the decisions of the Supreme Court clearly elucidate that where a transaction consists of a series of acts and the acts, the acts must be connected to each other in order to be part of the same transaction. In the present case the acts committed by the petitioner and the co accused form part of the same transaction and hence they can be tried together in the same trial. So merely because charge had been framed against a co accused earlier will not a bar for the learned trial Court to frame charge against the petitioner and proceed against her in the same trial.

15. Another feature of the case is that sufficient materials were available against the petitioner to proceed against her when cognizance of offences were taken, but as she had absconded and evaded arrest, preliminary chargesheet had been filed against the co accused who were in custody and investigation had been kept open against her. So to drop the proceedings against such an accused would be giving premium to her/his efforts to avoid arrest during initial investigation in the case.

16. The submission of the learned counsel for the petitioner that the petitioner could have been proceeded against only after recording of evidence by exercise of power under Section–319 Crl.P.C. if the evidence so recorded pointed to the complicity of the petitioner, and since that stage had not come, the proceeding should be dropped, is misconceived and hence rejected.

17. On 05.08.2020, cognisance of the offences under Section 363/366/370/342/376/341/506/323/324/328/120B of IPC read with Section 6 of POCSO Act had been taken by the learned trial Court on the basis of the preliminary chargesheet in which incriminatory materials were available against the petitioner and thereafter final chargesheet was filed. On a conjoint reading of Section 223 and 319 of the Crl.P.C. and the judgments rendered by the Supreme Court and the facts of the case, I am of the view that as the offences allegedly committed by the co accused and the petitioner arose out of same transaction, they can be tried in same trial and it was not necessary to wait till evidence is recorded to proceed against the petitioner by exercising power under Section–319 Cr.P.C. As ample materials are available against the petitioner, the learned trial court has rightly refused to drop the proceedings against her and framed charge against her.

18. In view of the above discussion, I do not find any illegality or perversity in the impugned orders so as to warrant any interference. The Criminal Revision is accordingly dismissed.

—— o ——

2024 (II) ILR-CUT-612

MISS. SAVITRI RATHO, J.

BLAPL NO. 5609 OF 2023

SATYA NARAYAN YADAV ……Petitioner

-V-

STATE OF ODISHA ……Opp.Party

NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985 – Section 37 r/w Article 21 of the Constitution of India, 1950 – Earlier the bail application of petitioner was rejected with a direction to dispose of the case as expeditiously as possible, preferably within a period of six months – As per report of the learned Trial Court, there has been no progress in the trial as no witness had been examined till 12.02.2024 – Whether the "fetter" in Section 37 of the NDPS Act will operate as a bar for releasing the petitioner on bail? – Held, No.

Case Laws Relied on and Referred to :-

1. 2023 LiveLaw (SC) 533 : Rabi Prakash vrs. State of Odisha.
2. 1994 SCC (6) 731: JT 1994 (6) 544 : Supreme Court Legal Aid Committee (Representing Undertrial Prisoners) vrs. Union of India.
3. 2008 CRILJ 2454 : 2008 SCC Online : Mukhtiar Singh vrs. State of Haryana (P&H HC).
4. 2004 (13) SCC 608 : Sorabkhan Gandhkhan Pathan and Another vrs. State of Gujarat.
5. 2022 LawSuit (Ori) 484 : Kishore Bira vrs. State of Odisha (BLAPL No. 9629 of 2021 disposed on 11.07.2022).
6. 2023 LiveLaw (SC) 474 : Sebil Elanjipally vrs. State of Odisha (BLAPL No. 6803 of 2022).
7. (1980) 1 SCC 98: 1979 AIR 1369: AIR 1979 SC 1369 : Hussainara Khatoon & Ors.(IV) vrs. Home Secretary, State of Bihar, Patna.

8. 2023 LiveLaw (SC) 260 : Mohd. Mulsim @ Hussain vrs. State of Delhi.
9. (1994) 6 SCC 731 : Supreme Court Legal Aid Committee vs. Union of India.
10. (1996) 2 SCC 616 AIR 1996 SC 2957 : Shaheen Welfare Association vs. Union of India.
11. (2001) 7 SCC 673 : State of Madhya Pradesh vs. Kajad.
12. (2013) 2 SCC 603 : Thana Singh vs. Central Bureau of Narcotics.
13. (SLP (Crl.) No. 6690 of 2022 : Dheeraj Kumar Shukla vs. State of Uttar Pradesh.
14. (SLP (Crl.) No. 3133 of 2022 : Md. Raja and Another vs. The State of West Bengal.
15. Naeem Ahmed v Govt of NCT of Delhi, 2024 SCC OnLine SC 220.
16. 2023 SCC Online SC 236 : Union of India vs Ajay Kumar Singh @ Papu.
17. 2024 INSC 114 : State vs B.Ramu.
18. 2023 (II) ILR-CUT-851: 92 OCR-413 : Ramakanta Prasad v. State of Odisha.

For Petitioner : Mr. Vaishnav Kiriti Singh
For Opp.Party : Mr. S.S. Mohapatra, ASC

JUDGMENT Date of Judgment : 15.04.2024

SAVITRI RATHO, J.

This is the second application of the petitioner under Section 439 of Cr.P.C. in connection with Koraput Town P.S. Case No.74 of 2021 corresponding to T.R. Case No.31 of 2021, pending in the Court of the learned Addl. Sessions Judge-cum-Special, Koraput, where chargesheet has been submitted against the petitioner and other accused persons for commission of offence punishable under Section 20 (b) (ii) (C)/29 of the NDPS Act , on the allegation of transportation of 1752.200 Kgs. of contraband ganja in a truck.

2. The earlier application of the petitioner in BLAPL 5182 of 2021 has been disposed of by a coordinate Bench of this Court on 13.10.2022. While rejecting the prayer for bail of the petitioner, the Court had directed for expediting the trial and also observed that the learned Court in seisin over the case would do well to dispose of the case as expeditiously as possible, preferably within a period of six months from the date of receipt of the copy of the order, and liberty had been granted to renew his prayer for bail if trial is not concluded within the aforesaid time.

3. This bail application has been listed before me as BLAPL No.4181 of 2021 filed by the co-accused-Nikodini Turuk and BLAPL No.4185 of 2021 filed by co-accused, Aditya Sahu had been disposed of by me on 16.02.2022.

4. The prayer for bail of the petitioner-Satya Narayan Yadav has been rejected vide order 09.01.2023 passed by the learned Additional Sessions Judge-cum-Special Judge, Koraput in T.R. Case No. 31 of 2021.

5. The prosecution allegation in brief is that on 11.03.2021, when Sri Chittaranjan Pradhan, S.I. of Police, Koraput Town Police Station along with staff was waiting at Landiguda Chhak, to verify the veracity of information regarding illegal possession and transportation of contraband ganja, they found one truck bearing Registration No. BR-44-GA-0374 and one Bolero bearing Registration No. OD-10R-1337 being loaded with something. Those vehicles were being escorted by one motorcycle in the front side and one Maruti Suzuki Alto from behind. On seeing the Police vehicle, the escorting vehicle Maruti Suzuki and motor cycle fled

towards new colony. The Police team chased the vehicles and were able to stop the vehicles and apprehend the petitioner and three others. 1752 kg. and 200 grams of contraband ganja were recovered from the vehicles – truck and Bolero / maruti from their exclusive and conscious possession. After observing the formalities of search and seizure under NDPS Act, the ganja was seized from the possession of the present petitioner and the co accused persons.

6. Mr. Vaishnav Kirti Singh, learned counsel for the petitioner has submitted that the petitioner is aged about 25 years and has no criminal antecedents and is in custody since 11.03.2021. His right to speedy trial has been infringed as trial has not yet commenced in spite of direction of this Court in BL APL No. 5182 of 2021, for which Section – 37 of the NDPS Act will not be bar for consideration of his prayer for bail. He has submitted that merely because ganja was recovered from the truck does not mean that the petitioner was in conscious possession of ganja, in absence of further incriminating materials. He has also submitted that the petitioner is not related to the other accused persons who were allegedly escorting the truck in different vehicles and that some of the co accused persons namely Babu rao Khilla in BL APL No. 4441 of 2021 , rajesh Adkatia in BL APL no. 4442 of 2021 , Gora Dushura Barik in BL APL No. 4682 of 2021 , Manik Adkatia in BL APL No. 4882 of 2021 have been released on bail. He further submits that the petitioner is the sole earning member of his family and his minor son has died recently for which his prayer for bail may be sympathetically considered. In support of his submission that he is entitled to be released on bail on account of delay in completion of trial he has relied on the following decisions :

1. Rabi Prakash vrs. State of Odisha: 2023 LiveLaw (SC) 533

2. Supreme Court Legal Aid Committee (Representing Undertrial Prisoners) vrs. Union of India: 1994 SCC (6) 731: JT 1994 (6) 544

3. Mukhtiar Singh vrs. State of Haryana (P&H HC): 2008 CRILJ 2454 : 2008 SCC Online page

4. Sorabkhan Gandhkhan Pathan and Another vrs. State of Gujarat: 2004 (13) SCC 608

5. Kishore Bira vrs. State of Odisha (BLAPL No. 9629 of 2021 disposed on 11.07.2022): 2022 LawSuit (Ori) 484

6. Sebil Elanjipally vrs. State of Odisha (BLAPL No. 6803 of 2022): 2023 LiveLaw (SC) 474

7. Hussainara Khatoon and Others (IV) vrs. Home Secretary, State of Bihar, Patna : (1980) 1 SCC 98: 1979 AIR 1369: AIR 1979 SC 1369

8. Mohd. Mulsim @ Hussain vrs. State of Delhi: 2023 LiveLaw (SC) 260.

7. Mr. S.S. Mohapatra, learned Additional Standing Counsel has opposed the prayer for bail stating that the truck which was being driven by the petitioner was being escorted by two other vehicles which escaped when the Police intercepted the truck. The petitioner and one Sanjeeb Kumar Thakur who were present in the truck were apprehended and they have confessed that while they were returning to

Chhatisgarh, the vehicle has been loaded with ginger along with ganja. He has also submitted that although the charge sheet has been filed, investigation has been kept open as the CDRs of the petitioners and other documents were to be verified. He finally submitted that in view of the huge quantity of ganja seized, even while considering the prayer for bail of the petitioner on the ground of delay, the limitation contained in Section 37 of the NDPS Act have to be considered.

STATUTORY PROVISION

8. Section 37 of the Narcotic Drugs and Psychotropic Substances Act, 1985:

> ***"37. Offences to be cognizable and non-bailable.—***
> *(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)—*
> *(a) every offence punishable under this Act shall be cognizable;*
> *(b) no person accused of an offence punishable for offences under section 19 or section 24 or section 27A and also for offences involving commercial quantity shall be released on bail or on his own bond unless—*
> *(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and*
> *(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.*
> *(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force, on granting of bail.*

JUDICIAL PRONOUNCEMENTS

9. The earlier view of the Supreme Court in NDPS cases was that in view of the restrictions imposed in Section 37 of the NDPS Act, in cases involving commercial quantity, "*negation of bail is the rule and its grant an exception*". But this view underwent a change when the Courts found that persons accused of committing offences under the NDPS Act were in custody for long periods due to delay in completion of the trials and had not been granted bail in view of the bar in Section 37 of the NDPS Act. Therefore before dealing with the contentions of the learned counsel, I consider it apposite to refer to some of the decisions relied on by the counsel for the petitioner and some others which are relevant for deciding this application.

9.1 Supreme Court Legal Aid Committee vs. Union of India (1994) 6 SCC 731 had been initially filed by the petitioner under Article 32 of the Constitution on account of the delay in disposal of cases under the NDPS Act involving foreigners. The application was thereafter amended and prayer was made prayed that all under-trials who were in jail for the commission of any offence or offences under the NDPS Act for a period exceeding two years on account of the delay in the disposal of cases lodged against them should be released from jail declaring their further detention to be illegal and void and pending decision of this Court on the said larger

issue, they should be released on bail. After discussing various provisions of the NDPS Act and the pendency of cases in Mumbai, the Supreme Court observed that since the number of courts constituted to try offences under the Act were not sufficient and the appointments of Judges to man these courts were delayed, cases had piled up and the accused had to languish in jail as the provision for enlarging them on bail was strict. Portions of the judgment which are relevant for deciding this bail application are extracted below:

> *"15……As we have not felt inclined to accept the extreme submission of quashing the proceedings and setting free the accused whose trials have been delayed beyond reasonable time for reasons already alluded to, we have felt that deprivation of the personal liberty without ensuring speedy trial would also not be in consonance with the right guaranteed by Article 21. Of course, some amount of deprivation of personal liberty cannot be avoided in such cases; but if the period of deprivation pending trial becomes unduly long, the fairness assured by Article 21 would receive a jolt. It is because of this that we have felt that after the accused persons have suffered imprisonment which is half of the maximum punishment provided for the offence, any further deprivation of personal liberty would be violative of the fundamental right visualised by Article 21, which has to be telescoped with the right guaranteed by Article 14 which also promises justness, fairness and reasonableness in procedural matters. What then is the remedy? The offences under the Act are grave and, therefore, we are not inclined to agree with the submission of the learned counsel for the petitioner that we should quash the prosecutions and set free the accused persons whose trials are delayed beyond reasonable time. Alternatively he contended that such accused persons whose trials have been delayed beyond reasonable time and are likely to be further delayed should be released on bail on such terms as this Court considers appropriate to impose. This suggestion commends to us. We were told by the learned counsel for the State of Maharashtra that additional Special Courts have since been constituted but having regard to the large pendency of such cases in the State we are afraid this is not likely to make a significant dent in the huge pile of such cases. We, therefore, direct as under:*
>
> *(i) Where the undertrial is accused of an offence(s) under the Act prescribing a punishment of imprisonment of five years or less and fine, such an undertrial shall be released on bail if he has been in jail for a period which is not less than half the punishment provided for the offence with which he is charged and where he is charged with more than one offence, the offence providing the highest punishment. If the offence with which he is charged prescribes the maximum fine, the bail amount shall be 50% of the said amount with two sureties for like amount. If the maximum fine is not prescribed bail shall be to the satisfaction of the Special Judge concerned with two sureties for like amount.*
>
> *(ii) Where the undertrial accused is charged with an offence(s) under the Act providing for punishment exceeding five years and fine, such an undertrial shall be released on bail on the term set out in (i) above provided that his bail amount shall in no case be less than Rs 50,000 with two sureties for like amount.*
>
> *(iii) Where the undertrial accused is charged with an offence(s) under the Act punishable with minimum imprisonment of ten years and a minimum fine of Rupees one lakh, such an undertrial shall be released on bail if he has been in jail for not less than five years provided he furnishes bail in the sum of Rupees one lakh with two sureties for like amount.*

(iv) Where an undertrial accused is charged for the commission of an offence punishable under Sections 31 and 31-A of the Act, such an undertrial shall not be entitled to be released on bail by virtue of this order.

The directives in clauses (i), (ii) and (iii) above shall be subject to the following general conditions:

(i) The undertrial accused entitled to be released on bail shall deposit his passport with the learned Judge of the Special Court concerned and if he does not hold a passport he shall file an affidavit to that effect in the form that may be prescribed by the learned Special Judge. In the latter case the learned Special Judge will, if he has reason to doubt the accuracy of the statement, write to the Passport Officer concerned to verify the statement and the Passport Officer shall verify his record and send a reply within three weeks. If he fails to reply within the said time, the learned Special Judge will be entitled to act on the statement of the undertrial accused;

(ii) the undertrial accused shall on being released on bail present himself at the police station which has prosecuted him at least once in a month in the case of those covered under clause (i), once in a fortnight in the case of those covered under clause (ii) and once in a week in the case of those covered by clause (iii), unless leave of absence is obtained in advance from the Special Judge concerned;

(iii) the benefit of the direction in clauses (ii) and (iii) shall not be available to those accused persons who are, in the opinion of the learned Special Judge, for reasons to be stated in writing, likely to tamper with evidence or influence the prosecution witnesses;

(iv) in the case of undertrial accused who are foreigners, the Special Judge shall, besides impounding their passports, insist on a certificate of assurance from the Embassy/High Commission of the country to which the foreigner-accused belongs, that the said accused shall not leave the country and shall appear before the Special Court as and when required;

(v) the undertrial accused shall not leave the area in relation to which the Special Court is constituted except with the permission of the learned Special Judge;

(vi) the undertrial accused may furnish bail by depositing cash equal to the bail amount;

(vii) the Special Judge will be at liberty to cancel bail if any of the above conditions are violated or a case for cancellation of bail is otherwise made out; and

(viii) after the release of the undertrial accused pursuant to this order, the cases of those undertrials who have not been released and are in jail will be accorded priority and the Special Court will proceed with them as provided in Section 309 of the Code.

16. We may state that the above are intended to operate as one-time directions for cases in which the accused persons are in jail and their trials are delayed. They are not intended to interfere with the Special Court's power to grant bail under Section 37 of the Act. The Special Court will be free to exercise that power keeping in view the complaint of inordinate delay in the disposal of the pending cases. The Special Court will, notwithstanding the directions, be free to cancel bail if the accused is found to be misusing it and grounds for cancellation of bail exist. Lastly, we grant liberty to apply in case of any difficulty in the implementation of this order.

17. We are conscious of the fact that the menace of drug trafficking has to be controlled by providing stringent punishments and those who indulge in such nefarious activities do not deserve any sympathy. But at the same time we cannot be oblivious to the fact that many innocent persons may also be languishing in jails if we recall to mind the percentage of acquittals".....

9.2 ***Shaheen Welfare Association vs. Union of India : (1996) 2 SCC 616 AIR 1996 SC 2957***, was a PIL, where the petitioner had prayed for certain reliefs to undertrial prisoners charged under the TADA and detained in jails for long periods. While deciding the case, the Supreme Court divided the undertrials into four categories and laid down the norms for deciding their prayers for bail, holding as follows:

> *"When stringent provisions have been prescribed under an Act such as TADA for grant of bail, a conscious decision has been taken by the legislature to sacrifice to some extent, the personal liberty of an undertrial accused for the sake of protecting the community and the nation against terrorist and disruptive activities or other activities harmful to society, it is all the more necessary that investigation of such crimes is done efficiently and an adequate number of Designated Courts are set up to bring to book persons accused of such serious crimes. This is the only way in which society can be protected against harmful activities. This would also ensure that persons ultimately found innocent are not unnecessarily kept in jail for long periods."*

9.3 In the case of ***State of Madhya Pradesh vs. Kajad*** reported in ***(2001) 7 SCC 673***, while referring to Section 37 of the NDPS Act, the Supreme Court has held as follows :

> *"The purpose for which the Act was enacted and the menace of drug trafficking which intends to curtail is evident from its scheme. A perusal of Section 37 of the Act leaves no doubt in the mind of the court that a person accused of an offence, punishable for a term of imprisonment of five years or more, shall generally be not released on bail. Negation of bail is the rule and its grant and exception under sub clause (ii) of clause (b) of Section 37(1). For granting the bail the court must, on the basis of the record produced before it, be satisfied that there are reasonable grounds for believing that the accused is not guilty of the offences with which he is charged and further that he is not likely to commit any offence while on bail. It has further to be noticed that the conditions for granting the bail, specified in clause (b) of sub-section (1) of Section 37 are in addition to the limitations provided under the Code of Criminal Procedure or any other law for the time being in force regulating the grant of bail. Liberal approach in the matter of bail under the Act is uncalled for."*

9.4 In the case of ***Thana Singh vs. Central Bureau of Narcotics, (2013) 2 SCC 603***, the Supreme Court , while granting bail to the petitioner who had been languishing in prison for more than twelve years, in a case under the NDPS Act awaiting the commencement of his trial , observed as follows :

> *"4. Time and again, this Court has emphasised the need for speedy trial, particularly when the release of an undertrial on bail is restricted under the provisions of the statute, like in the present case under Section 37 of the NDPS Act. While considering the question of grant of bail to an accused facing trial under the NDPS Act in Supreme Court Legal Aid Committee (Representing Undertrial Prisoners) v. Union of India [(1994) 6 SCC 731 : 1995 SCC (Cri) 39] this Court had observed that though some amount of deprivation of personal liberty cannot be avoided in such cases, but if the period of deprivation pending trial becomes unduly long, the fairness assured by Article 21 of the Constitution would receive a jolt. It was further observed that after the accused person has suffered imprisonment, which is half of the maximum punishment provided for the offence, any further deprivation of personal liberty would be violative of the*

fundamental right visualised by Article 21. We regret to note that despite it all, there has not been visible improvement on this front.

5. Bearing in mind these observations and having regard to the fact that in the present case the appellant has been in custody for more than 12 years and seemingly there being no prospect of the conclusion of trial in the near future, we are of the opinion that it is a fit case where he deserves to be admitted to bail forthwith."

9.5 In the case of ***Dheeraj Kumar Shukla vs. State of Uttar Pradesh (SLP (Crl.) No. 6690 of 2022*** decided on 30.05.2022), commercial quantity of ganja had been seized from the petitioner , and he was is in custody more than two and half years.The Supreme Court held that the provisions of Section 37 of the NDPS Act may ordinarily be attracted . However in view of absence of criminal antecedents and as the petitioner was in custody for more than two and half years and trial was yet to commence, the condition of Section 37 of the NDPS Act can be dispensed with at that stage and without expressing any view on the merits of the case, the petitioner was directed to be released on bail.

9.6 The Supreme Court in the case of ***Md. Raja and Another vs. The State of West Bengal***, (SLP (Crl.) No. 3133 of 2022),decided on 22.08.2022, granted bail to the appellants who were facing trial for being in possession of 414 kg. of ganja and had remained in custody for more than four years , due to delay in commencement of trial , without going into the requirements of Section 37 of the NDPS Act.

9.7 In the case of ***Mohd Muslim @ Hussain***, the Supreme Court was dealing with the case of an accused who was in custody since more than twelve years. The Court referred to the earlier decisions in the case of ***Hussainara Khatoon*** (supra) that ***Kadra Pahadiya & Ors. vs. State of Bihar*** reported in ***(1981) 3 SCC 671*** , ***State of Madhya Pradesh vs. Kajad*** reported in ***(2001) 7 SCC 673***, ***Supreme Court Legal Aid Committee (Representing Under trial Prisoners) vs. Union of India*** reported in ***(1994) 6 SCC 731***, ***Shaheen Welfare Association vs. Union of India*** reported in ***(1996) 2 SCC 616***, ***Union of India vs. K.A. Najeeb reported in (2021) 3 SCC 713***, ***Satender Kumar Antil vs. Central Bureau of Investigation*** reported in ***(2022) 10 SCC 51*** and ***Union of India vs. Rattan Malik*** reported in ***(2009) 2 SCC 624*** amongst other decisions while disposing of the Appeal. The relevant portions of the judgment are extracted below:

"18. The conditions which courts have to be cognizant of are that there are reasonable grounds for believing that the accused is "not guilty of such offence" and that he is not likely to commit any offence while on bail. What is meant by "not guilty" when all the evidence is not before the court? It can only be a prima facie determination. That places the court's discretion within a very narrow margin. Given the mandate of the general law on bails (Sections 436, 437 and 439, CrPC) which classify offences based on their gravity, and instruct that certain serious crimes have to be dealt with differently while considering bail applications, the additional condition that the court should be satisfied that the accused (who is in law presumed to be innocent) is not guilty, has to be interpreted reasonably. Further the classification of offences under Special Acts (NDPS Act, etc.), which apply over and above the ordinary bail conditions required to be

assessed by courts, require that the court records its satisfaction that the accused might not be guilty of the offence and that upon release, they are not likely to commit any offence. These two conditions have the effect of overshadowing other conditions. In cases where bail is sought, the court assesses the material on record such as the nature of the offence, likelihood of the accused co-operating with the investigation, not fleeing from justice: even in serious offences like murder, kidnapping, rape, etc. On the other hand, the court in these cases under such special Acts, have to address itself principally on two facts: likely guilt of the accused and the likelihood of them not committing any offence upon release. This court has generally upheld such conditions on the ground that liberty of such citizens have to - in cases when accused of offences enacted under special laws – be balanced against the public interest.

19. A plain and literal interpretation of the conditions under Section 37 (i.e., that Court should be satisfied that the accused is not guilty and would not commit any offence) would effectively exclude grant of bail altogether, resulting in punitive detention and unsanctioned preventive detention as well. Therefore, the only manner in which such special conditions as enacted under Section 37 can be considered within constitutional parameters is where the court is reasonably satisfied on a prima facie look at the material on record (whenever the bail application is made) that the accused is not guilty. Any other interpretation, would result in complete denial of the bail to a person accused of offences such as those enacted under Section 37 of the NDPS Act.

20. The standard to be considered therefore, is one, where the court would look at the material in a broad manner, and reasonably see whether the accused's guilt may be proved. The judgments of this court have, therefore, emphasized that the satisfaction which courts are expected to record, i.e., that the accused may not be guilty, is only prima facie, based on a reasonable reading, which does not call for meticulous examination of the materials collected during investigation (as held ***in Union of India v. Rattan Malik : (2009) 2 SCC 624)****. Grant of bail on ground of undue delay in trial, cannot be said to be fettered by Section 37 of the Act, given the imperative of Section 436A which is applicable to offences under the NDPS Act too (ref.* ***Satender Kumar Antil*** *supra). Having regard to these factors the court is of the opinion that in the facts of this case, the appellant deserves to be enlarged on bail.*

21. Before parting, it would be important to reflect that laws which impose stringent conditions for grant of bail, may be necessary in public interest; yet, if trials are not concluded in time, the injustice wrecked on the individual is immeasurable. Jails are overcrowded and their living conditions, more often than not, appalling. According to the Union Home Ministry's response to Parliament, the National Crime Records Bureau had recorded that as on 31st December 2021, over 5,54,034 prisoners were lodged in jails against total capacity of 4,25,069 lakhs in the country (National Crime Records Bureau – Prison Statistics in India). Of these 122,852 were convicts; the rest 4,27,165 were undertrials."

"23……. Incarceration has further deleterious effects - where the accused belongs to the weakest economic strata: immediate loss of livelihood, and in several cases, scattering of families as well as loss of family bonds and alienation from society. The courts therefore, have to be sensitive to these aspects (because in the event of an acquittal, the loss to the accused is irreparable), and ensure that trials – especially in cases, where special laws enact stringent provisions, are taken up and concluded speedily."

9.8 In ***Naeem Ahmed v Govt of NCT of Delhi, 2024 SCC OnLine SC 220***, the Supreme Court granted bail to the petitioner- accused who did not have any criminal antecedents , was in custody in connection with a case under Section 21 (c) of the NDPS Act for almost two years but trial was yet to start holding as follows:

> ***"9.*** *It is a seriously debatable question of fact whether the appellant was also found in the conscious possession of the contraband (smack). But such a question of fact will obviously be determined by the Trial Court at an appropriate stage. That being so, it seems to us that as of now, the twin test of Section 37 of the Act, need not be invoked against the appellant.*
>
> ***10.*** *Taking into consideration the totality of the circumstances, especially the period of custody undergone by the appellant however, without expressing any views on the merits of the case, the appeal is allowed. Accordingly, the appellant is ordered to be released on bail subject to his furnishing the bail bonds to the satisfaction of the Trial Court.*
>
> ***11.*** *However, the appellant shall report to the local Police Station twice in a month. His passport shall also remain deposited with the Investigating Officer/with the concerned Court. In the event, the appellant is found involved in any other case, the same shall be taken as a misuse of the concession of bail and the prosecution shall be at liberty to seek cancellation of the bail on that ground."*

9.9 In the case of ***Union of India vs Ajay Kumar Singh @ Papu : 2023 SCC Online SC 236*** the Supreme Court cancelled the bail granted to an accused by the High Court , who had evaded arrest for more than a year and had a number of similar criminal antecedents although the basis of his implication were the statements and affidavits of the co accused who were the driver and helper of the truck from which commercial quantity of ganja was recovered . The Supreme Court held as follows:

> *"16. In view of the above provisions, it is implicit that no person accused of an offence involving trade in commercial quantity of narcotics is liable to be released on bail unless the court is satisfied that there are reasonable grounds for believing that he is not guilty of such an offence and that he is not likely to commit any offence while on bail.*
>
> *17. The quantity of "ganja" recovered is admittedly of commercial quantity. The High Court has not recorded any finding that the respondent-accused is not prima facie guilty of the offence alleged and that he is not likely to commit the same offence when enlarged on bail rather his antecedents are indicative that he is a regular offender. In the absence of recording of such satisfaction by the court, we are of the opinion that the High Court manifestly erred in enlarging the respondent-accused on bail.*

9.10 In the case of ***State vs B.Ramu : 2024 INSC 114***, the Supreme Court cancelled the order of the High Court granting anticipatory bail to an accused against whom allegations were under Sections 8(c), 20(b) (ii) (c) and 29(1) of the NDPS Act .The Supreme Court held :

> *"9. A plain reading of statutory provision makes it abundantly clear that in the event, the Public Prosecutor opposes the prayer for bail either regular or anticipatory, as the case may be, the Court would have to record a satisfaction that there are grounds for believing that the accused is not guilty of the offence alleged and that he is not likely to commit any offence while on bail.*

10.It is apposite to note that the High Court not only omitted to record any such satisfaction, but has rather completely ignored the factum of recovery of narcotic substance (ganja), multiple times the commercial quantity. The High Court also failed to consider the fact that the accused has criminal antecedents and was already arraigned in two previous cases under the NDPS Act.

11.In case of recovery of such a huge quantity of narcotic substances, the Courts should be slow in granting even regular bail to the accused what to talk of anticipatory bail more so when the accused is alleged to be having criminal antecedents.

12. For entertaining a prayer for bail in a case involving recovery of commercial quantity of narcotic drug or psychotropic substance, the Court would have to mandatorily record the satisfaction in terms of the rider contained in Section 37 of the NDPS Act."

9.11 In the case of ***Ramakanta Prasad v. State of Odisha): 2023 (II) ILR-CUT-851: 92 OCR-413*** this Court granted bail to the petitioner who was in custody for more than six years , after referring to various decions of the Supreme Court.

10. Report dated 12.03.2024 of the learned Additional Sessions Judge–cum Special Judge, Koraput reveals that out of 23 chargesheeted witness, no witness has been examined.

11. It is not disputed that the petitioner is a young man and was aged about 23 years at the time of occurrence and has no criminal antecedent. He is in custody since 11.03.2021 and trial is yet to start in spite of direction of this court in BL APL No. 5182 of 2021. More than one and half years have elapsed since disposal of the BLAPL (on 13.10.2022) . As per report of the learned trial Court, there has been no progress in the trial as no witness had been examined till 12.03.2024 .

12. Considering the decisions of the Supreme Court referred to above, the age of the petitioner, lack of criminal antecedents, the period of his detention in jail custody (more than three years), the number of charge sheet witnesses in the case and the the mandate of Article 21 of the Constitution and right of the petitioner to speedy trial, as trial has not commenced, I am convinced that the petitioner has made out a case for being released on bail. For the same reasons and more particularly as the petitioner does not have any criminal antecedents, I am of the view that the "fetters' in Section 37 of the NDPS Act will not operate as a bar for releasing the petitioner on bail.

13. The BLAPL is accordingly allowed.

14. The petitioner Satya Narayan Yadav shall be released on bail on such terms and conditions as deemed fit by the learned Court below in season over the matter , after verifying that the petitioner does not have any criminal antecedents under the NDPS Act , on the following amongst other conditions :

i) He will not indulge in any criminal activity.

ii) He will not tamper with evidence or try to influence witnesses.

iii) He will report before the Simri Police Station in Bihar , once a month preferably on the first Sunday till conclusion of trial .

iv) He will furnish his mobile numbers and present and permanent address to the learned trial Court which will be verified by the I.O. / IIC Koraput Town Police Station , before he is released on bail . Any change will be intimated to learned trial court within five days of the change.

v) The petitioner shall deposit cash surety of Rs 50,000/- .

vi) The petitioner shall remain present on each date the case is posted for trial .

vii) The petitioner shall not leave Koraput District without permission of the learned Trial Court once trial commences .

15. Violation of any condition will entail in cancellation of bail/recall of this order.

—— o ——

2024 (II) ILR-CUT-623

R.K. PATTANAIK, J.

MACA NO. 133 OF 2019

SANATAN PRADHAN & ORS. ……Appellants

-V-

BISWAJIT PRADHAN & ANR. ……Respondents

MOTOR VEHICLE ACT, 1988 – Section 166 – The Learned Tribunal dismissed the claim petition for the reason that, the registration number of the offending vehicle was not mentioned in the FIR – Whether the impugned order is sustainable? – Held, No – Duty of claim Tribunal while dealing with an application for compensation – Explained. (Paras 12-13)

For Appellants : Mr. S.B. Das.
For Respondents : Mr. S.A. Ali.

JUDGMENT Date of Judgment : 13.05.2024

R.K.PATTANAIK, J.

1. Instant appeal under Section 173 of the Motor Vehicles Act, 1988 (hereinafter referred to as 'the M.V. Act') is filed by the claimants challenging the impugned judgment dated 27th November, 2018 passed in M.A.C.Case No.13 of 2011 by the learned Presiding Officer, 3rd M.A.C.T, Jajpur, whereby, an application under Section 166 of the M.V. Act was dismissed against respondent No.2 on contest and ex parte vis-à-vis respondent No.1, namely, owner of the offending vehicle on the grounds inter alia that the alleged incident and accident resulting in death of the deceased could not have been disbelieved with a finding in that regard, hence, therefore, the same is liable to be interfered with and set aside with consequential direction allowing just compensation in their favour with interest.

2. The case of the appellants is that the alleged occurrence took place on 3rd October, 2009 at about 6 P.M and at that time, the deceased and others were standing on the road side near Chandikhole over-bridge and suddenly, the offending vehicle bearing registration No.OR-05AB-0421 arrived running at a high speed in a rash and negligent manner and dashed the deceased and another, as a result of which, he sustained grievous injuries and became senseless and immediately after the accident though shifted to CHC, Badachana but while undergoing treatment, succumbed to the same.

3. In connection with the alleged accident, claiming compensation, the appellants approached the learned Tribunal. Considering the pleading on record, learned Tribunal framed the following issues: (i) as to if the claim application is maintainable? (ii) whether the offending vehicle is responsible for the accident dated 3rd October, 2009 causing death of the deceased? (iii) whether the driver of the alleged vehicle was rash and negligent? (iv) whether the appellants are entitled to receive compensation and what would be the quantum of such compensation? and (v) whether the respondents are jointly and severally liable to pay the compensation? and thereafter, proceeded to receive evidence and finally, dismissed the claim application filed under Section 166 of the M.V. Act. The said decision of learned Tribunal is under challenge at present on the grounds, such as, (i) dismissal of the claim application is illegal and without any proper reasoning;(ii) not justified for the learned Tribunal to disbelieve P.W.3 and for the reason that the registration number of the offending vehicle could not be mentioned in the FIR;(iii) such details of the vehicle must have been within the knowledge of the claimants and others but it was not expected to be instantly revealed in view of the critical condition of the deceased after the accident;(iv) for the fact that, learned J.M.F.C, Chandikhole has taken cognizance of the offences against the offending vehicle's driver vide Ext.3 which could not have been ignored. With the above grounds pleaded, the appellants contend that learned Tribunal was not justified in dismissing the claim application filed by them.

4. Heard Mr. Das, learned counsel for the appellants and Mr. Ali, learned counsel for respondent No. 2. None appears for respondent No.1 at the time of hearing of the appeal.

5. Mr. Das, learned counsel for appellants would submit that learned Tribunal was not to disbelieve the evidence on record and merely for the reason that the registration number of the offending vehicle could not be mentioned in the FIR. It is further submitted by Mr. Das that notwithstanding any such final report by the local police with respect to the alleged accident, learned Tribunal was required to examine and appreciate the whole of the evidence and by taking cognizance of the order i.e. Ext.3 of learned J.M.F.C, Chandikhole in G.R. Case No.745 of 2009. According to Mr. Das, as on the basis of a protest petition filed in the G.R. Case, after the receipt of final report by the court learned J.M.F.C, Chandikhole, cognizance of the offences under Sections(s) 279 and 304-A I.P.C was taken by order 20th January,

2011 which corresponds to Badachana P.S. Case No.215 of 2009, learned Tribunal instead of considering the entire evidence and appreciating the same in its proper perspective was not right in dismissing the claim application with a finding that the offending vehicle was not involved. Hence, Mr. Das submits that the impugned judgment dated 27th November, 2018 of the learned Tribunal is liable to be set aside with a direction for payment of compensation in favour of the appellants.

6. Mr. Ali, learned counsel for respondent No.2, on the other hand, submits that learned Tribunal did not err in reaching at such a conclusion and well justified to disbelieve the involvement of the alleged vehicle since the registration number of the said vehicle was not disclosed in the FIR and the investigation was concluded with a final report. In absence of any such evidence regarding the vehicle to be involved and that the driver plying the same being rash and negligent, as according to Mr. Ali, learned Tribunal could not have allowed compensation in favour of the appellants, thus, therefore, the impugned judgment dated 27th November, 2018 is in accordance with law.

7. Perused the LCR.

8. Respondent No.2 filed WS and denied the involvement of the offending vehicle though insured with them at the relevant point of time with a policy valid from 21st October, 2008 to 20th October, 2009. In fact, respondent No.1 had entered appearance and also filed WS and admitted the ownership of the offending vehicle and claimed that the same to be insured with respondent No.2 and the driver concerned was having a valid DL and hence, insurer is liable to pay the compensation, however, later on, he was set ex parte on account of default.

9. The appellants claimed compensation for a sum of Rs.5 lac along with 12% interest per annum from the date of filing of the claim application till its realization but then, learned Tribunal considering the evidence on record, disbelieved the vehicle's involvement. The source of knowledge of P.W.1 describing the particulars of the vehicle was suspected and for the reason that he was not present at the spot and likewise, learned Tribunal rejected the testimony of P.W.2 though he lodged the report at Badachana P.S. but without any particulars of the truck with a plea that he was to provide the registration number of the vehicle later as orally promised to the local police and that on 8th October, 2009 disclosed the same with respondent No.1 being its registered owner but there was no response. The circumstances under which the FIR was lodged and why particulars of the vehicle could not be disclosed therein is a matter to be examined.

10. Admittedly, a protest petition was filed by P.W.2 in connection with G.R. Case No.745 of 2009, whereafter, order of cognizance dated 20th January, 2011 was passed by the court of learned J.M.F.C, Chandikhole. By such order, the driver of the offending vehicle stands prosecuted for offences under Section(s) 279 and 304-A IPC. The learned Tribunal has taken judicial notice of the said order in G.R. Case No.745 of 2009 but still was not inclined to accept the plea of the appellants. As it is

made to reveal from the record, local police could not detect the offending vehicle and hence, submitted the final report dated 26th December, 2009. The alleged accident took place on 3rd October,2009 and by the end of 2009 with the investigation concluded, he final report was submitted after the offending vehicle could not be traced. A question was raised by learned Tribunal as to why the registration number and other details of the offending vehicle could not be revealed in the FIR? The occurrence took place in the evening hours of 3rd October, 2009. Promptly after the accident, the report was lodged at about 7.30 P.M. registered as Badachana P.S. Case No.215 of 2009. It is claimed by the appellants that 3 to 4 days after the alleged accident, the registration number of the vehicle could be ascertained. If such is the case, was it not brought to the notice of the local police? In view of the delay in disclosure or non-disclosure regarding the registration number of the offending vehicle, it has led to the submission of final report, which appears to have influenced learned Tribunal to disbelieve the plea of the appellants. The final report prima facie suggests that there was no information available with the PS with respect to the offending vehicle. On the one hand, due to the fact that the offending vehicle could not be detected, the final report was furnished and on the other hand, the appellants claim that such disclosure was not possible at the time of lodging of the FIR but involvement of the vehicle could be ascertained, three to four days thereafter.

11. There is no denial to the fact that an accident had taken place in the evening of 3rd October, 2009 which caused death of the deceased, a young man of 22 years. After the accident, it is also not in dispute that FIR was lodged immediately at 7.30 P.M. on the said date. Such prompt lodging of FIR is a strong piece of circumstance in favour of the accident. Only for the reason that the details of the vehicle were not revealed in the report when it was lodged and thereafter, till the continuance of the investigation has apparently persuaded the learned Tribunal to dismiss the claims case. It cannot be gainsaid that for the alleged accident, P.W.2 knocked the doors of learned J.M.F.C, Chandikhole and thereafter, by order dated 20th January, 2011 in G.R. Case No.745 of 2009, cognizance of the offences under Section 279 and 304-A IPC has been taken against the driver of the alleged vehicle. The said fact cannot be lost sight of since learned J.M.F.C., Chandikhole on a subjective satisfaction took the cognizance of the offences on 20th January, 2011. In other words, prima facie, a case of rash and negligence of the driver of offending vehicle was made out which allowed the learned court to pass the order of cognizance in G.R. Case No.745 of 2009.

12. Against the aforesaid backdrop and considering the evidence of the appellants before learned Tribunal, the Court is of the humble view that in a proceeding before Claims Tribunal under the M.V. Act, a beneficial piece of legislation, the evidence is to be appreciated in its entirety and not to be swayed away or easily influenced by the fact that there is a final report submitted by the local police. A case before a Tribunal is to be proved by preponderance of probabilities

and not beyond reasonable doubt, which is absolutely necessary in a criminal prosecution. The said aspect is to be kept in mind while considering the evidence in a claims proceeding. Some amount of flexibility is required while dealing with matters under the M.V. Act though the basic facts are needed to be proved. Each and every circumstance connected to an accident is to be duly examined with an expansive mindset. Normally, reporting of the details of the vehicle involved in accident is not possible or expected. In the instant case, the accident took place in the evening at 6 P.M. in the month of October, 2009. It could well neigh be possible to be not mindful and notice the offending vehicle and then to mention it in the report with all details. It does happen at times and under distressful condition after an accident and loss of life.

13. So, therefore, a Claims Tribunal, while dealing with an application for compensation is required to take judicial notice of each and every such aspect instead of blindly accepting the final opinion of the local police and shutting eyes to the evidence on record. If there is inordinate delay in reporting of the incident or any such circumstance which airs a cloud of suspicion strong enough to make the incident suspect, in such a situation, it would be correct and justified for the Claims Tribunal to dismiss an application for compensation. But, where there has been a report lodged with all promptitudes and from the source, involvement of the vehicle is revealed thereafter, the Tribunal should not ordinarily be suspicious but to consider it and by being little more proactive, provide the opportunity to the claimants to bring on record all such information about the same and also to explain why it was not with the local police leading to the submission of final report. At the cost of repetition, it is reiterated that a claims case is based on preponderance of probabilities and keeping in view the same, a request for compensation is to be examined. In the case at hand, the Court is of the humble view that a detailed and elaborate assessment of the evidence, in the facts and circumstances of the case, is necessary and the same has not been resorted to by learned Tribunal, hence, therefore, it needs an enquiry and reconsideration by a remand as the same would serve the purpose and meet the ends of justice.

14. Accordingly, it is ordered.

15. In the result, appeal under Section 173 of the M.V.Act filed by the appellants is hereby allowed. As a necessary corollary, the impugned judgment dated 27th November, 2018 passed in M.A.C. Case No. 13 of 2011 by the learned Presiding Officer, 3rd M.A.C.T., Jajpur is hereby set aside for the reasons stated herein before with a direction as to restoration of the application filed under Section 166 of the M.V. Act to file for a fresh decision and disposal according to law and for the said purpose, to provide opportunity to the appellants to furnish additional evidence. Since the incident is of the year 2009, it is further directed that learned Tribunal shall ensure disposal of the claims case at the earliest preferably within a period of three months from the date of receipt of a copy of this order.

16. In the circumstances, however, there is no order as to costs.

—— o ——

2024 (II) ILR-CUT-628

SASHIKANTA MISHRA, J.

W.P.(C) NO. 28959 OF 2021

SUJATA PARIJA ……Petitioner

-V-

BERHAMPUR UNIVERSITY & ORS. ……Opp.Parties

ACADEMIC MATTER – The petitioner had obtained M.A degree in the year 1993, but could not secured her desired marks – She again appeared the examination to improve her percentage of marks and passed securing 59.4% marks – Basing upon complain of an outsider, University issued impugned notification withdrawing/cancelling the M.A degree of the petitioner – Whether the impugned notification is sustainable? – Held, No, this action is entirely unconscionable in law.

Case Laws Relied on and Referred to :-

1. 1995 SCC Supl (4) 100 : Union of India and Ors. vs. M.Bhaskaran.
2. (2003) 8 SCC 319 : Ram Chandra Singh Vs. Savitri Devi.
3. AIR 1990 SC 1075 : Sanatan Gauda vs. Berhampur University and Ors.
4. O.J.C. Nos. 2440 of 1985 & 3345 of 1988 : Reeta Vs. Berhampur University & Ors.
5. W.P.C. No.9988/2022 : Yogesh Kumar Chand Vs. State of Odisha and Ors.
6. (2001) 5 SCC 629 : Sikkim Subba Associates Vs. State of Sikkim.

For Petitioner : Mr. Dayananda Mohapatra.

For Opp.Parties : Mr. Anshuram Mishra, Mr. S.C.Dash, Mr. S.K.Das (Intervener)

JUDGMENT Date of Judgment : 18.03.2024

SASHIKANTA MISHRA, J.

Being aggrieved by the cancellation of her M.A. degree by the Berhampur University, the Petitioner has approached this Court seeking the following relief;

> *"Under the aforesaid circumstances the petitioner most humbly prays that this Hon'ble Court may graciously be pleased issue rule Nisi calling upon the opposite parties to show cause;*
>
> *As to why the impugned order in Annexure-8 and the resolution of the Syndicate/ Council in Annexure-9 Series shall not be quashed.*
>
> *And as to why the certificate issued to the petitioner by the University vide Annexure-2 shall not be restored and held valid and operating;*
>
> *And as to why the petitioner shall not be held eligible to get all consequential benefits on the basis of the certificate and mark sheet issued vide Annexure-2;*
>
> *And if the opposite parties fail to show cause or show insufficient cause to make the said rule absolute by issuance of an appropriate writ(s), order(s), direction(s) as this Hon'ble Court may think fit and proper;*
>
> *And/or to pass such further order(s), direction(s) as this Hon'ble Court deems just, fit and proper under the facts and circumstances of the present case.*
> *And for this act of kindness, the petitioners shall as in duty bound ever pray."*

2.(i). The facts of the case briefly stated are that the Petitioner having completed her graduation from S.V.M. College, Jagatsinghpur in the year 1986, appeared in the

M.A. examination in History under Utkal University as non-collegiate candidate and passed in the 3rd division in the year 1989. Basing on such qualification she was engaged as Lecturer in History on 13.l1.1990 in Kaduapada Higher Secondary School (Girls') in the district of Jagatsinghpur against the 2nd post. The School was subsequently renamed as Gadi Bramha Mahila Higher Secondary School, Kaduapada. In order to improve the percentage of marks, the Petitioner took admission under Berhampur University as non-collegiate candidate in the year 1993, but could not secure her desired marks because of illness. She repeated such examination to improve her percentage of marks under Berhampur University in the year 1996 and passed securing 59.4% marks. The University issued P.G. Certificate and mark sheets, copies of which are enclosed as Annexure-2 series.

(ii) The Petitioner submitted such certificates before the College authority, who recommended her name for grant-in-aid in consideration of her marks.

(iii) A dispute arose with regard to holding of the 2nd post between the Petitioner and one Nirmala Kumar Biswal, the intervener (Opposite Party No.6), who, though appointed against the 3rd post laid her claim as against the 2nd post. The dispute was taken to the State Education Tribunal and after hearing, the Tribunal held that the Petitioner's appointment against the 2nd post is valid. According to the Petitioner, the intervener-Opposite Party No.6 had challenged the judgment of the Tribunal in an appeal before this Court, but the same was dismissed.

(iv) Having thus failed in her attempt to be considered against the 2nd post, the Opposite Party No.6 submitted a written objection before the authorities of the Berhampur University alleging that the Petitioner was ineligible to appear in the M.A. examination for which the certificate issued by the University was invalid.

(v) The University issued a show cause notice dated 17.11.2012, basing on such objection, to the Petitioner stating that she had suppressed the fact of her passing M.A. examination earlier from Utkal University with repeat examination and thereafter appeared as non-collegiate candidate under Berhampur University in 1993-94, which was contrary to the prevailing rules and regulations to the effect that a candidate cannot appear in the M.A. examination twice on the same subject under different Universities.

(vi) The Petitioner challenged the aforesaid show cause notice before this Court in W.P.(C) No.24273/2012 refuting the allegation of suppression of facts and questioning the legality of the show cause notice issued after long lapse of 16 years. This Court, vide order dated 18.11.2019 directed the University to consider the representation of the Petitioner and to pass appropriate order giving opportunity of hearing.

(vii) The Petitioner submitted another detailed representation with prayer to drop the allegations. She personally appeared on 12.2.2020 and asked for the application form submitted by her at the relevant time, so that the allegation that she had suppressed the material facts could be rebutted, but the application form was not

provided on the ground that the same had been eaten by white ants. The matter was referred to the Syndicate and Academic Council, which resolved to withdraw the result/degree of the M.A. examination of the Petitioner issued earlier in August, 1996 and asked the Petitioner to surrender the original mark sheet/certificate as per order dated 5.11.2020, copy of which is enclosed as Annexure-8.

3. On such facts, it is stated that the action of the University in withdrawing the degree awarded to the Petitioner after lapse of 16 years is illegal and unjustified besides being hit by the principle of estoppel. It is further stated that the University authorities have not been able to substantiate the allegation that there was any suppression of material facts by the Petitioner at the relevant time but merely on the objection submitted by an outsider having a vested interest, they have taken such a drastic step, which cannot be countenanced in law.

4. The University has filed a preliminary affidavit refuting the averments made in the Writ Petition. It is stated that on the basis of a letter of the Chancellor dated 19.1.2011 enclosing the representation of the intervener-Opposite Party No.6, the University came to know that the Petitioner had earlier passed M.A. in History from Utkal University in 1991 before applying to the Berhampur University for appearing in M.A. examination in the same subject also. Under the prevailing regulation and instructions of the University for the P.G. course, no student who has passed P.G. examination except from Berhampur University can appear in another P.G. examination. Had the Petitioner stated so, she would not have been allowed to appear in the same subject. Therefore, she had suppressed the fact of her passing P.G. examination from Utkal University in the same subject. Pursuant to the order of this Court in the earlier Writ Petition filed by the Petitioner, opportunity of personal hearing was given to her by the Controller of Examination and necessary documents as sought for by her were also duly supplied. The Controller of Examination called upon her to attend the hearing with all original documents, but she could not produce the same and produced only photo copies. The matter was placed before the Academic Council which resolved on 8.10.2020 to withdraw the result/degree of the Petitioner in M.A. in History granted in September, 1993 and the subsequent examination for improvement granted in August, 1996. The resolution of the Academic Council being placed before the Syndicate, was duly approved on 12.10.2020 and a notification dated 5.11.2020 was issued with direction to the Petitioner to surrender the original mark sheets/certificates issued to her. On such averments, it has been stated that the Petitioner would not have been allowed by the University to appear in the M.A. examination in the same subject as she had suppressed the fact of passing of the same examination from Utkal University.

5. Heard Mr. Dayananda Mohapatra, learned counsel for the Petitioner, Mr. Anshuram Mishra, learned counsel for the Berhampur University, Mr. S.C. Dash, learned counsel for the Principal of the College and Mr. S.K.Das, learned counsel for the intervener-Opposite Party No.6.

6. Mr. D.Mohapatra would argue that the action of the authority in agitating the issue after 16 long years of issuance of the degree in favour of the Petitioner and that too at the instance of an outsider is squarely hit by the principle of estoppel and otherwise unjustified. In any case, it has been the consistent case of the Petitioner that she had not suppressed any material fact at the time of submitting application for appearing in the M.A. examination before the Berhampur University. The onus was on the University authorities to prove otherwise, which they miserably failed to do. Therefore, Mr. Mohapatra argues, the Petitioner could not have been held guilty of suppression of facts. That apart, the relevant regulation-F(b)(i) and (c) (i) only postulates that there is a bar for a candidate to appear in the M.A. examination in one subject if he/she has acquired P.G. degree in another discipline/subject. There is no bar for a candidate to appear in the P.G. examination under Berhampur University if he/she has already appeared and passed P.G. examination in the same subject from another University.

7. Mr. Anshuram Mishra, learned counsel, on the other hand, has referred to the Instructions to Non-Collegiate candidates issued by the University prevalent in 1993, Clause-F (c) (i) mandates that no candidate who has passed the M.A. examination except from Berhampur University will be allowed to appear in another M.A. examination. Mr. Mishra argues that in view of the bar as above, the Petitioner could not have appeared in the M.A. examination in History having already passed such examination from Utkal University. He further submits that it is evident that she had appeared in the examination of the Berhampur University suppressing the fact of her earlier degree from Utkal University as otherwise she would not have been allowed to appear in the Berhampur University. Mr. Mishra concludes his arguments by submitting that the University authorities have acted entirely in terms of the Regulations/Instructions and therefore, there can be no estoppel against law.

8. Mr. S.C.Dash, learned counsel, submits that the School has no role to pay in the dispute and it is for the University to decide whether the degree and certificate issued in favour of the Petitioner is valid or not. The School would abide by whatever is finally decided in the matter.

9. Mr. S.K.Das, learned counsel for intervener (Opposite Party No.6) referring to the objection filed by his client before the Chancellor argues that the petitioner by suppressing the material fact managed to get the M.A. degree from Berhampur University improving her marks only with the intention of getting grant-in-aid. Since the degree so obtained by her is a product of fraud, it has no force in the eye of law and the University very rightly cancelled the same. He also relies upon the Instructions issued to Non-Collegiate candidates to contend that except for candidates of Berhampur University no other candidate is entitled to appear in an examination in the same University to improve his/her earlier performance.

10. It is borne out from the records that a complaint was submitted by the intervener (Opp.Party No.6) on 10.1.2011 addressed to the Controller of Examination,

Berhampur University, copy of which appears to have been submitted also to the Chancellor. The Office of the Chancellor forwarded the complaint to the Registrar of Berhampur University by letter dtd.19.1.2011 with direction to take appropriate action in the matter. This is the genesis of the dispute that is sought to be adjudicated in the present Writ Petition. It is stated that the Petitioner acquired M.A. degree in History from Utkal University in 1989 and again in the year, 1991 through a repeat examination. Thereafter she appeared in M.A. examination in History in 1993 and repeated the same examination in the year 1996 from Berhampur University as a non-collegiate candidate. Though all these facts have not been explicitly averred in the Writ Petition, yet the same are borne out from the complaint dated 10.1.2011 submitted by the Opposite Party No.6. Basing on such complaint, the Controller of Examination of Berhampur University issued a show cause notice to the Petitioner on 17.11.2012 (Annexure-3) stating all the above facts and specifically alleging that she had suppressed the fact of passing M.A. in History from Utkal University. Reference was also made to the prevailing rules/regulations to the effect that a candidate cannot appear in the examination twice on the same subject in different Universities. In her detailed reply (Annexure-7) submitted on 10.1.2020 (pursuant to order dtd.18.11.2019) passed in W.P.(C) No.24273/2012, the Petitioner related all the necessary facts including the fact of her passing M.A. examination earlier from Utkal University and by specifically taking the plea that she had disclosed such fact in her application at the time of registration as Non-Collegiate candidate. It was also stated that it was the duty of the University not to have permitted her to appear in the M.A. examination in 1993 as a non-collegiate candidate. But having done so, the University cannot question the degree so awarded to the Petitioner after long lapse of 16 years.

11. Thus, the crux of the dispute appears to be two fold;

(a) whether the Petitioner is guilty of suppression of material facts; and

(b) whether it was permissible for the Petitioner to have appeared in the M.A. examination in History under Berhampur University having earlier passed such examination from Utkal University.

12. It has been argued by learned counsel appearing for the University as well as the intervener-Opposite Party No.6 that suppression of material facts, in this case relating to passing of M.A. examination in History from Utkal University, amounts to fraud. There is no dispute with the proposition that suppression of material facts amounts to fraud, but then it is also well settled that fraud is to be specifically pleaded and proved. In the case of ***Union of India and others vs. M.Bhaskaran***[1] , the Supreme Court has observed that if by committing fraud any employment is obtained, the same cannot be permitted to be countenanced by a court of law as the employment secured by fraud renders it voidable at the option of the employer. 'Fraud' means an intention to deceive; whether it is from any expectation of

1. 1995 SCC Supl (4) 100

advantage to the party himself or from ill will towards the other is immaterial. Further, the expression 'Fraud' involves two elements, deceit and injury to the person deceived. Misrepresentation itself amounts to fraud. A fraudulent misrepresentation is called deceit. It is a fraud in law, if a party makes representation, which he knows to be false. However, fraud is proved only when it is shown that a false representation has been made (i) knowingly, or (ii) without belief in its truth, or (iii) recklessly, careless whether it be true or false. Reference in this regard may be had to the judgment of the Supreme Court rendered in the case of ***Ram Chandra Singh Vs. Savitri Devi***[2] . The bottom line is, wilful suppression of material facts as has been alleged in the instant case, would amount to an act of fraud. At this juncture it may be apt to refer to the oft-quoted *maxim fraus et jus nunquam co-habitant* which means 'fraud and justice never dwell together'. This is a pristine maxim oft quoted in the judgments of the High Courts and the Supreme Court of this Country.

13. Coming to the facts of the present case, in the light of the legal propositions referred to in the preceding paragraph, this Court finds that the basic allegation against the Petitioner is that she had suppressed the fact of possessing M.A. degree in History from Utkal University at the time of applying for appearing in M.A. examination in History again in Berhampur University in the year 1993. However, not a scrap of material is put forth to substantiate such allegation. The burden of proving the allegation obviously rests on the person making the same, in this case, the University more so on the face of specific denial thereof by the Petitioner. Surprisingly, the University has taken a stand that the application form submitted by the Petitioner is not available being eaten by white ants. So how could it arrive at a conclusive determination that the Petitioner had suppressed the material facts in her application form? As it appears, suppression is being inferred, but then in the absence of the application form itself such inference would be too farfetched to be accepted. This Court is therefore, of the considered view that the basic allegation that the petitioner had suppressed material facts while applying for appearing in the M.A. examination in Berhampur University is not established at all.

14. This takes the Court to the second point in dispute that is, whether it was otherwise permissible for the Petitioner to have appeared in M.A. examination in Berhampur University after having passed such examination earlier from Utkal University. In this regard, as already stated, the clauses of Regulation of the University for Non-Collegiate candidates for M.A. Degree Examination and Instructions issued to such candidates in the year 1993 have been relied upon. In the regulation under Chapter-V titled 'General Provisions', a non-collegiate candidate has, inter alia, been defined as 'who has not undergone the prescribed courses of study in College affiliated to the University or in a P.G. Department of the University and has been exempted by the University from production of Certificate

2. (2003) 8 SCC 319

of attendance'. So a candidate not being a student of any college affiliated to the University or in a P.G. Department of the University can be a non-collegiate candidate. Regulation 14 reads follows;

> *"A candidate after passing M.A. examination of this University or any other University recognized as equivalent thereto may, on payment of the requisite fees, be admitted to the M.A. examination of this University in a subject other than the one in which he/she was previously examined and if he/she attains the standard prescribed for the degree, may be granted a diploma of having passed the M.A. examination in the subject and class in which he/she passed."*

Thus, a candidate passing M.A. examination of any other University (recognized as equivalent) can be admitted to M.A. examination in a subject other than the one in which he/she passed.

15. In the instructions issued to non-collegiate candidate in 1993, Clause-F (c) (i) reads as follows;

> *"No candidate who has passed the M.A. examination except from Berhampur University will be allowed to appear in the M.A. examination. A candidate after passing M.Sc. examination will not be allowed to register for any M.Sc. or M.A. examination as a non-collegiate candidate".*

If the provisions of the Regulations referred to above and the Instructions to Non-Collegiate candidates are harmonized, it would imply that there is a bar for a candidate to appear in another M.A. examination in the same subject though there is no bar to appear in another subject. But then, Clause-14 of the Instructions reads as follows;

> "*The University reserves the right to allow or not to allow any candidate to appear the examination."*

16. Thus, notwithstanding the apparent impermissibility for a candidate of another University with a M.A. degree in one subject to appear in the same examination in the same subject in Berhampur University, the University still has the right to allow the candidate to sit in the examination as reflected in Clause-14 referred above. This is being said because this Court has already held that there is no proof that the Petitioner was guilty of wilful suppression of material facts. If such is the case, then obviously the University cannot take a stand that it was not aware of its own Rules and Regulations, rather by allowing such a candidate to appear in M.A. examination in 1993 and 1996, it must be deemed to have exercised its power under Clause 14 quoted above.

17. As regards the applicability of the law of estoppel, the Supreme Court in the case of ***Sanatan Gauda vs. Berhampur University and others***[3]; held that having permitted a candidate to appear in the examination, the University was estopped from refusing to declare the result of the said examination on the ground that there was irregularity in the admission. The Supreme Court held that the University

3. AIR 1990 SC 1075

authorities ought to have scrutinized the position before permitting him to take the examination, but not having done so, they cannot refuse to publish the results.

In the case of ***Reeta Vs. Berhampur University and Ors.***[4] a Full Bench ofthis Court applied the principle of promissory estoppel to a case where the University belatedly declared that the Petitioners have failed in the examination after having declared them to be passed. In such case, it was held that the Petitioner could be protected by the principle of promissory estoppel.

This Court, in a similar matter in the case of ***Yogesh Kumar Chand Vs. State of Odisha and others***[5] took a similar view relying upon the judgments of Sanatan Gauda (Supra) and Reeta (Supra).

18. Even otherwise, it is well settled that even in mandatory provision, under specific circumstances, a party can waive its right. Waiver means relinquishment of one's own right. It is referable to a conduct signifying intentional abandonment of right. It may be express or may even be implied but should be manifest from some overt-act. Waiver involves a conscious, voluntary and intentional relinquishment or abandonment of a known existing legal right. Thus, benefit, claim or privilege, which, except for such a waiver, the party would enjoy. Reference may be had in this regard to the judgment of Apex Court in the case of ***Sikkim Subba Associates Vs. State of Sikkim***[6] .

Here is a case of a person granted an M.A. degree way back in the year 1996, the benefit of which is sought to be taken away referring to the provisions of Regulations/Instructions without there being any proof of commission of fraud by her. This Court would rather place emphasis on equitable considerations particularly in view of the power conferred on the University under Paragraph-14 of the instructions quoted above that the University having allowed the Petitioner to appear in the examination cannot turn around at this distance of time, that too at the instance of a rank outsider and take away the benefit earlier granted by it to the Petitioner.

19. Thus, from a conspectus of the analysis of facts and law as also the rival contentions, this Court holds that the action of the University in issuing the impugned Notification withdrawing/cancelling the M.A. degree of the Petitioner granted in the year 1993 and 1996 is entirely unconscionable in law. As such, the impugned Notification warrants interference by this Court.

20. In the result, the Writ Petition is allowed. The impugned Notification issued by the University under Annexure-8 is hereby quashed. There shall be no order as to costs.

—— o ——

4. O.J.C. Nos. 2440 of 1985 and 3345 of 1988
5. (W.P.C. No.9988/2022) decided on 21.10.2022
6. (2001) 5 SCC 629

2024 (II) ILR-CUT-636

SASHIKANTA MISHRA, J.

BLAPL NOS. 12345 & 12628 OF 2023

RINTU TAREI & ANR. ……Petitioners

-V-

STATE OF ODISHA ……Opp.Party

&

S.K. HUSSAIN & ORS. -V- STATE OF ODISHA (BLAPL NO. 12628/2023)

CODE OF CRIMINAL PROCEDURE, 1973 – Section 173(8) r/w Section 36-A(4),36-C of NDPS Act – Offences under the NDPS Act – Whether the investigating officer by applying section 173(8) of Cr.P.C can pray to extent the investigation period beyond the statutory period as mentioned in the section 36-A(4) of the NDPS Act? – Held, Yes – On a conjoint reading of section 5 of Cr.P.C and section 36-C of NDPS Act, it is evident that there being no specific provision in the NDPS Act debarring the I.O from investigating further after submission of charge sheet, the provision under section 173(8) would apply in full force.

Case Laws Relied on and Referred to :-

1. AIR 1978 SC 1025 : Nandini Satpathy vs. P.L. Dani.
2. 2009 6 SCC 346 : Rama Chouduary v. State of Bihar.
3. 1985 5 SCC 223 : K. Chandrasekhar v. State of Kerala and Others.
4. 1994 AIR 2623 : Hitendra Vishnu Thakur & Others v. State of Maharashtra.
5. (2009) 17 SCC631 : Sanjay Ku.Kedia v. Intelligence Offr, Narcotics Control Bureau & Anr.
6. 2022 SCC OnLine Ker 6374 : Muhammed Ajmal v. State of Kerala.
7. (2022) 1 CLT (Cri) (Supp) 127 : Rajendar Kakodiya & Another v. State of Orissa.
8. (2018) 71 OCR 31 : Lambodar Bag v. State of Orissa.
9. (2021) 81 OCR 694 : Naresh Diggal v. State of Orissa
10. (2012) 3 Guwahati Law Reports 397 : Jayanandan Prasad & Another v. State of Assam.

For Petitioners : M/s. D.P. Dhal, Sr. Adv., Mr. B.S. Das Parida, S. Mohapatra, K. Mohanty, A. Ray, S.S. Lenka, K.K. Sethy & A. Pradhan, G.P. Behera, B. Behera & G. Padhi.

For Opp.Party : Mr. S.K. Mishra, ASC.

JUDGMENT Date of Judgment : 16.04.2024

SASHIKANTA MISHRA, J.

"To strike the balance between the needs of law enforcement on the one hand and the protection of the citizen from oppression and injustice at the hands of the law enforcement machinery on the other is a perennial problem of statecraft"- observed Justice V.R. Krishna Iyer quoting Lewis Mayers in his celebrated judgment in the case of ***Nandini Satpathy vs. P.L. Dani***[1], This Court, in the present cases is called upon to embark upon a path similar, for the cries of the accused persons for protection of their sanctimonious right of liberty is pitted against the demand of the investigating agency to curb the same, ostensibly for investigation of what according to it, is a heinous crime. Underlying the legal battle however is the more cherished objective of the court to uphold the majesty of the rule of law under the Constitutional jurisprudence.

1. AIR 1978 SC 1025

This in essence, is the task cut out before this Court in these cases.

Both these applications relate to the same case and have been filed by the petitioners seeking bail therein. As such both were heard together and are being disposed of by this common judgment.

2. The petitioners in these bail applications are in custody since 27.05.2023 in connection with Sahadevkhunta P.S. Case No. 366 dated 12.11.2022 corresponding to Special Case No.294 of 2022 pending in the Court of learned Special Judge, Balasore for the alleged commission of offences under Sections 21(C)/29 of NDPS Act.

3. The prosecution case is that on 12.11.2022, upon receiving reliable information regarding transportation of contraband brown sugar, the police personnel of Sahadevkhunta Police Station rushed to the spot, which is at Kantabania bridge, and apprehended two persons, namely, Sk. Sahabul@Sunil and Jada Soren. On search, 270 grams of brown sugar was recovered from their possession. Both of them were arrested and forwarded to the Court of Special Judge. Upon completion of investigation, charge sheet was submitted on 11.05.2023 but on an application filed by the arrested accused for default bail under Section 167(2) of Cr.P.C read with Section 36-A (4) of the NDPS Act, learned Special Judge by order dated 11.05.2023, directed their release as he found that the charge sheet had not been submitted within 180 days as stipulated. Charge sheet was submitted on 11.05.2023, purportedly keeping the investigation open as per Section 173(8) of Cr.P.C.. On 27.05.2023, the petitioners in the present bail applications were arrested on the basis of evidence collected during further investigation. The bail applications having been rejected by the learned Special Judge, they have approached this Court seeking bail.

4. Heard Mr. D.P. Dhal, learned Senior Counsel with Mr. Ansuman Ray, learned counsel for the petitioners and Mr. S.K.Mishra, learned Additional Standing Counsel for the State.

5. Mr. Dhal opens his arguments by submitting that the petitioners were in custody in connection with another case being Sahadevkhunta Case No. 352 of 2022 since 27.10.2022. Alleging that they had not been produced before the learned Special Judge after their arrest within the stipulated 24 hours, the petitioners moved applications for bail before the Special Judge, which being rejected, they approached this Court in CRLMC No.3703 of 2022. By Judgment passed on 17.05.2023, this Court held that the mandatory requirement of Section 57 of Cr.P.C. (read with Article 22 of the Constitution) had been violated and therefore, directed the petitioners to be released. Accordingly, the petitioners were released on 27.05.2023 but were again arrested in connection with the present case (Sahadevkhunta P.S. Case No. 366 of 2022) immediately upon their release from jail. In fact, they were supposedly arrested from outside the jail gates. Mr. Dhal forcefully argued that this by itself shows that the Investigating Agency was hell bent upon taking the petitioners to custody somehow and therefore, falsely entangled them in the present case even though their names do not find place either in the FIR or the charge sheet submitted in the present case. Mr. Dhal further argues that even otherwise, the Investigating Officer is not authorized to seek extension of time to complete investigation. He has relied upon several judgments in

this regard. On merits, Mr. Dhal has argued that there is not a whisper about the petitioners' involvement either in the FIR or in the charge sheet but their alleged involvement is sought to be established through the statements of two witnesses, namely, Debabrata Mishra and Rabindra Behera. According to Mr. Dhal, it is apparent that the said witnesses are stock witnesses of the Investigating Agency and have been utilized only for the purpose of taking the petitioners into custody again. Even accepting their statements for a moment, a prima facie case is not revealed against the petitioners. Moreover, there is nothing in their statements to show the involvement of the petitioners with the alleged occurrence.

6. Mr. S.K. Mishra, learned State Counsel, on the other hand, argues that the proposition of law cited by learned Senior Counsel that the Investigating Officer is not authorized to seek extension of time for the investigation is not applicable to the present case because the Investigating Officer did not seek extension of time to complete investigation as provided under Section 36-A (4) of the NDPS Act, but filed charge-sheet keeping the investigation open as per the provision under Section 173 (8) of Cr.P.C. After submission of charge sheet, Mr. Mishra further argues, the right of the Investigating Agency to collect relevant information, materials and evidence cannot be taken away. Mr. Mishra also argues that there is nothing on record to show that the case was built up against the petitioners falsely to take them into custody only because they were released in the earlier case as per orders passed by this Court in CRLMC No.3703 of 2023. On merits, Mr. Mishra would argue that both the witnesses have clearly stated about supply of brown sugar by the petitioners to the co-accused persons, which they had seen themselves.

7. Perusal of the order sheet of the case before learned Special Judge reveals that charge sheet in Sahadevkhunta P.S. Case No. 366 of 2022 was submitted on 11.05.2023 on which date the co-accused persons, namely, Sk. Sahabul@Sunil and Jada Soren were released on default bail as learned Special Judge found that charge sheet had been submitted after expiry of 180 days. In the charge sheet, the Investigating Officer had mentioned about keeping the investigation open under Section 173(8) of Cr.P.C. The order sheet does not reveal any specific petition being filed by the I.O. seeking permission to keep the investigation open under Section 173(8). Be that as it may, learned Special Judge stated in his order dated 11.05.2023 that the prayer of the Investigating Officer for extension of time will be considered after serving the copy to the other side. No further order appears to have been passed in this regard by learned Special Judge. On 09.06.2023, in course of hearing of the bail applications filed by the petitioners an argument was made that the Court not having accorded permission to the I.O. to continue the investigation after expiry of 180 days, he had no jurisdiction to do so nor to arrest the petitioners on the basis of the statements of some witnesses recorded by him during such further investigation. In paragraph -6 of order dated 09.06.2023, the Special Judge also noted that no written permission was accorded to the I.O. for further investigation of the case. Having held so learned Special Judge referred to two judgments of the Apex Court, i.e., ***Rama Choudhary v. State of Bihar***[2] and ***K. Chandrasekhar v. State of Kerala and others***[3], wherein it was held that carrying on

2. 2009 6 SCC 346 **3 .** 1985 5 SCC 223

further investigation even after filing of the charge sheet is a statutory right of the police and that the law does not require taking prior permission from the Magistrate. Accordingly, the contentions advanced on behalf of the petitioners were rejected.

The arguments made by learned Senior Counsel need to be considered in the above factual background. Learned Senior Counsel has relied upon the judgments of the Supreme Court in the case of ***Hitendra Vishnu Thakur & Others v. State of Maharashtra***[4], ***Sanjay Kumar Kedia v. Intelligence Officer***[5], ***Narcotics Control Bureau and Another,*** *and* ***Muhammed Ajmal v. State of Kerala***[6],.

8. Learned State Counsel has also relied upon the judgment of this Court in the case of **Rajendar Kakodiya & Another v. State of Orissa**[7]**, Lambodar Bag v. State of Orissa**[8]**,** and **Naresh Diggal v. State of Orissa**[9]**,** as also of the Gauhati High Court in the case of **Jayanandan Prasad & Another v. State of Assam**[10]**.**

It has been argued by learned Senior Counsel that the provision under Section 36-A (4) does not authorize the Investigating Officer but only the Public Prosecutor to seek extension of time for completion of investigation. For immediate reference Section 36-A (4) is quoted herein below.:-

> *"(4) In respect of persons accused of an offence punishable under section 19 or section 24 or section 27A or for offences involving commercial quantity the references in sub-section (2) of section 167 of the Code of Criminal Procedure, 1973 (2 of 1974), thereof to "ninety days", where they occur, shall be construed as reference to "one hundred and eighty days":*
>
> *Provided that, if it is not possible to complete the investigation within the said period of one hundred and eighty days, the Special Court may extend the said period up to one year on the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of one hundred and eighty days."*

A plain reading of the provision makes it evident that power is conferred on the Special Court to extend the period of completion of investigation on the report of the Public Prosecutor in the manner stated therein. The decisions cited by Mr. Dhal have all emphasized the statutory mandate that it is the Public Prosecutor alone who can pray for extension of time to complete investigation and not the Investigating Officer. The case at hand however, stands on an entirely different footing inasmuch as charge sheet has already been submitted and the I.O. has sought to take recourse to Section 173 (8) of Cr.P.C. to keep the investigation open. Obviously, the provision under Section 36-A (4) would have no application once charge sheet is submitted. It has been argued that N.D.P.S. Act being a Special statute and there have being no provision in it akin to Section 173 (8) of Cr.P.C., the I.O. could not have kept investigation open after submitting the charge sheet. In this regard, Section 5 of the Cr.P.C. has been referred to by learned Senior Counsel, which reads as follows:-

4. 1994 AIR 2623 **5**. (2009) 17 SCC 631
6. 2022 SCC OnLine Ker 6374 **7**. (2022) 1 CLT (Cri) (Supp) 127
8. (2018) 71 OCR 31 **9**. (2021) 81 OCR 694
10. (2012) 3 Guwahati Law Reports 397

> *"**5. Saving**.—Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force."*

On such basis, it is argued that the provision under Section 173(8) cannot be applied to a case under N.D.P.S. Act.

This Court is however unable to accept the argument as above since it finds that Section 36-C of the NDPS Act takes care of such contingency, which reads as follows:-

> *"36-C. Application of Code to proceedings before a Special Court.-Save as otherwise provided in this Act, the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) (including the provisions as to bail and bonds) shall apply to the proceedings before a Special Court and for the purposes of the said provisions, the Special Court shall be deemed to be a Court of Session and the person conducting a prosecution before a Special Court, shall be deemed to be a Public Prosecutor."*

Thus, on a conjoint reading of Section 5 of Cr.P.C. and Section 36-C of N.D.P.S. Act, it is evident that there being no specific provision in the NDPS Act debarring the I.O. from investigating further after submission of charge sheet, the provision under Section 173(8) would apply in full force. To the above extent therefore, the reasoning adopted by learned Special Judge as mentioned above cannot be faulted with.

9. Mr. Dhal, learned Senior Counsel then argued that the petitioners were released from custody in the earlier case on the basis of judgment passed by this Court in CRLMC No.3703 of 2022 as it was proved that they had been forwarded to the Court beyond 24 hours. Since this was an embarrassment for the Investigating Agency, it has tried to cover up the same by arresting the petitioners again immediately upon their release from jail in the said case by building up a false case against them.

10. Learned State Counsel has tried to counter such contentions by submitting that the Investigating Agency cannot be attributed with such malafides.

11. There seems to be no dispute with regard to the factual position that the petitioners were arrested on 27.05.2023, i.e., on the day on which they were released from jail in connection with the previous case (Sahadevkhunta P.S. Case No. 352 of 2022). It is also stated that they were arrested just as they had stepped out of the jail gate. Now simply because they were arrested on the same day and in front of the jail gate cannot, ipso facto, lead to the conclusion that the Investigating Agency was actuated with a malafide intent to somehow take them into custody, in view of the order passed by this Court directing their release in the previous case. It is urged by learned State Counsel that nothing has been placed before this Court to persuade it to arrive at such a conclusion and that the possibility that the arrest in the present case, upon their release from custody in the previous case was a mere coincidence, cannot be entirely ruled out.

12. This Court finds that according to the prosecution, the involvement of the petitioners in the present case came to light from the statements of two witnesses, Debabrata Mishra and Rabindra Behera recorded on 24.05.2023 by the I.O. in course of

further investigation. If such was the case, what stopped the I.O. from seeking order for remand of the petitioners from the Special Court shortly after recording of the statements of the two witnesses as by then they were already in custody in connection with the previous case ? . The I.O. instead allowed two days to pass and swung into action only when the petitioners were directed to be released on 27.05.2023 by order of this Court. This inaction for two days is inexplicable and being tell-tale, lends considerable support to the argument of learned Senior Counsel that the I.O. was actuated with the desire to somehow detain the petitioners in custody so as to nullify the order of this Court passed in respect of the previous case. At this juncture, this Court would observe that no matter how serious the allegations may be against a person, adherence to the legal principles cannot be given a go-bye. The need to respect the Rule of law by all stakeholders in the criminal justice system cannot be over-emphasized. The petitioners may or may not be guilty of the accusations but their fundamental rights guaranteed under the Constitution cannot be whittled down, trammeled or done away with under any circumstances.

13. Coming to the merits of the case, it is seen that the FIR lodged by one Mukunda Murari Patra on 12.11.2022 relates to a specific occurrence that took place on that day at about 2.20 P.M. The co-accused persons, Sk. Sahabul@Sunil and Jada Soren were apprehended and on their personal search brown sugar weighing 273 grams was found. There is absolutely no mention regarding the involvement of the petitioners. In the charge sheet submitted on 11.05.2023 also, there is no mention whatsoever of any role having been played by the petitioners in the alleged occurrence. The I.O. is said to have examined one Debabrata Mishra and Rabindra Behera on 24.05.2023 and on such basis arrested the petitioners on 27.05.2023. This Court has already held that there was nothing wrong in the procedure so adopted by the I.O. to further investigate the case after submission of charge sheet but then it needs to be seen as to what the witnesses have stated. Both of them have stated parrot-like that on 12.11.2022, they had seen the apprehension of the co-accused persons, Sk. Sahabul@Sunil and Jada Soren in presence of the witnesses and of the recovery of brown sugar from their possession. They again say that they were aware of the fact that the petitioners were selling brown sugar to the co-accused persons. Further, somewhere around 15th Septembers, 2022, they had seen all five of them selling a big brown packet to the co-accused persons, which they had seen to contain brown sugar. They further say that as the petitioners were antisocials, they could not say anything before the police at the relevant time and only after knowing that they were taken to custody, they mustered courage to speak about the occurrence.

14. Read objectively, the statements of the two witnesses, prima facie, appear to be too far-fetched and vague to be believed. Firstly, there is no reason as to why the I.O. did not cite them as witnesses in the charge sheet, if they were present near the spot at the time of apprehension close enough to know that the packet found from the co-accused persons contained brown sugar. Secondly, if the petitioners and the co-accused persons according to them are anti-socials then how could they muster courage to stand so close to them during the alleged sale of brown sugar so as to know that it was brown sugar. Thirdly, they have stated nothing otherwise to link the petitioners with the alleged occurrence, save and except for vaguely stating that they had seen them selling brown sugar to the co-accused persons around 15th September, 2022. The date of occurrence, it

must be kept in mind is 12.11.2022. So essentially, the witnesses are referring to the alleged sale of brown sugar by the petitioners that happened at least two months prior to the occurrence. All these incongruities create reasonable doubt in the mind of the Court as regards the veracity of their versions. If the statements of these two witnesses are discarded, prosecution is left with no other material/evidence to link the petitioners with the alleged occurrence. It is needless to mention that in order to justify arrest of a person a prima facie nexus between him and the alleged occurrence must be shown to exist. From what has been discussed hereinbefore, this Court is of the considered view that such a proximate nexus does not exist in the present case so as to justify the detention of the petitioners in custody. In other words, this Court does not find a prima facie case against the petitioners justifying their arrest on 27.05.2023. As such, they are entitled to be set at liberty.

15. For the foregoing reasons therefore, the bail applications are allowed. Let the petitioners be released on bail on such terms and conditions as the court below may deem fit and proper to impose including the following conditions-

i. They shall appear before the IIC of Sahadevkhunta Police Station on every Sunday at 10.00 A.M. for a period of six months and such fact shall be certified by the I.O. to the Special Court once in every fortnight.

ii. They shall personally appear before the court below on each date of posting of the case and no representation through counsel shall be allowed under any circumstances.

iii. They shall not commit similar or any other offence.

—— o ——

2024 (II) ILR-CUT-642

A.K. MOHAPATRA, J.

W.P.(C) NO. 35563 OF 2020 WITH BATCHES

[W.P(C) Nos. 18, 29014, 29157/2019, 1379, 1795, 2901, 6334, 13702, 2808, 33005, 33220, 33224, 33921, 33957, 34175, 34177, 34987, 35081, 36105, 36106, 36180, 37242, 37250/2020, 4804, 4805, 4807, 4809, 4813, 4816, 4820, 4822, 4826, 4830, 4920, 4928,4932, 4934, 4935, 4937, 4939, 4940, 4942, 4943,4946, 4947, 4949, 4951, 4952, 6129, 6132, 6140, 6276, 8050, 8702, 9193,9733, 9737, 10192, 10197, 10294, 10297, 10420, 10421, 10507, 10588,11916, 11917, 11918, 12200, 12559, 13206, 13209, 13938, 14646, 24130, 24134, 25088, 26741, 27020, 27391, 28628, 29090, 29551, 31345, 31815, 31888, 31947, 32454, 32456, 32458, 32461, 32463, 32621, 33338, 33339, 33536, 34165 & 4I703/2021]

AMARESH BEHERA & ORS. ……Petitioners

-V-

STATE OF ODISHA & ORS. ……Opp.Parties

ODISHA PHARMACIST SERVICE (METHOD OF RECRUITMENT AND CONDITIONS OF SERVICE) RULE, 2019 – Rule, 4(1) r/w amendment notification dtd. 27.11.2020 – Regularization of service of pharmacist – During pendency of the writ petition the amendment to rule 4(1) of the 2019 Rule came into force with effect from 28.11.2020 – Whether the service of petitioner in the post of pharmacist should be regularized as

per amendment Rule? – Held, as the petitioners have rendered a long periods in the post, a valuable right had accrued in favour of the petitioners for their absorption against regular vacant posts of Pharmacist as per rule 4(1) of the 2019 Rules as one time measure.

(Para 47)

Case Laws Relied on and Referred to :-

1. 2023 LiveLaw (SC) 294 : The Government of Tamil Nadu and Anr. Etc. v. Tamil Nadu Makkal Nala Paniyalargal and Ors. Etc. Etc..
2. 2023 LiveLaw (SC) 91 : Vibbhuti Shankar Pandey v. State of Madhya Pradesh and Others.
3. 2022 LiveLaw (SC) 296 : The Managing Director, Ajmer Vidhyut Vitran Nigam Ltd., Ajmer & Anr. V. Chiggan Lal & Ors.
4. (2006) 4 SCC 1 : 2022 LiveLaw (SC) 296; Secretary, State of Karnataka and others v. Umadevi and others.
5. (2019) 19 SCC 626 : State of Odisha and another v. Anup Kumar Senapati.
6. (2011) 14 SCC 243 : State of Jammu & Kashmir and others v. Ajay Dogra.

For Petitioners : Mr. Budhadev Routray, Sr. Adv.,
M/s. B. Singh, R.P. Dalai, K. Mohanty & S.K.Samal.

For Opp.Parties : Mr. Saswat Das, A.G.A. (O.P.Nos. 1,2 & 4)
M/s. B.P. Tripathy, R. Achary, N. Barik, A.K. Dash &
S. Hidayatullah (O.P. No.3-N.H.R.M.)

JUDGMENT Date of Hearing : 08.02.2024 : Date of Judgment : 26.04.2024

A.K. MOHAPATRA, J.

The present batch of writ applications have been filed by a group of persons, who are working as Pharmacists under the Opposite Party No.4, challenging the action/inaction of the Opposite Parties in not regularizing/absorbing their services and consequently not inducting them in the cadre of Pharmacist under the provisions of the Odisha Pharmacist Service (Methods of Recruitment and Conditions of Service) Rules, 2019 (in short "2019 Rules"). The Opposite Parties, as it appears, denied regularization of service of the Petitioners as Pharmacist solely on the ground that the Petitioners are working in Mobile Health Unit (MHU), hence, their services are not covered under the aforesaid rules of the year 2019. Although the Petitioners have taken a stand that there is no prohibition under any law or the rules referred to hereinabove to exclude the category of the present Petitioners from the purview of Pharmacist merely because the Petitioners are employed in Mobile Health Units, and the presumption of the Opposite Parties that they are excluded from the purview of the 2019 Rules is highly illegal, arbitrary and discriminatory.

2. In the present batch of writ applications, the Petitioners have specifically prayed for quashing of the clarificatory letter dated 20.03.2019 under Annexure-9 issued by the Opposite Party No.1 and letter dated 23.03.2019 issued by the Opposite Party No.3 under Annexure-10 to the writ application. In addition to the above prayer, a further prayer has been made for issuance of a writ of mandamus directing the Opposite Parties to include the names of the Petitioners in the gradation list for the post of Pharmacist and to regularize the services of the Petitioners as Pharmacist and thereby induct the Petitioners in the gradation list meant for the Pharmacist as per the provisions contained in the above noted 2019 Rules and, consequentially, extend all service and financial benefits to the Petitioners as has been done in the case of their counterparts.

3. The factual background leading to the filing of the present batch of writ applications, bereft of all unnecessary details, is that initially Zilla Swasthya Samiti, Mayurbanj issued an advertisement on 11.08.2011 for recruitment to various posts for Mobile Health Unit under N.R. H. M. in Mayurbhanj District including 33 posts of Pharmacist. Pursuant to the aforesaid advertisement, the Petitioners, and similarly situated many other candidates, who were having the requisite qualification as prescribed in the advertisement, applied for the post of Pharmacist. In due course of selection, the Petitioners and similarly situated many other candidates were duly selected and were appointed through a fair and transparent selection procedure. Ever since their initial appointment the Petitioners have been continuing as Pharmacists as of now. While the matter stood thus, on 29.10.2008 in pursuance to the Finance Department Circular dated 31.12.2010, instructions were issued to all the C.D.M.Os., Superintendents of Medical Colleges for filling up the Para Medical posts including the post of Pharmacist on contractual basis. It is relevant to mention here that such contractual posts were created after abolition of regular vacant posts. After such contractual appointment, the Pharmacist Association made a demand before the Government for regularization of the service of such contractual Pharmacists. The Government of Odisha pursuant to such demand and after a careful consideration was pleased to take a decision to the effect that the Pharmacist appointed on contractual basis on completion of 6 years of uninterrupted contractual service will be eligible for appointment as regular Pharmacist. Moreover, clause(D) of the Resolution dated 29.10.2008 specifically provides that the Pharmacists, who are working in Mobile Health Unit will be eligible for regular appointment after completion of 6 years of service.

4. While this was the position, the Government of Odisha issued another resolution through the Opposite Parties No.1 and 2 on 13.05.2013 referring to the earlier resolution dated 29.10.2008 and on supersession of the above noted Circular dated 31.12.2010, the Government of Odisha was pleased to formulate a comprehensive policy for regularization of contractual Pharmacists. Further, it was also provided that such regularization of contractual Pharmacists shall be made on the basis of their seniority subject to completion of 6 years of service. Further, Clause-9 of the aforesaid resolution provides that the past service of such contractual Pharmacists rendered in various projects/schemes including the Mobile Health Unit shall also be counted for computation of the time period of 6 years' at the time of regularization. On 28.06.2014, the Opposite Party No.1 issued a letter to Opposite Party No.2 with regard to absorption of MHU Pharmacists, working in MHUs, against regular vacancies. Accordingly, necessary information was sought for with regard to the detailed particulars of the Pharmacists working in different district MHUs. In pursuance to such letter of the Opposite Party No.1, the Opposite Party No.2 issued letter to all the C.D.M.Os. of the State thereby seeking information with regard to number of Pharmacists working under the MHU who have been absorbed against regular vacancies as per Resolution dated 29.10.2008 and as to how many MHU Pharmacists have been left out for regularization. The Opposite Party No.4 submitted necessary information with details of the persons who are working in MHU, for their absorption against regular vacancies. The names of the present Petitioners appeared in the said list provided by the Opposite Party No.4. The

said letter further reveals that the Pharmacists have been appointed by following the O.R.V. Act and Rules and have been selected by following the due selection procedure. The said letter further reveals that two of the Pharmacists working in MHU have already been regularized against the regular vacancies.

5. The Opposite Party No.4 again issued a letter on 10.01.2017 to all the Medial Officers-in-Charge of all the C.H.Cs. of Mayurbhanj district requesting them to furnish information with regard to engagement of Pharmacists in MHU under N.R.H.M and their present position. Pursuant to the said letter, again the names of the present Petitioners were sent in the proforma as mentioned in the aforesaid letter dated 10.01.2017. Most unfortunately, despite furnishing such details pertaining to the Petitioners, the Opposite Parties did not take any action for regularization of the service of the Petitioners as regular Pharmacists.

6. The entire basis of the claim of the present Petitioners is that no action for regularization was taken as per the Resolution of the year 2008 and the Resolution of the year 2013. While the matter stood thus, the Opposite Party No.1 vide Gazette Notification dated 08.03.2019 in exercise of the power conferred by proviso to Article 309 of the Constitution of India and in superannuation of all instructions and orders issued in this regard except as things omitted or have been done before supersession, a new rule, namely, the Odisha Pharmacist Service (Methods of Recruitment and Conditions of Service) Rules, 2019 was introduced and the said rule came into force for regulating the method of recruitment and condition of service of persons appointed under the Orissa Pharmacy Service. Rule-4 of the 2019 Rules deals with condition of taking over the existing contractual Pharmacist and all the contractual Pharmacists, who were duly recruited by the concerned society/scheme and have completed of 6 years contractual service, are deemed to be a regular Government employees as one time measure subject to fulfillment of eligibility criteria as prescribed under Rule-5. Rule-5 provides the modalities for induction of Pharmacists into a cadre and that the contractual Pharmacists, who have completed 6 years of service in the society/scheme, shall be deemed to have been inducted to the cadre subject to fulfillment of the condition as laid down in Rule-5.

It is needless to mention here that the Petitioners satisfy all the eligibility criteria as provided under Rule-5 of the 2019 Rules and, as such, they are eligible in all respect for regularization of their service as regular Pharmacist by virtue of the deeming provision contained under the 2019 Rules, and, as such, they were to be inducted in the regular cadre of Odisha Pharmacist Service.

7. Be that as it may, the Petitioners got the first shock when they came across the letter dated 20.03.2019 issued by the Opposite Party No.1. Letter dated 20.03.2019 was issued after promulgation of the new rules, 2019 on 08.03.2019. The said letter reveals that the Opposite Party No.1 instructed all authorities for submission of information with regard to Laboratory Technician, Staff Nurse, Pharmacist, Radiographer, Multi Purpose Health Worker (Male) Government Health Worker (Male), however, the very same letter indicates that the Opposite Party No.1 has asked the authorities not to include the information of employees working in Mobile Health Unit (MHU). Pursuant to the letter dated 20.03.2019 of Opp.Party No.1, Opp.Party No.4 issued letter dated 23.03.2019 to

the District Programme Manager, NHM, Mayurbhanj thereby informing him that the information relating to the employees working in MHU are not to be included while submitting the detailed particulars of Para Medical Staff pursuant to letter dated 20.03.2019. The letter dated 20.03.2019 and 23.03.2019 were the first instance where the Petitioners were discriminated for the first time in violation of the provisions contained in 2019 Rules. Similarly, the Opposite Party No.1 again issued a letter to all the Collectors/Superintendents of Medical Colleges, C.D.M.Os for preparing the gradation list and for publication of such gradation list under intimation to the Opposite Party No.1 vide letter dated 04.10.2019. Such letter also reveals that the authorities were instructed not to include the names of the Petitioners in such gradation list pursuant to the letters issued by the Opposite Parties No.1 and 4 on 20.03.2019 and 23.03.2019 respectively.

8. The writ petition further reveals that on 30.07.2019, a letter was issued by the Opposite Party No.2 to all CDMOs of the districts wherein at Point No.3, the Opposite Party No.3 sought for reasons as to why the Pharmacists engaged in MHU prior to 2013 could not be regularized as per the Resolution dated 29.10.2008. However, no action was taken on such letter of the Opposite Party No.2. Finally, a High Power Committee meeting was held on 16.11.2020 to consider regularization of contractual service of Para Medical staff engaged in various scheme/society as per the N.R.H.M. Scheme. In the said meeting, it was decided that the contractual employees shall be adjusted against the existing vacancies in the respective categories. A copy of the minutes of the meeting dated 16.11.2020 has also been filed along with the writ petition and marked as Annexure-13.

9. Per contra, a counter affidavit has been filed on behalf of the Opposite Party No.1 and 2 by none other than the Director of Health Services of Odisha, Bhubaneswar. In the said counter affidavit, it has been stated that since 1995 MHUs were created in both KVK and Non-KVK districts under different schemes as well as State budget in a phase-wise manner. In 2009, it was decided that 95 numbers of MHUs running under Revised Long Term Action Plan of Government of India (RLTAP) in KVK district and 95 numbers of MHUs in Non-KVK districts under ADAPT initiative of Government of India and the State will be further continued under N.R.H.M. Their funding will be met out of the N.R.H.M. fund. Subsequently, it was observed that there have been several significant improvements in the health indicator of the State over the last decade. These improvements have been made due to several interventions, the significance of which is due to placement of trained and competent Pharmacists at Health Care Facilities. It has also been stated that contractual Pharmacists under the society are working at Health Care Facilities such as Drug Warehouses and Urban Health Facilities. Such Pharmacists are experienced and the Government has made a considerable investment in the training of NHM Pharmacists in Drug Logistic Management Programme to enhance their skills and competencies in providing quality services. It was felt by the Government that the emergent services of these Pharmacists are highly essential for a better and improved health service facilities in the State. Further, it was observed that the team and MHU including the Pharmacists working therein do not render any services at Health Care Facilities, rather they only work for health screening in the community with treatment of

some minor ailments. The main job of such Pharmacists is only to refer required persons for further check-up and treatment at health facilities.

10. The counter affidavit further reveals that in view of the aforesaid ground reality, the Government of Odisha in Health & Family Welfare Department has taken an in-principle stand to regularize the service of the contractual Pharmacists of the society working in different fixed Health Care Facilities mentioned above in consideration of the fact that the services of such contractual Pharmacists shall be required to be continued in the long term, in the facilities where they are posted unlike the Pharmacists who work in a community screening programme such as in MHU. Moreover, the services of the Pharmacists working in MHU are required only for a definite period till continuance of such programme. Accordingly, sub-rule-1 of Rule-4 of the Rules, 2019 has been amended by the Odisha Pharmacist Service (Methods of Recruitment and Conditions of Service) Amendment Rules, 2020. The said amendment is quoted herein below:-

> "On the date of commencement of these Rules, all the contractual Pharmacists, who have been duly recruited by concerned Societies or Schemes for working in different fixed Healthcare Facilities only against the posts approved or sanctioned by the Government in the Programme Implementation plan (PIP) or Action Plan of concerned Society or Scheme and have completed 6(six) years of satisfactory contractual service, shall be deemed to be regular Government employees as one time measure subject to fulfillment of eligibility criteria as prescribed under Rule-5."

11. The Opposite Parties No.1 and 2 have further stated in the counter affidavit that the Petitioners have been engaged in the post of Pharmacist in different MHUs under N.R.H.M. as per norms of the Society on contractual basis with a consolidated remuneration vide order dated 16.12.2011 of the C.D.M.O., Mayurbhanj (Opposite Party No.4). Therefore, by applying the provisions contained in the amended rules of the year 2020, it has been stated that since the Petitioners were not working in any fixed Healthcare Unit, they are not entitled to the benefit of automatic absorption in service against the vacant posts of Pharmacist on completion of 6 years of satisfactory contractual service. In other words, by virtue of the amendment in the year 2020, the Petitioners were taken out of the purview of 2019 Rules, which categorically provides that on completion of 6 years of uninterrupted service, the Petitioners would be automatically absorbed against the regular vacant posts of Pharmacist.

12. In reply to G.A. Department Resolution dated 17.09.2023, it has been stated in the counter affidavit that the same is a policy decision of the Government with regard to regular appointment of two categories of contractual Group-'C' and Group-'D' employees appointed under the State Government on contractual basis and such appointment is against contractual posts which have been created with the concurrence of Finance Department by abolishing the corresponding regular posts. Moreover, to take the benefit of Resolution dated 17.09.2013, such contractual employees must have been selected and recruited by following a regular recruitment process and by following the provisions of the O.R.V. Act and Rules. It is also mentioned in the counter affidavit that the G.A. & P.G. Department Notification dated 12.11.2013 under Rule-3(4)(a) has further stipulated that the said rule is not applicable to any Temporary Plan Schemes (including those under Centrally Sponsored Plan Scheme, Externally Aided Projects). In

such view of the matter, the Opposite Parties have taken a stand in the counter affidavit that Notification dated 12.11.2013, the Resolutions dated 29.10.2008 and 13.05.2013 have lost their force and the same is not applicable to the Petitioners.

13. Heard Mr. Budhadev Routray, learned Senior Counsel appearing for the Petitioners leading the argument on behalf of the Petitioners along with other learned counsels appearing for the Petitioners in the batch of similar other matters and Mr. B.P. Tripathy, learned counsel appearing for the Opposite Party No.3-N.H.R.M. and Mr. Saswat Das, learned Additional Government Advocate appearing for the State-Opposite Parties Nos.1, 2 and 4. Perused the pleadings of the respective parties as well as the materials placed on record for consideration by this Court.

14. Learned counsels appearing for the Petitioners were all sailing in the same boat and, as such, the grounds taken by them are common. To summarize the arguments advanced by the learned counsels appearing for the Petitioners, this Court would refer to the broader arguments advanced by Mr. Budhadev Routray, learned Senior Counsel leading the arguments from the side of the Petitioners in the following terms:-

> (i) Vide Resolution dated 29.10.2008 of the Health & Family Welfare Department coupled with the Finance Department Circular dated 31.12.2004, contractual posts were created after abolition of equal number of regular vacant posts by the Government.
>
> (ii) The Resolution dated 29.10.2008 specifically provides that on completion of 6 years of uninterrupted contractual service ignoring technical one day gap, if any, the Pharmacists engaged on contractual basis will be eligible for appointment as regular Pharmacists. For such regular appointment will be made after creation of regular post in lieu of contractual post.
>
> (iii) In the case of Pharmacists, who worked under Mobile Health Units and subsequently were engaged on general stream on contractual basis, these six years will be taken from the date of joining in M.H.U.
>
> (iv) The Pharmacists, who were working under Mobile Health Units, will also be eligible for regular appointment after completion of those six years.
>
> (v) The contractual Pharmacists, who were engaged against contractual post, will be appointed after creation of regular posts. But in case of M.H.U. Pharmacists, they will be appointed on regular basis in future vacancies.
>
> (vi) The regularization will be subject to observation of O.R.V. Act and Rules.
>
> (vii) As per the aforesaid Resolution, an advertisement was issued on 11.08.2011 under Annexure-1 for recruitment to various posts under M.H.U. including the posts of Pharmacist. Accordingly, the Petitioners were appointed as Pharmacist on contractual basis pursuant to order under Annexure-2.
>
> (viii) While the Petitioners were continuing, , the Government of Odisha, taking into consideration the Resolution dated 29.10.2008, after a careful consideration was pleased to formulate a comprehensive policy on regularization wherein it was decided that regularization of contractual Pharmacist should be made on the basis of seniority subject to completion of six years of service as Pharmacist and such six years' service may include their service rendered on contractual basis in different projects/schemes.

15. It was emphatically submitted by the counsels appearing for the Petitioners that the Petitioners have completed six years of service as Pharmacists on 16.12.2017 and as

per the aforesaid Resolution the services of the Petitioners were to be regularized with effect from that date. It was also contended, by referring to letter dated 19.08.2014 of the C.D.M.O., Mayurbhanj under Annexure-6, that the Pharmacists, including the present Petitioners, were selected and appointed by following the O.R.V. Act and Rules.

16. Learned counsels appearing for the Petitioners further contended that in view of the provisions contained under Rules-4 and 5 of the 2019 Rules, the contractual Pharmacists like the Petitioners, who have been duly recruited by the concerned societies/schemes and have completed six years of satisfactory contractual service shall be deemed to be regular Government employees as an one-time measure as provided in the 2019 Rules. It was also contended that in view of Rules-4 and 5 of the 2019 Rules, the Petitioners are deemed to be regular Government employees w.e.f. 16.12.2017, i.e. the date on which the Petitioners have completed 6 years of service as Pharmacists.

17. Learned counsels appearing for the Petitioners further contended that instead of regularizing the service of the Petitioners under Rules-4 and 5 of the 2019 Rules, the Opposite Parties issued the clarificatory letters dated 20.03.2019 and 23.03.2019. In the said context, it was submitted that the executive instructions in the shape of aforesaid two letters cannot override the statutory provision contained in the Rules, 2019 which have been framed under the proviso to Article 309 of the Constitution of India. Moreover, the amendment of the year which came into force vide Notification dated 27.11.2020 will have prospective effect. Therefore, by the time the amended 2020 Rules came into force, the benefit under Rules-4 and 5 had already accrued in favour of the Petitioners. Moreover, it was also contended that despite amendment dated 27.11.2020, the State Government had issued letter dated 30.12.2020 with a direction to hold a meeting on the subject of regularization of MHU staffs in the General Health Care.

18. By referring to the amendment Rules 2020, learned counsels appearing for the Petitioner contended that such amendment is prospective in nature and, as such, the same will be effective from the date of the Notification in the Official Gazette i.e. on 27.11.2020. By the time such amendment came into force, the right flowing from the earlier notification as well as under Rules 4 and 5 of 2019 Rules had already crystalized in favour of the Petitioners by virtue of deeming fiction contained in the aforesaid two rules. Furthermore, by applying the aforesaid deeming provision, the Opposite Parties should have treated the services of the Petitioners were regularized w.e.f. 16.12.2017, on which date they completed 6 years of continuous service on contractual post as Pharmacist.

19. Per contra, Mr. Saswat Das, learned Additional Government Advocate appearing for the State-Opposite Parties No.1, 2 & 4 and Mr. B.P. Tripathy, learned counsel appearing on behalf of the Opposite Party No.3-N.H.R.M., advanced their arguments on the main plank that the Petitioners are not entitled to be regularized in service as they were not working in any fixed Health Care Unit. On careful analysis of their submission, this Court observes that such Opposite Parties were also sailing on the same boat and they were opposing the prayer of the Petitioners on common grounds. Therefore, the counter arguments advanced by such Opposite Parties are summarized herein below:-

(a) The Petitioners were neither governed under the Resolution dated 29.10.2008 nor under the Resolution dated 13.05.2013. They were also not covered under the Resolution dated 17.09.2013 issued by the G.A. & P.G. Department, Government of Odisha and the Notification dated 12.11.2013. It was also contended that the Petitioners are not covered under 2019 Rules as the benefits under the 2019 Rules were confined to the Para Medical staffs working under the fixed Health Care facilities by virtue of amendment made to the aforesaid 2019 Rules in the year 2020 vide Gazette Notification dated 27.11.2020.

(b) The Pharmacists engaged in different MHT/MHU conduct health screening in the community. Such Para Medical Team including the Pharmacist do not render any service at fixed Health Care Facilities. Their basic duty is to refer persons for further check-up and treatment at fixed Health Care Facilities. As such, the Government in Health & Family Welfare Department took an in-principle stand to regularize the service of the contractual Pharmacist of the society working in different fixed health care facilities. It was also contended that the services of the Pharmacists working in M.H.Us are required only for a definite period, i.e. till continuance of such programme. Keeping in view the aforesaid nature of their work, the Rules of the year 2019 was amended in the year 2020, thereby excluding the Petitioners from the purview of 2019 Rules.

(c) The Petitioners have been specifically engaged as Pharmacist in M.H.U. under N.R.H.M. as per the Societies norms on contractual basis on a consolidated remuneration vide order dated 16.12.2011 issued by the Opposite Party No.4-C.D.M.O., Mayurbhanj.

(d) The post of Pharmacist in M.H.U. are not permanent in nature. Therefore, those are not regular vacant posts against which one can claim regularization. Thus, the services of the Petitioners under no circumstances can be regularized by operation of 2019 Rule.

20. In the aforesaid context, learned counsel for the Opposite Parties referred to the judgments in ***The Government of Tamil Nadu and Anr. Etc. v. Tamil Nadu Makkal Nala Paniyalargal and Ors. Etc. Etc.,*** reported in ***2023 LiveLaw (SC) 294***; ***Vibbhuti Shankar Pandey v. State of Madhya Pradesh and Others***, reported in ***2023 LiveLaw (SC) 91***; ***The Managing Director, Ajmer Vidhyut Vitran Nigam Ltd., Ajmer & Anr. V. Chiggan Lal & Ors.***, reported in ***2022 LiveLaw (SC) 296***; ***Secretary, State of Karnataka and others v. Umadevi and others***, reported in ***(2006) 4 SCC 1***; and ***State of Odisha and another v. Anup Kumar Senapati***, reported in ***(2019) 19 SCC 626***.

21. Learned counsels appearing for the Opposite Parties further argued that the deeming fiction under Rule-4 of the 2019 Rules is to be read in isolation of the provisions contained in Rule-5, 6 & 7. Such regularization is not automatic, but subject to fulfillment of the provisions contemplated under Rules-5, 6 & 7 of the 2019 Rules. Thus, the legal fiction under Rule-4 can be made applicable subject to the fulfillment of the aforesaid provisions and on verification of the eligibility of such persons in terms of Rules-5, 6 and 7. As such, it cannot be said that any vested right or accrued right is conferred on the Petitioners from the date of promulgation of the 2019 Rules. This is more so in view of the amendment of 2019 Rules in the year 2020 vide Notification dated 27.11.2020.

22. It was also contended by the learned counsels appearing for the Opposite Parties that the Petitioners have approached this Court after promulgation of the amended 2020 Rules on 27.11.2020. In the said context, it was argued that the Petitioners have not

challenged the validity of the amendment of the year 2020. Therefore, they cannot claim any regularization by resorting to the rules of the year 2019. In the said context, learned counsels for the Opposite Parties referred to the judgment of the Hon'ble Supreme Court in ***State of Jammu & Kashmir and others v. Ajay Dogra***, reported in ***(2011) 14 SCC 243*** wherein the Hon'ble Supreme Court has held that in the absence of any challenge to the basic conditions/provisions of the Rules, no relief can be granted to the Petitioners.

In course of their argument, learned counsel appearing for the Opposite Parties also referred to the book (Principles of Statutory Interpretation) by Justice G.P. Singh (14th Edition). They further specifically referred to the following quotation from the book:-

> "As was observed by James LJ; when a statue enacts that something deemed to have been done, which in fact and in truth was not done, the Court is entitled and bound to ascertain for what purposes and between what person, the statutory fiction is to be resorted to. When a legal fiction is created, stated S.R. Das, J for what purpose, one is late to ask at once, is it so created?"

They further contended that, for the sake of argument, even if it is assumed that the Petitioners had approached this Court prior to commencement of amended Rules, 2020 and that the said rule was given effect to during the pendency of the writ petition, even then, it is to be construed that no vested or accrued right has arisen in favour of the Petitioners by virtue of the legal fiction/ deeming clause. As such, the deeming clause under Rule-4 can only be brought into operation subject to fulfillment of conditionality prescribed under Rules-5, 6 & 7, which is yet to be determined by this Court in the present proceeding.

23. Furthermore, referring to the judgment in ***Anup Kumar Senapati's*** case (supra), it was submitted that if in a repealed enactment, a right has been conferred by an investigation in respect of such right, it is necessary to determine whether such right should be or should not be given, no such right is saved. No vested right is checked under the repealed rules. The very same principle, it was argued, is also applicable to the case of amendment, as is the case in the present writ petitions.

24. Finally, it was argued that the deeming clause as provided under Rule-4(1) of the 2019 Rules has to be construed to be the regularization of Pharmacists on successful completion of 6 years of satisfactory contractual service against the post as specified under Rule-3 of the 2019 Rules. The said 2019 Rules does not envisage or conceive of posts under M.H.U. Therefore, under no circumstance can the services of the present Petitioners be said to have been regularized by operation of the deeming clause contained in Rule-4 of the 2019 Rules. Moreover, such deeming clause was modified by virtue of an amendment in the year 2020 and that the Petitioners were not engaged in any fixed Health Care Facilities.

25. Learned counsels appearing for the Opposite Parties in course of their submissions, referring to the judgment in ***Tamil Nadu Makkal Nala Paniyalargal's*** case (supra), submitted before this Court that in the absence of sanctioned posts, the State cannot be compelled to create the posts and absorb the persons who are continuing in service of the State. Similarly, they also referred to the judgment in ***Vibbhuti Shankar***

Pandey's case (supra) and submitted before this Court that for regularization of daily wage employee two conditions are required to be satisfied; Firstly, initial appointed must be done by the competent authority and secondly, there must be sanctioned posts against which the daily rated employee must be working. No claim for regularization can be considered if these two conditions are not satisfied. They also referred to ***Chiggan Lal's*** case (supra) to impress upon this Court that it is a settled position of law that the date from which regularization is to be granted is a matter to be decided by the employer keeping in view a number of factors like the nature of work, the number of posts lying vacant, financial condition of the employer, the additional financial burden, the suitability of the employee for the job etc. The final decision in the appropriate context will depend upon the facts of each year and no parity can be claimed based on regularization made in respect of the earlier years. A reference was also made to the judgment of the Hon'ble Supreme Court in ***Uma Devi's*** case (supra) to submit before this Court that for regularization it is mandatory that the person claiming regularization must have continued against a sanctioned vacant posts for more than 10 years without any intervention of any court or tribunal and that the person concerned must have been recruited against such sanctioned vacant posts through a valid recruitment process.

26. Finally, learned counsel appearing for the Opposite Parties referred to the judgment of the Hon'ble Supreme Court in ***Ajay Dogra's*** case (supra). While referring to the aforesaid judgments, learned counsels appearing for the Opposite Parties led emphasis on paragraph-17 of the judgment in ***Ajay Dogra's*** case (supra), which is quoted herein below:-

> "17. In our considered opinion, the ratio of the aforesaid decisions of this Court is squarely applicable to the facts of the present case. There was no challenge to the constitutional validity of Rule 176 of the Police Rules so far as it relates to prescribing physical conditions regarding the height and the chest. The stipulations in the advertisement regarding standard of physical conditions was also not challenged in the writ petition. The High Court was not justified in going into the validity of the aforesaid criterion in absence of any such challenge. The High Court also has not specifically declared the Rule prescribing minimum height standard and chest standard ultra vires and, therefore, so long as that Rule exists in the statute book, no such direction as issued by the High Court could be issued. Consequently, the directions issued by the High Court in the present case are required to be set aside."

27. Further, referring to the judgment of the Hon'ble Supreme Court in ***Anup Kumar Senapati's*** case (supra), it was contended that what is unaffected by repeal of a statute is a right acquired or accrued and not a mere hope or expectation of or liberty to apply for acquiring a right. There is a distinction between application for enforcing a right acquired/accrued and making an application for acquisition of a right, it is the former that is saved, but the latter is not. It was also contended that under some repealed enactment maybe a right has been given, such right is then unaffected. But there is an inherent distinction between an investigation with respect to a right and an investigation to decide whether some right should or should not be given, the former is preserved on a repeal but the latter is not. A right to take advantage of the provisions, without doing any act towards availing that right, cannot be deemed as an accrued right. Therefore, it cannot be said that if steps are taken under a statute for acquisition of a right, the right

accrues even if the steps so taken do not reach the stage where the right is given. After repeal of advantage available under the Repealed Act, to apply and obtain relief is not a right which is saved when the application was necessary and it was discretionary to grant the relief and investigation is required into whether the relief should be granted or not. The repeal would not save the right to obtain such relief.

28. Having heard the learned counsels appearing on behalf of the Petitioners as well as the Opposite Parties and on a careful scrutiny of the pleadings of the respective parties as well as the materials on record, this Court is of the considered view that to determine the issue involved in the present writ petitions, this Court is required to examine as to whether the claim of the Petitioner is backed by any statutory right conferred upon them. In the aforesaid attempt, this Court is also required to examine as to whether a vested/accrued right was conferred upon the Petitioners in view of Rule-4 of 2019 Rules and whether such right has been taken away subsequently with prospective effect before giving such benefit of the deeming clause under Rule-4 to the Petitioners by completing the process as provided under the aforesaid rules?

29. To reply to the aforesaid questions, this Court, at the outset, is required to examine the basis of the claim of the present Petitioners. The Petitioners will be entitled to the relief sought for in the present writ petitions only in the event this Court comes to a conclusion that their claims were backed by some authority and that such authority was withdrawn without even considering the case of the Petitioners pursuant to such authorities/provisions of the rules.

30. It would be apt to first look into the Resolution dated 29.10.2008 under Annexure-3 to the writ petition. Learned counsel appearing for the Petitioners heavily relied upon the aforesaid Resolution and further contended that the Advertisement dated 11.08.2011 under Annexure-1 was issued pursuant to the said Resolution under Annexure-3. The Resolution under Annexure-3 provides that in pursuance of Finance Department Circular dated 31.12.2004, the C.D.M.O., Mayurbhanj was required to fill up the Para Medical posts including the post of Pharmacists on contractual basis with a consolidated remuneration. It further clearly provides that such contractual posts were created after abolition of equal number of regular vacant posts. Resolution under Annexure-3 provides that on completion of six (6) years of uninterrupted contractual service ignoring technical one day gap, if any, the Pharmacists engaged in contractual basis will be eligible for appointed as regular Pharmacists. However, such regular appointment shall be made after creation of regular post in lieu of contractual post. The Resolution further provides that the Pharmacists who are working under MHUs will also be eligible for regular appointment after completion of six years of contractual service.

31. While the matter stood thus, the C.D.M.O., Mayurbhanj published an advertisement on 11.08.2011 under Annexure-1 to fill up 33 number of posts of Pharmacist with a consolidated pay under Zilla Swasthya Samiti, Mayurbhanj. Pursuant to such advertisement, the Petitioners participated in the recruitment process and eventually they were selected and appointed as Pharmacist and engaged in M.H.Us. under N.R.H.M. in Mayurbhanj District. The Petitioners were given appointment pursuant to letter dtd 16.12.2011 under Annexure-2.

32. While the matter stood thus, again another Resolution dated 13.05.2013 was issued by the Health & Family Welfare Department, Government of Odisha on the subject of regularization of contractual Pharmacists against regular vacant posts. The Resolution dated 13.05.2013 under Annexure-4 provides that regularization shall be made in respect of those Pharmacists only who have been recruited by following due and transparent procedure of recruitment and by following the reservation policy. A certificate to that effect shall be furnished by the appointing authority at the time of regularization. Under Clause-9 of the Resolution dated 13.05.2013 under Annexure-4, it has been specifically provided that the past services of contractual Pharmacists working under various project/schemes like M.H.U. etc. shall also be counted for computation of six years at the time of regularization after their absorption against the post of contractual Pharmacist under General Health Care subject to proper verification of documents by appointing authorities. While this was the position, Health & Family Welfare Department, Government of Odisha, made an inquiry to the Director of Health Service, Odisha, Bhubaneswar with regard to absorption of M.H.U. Pharmacists against regular vacancy vide letter dated 28.06.2014. Acting upon such letter, the Director sought for information from all C.D.M.Os. vide his Circular dated 07.08.2014. The C.D.M.O., Mayurbhanj vide his letter dated 19.08.2014 addressed to the Director of Health Services, Odisha, Bhubaneswar provided the information with regard to the Pharmacists working in M.H.Us in the district. In the said letter, the C.D.M.O., Mayurbhanj has categorically stated that the above Pharmacists are appointed by following O.R.V. Act and Rules and that due recruitment procedure has been followed while selecting such Pharmacists for appointment in the M.H.Us. of Mayurbhanj district. Such letter further reveals that two numbers of Pharmacists have already been absorbed against regular vacancy. However, it was mentioned that the list of Pharmacists attached to Annexue-6 have not completed 6 years of contractual service.

33. While the matter stood thus, the Government of Odisha framed a set of rules in exercise of the power conferred by the proviso to Article-309 of the Constitution of India in supersession of all orders and instructions issued earlier. The said set of rules notified in the Official Gazette on 13.03.2019 and, as such, the same has come into effect form 13.03.2019. Since the dispute in the present writ petition revolves around interpretation of Rules-4, 5, 6 & 7, such rules are quoted herein below for reference:-

> "**4. Conditions of taking over of existing contractual Pharmacists:-** (A) (1) On the date of commencement of these rules, all the contractual Pharmacists who have been duly recruited by concerned societies / Schemes and have completed 6(six) years of satisfactory contractual service shall be deemed to be regular government employees as one ttime measure subject to fulfilment of eligibility criteria as prescribed under rue-5:
>
> Provided that all the contractual Pharmacists who are yet to complete six years of contractual service and having eligibility criteria as prescribed under rule-5 shall deemed to be contractual government employees as one time measure and shall be regularized as and when they complete six years of satisfactory contractual service, including the service that has already been rendered in concerned scheme/society:
>
> Provided further that those contractual Pharmacists, who do not meet the eligibility criteria, as mentioned under rule-5 & shall continue as such under the OSH&FW Society tit closure of the project, retirement or disengagement, whichever is earlier.

(2) On their regularisation, such posts of contractual Pharmacists of the OSH&FW Society in sub-clause (1) shall be deemed to have been abolished from the date of such induction of contractual Pharmacists into the Cadre. As these posts shall cease to exist, no further recruitment to fill up these posts shall be made by the OSH & FW Society other than by the Commission.

5. **Modalities for Induction of Pharmacists into the Cadre:-** All the Contractual Pharmacists who have completed 6 years of satisfactory contractual service under the Society/ Scheme, shall be deemed to have been inducted into the Cadre, subject to following conditions;

(i) Such Pharmacists who have the minimum educational qualification & other eligibility criteria as per rule-10 at the time of engagement under the Society/Scheme;

(ii) who have been selected though an open & transparent recruitment process;

(iii) While inducting, the prevalent reservation principles as in rule-7 shall be followed.

6. **Methods of recruitment:-** Subject to other provisions made in these rules, the methods of recruitment to the posts as indicated in column 2 of the Appendix shall be made in the following manner, namely:-

(a) Recruitment to the post of Pharmacist shall be made by direct recruitment through competitive examination to be conducted by "the Commission" in the manner provided under rule 8.

(b) The post of Senior Pharmacist shall be filled up by way of promotion from among the persons holding the post of Pharmacist.

(c) The post of Chief Pharmacist shall be filled up by way of promotion from among the persons holding the post of Senior Pharmacist.

(d) The post of Assistant Director shall be filled up by way of promotion from among the persons holding the post of Chief Pharmacist.

7. **Reservations:-** Notwithstanding anything contained in these rules the reservation of vacancies or posts as the case may be, shall be made for candidates-

(a) Belonging to Scheduled Castes and Scheduled Tribes shall be made in accordance with the provisions for the Odisha Reservation of Vacancies in Posts and Services (for Scheduled Castes and Scheduled Tribes) Act,1975 (Odisha Act of 1975) and the rules made thereunder;

(b) Belonging to SEBC, women, sportsmen, Ex-Servicemen and persons with disabilities shall be made in accordance with the provisions made under such Act, rules, orders, resolutions or instructions issued in this behalf by the Government from time to time."

34. On a careful reading of Rule-4 of 2019 Rules, this Court observes that the same provides that on the date of commencement of said rule all the contractual Pharmacists, who have been duly recruited by concerned society/scheme and have completed 6 years of satisfactory contractual service, shall be deemed to be regular Government employees as one time measure subject to fulfillment of eligibility criteria as prescribed under Rule-5. The said rule also provides that all the contractual Pharmacists who are yet to complete six years of contractual service and are having eligibility criteria as prescribed under rule-5 shall deemed to be contractual government employees as an one-time measure and shall be regularized as and when they complete six years of satisfactory contractual service. It further provides that those contractual Pharmacists, who do not meet the eligibility criteria, as prescribed under rule-5 shall continue as such under the OSH&FW Society till closure of the project, retirement or disengagement, whichever is earlier.

35. In view of the provisions contained in Rule-4, which is in the nature of a deeming provision, the same is subject to fulfillment of the condition prescribed under rule-5. Rule-5 provides that all the contractual Pharmacists who have completed 6 years satisfactory contractual service under the Society/Scheme shall be deemed to have been inducted into the Cadre,subject to the conditions (i) such Pharmacists much have the minimum educational qualification and other eligibility criteria as per rule-10 at the time of engagement; (ii) they have been selected through an open and transparent recruitment process; and (iii) while selecting such Pharmacists, the prevalent reservation principles as provided in rule-7 has been followed. While Rule-6 provides for method for recruitment, this Court is of the considered view that the same may not be strictly applicable to the case of the Petitioners as they are claiming regularization/absorption against regular vacancies in the post of Pharmacist. Rule-7, on the other hand, provides that notwithstanding anything contained in these rules, the reservation of vacancies in posts shall be made for the candidates by following the O.R.V. Act and Rules for the reserved category candidates and for SEBC, women, sportsmen, Ex-Servicemen and persons with disabilities category, as the case may be. The minimum educational qualification under Rule-10 for the post of Pharmacist is prescribed in the schedule at column No.4. Column No.4 of the schedule provides that the candidates must have passed+2 Science Examination conducted by the Council of Higher Secondary Education, Odisha/equivalent and Diploma in Pharmacy from Government Medical College & Hospitals of the State/any other recognized private institutions duly approved by A.I.C.T.E. and examination conducted by the Odisha Pharmacy Board. So far the present Petitioners are concerned, it is not disputed by the parties that they did not have the minimum educational qualification as prescribed under Rule-10 at the time of their selection and initial appointment as Pharmacist on contractual basis.

36. On a cogent reading of the rules/provisions contained in the 2019 Rules, this Court found that all the contractual Pharmacists, who have been duly recruited by the concerned societies/schemes, possess the minimum educational qualification, have been selected through an open and transparent recruitment process and, while conducting the recruitment test the reservation principles have been followed in respect of such recruitment, are eligible to be regularized in service by the operation of the deeming provision contained in Rule-4(1) of 2019 Rules as a one time measure. Applying the aforesaid conclusion drawn by this Court on interpretation of the rules, this Court observes that it is not disputed that the Petitioners do not have the minimum educational qualification as provided in Rule-10 of the 2019 Rules. Moreover, the Petitioners were selected by following a due selection procedure pursuant to Advertisement under Annexure-1 to the writ petition. With regard to observance of the principle of reservation while carrying out the recruitment process, which is one of the requirement under Rule-5, this Court observes that the C.D.M.O., Mayurbhanj in its letter dated 19th August, 2014 under Annexure-6, being the appointing authority, has categorically stated as follows:-

> "The above pharmacists are appointed by following ORV Act and Rule, due recruitment procedure by selection committee against the MHU of Mayurbhanj District. Two numbers of pharmacists have already absorbed against regular vacancy. The aforesaid pharmacists have not completed 6 years of the contractual service."

37. In view of the letter dated 19.08.2014 under Annexure-6 issued by none other than the appointing authority, i.e. the C.D.M.O., Mayurbhanj, this Court has no hesitation in coming to a conclusion that a fair and transparent procedure was followed by the selection committee and that such selection committee has also followed the ORV Act and Rules by giving due weightage to different categories of candidates. Therefore, this Court is unable to find any hurdle under Rule-4 of the 2019 Rules which would come in the way of the present Petitioners for their regular absorption against regular vacant posts of Pharmacist. The letter under Annexure-6 further reveals that since the Petitioners have not completed 6 years of service on 19th August, 2014, their cases were not considered for absorption pursuant to the Resolution dated 29.10.2008 and Resolution dated 13.05.2013 under Annexures-3 and 4 respectively.

38. Indisputably the Petitioners, who were appointed pursuant to the letter dated 16.12.2011 under Annexure-2 to the writ petition, have completed 6 years of continuous service on 16.12.2017. Since the letter under Annexure-6 was written on 19.08.2014, the C.D.M.O., Mayurbhanj has rightly observed that the Petitioners had not completed 6 years of continuous service for consideration of their case although it was categorically stated in the said letter that they were selected by following a valid selection procedure and by applying the principle of reservation as envisaged in O.R.V. Act and Rules.

39. It is pertinent to note that the 2019 Rules came into force from the date of Gazette Notification on 13.03.2019. It is clear that prior to the aforesaid date when the 2019 rule came into the force, the Resolutions under Annexures-3 and 4 were in force. A careful scrutiny of the letter dated 19th August, 2014 under Annexure-6 reveals that names of 37 candidates were included in the said list. Further, a noting has been attached to the said letter that two Pharmacists have already been absorbed against regular vacancy. So far as the other Pharmacists whose name appeared in the said list are concerned, since they had not completed 6 years of contractual service, their cases were not considered for regular absorption. Taking into consideration the resolution under Annexures-3 and 4 as well as letter under Annexure-3, it appears that the cases of the present Petitioners should have been considered on completion of 6 years of service, i.e. w.e.f. the date of completion of 6 years of continuous service from their respective date of joining. The date of joining as has been provided in the letter under Annexure-6 reveals that the Petitioners have joined immediately after the date of their initial appointment. Therefore, by the time the new rule came into force w.e.f. 13.03.2019, the cases of the Petitioner should have been considered under the Resolutions at Annexures-3 and 4 and keeping in view the fact that two of such Pharmacists engaged in MHU have been regularly appointed.

40. So far the rule of the year 2019 is concerned, this Court on a careful analysis of the aforesaid rule, is of the considered view that the Petitioners fulfill all the eligibility criteria as is required under the 2019 Rules. Therefore, by applying the deeming provision contained in Rule-4(1) of the said Rules, the services of the Petitioners ought to have been treated as regularized w.e.f. the date on which the rule came into force, i.e. on 13.03.2019. The preamble of the Rules, 2019 further carves out an exception, i.e. with respect to things done or omitted to be done before such supersession, the Governor

of Odisha hereby makes the following rules for regulating the method for recruitment and condition of service of persons appointed to the Odisha Pharmacist Service.

41. With regard to the judgments relied upon on behalf of the State-Opposite Parties as well as N.R.H.M., this Court on a careful reading of such judgments and on analysis of the issue involved in such judgments, is of the considered view that such judgments are not applicable to the facts of the present case. The reported judgments relied upon by the Opposite Parties are cases which were not governed any rules or executive instructions. So far the case of the Petitioners are concerned, the same is clearly governed by two Resolutions of the Government under Annexure-3 and 4 of the writ petition and the 2019 Rules which has been formulated in exercise of the power conferred under Article-309 of the Constitution of India. Accordingly, the judgments cited by the counsels for the Opposite Parties are hereby distinguished.

42. At this juncture, this Court would like to refer to the fact that similarly placed Pharmacists working under the M.H.U. had earlier approached the Odisha Administrative Tribunal, Bhubaneswar by filing O.A. No.744 of 2017 before 2019 Rules came into force. The learned Tribunal taking into consideration the judgment of the Division Bench of this Court dated 03.07.2017 passed in W.P.(C) No.2538, 2515 and 2537 of 2017 has categorically held that the Resolution dated 12.11.2013 of the G.A. & P.G. Department read with Resolution dated 29.10.2008 of the Finance Department is applicable to the contractual Pharmacist working under M.H.U. and, accordingly, Odisha Administrative Tribunal allowed the application with a direction to the Opposite Parties to bring over such applicants as contractual Pharmacists under the General Health Stream as they have completed 6 years of service in the M.H.U. The order passed in the aforesaid O.A. No.744 of 2017 has been confirmed by a Division Bench of this Court in W.P.(C) No.3957 of 2019 vide order dated 21.11.2019.

43. After the judgment of the Tribunal, which was confirmed by this Court, the order passed by the Tribunal was not being implemented. The Odisha Administrative Tribunal was abolished vide order dated 05.08.2019 w.e.f. 02.08.2019. For implementation of the order passed by the Tribunal, the applicants approached this Court by filing W.P.(C) No.1353 of 2020 with a prayer to implement order dated 17.05.2018 passed in O.A. No.744 of 2017. This Court was pleased to allow the prayer and, accordingly, directed the Opposite Parties to implement the order of the Tribunal passed in O.A. No.744 of 2017 within a period of six weeks. The State-Opposite Parties being aggrieved by such order approached the Hon'ble Supreme Court by filing SLP (C) No(s). 13077 of 2020. The Hon'ble Supreme Court vide order dated 12.01.2021 while taking into consideration the 2019 Rules, particularly Rule-4(1) which introduced the deeming fiction for regularization of service of the Pharmacists who have completed six years of service, dismissed the SLP. Thus, the order passed by the Tribunal in O.A. No.744 of 2017 has attained finality.

44. In the aforesaid context, learned Senior Counsel appearing on behalf of the Petitioners argued that on dismissal of the aforesaid SLP, the doctrine of merger applies. Accordingly, the order of the Tribunal merges with the order passed by the Hon'ble Supreme Court on merits. It was further contended that while dismissing the SLP, the

Hon'ble Supreme Court has also referred to the 2019 Rules and that the incumbent having completed six years of satisfactory service shall be deemed to be regular.

45. The next question that falls for consideration is the amendment rules of the year 2020. On perusal of the present writ petition, it appears that the writ petition was initially filed on 15.12.2020. While the writ petition was pending for adjudication before this Court, the State of Odisha amended the 2019 Rules by virtue of amendment of the year 2020. The aforesaid amendment Notification dated 27.11.2020 was notified in the Gazette on 28.11.2020. The Rule-1(2) of the amendment Rule, 2020 provides that the said rule shall come into force from the date of their publication in the Odisha Gazette. Since the amendment 2020 Rule was published in the gazette on 28th November, 2020, this Court has no hesitation to come to a conclusion that the amended rule shall come into force w.e.f. 28.11.2020. Moreover, on a careful scrutiny of the amendment to the Rule-4(1) of the 2019 Rules reveals that the amended rule is confined to the regularization of the service of the Pharmacists who have been appointed in different fixed Health Care Facilities and have competed six years of satisfactory service. Therefore, the learned Additional Government Advocate as well as learned counsel appearing for the N.H.RM. argued that the amendment of the year 2020 will be applicable to the Petitioners and that since the Petitioners were not appointed in any fixed Health Care Facilities, they would not be entitled to the regularization by following the deeming clause under Rule-4(1) of the Rules, 2019. The main thrust of argument of the learned counsel for the Opposite Parties was that since the Petitioners have not been appointed in any fixed Health Care Facilities, they are not entitled to the benefit of regularization under Rule-4(1) of the 2019 Rules with the aid of the deeming clause envisaged therein.

46. On a careful analysis of the 2019 Rules and the amendment thereto vide Amendment Rules, 2020, this Court has no hesitation in coming to a conclusion that the Amending Rules which provides that the benefits under the Rule-4(1) of the 2019 Rules shall be confined to the Pharmacists appointed in fixed Health Care Facilities would come into force w.e.f. 28.11.2020, i.e. from the date the publication of such amending rule in the official gazette. Rule-1(2) of the 2020 Rules specifically provides that the same shall come into force with effect from their publication in Odisha Gazette. Therefore, this Court has no hesitation in coming to a conclusion that the amending rule confining the benefit under Rule-4(1) of 2019 Rules to the Pharmacists working in fixed Health Care Facilities shall come into force w.e.f. 28.11.2020.

47. As has already been observed, this writ petition was filed prior to the amending rule of the year 2020 under Annexure-B/2 to the counter affidavit came into force i.e. on 28.11.2020, therefore, this Court has to examine the case of the Petitioners by applying the provisions contained under the Rules of the year 2019. While saying so, this Court is also of the view that the cases of the Petitioners were also eligible to be considered under the Resolutions at Annexures-3 and 4 to the writ petition on completion of six years of satisfactory service. In either case, the Petitioners are eligible to be regularized on completion of six years of satisfactory service. Therefore, the question formulated by this Court for adjudication of the present writ petition is required to be answered in the affirmative and in favour of the present Petitioners. Thus, this Court has no hesitation in

coming to a conclusion that a valuable right had accrued in favour of the Petitioners for their absorption against regular vacant posts of Pharmacist initially under the Resolution under Annexure-3 and 4 to the writ petition, and thereafter on introduction of the 2019 Rules, particularly in view of Rule-4(1) of the aforesaid rules.

48. In the ultimate analysis, this Court holds that the Petitioners are eligible for the benefit of regularization of their service against regular vacant posts of Pharmacist in terms of Rule-4(1) of 2019 Rules and that the Petitioners have the eligibility for such regularization and that the selection procedure followed was in terms of
Rule-5, as is evident from the letter of the C.D.M.O., Mayurbhanj under Annexure-6 to the writ petition. Accordingly, the Opposite Parties are directed to regularize the service of the Petitioners as an one-time measure, as provided under Rule-4(1) of the 2019 Rules, within a period of three months from the date of communication of a copy of this judgment.

49. With the aforesaid observation and direction, the writ petition is allowed. However, there shall be no order as to costs.

50. All the connected writ petitions are also allowed in terms of the present judgment.

—— o ——

2024 (II) ILR-CUT-660

V. NARASINGH, J.

W.P.(C) NO. 22599 OF 2015

MOHD. SHARIF KHAN ……Petitioner

-V-

CMD, POWER GRID CORPORATION OF INDIA LTD. & ORS. ……Opp.Parties

SERVICE LAW – Encashment of Earned Leave and Half Pay Leave – Whether withdrawal of certain benefits accrued in favour of employees in terms of existing rules can be affected by putting a ceiling in guise of clarification? – Held, No – The law provides that a clarification must not have the effect of saddling any party with an unanticipated burden or withdrawing an anticipated benefit.

Case Laws Relied on and Referred to :-

1. 2010 (12) SCC 538 : State of Madhya Pradesh & others V. Jogendra Sribastav.
2. 2013 SCC online P&H 3812: Ex-Sub-Inspector, Mahinder Singh V. State of Haryana &Ors.
3. 2023 SCC OnLine SC 640: Sankaracharya University of Sanskrit V. Manu.

For Petitioner : Mr. L. Pangari, Sr. Adv.
For Opp.Parties : Mr. A.N.Das

JUDGMENT Date of Hearing : 19.10.2023 : Date of Judgment : 15.04.2024

V. NARASINGH, J.

Heard learned Senior counsel for the Petitioner Mr. Pangari, and learned counsel for the Opposite Party-Corporation, Mr. A.N. Das.

1. The Petitioner was working as a Senior Assistant under the Opposite Party-Corporation. He retired from service on attaining the age of superannuation with effect from 31st August,2013.

2. He assails the rejection of his representation at Annexure-13 basing upon the letter dated 27.08.2013 of the Opposite Party-Corporation(Annexure-6) by which the Opposite Party-Corporation restricted the leave encashment both Earned leave (EL) and the Half Pay Leave (HPL) clubbed together to the overall ceiling limit of 300 days and with the further prayer to direct the Opposite Party-Corporation and its Authorities to encash the Half Pay Leave as accumulated to the tune of 375 days with an interest of 15 % per annum. For convenience of ready reference letter dated 27.08.2013 at Annexure-6 is extracted hereunder:

xxx xxx xxx

Sub: Limit of Leave encashment-Restriction to 300 days.

1.0 In view of clarification issued by the Department of Public Enterprise on the above subject, It is clarified that on retirement/separation on account of death, the encashment of leave will be allowed subject to overall ceiling limit of 300 days (both Earned leave & Hal-Pay leave clubbed together). Further, to make up the shortfall in Earned Leave, no commutation of Half-Pay Leave will be permissible. To illustrate: If an employee has 100 days of Earned Leave and 300 days of HPL then encashment of HPL is restricted to 200 days.

2.0 The same shall come into force with immediate effect.

This issues with the approval of Competent Authority.

xxx xxx xxx

3. It is urged with vehemence by the learned Senior counsel for the Petitioner, Mr. Pangari that encashment of Half Pay Leave being an accrued right cannot be taken away by an amended provision. It is submitted that Rule 27 of Power Grid Leave rules dealing with procedure and amount of encashment more particularly Rule 27(IV) and Rule 29 thereof which evidently were incorporated pursuant to the corporate HR circular No.3II of 2013 dated 27.08.2013 cannot have any retrospective application, in case of the Petitioner who admittedly was on the rolls of the corporation w.e.f 19.11.1991.

For convenience of ready reference Rule 27(IV) and 29 of the Leave Rules are extracted hereunder;

xxx xxx xxx

"27.0 Procedure and amount of Encashment

(i) xxx xxx xxx

(ii) xxx xxx xxx

(iii) xxx xxx xxx

(iv) In case of retirement and separation on account of death, encashment of leave will be allowed subject to overall ceiling limit of 300 days (both Earned Leave and Half Pay Leave clubbed together.) Further, to make up the shortfall in Earned Leave, no commutation of Half-Pay leave will be permissible. **Illustration**: If an employee has 100 days of EL and 300 days of HPL then encashment of HPL is restricted to 200 days.

In case of death, the encashment shall be allowed to the legal heirs/nominee of the employee, as nominated by him for the purpose of CPF.
In the case of employees who resign their appointment, the total amount of Earned Leave at their credit worked out as on the date of resignation shall be allowed to be encashed.

xxx xxx xxx
xxx xxx xxx

29.0 Encashment of Half Pay Leave

The encashment of Half-Pay Leave will be allowed subject to a maximum of 300 days (HPL and El taken together) standing at the credit of the employee in the following events:
i) Separation from the Company on attaining the age of superannuation or
ii) Death while in service or
iii) Cessation of service, other than on grounds of disciplinary action, after attaining the age of 50 years provided that the concerned employee has completed a minimum of 10 years continuous service in Central/State Government/PSUs out of which a minimum of 5 years is in POWERGRID or
iv) On completion of the tenure of Board Level appointees.

xxx xxx xxx

4. It is contended by the petitioner that at the time of his retirement on 31st August 2013 as per the Power Grid Leave Rules Policy Manual he is entitled to encash his own leave as accumulated in leave account and as regards half pay leave he was entitled to avail his leave as much as credited to his leave account in the case at hand, for a period of 365 days, having no ceiling limit. The petitioner has further contended by relying upon various provisions available in power grid leave rules policy manual more particularly in paragraph No. 8.2 and 9 which are at Annexure-4 to the writ petition that there is no ceiling limit for EL and the half pay leave which are already credited to his leave account. Therefore, Petitioner claims that he is entitled to encash such half pay leave to the tune of 365 days being accumulated at the time of his superannuation and credited to his leave account as a matter of right which, has accrued in his favour, for discharging his duties continuously under the opposite parties till his retirement.

5. The decision of the Executive Director Human Resources of Power Grid Corporation of India limited notified through circular on 27th August 2013 i.e. just 3 days before the retirement of the petitioner is cause of action, for the petitioner to move this Court, where for the first time a restriction to the tune of 300 days for leave encashment was introduced that too clubbing both Earned leave and half pay leave with the further stipulation that to make up the shortfall in EL, no accumulation of half pay leave will be permissible.

6. Being aggrieved with such decision of the authorities the petitioner represented to the Chairman and Managing Director ofPower Grid Corporation of India limited on 30th August 2013 and also made several correspondences thereafter. In the meantime pending consideration of the representation submitted by the petitioner the corporation notified an amendment in power grid leave rule as per

notification dated 26 November 2013 indicating therein the employees EL maintained in 2 sections i.e. encashable and nonencashable will be merged and will be maintained in one section including existing leave balance.

7. The petitioner also approached this court in WP(C) No. 19411 of 2014 assailing the decision of authorities relating to ceiling of EL which was disposed of on 15th October 2014 without expressing any opinion on the merit of the case but directing the opposite party number 2 to dispose the pending representations filed by the petitioner within a period of 2 months.

7-A. Complying the above direction of this court, the opposite party number 2 decided the grievance of the petitioner by rejecting the same as per impugned order dated 30th April 2015 is at annexure 13.

8. It is also contended by the petitioner that the Leave Rule annexed as Annexure 3 to the writ petition more particularly Rule 4 deals with "Amendments To And Interpretation Of The Leave Rules" which makes it clear that these leave rules may be amended or modified from time to time by the Corporation and the same shall take effect in accordance with the orders issued by the Corporation.

8-A. It is also reflected in the said rule that so far half pay leave is concerned there is no ceiling limit.

8-B. By means of annexure 6 the authorities have decided to introduce ceiling, restricting the leave encashment only to the tune of 300 days as per letter dated 27th August 2013(Annexure-6) wherein, in the guise of clarification, it is stated that in terms of the decision of Department of Public enterprises, the encashment of leave on retirement or separation on account of death, the same will be allowed, subject to overall ceiling limit of 300 days both EL and HPL clubbed together making it effective with immediate effect.

8-C. By way of introducing such provision in the guise of clarification, the authorities have taken away the accrued right of the Petitioner which is not permissible since a clarification cannot supersede override or set at naught the original provision. Therefore the said decision being treated as an amendment to the provision cannot have retrospective effect and therefore, the decision of the authority at Annexure 15 is wrong and liable to be interfered with.

9. The issue involved in this case is whether withdrawal of certain benefits accrued in favour of employees in shape of encashment of leave as well as half pay leave in their leave account in terms of the existing leave rules can be affected by putting a ceiling on the maximum days of such leave and thereby depriving the employee from the financial benefits for the periods beyond the ceiling limit by changing the existing rules and regulations governing the field of encashment of leave in the guise of clarification.

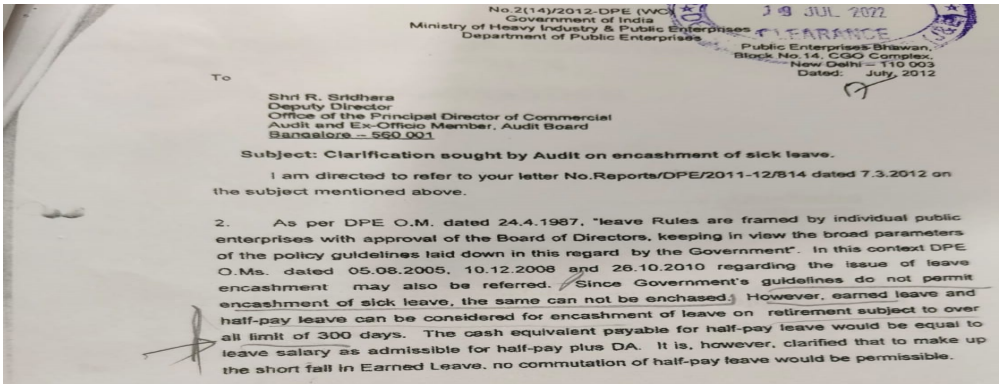
9-A. It is stated by the Opposite Parties that the Circular No.311 dated 27.08.2013 has been issued by the Competent Authority taking into consideration the related Govt. guidelines and circulars in vogue and no such binding.

9-B. Such circular was issued only to avoid any ambiguity as well as correct the irregularity by ensuring proper implementation of leave encashment Rules uniformly in all public sector undertakings and to obviate the objections in the Audit paras.

9-C. In this context the attention of this Court was drawn to the letters dated 17.07.2012 and 07.02.2014, Department of the Public Enterprises, Govt. of India limiting the ceiling of encashment of leave to a maximum of 300 days.

9-D. It is apt to note here that the letter dated 17.07.2012 was enclosed to the Office Memorandum dated 07.02.2014. For convenience of ready reference the Office Memorandum dated 07.02.2014 and the Clarificatory letter issued by the Department of Public Enterprises, Govt. of India dated 17.07.2012 are at Annexure-A/1, annexed to the counter affidavit filed by the Corporation, is extracted hereunder.

Letter Dated 17.07.2012 (Clarificatory Letter)-



No.2(14)/2012-DPE (WC)
Government of India
Ministry of Heavy Industry & Public Enterprises
Department of Public Enterprises

19 JUL 2022
CLEARANCE

Public Enterprises Bhawan,
Block No.14, CGO Complex,
New Delhi – 110 003
Dated: July, 2012

To

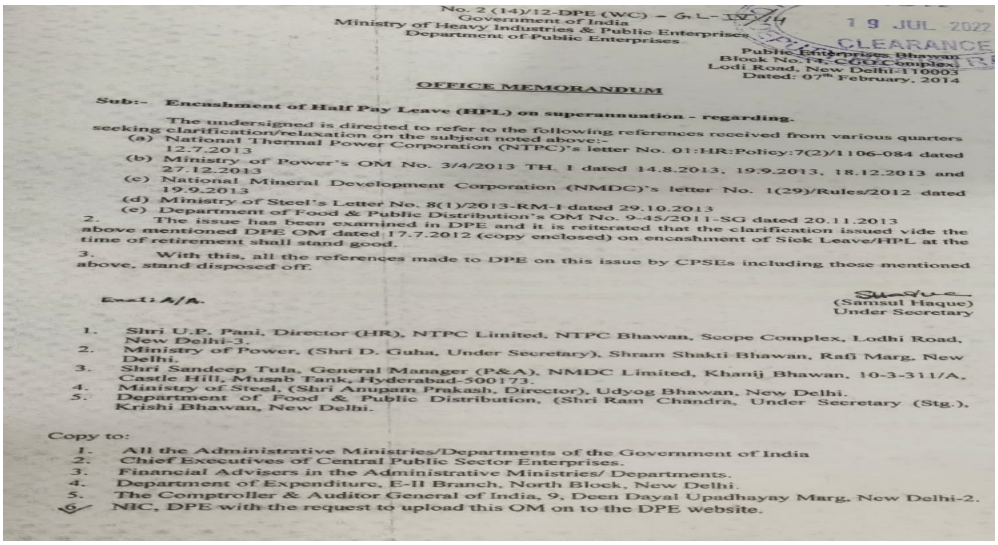
Shri R. Sridhara
Deputy Director
Office of the Principal Director of Commercial
Audit and Ex-Officio Member, Audit Board
Bangalore – 560 001

Subject: Clarification sought by Audit on encashment of sick leave.

I am directed to refer to your letter No.Reports/DPE/2011-12/814 dated 7.3.2012 on the subject mentioned above.

2. As per DPE O.M. dated 24.4.1987, "leave Rules are framed by individual public enterprises with approval of the Board of Directors, keeping in view the broad parameters of the policy guidelines laid down in this regard by the Government". In this context DPE O.Ms. dated 05.08.2005, 10.12.2008 and 26.10.2010 regarding the issue of leave encashment may also be referred. Since Government's guidelines do not permit encashment of sick leave, the same can not be enchased. However, earned leave and half-pay leave can be considered for encashment of leave on retirement subject to over all limit of 300 days. The cash equivalent payable for half-pay leave would be equal to leave salary as admissible for half-pay plus DA. It is, however, clarified that to make up the short fall in Earned Leave, no commutation of half-pay leave would be permissible.

Letter Dated 07.02.2014 (Office Memorandum)-



No. 2 (14)/12-DPE (WC) – G.L-IV/14
Government of India
Ministry of Heavy Industries & Public Enterprises
Department of Public Enterprises

19 JUL 2022
CLEARANCE

Public Enterprises Bhawan
Block No.14, CGO Complex
Lodi Road, New Delhi-110003
Dated: 07th February, 2014

OFFICE MEMORANDUM

Sub:- Encashment of Half Pay Leave (HPL) on superannuation - regarding.

The undersigned is directed to refer to the following references received from various quarters seeking clarification/relaxation on the subject noted above:-

(a) National Thermal Power Corporation (NTPC)'s letter No. 01:HR:Policy:7(2)/1106-084 dated 12.7.2013
(b) Ministry of Power's OM No. 3/4/2013 TH. I dated 14.8.2013, 19.9.2013, 18.12.2013 and 27.12.2013
(c) National Mineral Development Corporation (NMDC)'s letter No. 1(29)/Rules/2012 dated 19.9.2013
(d) Ministry of Steel's Letter No. 8(1)/2013-KM-I dated 29.10.2013
(e) Department of Food & Public Distribution's OM No. 9-45/2011-SG dated 20.11.2013

2. The issue has been examined in DPE and it is reiterated that the clarification issued vide the above mentioned DPE OM dated 17.7.2012 (copy enclosed) on encashment of Sick Leave/HPL at the time of retirement shall stand good.

3. With this, all the references made to DPE on this issue by CPSEs including those mentioned above, stand disposed off.

Encl: A/A.

(Samsul Haque)
Under Secretary

1. Shri U.P. Pani, Director (HR), NTPC Limited, NTPC Bhawan, Scope Complex, Lodhi Road, New Delhi-3.
2. Ministry of Power, (Shri D. Guha, Under Secretary), Shram Shakti Bhawan, Rafi Marg, New Delhi.
3. Shri Sandeep Tula, General Manager (P&A), NMDC Limited, Khanij Bhawan, 10-3-311/A, Castle Hill, Masab Tank, Hyderabad-500 173.
4. Ministry of Steel, (Shri Anupam Prakash, Director), Udyog Bhawan, New Delhi.
5. Department of Food & Public Distribution, (Shri Ram Chandra, Under Secretary (Stg.), Krishi Bhawan, New Delhi.

Copy to:

1. All the Administrative Ministries/Departments of the Government of India
2. Chief Executives of Central Public Sector Enterprises.
3. Financial Advisers in the Administrative Ministries/ Departments.
4. Department of Expenditure, E-II Branch, North Block, New Delhi.
5. The Comptroller & Auditor General of India, 9, Deen Dayal Upadhayay Marg, New Delhi-2.
6. NIC, DPE with the request to upload this OM on to the DPE website.

10. It is also the stand of the opposite parties that the circular has been issued by taking into consideration the clarification issued by the Department of Public Enterprises, Union of India after considering the request of various similar PSUs with respect to interpretation of encashment of Leave Rules. So far the power to amend the rule, in terms of Clause-4.1 of the Leave Rule, it asserted that the circular dated 27.08.2013 is not an amendment rather a clarificatory order and nothing but a compliance to audit objections. (Emphasized)

11. Extending similar benefit to others as a ground for the Petitioner to assert his claim was resisted by the Opposite Parties on the principle that negative equality cannot confer any right.

12. In resisting such submission, the petitioner has relied upon the decision of Apex court in **State of Madhya Pradesh & others Vs. Jogendra Sribastav** reported in **2010 (12) SCC 538**.

xxx xxx xxx

> "That rights and benefits which have already been earned or accrued under the existing rules cannot be taken away by amending the rules with retrospective effect."

xxx xxx xxx

13. Per contra the Opp. Parties placed reliance upon the decision Punjab and Haryana High Court in the matter of **Ex-Sub-Inspector, Mahinder Singh Vs. State of Haryana & others** reported in **2013 SCC online P & H 3812**. It has been urged that even if more EL were accumulated, the encashment would be as per applicable rules and as per Govt. instruction as on the date of superannuation.

13-A. On a close scrutiny of the above decision of Punjab and Haryana High Court it reveals that it is a decision under a special circumstance wherein no principle has been decided rather basing upon the rules and regulations in force governing the field the decision of the Single Bench dismissing the writ petition was affirmed.

13-B. It is only expressed that even if there is no provision for leave encashment of unutilized leave in the rules, the benefits, if any, could only flow from the instruction, as it is a concession which depends upon the policy of the Govt. As such, the Judgment of Punjab and Haryana High Court cannot be of any assistance to the Opposite Party Corporation in the factual matrix of this case.

14. There is no doubt that any financial benefit accrued within the tenure of service or after retirement can only be granted as per the rules and regulations in force governing the field. But when the leave in terms of EL as well as HPL were already credited in the leave account as per the prevailing Rules whether that can be affected by means of introducing a circular, without having any retrospective effect or retrospective operation needs to be addressed in this Writ Petition.

15. Accordingly it is required to be determined whether the Annexure-6 dated 27.08.2013 was a clarification or a substantive amendment in order to arrive at the consequential effect thereof whether it would be applicable retrospectively or not.

15-A. Referring to a catena of cases, on the similar issues, Apex Court in the matter of **Sankaracharya University of Sanskrit vrs. Manu** reported in **2023 SCC OnLine SC 640** held thus:-

xxx xxx xxx

"9.The proposition of law that a clarificatory provision may be made applicable retrospectively is so well established that we do not wish to burden this judgment by referring to rulings in the same vein. However, it is necessary to dilate on the role of a clarification/explanation to a statute and how the same may be identified and distinguished from a substantive amendment.

9.1. An explanation/clarification may not expand or alter the scope of the original provision, vide Bihta Cooperative Development Cane Marketing Union Ltd. v. Bank of Bihar, A.I.R. 1967 SC 389. Merely describing a provision as an "Explanation" or a "clarification" is not decisive of its true meaning and import. On this aspect, this Court in Virtual Soft Systems Ltd. v. Commissioner of Income Tax, Delhi, (2007) 289 ITR 83 (SC) observed as under:

Even if the statute does contain a statement to the effect that the amendment is declaratory or clarificatory, that is not the end of the matter. The Court will not regard itself as being bound by the said statement in the statute itself, but will proceed to analyse the nature of the amendment and then conclude whether it is in reality a clarificatory or declaratory provision or whether it is an amendment which is intended to change the law and which applies to future periods.

This position of the law has also been subscribed to in ***Union of India v. Martin Lottery Agencies Ltd., (2009) 12 SCC 209*** *wherein it was stated that when a new concept of tax is introduced so as to widen the net, the same cannot be said to be only clarificatory or declaratory and therefore be made applicable retrospectively, even though such a tax was introduced by way of an explanation to an existing provision. It was further held that even though an explanation begins with the expression "for removal of doubts," so long as there was no vagueness or ambiguity in the law prior to introduction of the explanation, the explanation could not be applied retrospectively by stating that it was only clarificatory.*

9.2. From the aforesaid authorities, the following principles could be culled out:

i) If a statute is curative or merely clarificatory of the previous law, retrospective operation thereof may be permitted.

ii) In order for a subsequent order/provision/amendment to be considered as clarificatory of the previous law, the pre-amended law ought to have been vague or ambiguous. It is only when it would be impossible to reasonably interpret a provision unless an amendment is read into it, that the amendment is considered to be a clarification or a declaration of the previous law and therefore applied retrospectively.

iii) An explanation/clarification may not expand or alter the scope of the original provision.

iv) Merely because a provision is described as a clarification/explanation, the Court is not bound by the said statement in the statute itself, but must proceed to analyse the nature of the amendment and then conclude whether it is in reality a clarificatory or declaratory provision or whether it is a substantive amendment which is intended to change the law and which would apply prospectively." (Emphasized)

xxx xxx xxx

16. There is no dispute to the effect that the leave Rules in operation prior to issuance of Annexure 6 dated 27.08.2013 had no ceiling and the employees who retired prior to the said date had availed the benefit accrued in favor of them.

It is the stand of the Opp. Parties that after it was objected by Audit team declaring the said type of encashment to be illegal the decision was taken on 27.08.2023 by fixing a 'cap' at certain days of leave that too clubbing both EL and HPL.

17. Applying the law as discussed hereinabove to the facts of the present case, this court is of the view that the subsequent order dated 27.08.2023 cannot be treated as a clarification and therefore cannot be made applicable retrospectively.

17-A. The order dated 27.08.2023 has substantively modified the leave Rule relating to leave encashment of EL & HPL without any ceiling. (Emphasized)

18. As noted above, the law provides that a clarification must not have the effect of saddling any party with an unanticipated burden or withdrawing an anticipated benefit. Accordingly this court is of the considered view that the leave encashment in terms of the Rules at Annexure 3 cannot be circumscribed by the circular dated 27.08.2013 at Annexure-6 having no retrospective effect taking into consideration the language and intent of such circular.

19. Thus the decision of the authorities in rejecting the representation of the petitioner at Annexure 13 is not sustainable in the eyes of law and accordingly Annexure 13 dtd.30.04.2015 is quashed.

20. The petitioner is held to be entitled for his leave encashment sans ceiling in terms of the pre amended Rule at Annexure 3 without being interjected by Annexure 6 & 10. And, the same be released in favour of the petitioner after adjustment of the leave already encashed, if any, within a period of four months from the date of receipt of a copy of the Judgment. Failing which, the same will entail interest @8% per annum from the date of entitlement, till actual disbursal.

21. Accordingly the writ petition is disposed of. No costs.

—— o ——

2024 (II) ILR-CUT-667

B.P. SATAPATHY, J.

W.P(C) NO. 7924 OF 2023 WITH BATCHES

[W.P(C) NOS. 8034,8037,8039,8516,10948,10949,10950,10951,10952,10953 & 10954 OF 2023]

NIHAR KANTA BISWAL & ORS. ……Petitioners

-V-

STATE OF ODISHA & ORS. ……Opp.Parties

SERVICE LAW – Regularization – Petitioners engaged as junior lecturer on contractual basis with effect from August 2006 – Petitioners were allowed to continue without any break and without any protection from

any Court of Law – The OPSC issued advertisement to fill up the post of Junior Lecturer/Post Graduate Teacher on regular basis against 72 posts – Whether the petitioners are eligible for regularization in the said post? – Held, Yes – Due to their service continuance on contractual basis w.e.f August, 2006, the petitioners are eligible and entitled to get the benefit of regularization.

Case Laws Relied on and Referred to :-

1. 2017 (II) ILR-CTC-1059 : Sanatan Sahoo Vrs. State of Odisha & Ors.
2. 2018 (I) ILR-CTC-659 : Ranjeet Kumar Das Vrs. State of Odisha & Ors.
3. W.P(C) No.18569/2016 & batch (disposed of on 12.07.2022) : Subrat Narayan Das Vrs. State of Odisha & Ors.
4. 1993 (2) SCC 486 : State of Odisha & Ors. Vrs. Sukanti Mohapatra & Ors.
5. (1991) 4 SCC 139 : State of U.P. & Anr. Vrs. Synthetics & Chemicals Ltd. & Anr.
6. (1958) 34 ITR 130 : Commissioner of Income Tax, Bombay Vrs. Amritlal Bhogilal & Co.
7. (1969) 2 SCC 74 : Shankar Ramchandra Abhyankar Vrs. Krishnaji Dattatreya Bapat.
8. (2000) 6 SCC 359 : Kunhay Yammed & Ors. Vrs. State of Kerala & Anr.
9. 2023 LiveLaw (SC) 674 : Experion Developers Pvt. Ltd. Vrs. Himanshu Dewan & Sonali Dewan & Ors.
10. C.A.No.9941/2016 (decided on 03.01.2024) : Mary Pushpam Vs. Telvi Curusumary &Ors.

For Petitioners : Mr. B. Routray, Sr. Adv.,
Mr. Manoj Kumar Mishra, Sr. Adv.

For Opp.Parties : Mr. S.K. Samal, AGA

JUDGMENT Date of Hearing : 19.03.2024 : Date of Judgment : 08.05.2024

BIRAJA PRASANNA SATAPATHY, J.

1. Since the issue involved in the present batch of Writ Petitions is similar, all the matters were heard analogously and disposed of by the present common order.

2. All these Writ Petitions have been filed *inter alia* challenging order dated 08.08.2018, so passed by the O.P. No.1 and with a further prayer to direct the Opp. Parties to regularize the services of the petitioners as against the post of Junior Lecturers (Post Graduate Teacher) with all service and financial benefits. But for effectual adjudication of the dispute in question, W.P.(C) No.7924 of 2023 is taken as the lead case and pleadings made and documents annexed thereto are to be treated as the points for disposal of the matter by this Court.

3. Mr. B. Routray, learned Senior Counsel appearing in W.P.(C) No.7924 of 2023 contended that Government in ST & SC Development Department vide its notification issued on 31.01.2006 decided to upgrade Government High Schools (SSD), Higher Secondary School (+2 Science) w.e.f. the Academic Session 2005-06 under the State plan (SP).

3.1. As per the said decision, it was decided that after such up-gradation, the schools will be renamed as Government Higher Secondary School (+2 Science). Basing on the decision taken by the Government on 31.01.2006 under Annexure-1, a further communication was issued by the Director (ST & SC)-cum-Addl. Secretary to Govt., ST & SC Development Department on 17.06.2006 under Annexure-2. Vide the said letter,

taking into account the decision of the Govt. to upgrade 8 nos. of High Schools in KBK area to Higher Secondary Schools (+2 Science and Commerce) w.e.f. Academic Session 2005-06, in proceeding of the meeting held on 07.06.2006 which was forwarded to the Collectors coming under the KBK districts vide Annexure-2, the criteria for selection of teaching and non-teaching staffs in such Higher Secondary Schools was formulated.

3.2. As against the post of teaching staff, it was decided to invite applications through open advertisement by ST & SC Development Department in the News Papers for walk-in-interview for selection of candidates for their engagement on contractual basis having Masters' Degree qualification in the respective subject with at least 55% of mark from a recognized University. It was further decided that selection of candidates for engagement of Jr. Lecturers are to be conducted by a committed headed by the Director (ST & SC)-cum-Addl. Secy., as Chairman, Director, Higher Education and Chairman, +2 Council as Member Secretary with the subject experts. It was further decided that the selection will carry 100 marks i.e. 50% for Career mark and 50% for Interview. In the said proceeding of the meeting dated 07.06.2006 so enclosed to Annexure-2, it was also decided that on such engagement of Junior Lecturers, they will get salary @ Rs.6500/- per month consolidated.

3.3. It is contended that for recruitment of such Junior Lecturers and Laboratory Assistant, 72 posts of Junior Lecturers and 32 Posts of Laboratory Assistant were created on contractual basis vide Department Govt. Order No.30136 (SSD) dated 28.07.2006. It is contended that basing on the decision so taken by the Govt. under Annexure-1 and by the Director under Annexure-2 with the proceeding of the meeting held on 07.06.2006, an advertisement was issued on 28.06.2006 under Annexure-3, inviting applications from eligible candidates for engagement as Junior Lecturers on contractual basis for the Session 2006-07 in Shri Ekalabya Model Residential School managed by OMTES, Odisha and 8 High Schools upgraded to +2 Higher Secondary Schools under the management of ST & SC Development Department, Government of Odisha.

3.4. Pursuant to the advertisement so issued under Annexure-3, all the petitioners participated in the selection process as against the post of Junior Lecturers in different discipline and on being duly selected, petitioners were issued with the order of engagement by the Department on 04.08.2006. After due execution of the agreement, engagement order was issued on 10.08.2006. After such execution of the agreement with the order of engagement issued on 10.08.2006, petitioners joined as Junior Lecturers in different discipline and posted to various Government (SSD) Higher Secondary Schools in KBK districts.

3.5. It is contended that even though vide the engagement order issued on 10.08.2006, the term of appointment was up to the end of Feb, 2007, but the same was extended from time to time vide orders issued by the Department on 09.07.2009 and 19.07.2012 under Annexure-5 series. It is also contended that considering the demand of such contractual Junior Lecturers and Laboratory Assistants working in Higher Secondary Schools under ST and SC Development Department, vide office order dated 09.12.2011 under Annexure-6, the monthly remuneration was enhanced from Rs.9300/-

to Rs.12,500/- for Junior Lecturers and to Rs.11,000/- in respect of Laboratory Assistants. The said order under Annexure-6 was also issued with due concurrence of the Finance Department. Not only that continuance of the petitioners as Junior Lecturers, was also extended vide order dated 09.07.2009 and 19.07.2012 with due concurrence of the Finance Department.

3.6. It is contended that even though petitioners continued as Junior Lecturers on contractual basis vide order of engagement issued in the year 2006 without any break in engagement and with due extension issued by the Govt. from time to time, but on the face of such continuance, when no step was taken to regularize their services, the petitioners along with similar situated Junior Lecturers approached the State Administrative Tribunal (In short "Tribunal") in O.A. No.1225 (C) of 2015 and batch.

3.7. It is contended that during pendency of the matter before the Tribunal with the prayer for regularization of the services of the petitioners, Odisha Higher Secondary Education Service (in State Scale of Pay), (Method of Recruitment and Conditions of service of Post Graduate Teachers of the Schedule Tribe & Schedule Caste Development Department) Rules, 2016 came into force (in short the Rules). The aforesaid 2016 Rule was published in the Odisha Gazette Extra-Ordinary on 20.05.2016. It is contended that while publishing the rules in question vide notification dated 12.05.2016, it was clearly indicated that such rule was framed in supersession of the Rules/Regulations/Orders/ Instructions issued in this regard except as in respect to things done or omitted to be done before such supersession.

3.8. It is contended that in view of the provisions contained in the Preamble to the Rules, that the Rules were framed in supersession of the Rules/Regulations/Orders / Instructions issued in this regard except as respect to things done or omitted to be done before such supersession, learned Senior Counsels appearing for the Petitioners contended that in view of such provision contained in the Preamble, since basing on the earlier instruction issued by the Government in the ST & SC Development Department on 31.01.2006 and 17.06.2006 under Annexure-1 and 2, a conscious decision was taken to provide appointment to Junior Lecturers on contractual basis, petitioners are not governed under the provisions of the aforesaid 2016 rules, since they were appointed in terms of the earlier instruction issued under Annexure-1 and 2.

3.9. With regard to the provisions contained in the Preamble "except as respect to things done or omitted," and its true intent, learned Senior Counsel appearing for the Petitioners relied on a decision of the Hon'ble Apex Court in the case of ***Anushka Rengunthwar and Others Vs. Union of India and Others***. Hon'ble Apex Court in Para-21, 27 and 51 of the said Judgment has held as follows:-

> *"**21.** In that background, it would be necessary to refer to the impugned notification dated 04.03.2021 which reads as hereunder:*
>
> ***"MINISTRY OF HOME AFFAIRS***
> ***NOTIFICATION***
> *New Delhi, the 4th March, 2021*
>
> *S.O. 1050(E) - In exercise of the powers conferred by sub-section (1) of section 7B of the Citizenship Act, 1955 (57 of 1955) and in supersession of the notification of the*

Government of India in the Ministry of Home Affairs published in the Official Gazette vide number S.O. 542(E), dated the 11th April, 2005 and the notifications of the Government of India in the erstwhile Ministry of Overseas Indian Affairs published in the Official Gazette vide numbers S.O. 12(E), dated the 5th January, 2007 and S.O. 36(E), dated the 5th January, 2009, except as respect things done or omitted to be done before such supersession, the Central Government hereby specifies the following rights to which an Overseas Citizen of India Cardholder (hereinafter referred to as the OCI cardholder) shall be entitled, with effect from the date of publication of this notification in the Official Gazette, namely:—

(1) grant of multiple entry lifelong visa for visiting India for any purpose

Provided that for undertaking the following activities, the OCI cardholder shall be required to obtain a special permission or a Special Permit, as the case may be, from the competent authority or the Foreigners Regional Registration Officer or the Indian Mission concerned, namely:—

(i) to undertake research;
(ii) to undertake any Missionary or Tabligh or Mountaineering or Journalistic activities;
(iii) to undertake internship in any foreign Diplomatic Missions or foreign Government organisations in India or to take up employment in any foreign Diplomatic Missions in India;
(iv) to visit any place which falls within the Protected or Restricted or prohibited areas as notified by the Central Government or competent authority;

(2) exemption from registration with the Foreigners Regional Registration Officer or Foreigners Registration Officer for any length of stay in India:

Provided that the OCI cardholders who are normally resident in India shall intimate the jurisdictional Foreigners Regional Registration Officer or the Foreigners Registration Officer by email whenever there is a change in permanent residential address and in their occupation;

(3) parity with Indian nationals in the matter of,-

(i) tariffs in air fares in domestic sectors in India; and
(ii) entry fees to be charged for visiting national parks, wildlife sanctuaries, the national monuments, historical sites and museums in India;

(4) parity with Non-Resident Indians in the Matter of,-
(i) inter-country adoption of Indian children subject to the compliance of the procedure as laid down by the competent authority for such adoption;
(ii) appearing for the all India entrance tests such as National Eligibility cum Entrance Test, Joint Entrance Examination (Mains), Joint Entrance Examination (Advanced) or such other tests to make them eligible for admission only against any Non-Resident Indian seat or any supernumerary seat;

Provided that the OCI cardholder shall not be eligible for admission against any seat reserved exclusively for Indian citizens.
(iii) Purchase or sale of immovable properties other than agricultural land or farm house or plantation property; and
(iv) Pursuing the following professions in India as per the provisions contained in the applicable relevant statutes or Acts as the case may be, namely:—
(a) doctors, dentists, nurses and pharmacists;
(b) advocates;

(c) architects;

(d) chartered accountants;

(5) in respect of all other economic, financial and educational fields not specified in this notification or the rights and privileges not covered by the notifications made by the Reserve Bank of India under the Foreign Exchange Management Act, 1999 (42 of 1999), the OCI cardholder shall have the same rights and privileges as a foreigner.

xxxx xxxx xxxx xxxx

27. *Shri K.V. Viswanathan, learned senior counsel while contending that the right which had accrued cannot be taken away and the 'things done' or 'omitted to be done' before such supersession is to be kept in view, has relied on the decision in (1961) 1 SCR 305 Universal Imports Agency v. Chief Controller of Imports and Exports wherein it is held as hereunder:*

*"**16.** What were the "things done" by the petitioners under the Pondicherry law? The petitioners in the course of their import trade, having obtained authorization for the foreign exchange through their bankers, entered into firm contracts with foreign dealers on C.I.F. terms. In some cases irrevocable Letters of Credit were opened and in others bank drafts were sent towards the contracts. Under the terms of the contracts the sellers had to ship the goods from various foreign ports and the buyers were to have physical delivery of the goods after they had crossed the customs barrier in India. Pursuant to the terms of the contracts, the sellers placed the goods on board the various ships, some before and others after the merger, and the goods arrived at Pondicherry port after its merger with India. The prices for the goods were paid in full to the foreign sellers and the goods were taken delivery of by the buyers after examining them on arrival. Before the merger if the Customs Authorities had imposed any restrictions not authorised by law, the affected parties could have enforced the free entry of the goods in a court of law. On the said facts a short question arises whether para 6 of the Order protects the petitioners. While learned counsel for the petitioners contends that "things done" take in not only things done but also their legal consequences, learned counsel for the State contends that, as the goods were not brought into India before the merger, it was not a thing done before the merger and, therefore, would be governed by the enactments specified in the Schedule. It is not necessary to consider in this case whether the concept of import not only takes in the factual bringing of goods into India, but also the entire process of import commencing from the date of the application for permission to import and ending with the crossing of the customs barrier in India. The words "things done" in para 6 must be reasonably interpreted and, if so interpreted, they can mean not only things done but also the legal consequences flowing therefrom. If the interpretation suggested by the learned counsel for the respondents be accepted, the saving clause would become unnecessary. If what it saves is only the executed contracts i.e. the contracts whereunder the goods have been imported and received by the buyer before the merger, no further protection is necessary as ordinarily no question of enforcement of the contracts under the pre-existing law would arise. The phraseology used is not an innovation but is copied from other statutory clauses. Section 6 of the General clauses Act (10 of 1897) says that unless a different intention appears, the repeal of an Act shall not affect anything duly done or suffered thereunder. So too, the Public Health Act of 1858 (38 & 39 Vict. c. 55) which repealed the Public Health Act of 1848 contained a proviso to Section 343 to the effect that the repeal "shall not affect anything duly done or suffered under the enactment hereby repealed", This proviso came under judicial scrutiny in Queen v. Justices of the West Riding of Yorkshire [[L.R.] 1 Q.B.D. 220]. There notice was given by a local board of health of intention to make a rate under the*

Public Health Act, 1848, and amending Acts. Before the notice had expired these Acts were repealed by the Public Health Act, 1875, which contained a saving of "anything duly done" under the repealed enactments, and gave power to make a similar rate upon giving a similar notice. The board, in ignorance of the repeal, made a rate purporting to be made under the repealed Acts. It was contended that as the rate was made after the repealing Act, the notice given under the repealed Act was not valid. The learned Judges held that as the notice was given before the Act, the making of the rate was also saved by the words "anything duly done" under the repealed enactments. This case illustrates the point that it is not necessary that an impugned thing in itself should have been done before the Act was repealed, but it would be enough if it was integrally connected with and was a legal consequence of a thing done before the said repeal. Under similar circumstances Lindley, L.J., in Heston and Isleworth Urban District Council v. Grout [[1897] 2 Ch. 306] confirmed the validity of the rate made pursuant to a notice issued prior to the repeal. Adverting to the saving clause, the learned Judge tersely states the principle thus at p. 313:"That to my mind preserves that notice and the effect of it". On that principle the court of appeal held that the rate which was the effect of the notice was good."

xxxx xxxx xxxx xxxx

***51.** Further, as on the year 2021 when the impugned notification was issued the petitioner No. 1 was just about 18 years i.e., full age and even if at that stage, the petitioner was to renounce and seek for citizenship of India as provided under Section 5(1)(f)(g), the duration for such process would disentitle her the benefit of the entire education course from pre-school stage pursued by her in India and the benefit for appearing for the Pre-Medical Test which was available to her will be erased in one stroke. Neither would she get any special benefit in the country where she was born. Therefore in that circumstance when there was an assurance from a sovereign State to persons like that of the petitioner No. 1 in view of the right provided through the notification issued under Section 7B(1) of Act, 1955 and all 'things were done' by such Overseas Citizens of India to take benefit of it and when it was the stage of maturing into the benefit of competing for the seat, all 'such things done' should not have been undone and nullified with the issue of the impugned notification by superseding the earlier notifications so as to take away even the benefit that was held out to them.*

3.10. Placing reliance on the aforesaid decision, learned Senior Counsel contended that since the Petitioners were engaged on contractual basis in terms of the earlier instruction issued by the Government in ST and SC Development Department under Annexure-1 and 2, their cases are not governed under the provisions of 2016 Rule and they are exempted to be governed under the said Rules. It is contended that such things done in terms of the instruction issued under Annexure-1 and 2, cannot be nullified with issuance of the 2016 Rules. In view of such provision enacted in the Preamble to the 2016 Rules, it cannot take away the benefit that was already extended in favour of the petitioners basing on Annexure-1 and 2.

3.11. It is contended that in view of the clear provisions contained in the Preamble to the 2016 Rule and the decision in the case of ***Anushka Rengunthwar*** as cited (supra), petitioners though are not too be governed under the 2016 Rules, but the Tribunal without proper appreciation of the provisions contained under the Preamble, while disposing the batch of Original Applications in O.A. No.1225(C) of 2015 and batch, vide order dated 14.03.2018, came to a wrong conclusion that no direction can be issued

to regularize the services of petitioners in violation to the statutory rules framed under the aforesaid 2016 Rules. While holding so, the Tribunal disposed of the all the Original Applications with a direction on the Opp. Parties to take a policy decision for regularization of the applicants or to take such action in exercise of the relaxation provision contained under Rule-17 of 2016 Rules and by resorting to such provisions, if the petitioners are otherwise found eligible and suitable, they should be considered for appointment.

3.12. It is contended that though as per the provisions contained in the Preamble to the 2016 Rule, petitioners were not to be governed under the 2016 Rules and they are otherwise protected, but the Tribunal by committing an error directed the Opp. Parties to take a policy decision on the claim of petitioners to get the benefit of regularization and to relax the stipulation so contained under the Rules in exercise of relaxation provisions contained under Rule 17 of 2016 Rules. Petitioners being aggrieved by order dated-14.03.2018 so passed by the tribunal in O.A. No.1225(C) of 2015 and batch filed individual writ petitions before this Court in the year 2018 in W.P.(C) No.11442 of 2018 and batch.

3.13. Learned Senior Counsels appearing for the petitioners however contended that during pendency of the matter before the Tribunal and prior to its disposal, when steps were taken to fill up the post in which the petitioners are continuing in accordance with the 2016 Rules through Regular Selection Process and advertisement was issued by Odisha Public Service Commission vide Advertisement No.6 of 2017-18 for recruitment to the post of Post Graduate Teacher, the same when was challenged, the Tribunal protected the petitioners by passing an interim order. It is accordingly contended that till passing of such an interim order in the year 2018, petitioners were never protected by any interim order for their continuance, even though they continued on contractual basis w.e.f. Aug, 2006.

3.14. Petitioners when challenged the order passed by the Tribunal on 14.03.2018 by filing appropriate Writ Petitions before this Court, this Court also protected the interest of the petitioners by passing interim order in their favour. However, during pendency of the Writ Petition before this Court in W.P.(C) No.11442 of 2018 and batch, when it came to the knowledge of the petitioners that in terms of the directions issued by the Tribunal, claim of the present petitioners to get the benefit of regularization has been rejected vide order dated 08.08.2018, this Court vide order dated 07.02.2023 while disposing the batch of Writ Petitions, permitted the petitioners to challenge the order dated 08.08.2018 so passed by the O.P. No.1. Order dated 07.02.2023 is reproduced hereunder:-

> *"This matter is taken up through hybrid mode.*
>
> *2. Heard Mr. S. Routray, learned counsel appearing for the petitioner and Mr. A.K. Mishra, learned Additional Government Advocate appearing for the State-opposite parties.*
>
> *3. The petitioner has filed this writ petition seeking to quash the order dated 14.03.2018 under Annexure-13 passed by the State Administrative Tribunal in O.A. No.1225 (C) of 2015 and further to issue direction to the opposite parties to regularize the service of the petitioner from the initial date of appointment with all consequential service and financial benefits within a stipulated period.*

4. Mr. S. Routray, learned counsel appearing for the petitioner contended that seeking regularization of service, the petitioner had approached the State Administrative Tribunal, Cuttack Bench, Cuttack by filing O.A. No. 1225 (C) of 2015, and the Tribunal, vide common order dated 14.03.2018 directed the opposite parties to take a policy decision for regularization of the petitioner or to take such other action in exercising the relaxation provision under Rule-17 of the 2016 Rules and by resorting to such provision, if the petitioner is otherwise found eligible and suitable, he should be considered for appointment and such action shall be taken within a period of three months and till such action is taken, the petitioner may be allowed to continue in the present post. It is contended that this Court passed an interim order protecting the interest of the petitioner. It is further contended that even though opposite party no.1 has passed the order in compliance of the order dated 14.03.2018 passed by the Tribunal, that ipso facto cannot take away the rights of the petitioner to approach this Court.

5. Mr. A.K. Mishra, learned Additional Government Advocate appearing for the State-opposite parties contended that this Court, while entertaining this writ petition, has not granted any interim order staying operation of the order/judgment passed by the Tribunal. Rather, this Court protected the interest of the petitioner granting status quo to continue in service. Therefore, in compliance of the order passed by the Tribunal, opposite party no.1 has passed the order dated 08.08.2018 rejecting the claim of the petitioner, which has been placed on record by way of amendment sought by the petitioner. The said order having been passed in compliance of the order of the Tribunal, nothing remains to be adjudicated in this writ petition, rather fresh cause of action arises for the petitioner to approach the appropriate Court. Instead of doing so, the petitioner cannot pursue his remedy by the present writ petition.

6. Considering the contentions raised by learned counsel for the parties and after going through the records, this Court finds that the petitioner, who is working as Junior Lecturer in Government (S.S.D.) Higher Secondary School, had approached the Tribunal seeking direction for regularization of his service from the date of his initial appointment with all consequential service and financial benefits. The Tribunal, after due adjudication, passed order dated 14.03.2018, paragraphs-15 and 16 whereof read as under:

"15. Law is well settled that any appointment made to public service is to be done following the regular recruitment process or in the absence of any statutory rule, on the basis of any resolution and circular of the Government. Thus, recruitment to a post is the prerogative of the Government and there is no scope for the Tribunal to issue any direction in violation of the statutory rule. Rule -17 of the Orissa Higher Secondary Education Service (in State's Scales of Pay) (Method of Recruitment and Conditions of service of post Graduate teachers of the Scheduled Tribe and Scheduled Caste Development) Rules 2016 Rules provide for relaxation of any provision which read as follows:

"17. Relaxation – Whenever it is considered necessary or expedient to do so in the public interest, the Government may by order, for reasons to be recorded I writing in consultation with the Commission, relax any of the provisions of these rules in respect of any class or category of persons."

In the case of the Dental Surgeon, it appears from the order vide Annexure-10 that their services have been regularized as pre the resolution of the Government. Therefore, considering the plight of the applicants and that the applicants have been appointed being duly selected through walk-in-interview, they should be extended with similar benefits

invoking the relaxation provision under Rule-17 of the 2016 rules and there is no scope to issue any direction for regularization in violation of the statutory rule.

16. In view of the discussion, the O.As are disposed of with a direction to respondents to take a policy decision for regularization of the applicants or to take such other action in exercising of the relaxation provision under Rule-17 of the 2016 Rules and by resorting to such provision, if the applicants are otherwise found eligible and suitable, they should be considered for appointment and such action be taken within a period of three months from the date of receipt of a copy of this order and till any such action is taken the applicants may be allowed to continue in the present post".

Aggrieved by such order, the petitioner has approached this Court by filing this writ petition and, this Court has not passed interim order staying the order/judgment passed by the Tribunal, rather passed the order of status quo with regard to continuance of the petitioner in service. But during pendency of this writ petition, opposite party no.1 has passed order dated 08.08.2018 rejecting the claim of the petitioner in compliance of the order passed by the Tribunal. Needless to say, if the grievance of the petitioner has been complied with in terms of the order dated 14.03.2018 passed by the Tribunal, that itself creates separate cause of action for the petitioner, which is the assignment of the learned Single Judge of this Court.

7. As a consequence thereof, this Court is of the considered view that the order dated 14.03.2018 passed by the Tribunal having been complied with by opposite party no.1, nothing remains to be adjudicated in this writ petition. Thereby, this Court disposes of this writ petition granting liberty to the petitioner to assail the order dated 08.08.2018 passed by opposite party no.1 in compliance of the order passed by the Tribunal before the appropriate Court.

8. Issue urgent certified copy as per rules."

3.15. Pursuant to the liberty granted by this court on 07.02.2023 in W.P.(C) No.11442 of 2018 and batch, present batch of Writ Petitions were filed challenging the order dated 08.08.2018, so passed by the O.P. No.1 in terms of the order passed by the Tribunal on 14.03.2018. Vide order dated 08.08.2018, O.P. No.1 while declining to relax the provisions contained under 2016 Rules in exercise of the relaxation provision contained under Rule-17 of the said Rules, held that petitioners are not eligible to get the benefit of regularization, as it will be in complete violation of the Principle enshrined in Article-14 of the Constitution of India.

3.16. Learned Senior Counsels appearing for the Petitioners contended that since in terms of the decision taken by the Department with due issuance of the instruction/ guideline on 31.01.2006 and 17.06.2006 under Annexure-1 and 2, Petitioners were duly selected and engaged as Junior Lecturers now treated as Post Graduate Teacher on contractual basis vide order of engagement issued on 10.08.2006, in view of the provisions contained in the Preamble to the 2016 Rules, they are protected and not governed under the provisions of 2016 Rules. However, the Tribunal without proper appreciation of the provisions contained in the Preamble, illegally directed the Opp. Party No.1 to consider the claim of the petitioners to get the benefit of regularization by relaxing the provisions of the said rules taking recourse to Rule-17 of the Rules. However, since during pendency of the matters before this Court, order passed by the Tribunal on 14.03.2018 was complied, with rejection of the petitioners' claim vide order

dated 08.08.2018, which is impugned in the present batch of Writ Petitions, the order passed by the Tribunal on 14.03.2018 merged with order dated 08.08.2018.

3.17. Learned Senior Counsel appearing for the Petitioners contended that since petitioners in the present batch of Writ Petitions were allowed to continue on contractual basis with due extension of their services and with due concurrence of the Finance Department w.e.f. Aug, 2006, they also became eligible and entitled to get the benefit of regularization, since they continued for more than 10 years prior to being protected by the Tribunal for the first time in 2018 and subsequent interim order passed by this Court in the earlier batch of Writ Petitions as well as in the present batch of Writ Petitions, in view of the decision of the Hon'ble Apex Court in the case of ***Uma Devi Vs. State of Karnataka, Nihal Singh Vrs. State of Punjab***. Hon'ble Apex court in para-44 of the decision in the case of ***Uma Devi*** and Para – 22 to 24 & 35 to 38 of the decision in the case of ***Nihal Singh*** has held as follows :-

> *"**44.** The concept of "equal pay for equal work" is different from the concept of conferring permanency on those who have been appointed on ad hoc basis, temporary basis, or based on no process of selection as envisaged by the rules. This Court has in various decisions applied the principle of equal pay for equal work and has laid down the parameters for the application of that principle. The decisions are rested on the concept of equality enshrined in our Constitution in the light of the directive principles in that behalf. But the acceptance of that principle cannot lead to a position where the court could direct that appointments made without following the due procedure established by law, be deemed permanent or issue directions to treat them as permanent. Doing so, would be negation of the principle of equality of opportunity. The power to make an order as is necessary for doing complete justice in any cause or matter pending before this Court, would not normally be used for giving the go-by to the procedure established by law in the matter of public employment. Take the situation arising in the cases before us from the State of Karnataka. Therein, after Dharwad decision [(1990) 2 SCC 396 : 1990 SCC (L&S) 274 : (1990) 12 ATC 902 : (1990) 1 SCR 544] the Government had issued repeated directions and mandatory orders that no temporary or ad hoc employment or engagement be given. Some of the authorities and departments had ignored those directions or defied those directions and had continued to give employment, specifically interdicted by the orders issued by the executive. Some of the appointing officers have even been punished for their defiance. It would not be just or proper to pass an order in exercise of jurisdiction under Article 226 or 32 of the Constitution or in exercise of power under Article 142 of the Constitution permitting those persons engaged, to be absorbed or to be made permanent, based on their appointments or engagements. Complete justice would be justice according to law and though it would be open to this Court to mould the relief, this Court would not grant a relief which would amount to perpetuating an illegality."*

Hon'ble Apex Court in the case of ***Nihal Singh*** in Para-22 to 24 & 35 to 38 has held as follows:-

> *"**22.** It was further declared in Umadevi (3) case [State of Karnataka v. Umadevi (3), (2006) 4 SCC 1 : 2006 SCC (L&S) 753] that the jurisdiction of the constitutional courts under Article 226 or Article 32 cannot be exercised to compel the State or to enable the State to perpetuate an illegality. This Court held that compelling the State to absorb persons who were employed by the State as casual workers or daily-wage workers for a long period on the ground that such a practice would be an arbitrary practice and*

violative of Article 14 and would itself offend another aspect of Article 14 i.e. the State chose initially to appoint such persons without any rational procedure recognised by law thereby depriving vast number of other eligible candidates who were similarly situated to compete for such employment.

This extract is taken from Nihal Singh v. State of Punjab, (2013) 14 SCC 65 : (2013) 3 SCC (L&S) 85 : 2013 SCC OnLine SC 713 at page 76

23. *Even going by the principles laid down in Umadevi (3) case [State of Karnataka v. Umadevi (3), (2006) 4 SCC 1 : 2006 SCC (L&S) 753] , we are of the opinion that the State of Punjab cannot be heard to say that the appellants are not entitled to be absorbed into the services of the State on permanent basis as their appointments were purely temporary and not against any sanctioned posts created by the State.*

This extract is taken from Nihal Singh v. State of Punjab, (2013) 14 SCC 65 : (2013) 3 SCC (L&S) 85 : 2013 SCC OnLine SC 713 at page 76

24. *In our opinion, the initial appointment of the appellants can never be categorised as an irregular appointment. The initial appointment of the appellants is made in accordance with the statutory procedure contemplated under the Act. The decision to resort to such a procedure was taken at the highest level of the State by conscious choice as already noticed by us.*

xxxx xxxx xxxx

35. *Therefore, it is clear that the existence of the need for creation of the posts is a relevant factor with reference to which the executive government is required to take rational decision based on relevant consideration. In our opinion, when the facts such as the ones obtaining in the instant case demonstrate that there is need for the creation of posts, the failure of the executive government to apply its mind and take a decision to create posts or stop extracting work from persons such as the appellants herein for decades together itself would be arbitrary action (inaction) on the part of the State.*

This extract is taken from Nihal Singh v. State of Punjab, (2013) 14 SCC 65 : (2013) 3 SCC (L&S) 85 : 2013 SCC OnLine SC 713 at page 80

36. *The other factor which the State is required to keep in mind while creating or abolishing posts is the financial implications involved in such a decision. The creation of posts necessarily means additional financial burden on the exchequer of the State. Depending upon the priorities of the State, the allocation of the finances is no doubt exclusively within the domain of the legislature. However in the instant case creation of new posts would not create any additional financial burden to the State as the various banks at whose disposal the services of each of the appellants is made available have agreed to bear the burden. If absorbing the appellants into the services of the State and providing benefits on a par with the police officers of similar rank employed by the State results in further financial commitment it is always open for the State to demand the banks to meet such additional burden. Apparently no such demand has ever been made by the State. The result is—the various banks which avail the services of these appellants enjoy the supply of cheap labour over a period of decades. It is also pertinent to notice that these banks are public sector banks.*

This extract is taken from Nihal Singh v. State of Punjab, (2013) 14 SCC 65 : (2013) 3 SCC (L&S) 85 : 2013 SCC OnLine SC 713 at page 80

37. *We are of the opinion that neither the Government of Punjab nor these public sector banks can continue such a practice consistent with their obligation to function in accordance with the Constitution. Umadevi (3) [State of Karnataka v. Umadevi (3),*

(2006) 4 SCC 1 : 2006 SCC (L&S) 753] judgment cannot become a licence for exploitation by the State and its instrumentalities.

This extract is taken from Nihal Singh v. State of Punjab, (2013) 14 SCC 65 : (2013) 3 SCC (L&S) 85 : 2013 SCC OnLine SC 713 at page 80

***38**. For all the abovementioned reasons, we are of the opinion that the appellants are entitled to be absorbed in the services of the State. The appeals are accordingly allowed. The judgments under appeal are set aside."*

3.18. Learned Senior Counsel also relied on the decision of this Court rendered in the case of ***Dr. Prasanna Kumar Mishra Vrs. State of Odisha and Others***, disposed of on 01.12.2015, so upheld by this Court in its order dated 11.12.2019 in Writ Appeal No.4 of 2016 and further confirmed by the Hon'ble Apex Court in its order dated 07.08.2020 in SLP(Civil) No.4945 of 2020. This Court in Para-21 and 22 in the case of ***Prasanna Kumar Mishra*** has held as follows:-

*"**21.** No doubt after establishment of BPUT, the institutions under control of BPUT have to fill up the vacancies in accordance with the provisions of BPUT Act and Rules framed thereunder. If the institution has been taken over along with its staffs, in that case BPUT has to take necessary steps for regularization of the services instead of terminating them though the employees have not been appointed under the provisions of BPUT Act and Rules.*

***22.** In that view of the matter, this Court is of the considered view that the opposite parties should absorb the petitioner on regular basis against sanctioned vacant post taking into account the length of service rendered by him as a Lecturer in Mathematics in which he is continuing without insisting him to undergo the rigors of the selection procedure laid down under the BPUT Act and Rules framed thereunder reason being in the meantime the petitioner has become over aged and he has also been exploited for 20 years for no reasons though he has qualified in all the interviews conducted by the authority for his engagement on contractual basis. The petitioner being not a backdoor entrant to the service, the opposite party-University should extend all consequential benefits as due and admissible in accordance with law as expeditiously as possible preferably within a period of four months."*

Reliance was also made to the decision of this Court in the case of ***Sanatan Sahoo Vrs. State of Odisha and Others***, reported in 2017 (II) ILR-CTC-1059.This court in Para 6 to 9 has held as follows:-

"6. On perusal of the record, it reveals that the petitioner having the requisite qualification was engaged as Data Entry Operator on 01.09.1995. Since he was computer literate by then and computers were introduced in various departments of the State Government, being satisfied with the performance of the petitioner, on the discussion made between the Chief Engineer, P.H. Orissa with Secretary Housing & Urban Development Departments, vide order dated 06.11.2002, the petitioner was directed to work under Housing & Urban Development Department, at Bhubaneswar. Since then the petitioner has been performing his duty to the best of the satisfaction of all concerned. The Chief Engineer, PH (Urban) vide order dated 17.06.2009 directed all the Executive Engineers of PH divisions to furnish the information about DLR/NMR/HR workers engaged after 12.04.1993 for their regularization. Prior to deployment of the petitioner in Housing & Urban Development Department, there was a meeting on 30.10.2002 wherein it was decided to create the post of Computer Assistants in lieu of abolition of equal numbers of Junior Assistants. After the posting of the petitioner also

Housing & Urban Development Department vide letter No. 641/HUD dated 16.08.2004 recommended the case of the petitioner for regularization with concurrence of Finance Department. Thereafter in the meeting of all Principal Secretary, it was decided to absorb Data Entry Operators. While the petitioner was so continuing two posts of Jr. Data Entry Operator in the Administrative Department of Housing & Urban Development Department recommended the case of the petitioner and others since their services are badly required. Thus, it is apparent that appreciating his performance, time and again steps are being taken for regularization of his service both by PH Department and U & UD Department. While he was so continuing, even though two posts of Jr. Data Entry Operators were created under H& UD Department, the same were filled up on out sourcing basis from the service provider without due process of selection. Their services have also been regularized. Thus non consideration of the case of an employee, whose services have been utilized for last 22 years, is nothing but exploitation of such employee by his employer. The persons who were sponsored through outsourcing agency by the Service Provider and not through the due process of selection, have already been regularized, whereas the petitioner, has been discriminated on the plea that he has not been appointed by following the Rules meant for Data Entry Operators.

*7. Law is well settled in the case of Secretary State of Karnataka and others v. Umadevi reported in **(2006) 4 SCC 1**, Wherein at paragraph 53 it has been held as thus:-*

"53. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in S.V. NARAYANAPPA (supra), R.N. NANJUNDAPPA (supra), and B.N. NAGARAJAN (supra), and referred to in paragraph 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of Courts or of tribunals. The question of regularization of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases above referred to and in the light of this judgment. In that context, the Union of India, the State Governments and their instrumentalities should take steps to regularize as a onetime measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of Courts or of tribunals and should further endure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date. We also clarify that regularization, if any already made, but not subjudice, need not be reopened based on this judgment, but there should be no further by-passing of the constitutional requirement and regularizing or making permanent, those not duly appointed as per the constitutional scheme."

*However in the case of State of Karnataka & others v. M.L. Keshari & others reported in **(2010) 9 SCC 247**, the principle decided by the Apex Court in the case of Umadevi (supra) has been further clarified and followed.*

8. This Court in the case of Prakash Kumar Mohanty v. State of Odisha and others (W.P.(C) No. 22159 of 2012 decided on 28.02.2017) referring to the decisions in the case of Umadevi (Supra) and M.L. Kesari (supra) directed the competent authority to take a decision on the grievance of the petitioner in the light of the observations made in paragraph-53 of the Umadevi case within eight weeks from the date of receipt of copy of the order.

9. Admittedly in the present case, the petitioner having the requisite qualification was engaged as Data Entry Operator since September, 1995 and he has been continuing as such till date without the intervention of the Courts. He approached the Tribunal in the year 2013 for his regularization before the notification issued by the State Government regarding Odisha Group 'C' and Group 'D' posts (contractual appointment) Rules, 2003. The recruitment rule came into force only in the year 2008 and the rule regarding contractual engagement as contended by the State Government was followed latter on. Thus the engagement of the petitioner at best can be termed as irregular engagement and not illegal engagement. That apart, it is also admitted that sanctioned posts are available since 2009 and the petitioner had also completed more than 10 years by then."

Reliance was also placed to the decision in the case of ***Ranjeet Kumar Das Vrs. State of Odisha and Others***, reported in 2018 (I) ILR-CTC-659. This Court in Para-6, 11, 14, 15 and 17 has held as follows:-

"6. Before delving into the niceties of the order passed by the tribunal, this Court deems it proper to examine the claims of the petitioner on the basis of the factual matrix available on record itself. On the basis of the pleadings available before this Court, no doubt the petitioner had approached the tribunal seeking regularization of his services. Regularization in service law connotes official formalisation of an appointment, which was made on temporary or ad hoc or stop gap or casual basis or the like, in deviation from the normal rules of applicable norms of appointment. Such formalisation makes the appointment regular. The ordinary meaning of regularisation is "to make regular" according to The 12 Shorter Oxford English Dictionary, 3rd Edition, and according to Black's Law Dictionary, 6th Edition, the word "regular" means: "Conformable to law. Steady or uniform in course, practice, or occurrence; not subject to unexplained or irrational variation. Usual, customary, normal or general. Gerald v. American Cas. Co of Reading, Pa., D.C.N.C., 249 F, Supp. 355, 357. Made according to rule, duly authorised, formed after uniform type; built or arranged according to established plan, law, or principle. Antonym of "casual" or "occasional," Palle v. Industrial Commission, 79 Utah 47, 7 P. 2d. 248, 290."

Xxxx xxxx xxxx xxxx

11. In view of above constitutional philosophy, whether courts can remain as mute spectator, is a matter to be considered to achieve the constitutional goal in proper perspective. But all these questions had come up for consideration and decided by the Constitution Bench of the apex Court in Umadevi (3) mentioned supra. The factual matrix of the case in Umadevi (3) arose for consideration from a judgment of Karnataka High Court. In some of the cases, the Karnataka High Court rejected the claims of persons, who had been temporarily engaged as daily wagers but were continued for more than 10 years in the Commercial Taxes Department of the State of Karnataka for regularization as permanent employees and their entitlement to all the benefits of regular employees. Another set of civil appeals arose from the order passed by the same High Court on a writ petition challenging the order of the government directing cancellation of appointments of all casual workers/daily rated workers and seeking a further direction for the regularization of all such daily wage earners engaged by the State or local bodies. These claims were rejected by the Division Bench of the Karnataka High Court on appeal from the judgment of the learned Single Judge. The reason for the mater being considered by the Constitution Bench arose because of two earlier orders of reference made by a Bench of two-Judge and subsequently by a Bench of three-Judge- Secretary, State of Karnatak v. Uma Devi (1) (2004) 7 SCC 132, and

Secretary, State of Karnataka v. Uma Devi (2) (2006) 4 SCC 44, respectively, as they noticed the conflicting opinions expressed by the earlier 3 Bench judgments in relation to regularization.

xxxx xxxx xxxx xxxx

14. Applying the ratio of Umadevi (3) case, this Court in Nihal Singh v. State of Punjab, (2013) 14 SCC 65 directed the absorption of the Special Police Officers in the services of the State of Punjab holding as under: "35. Therefore, it is clear that the existence of the need for creation of the posts is a relevant factor with reference to which the executive government is required to take rational decision based on relevant consideration. In our opinion, when the facts such as the ones obtaining in the instant case demonstrate that there is need for the creation of posts, the failure of the executive government to apply its mind and take a decision to create posts or stop extracting work from persons such as the appellants herein for decades together itself would be arbitrary action (inaction) on the part of the State. 36. The other factor which the State is required to keep in mind while creating or abolishing posts is the financial implications involved in such a decision. The creation of posts necessarily means additional financial burden on the exchequer of the State. Depending upon the priorities of the State, the allocation of the finances is no doubt exclusively within the domain of the legislature. However in the instant case creation of new posts would not create any additional financial burden to the State as the various banks at whose disposal the services of each of the appellants is made available have agreed to bear the burden. If absorbing the appellants into the services of the State and providing benefits on a par with the police officers of similar rank employed by the State results in further financial commitment it is always open for the State to demand the banks to meet such additional burden. Apparently no such demand has ever been made by the State. The result is-the various banks which avail the services of these appellants enjoy the supply of cheap labour over a period of decades. It is also pertinent to notice that these banks are public sector banks."

15. As it appears from the record itself, the case of the petitioner is covered under the exception carved out in paragraph 53 of Umadevi (3) (supra), which is applicable to the present case. Meaning thereby, against an existing vacancy the petitioner having been engaged by following due procedure of selection and continued for a quite long period and, as admitted by Mr. R.K. Mohapatra, learned Government Advocate appearing for the State opposite parties and as is evident from the pleadings in the counter affidavit, the petitioner is still continuing, the same cannot be treated as an "illegal" appointment rather it may be nomenclature as an "irregular" appointment.

17. The tribunal having failed to give any direction so far as relief claimed in the Original Application for regularization of services of the petitioner, we are of the view that the impugned order, having not been passed in conformity with the relief sought, cannot sustain in the eye of law and the same is liable to be quashed. Accordingly, the order dated 04.10.2010 passed by the Orissa Administrative Tribunal, Bhubaneswar in O.A. No.1335 of 2003 is hereby quashed. The opposite parties are directed to take necessary steps in accordance with law for regularization of services of the petitioner treating the same as 24 an irregular appointment as per the exception carved out in the case of Umadevi (3) mentioned supra as expeditiously as possible, preferably within a period of four months from the date of communication of this judgment, and also release the legitimate dues as admissible to the petitioner forthwith."

Learned Senior Counsels also relied on the decision in the case of ***Subrat Narayan Das Vrs. State of Odisha and Others*** (in W.P.(C) No.18569 of 2016 and batch, disposed of on 12.07.2022). This Court in para-21 and 22 has held as follows:-.

> *"**21.** Similar view has also been taken by the apex Court in **Km. Neelima Mishra v. Harinder Kaur Paintal**, (1990) 2 SCC 746 : AIR 1990 SC 1402 and **E.P. Royappa v. State of Tamilnadu**, (1974) 4 SCC 3. It was held that Clause-1 of Article-16 guarantees equality of opportunity for all citizens in the matters of employment or appointment to any office under the State. The very concept of equality implies recourse to valid classification for preference in favour of the disadvantaged classes of citizens to improve their conditions so as to enable them to raise themselves to positions of equality with the more fortunate classes of citizens. This view has also been taken note of by the apex Court in the case of **Indra Sawhney and others v. Union of India and others**, 1992 Supp. (3) SCC 217 : AIR 1993 SC 477.*
>
> ***22.** In view of such position, if the Petitioners have been allowed to continue for a quite long period on contractual basis, due to financial crunch, they cannot be thrown out stating that they were not recruited as per the provisions of BPUT Act and the Rules framed thereunder. Therefore, the Petitioners case should be taken into consideration for regularization of their services."*

4. Making all these submissions, learned Senior Counsel appearing for the Petitioners contended that since Petitioners were all engaged on contractual basis by facing due recruitment process in the year 2006 and they are continuing as such till date, they are eligible and entitled to get the benefit of regularization with quashing of the impugned order dated 08.08.2018 so passed by the O.P. No.1. Petitioner in view of the stipulation contained in the Preamble to 2016 Rules are also protected and are not governed under the said Rules to face the recruitment so conducted by OPSC.

5. Per contra, Mr. S.K. Samal, learned Addl. Govt. Advocate made his submission basing on the stand taken in the counter affidavit. Though it is not disputed by the learned Addl. Govt. Advocate that basing on the instruction issued by the Government under Annexure-1 and 2 in the year 2006, petitioners were selected and engaged on contractual basis as against the post of Junior Lecturer in various discipline, but as found from the advertisement issued for the said purpose under Annexure-3, the selection was made basing on the performance in the walk-in-interview and accordingly it cannot be taken that petitioners were selected by facing due selection process. It is also contended that for the purpose of appointment of the petitioners on contractual basis, 72 nos. of post of Junior Lecturers and 32 nos. of Laboratory Assistants were only created on contractual basis vide Government order dated 28.07.2006. It is accordingly contended that since petitioners were all engaged on contractual basis, with due creation of contractual posts, petitioners are not eligible to get the benefit of regular appointment as they were never recruited and appointed as against Sanctioned Regular Post.

5.1. It is also contended that even though petitioners after such engagement on contractual basis, were allowed to continue with due extension of their engagement vide order issued under Annexure-5 series, but all those extensions were also issued while allowing the petitioners to continue on contractual basis. It is contended that since there was no recruitment rule for appointment of such Junior Lecturer at the relevant time, State Govt. in ST & SC Development Department in its wisdom, framed the rules namely

Orissa Higher Secondary Education Service (In State Scale of Pay) (Method of Recruitment and Conditions of Service of Post Graduate Teachers of the ST & SC Development Department) Rules, 2016, which was published on 20th May, 2016. Rule-6 of the said Rules prescribes the eligibility criteria for direct recruitment as against the post of Junior Lecturer (Post Graduate Teacher).

5.2. As provided under Rule-6, a candidate will be held eligible for direct recruitment to the post of Post Graduate Teacher, if he has got Masters Degree in the subject concerned with 50% mark and have B.Ed. or Equivalent degree recognized by National Council of Teacher Education. The Diploma and degree in Computer Application is also a desirable qualification. It is also contended that as provided under Rule-7 of the said Rules, the procedure for direct recruitment was prescribed and as provided therein, the Commission shall conduct a test in General English, General Knowledge and the subject concerned for which vacancies have been advertised. Since the petitioners in the present batch of cases were engaged by facing walk-in-interview, which is not in terms of the provisions contained under Rule-6 & 7 of the 2016 Rules, it cannot be said that the Petitioners were duly recruited and engaged as Junior Lecturers (Post Graduate Teacher).

5.3. It is further contended that in view of the clear provision contained under the aforesaid 2016 Rules, the Tribunal while disposing the batch of Original Applications vide order dated 14.03.2018 in O.A. No.1225(C) of 2015 and batch was not inclined to issue any direction, directing Opp. Parties to regularize the services of the petitioners. The Tribunal instead when directed the State- Opp. Party No.1 to take a policy decision for regularization of the services of the petitioners in exercise of the relaxation provision contained under Rule-17 of the aforesaid Rules, claim of the petitioners in terms of the said order was duly considered and rejected vide the impugned order dated 08.08.2018 so passed by the Opp. party No.1. It is also contended that the order passed by the Tribunal though was challenged by the present petitioners before this Court in W.P.(C) No.11442 of 2018 and batch, but the Writ Petitions were disposed of by granting liberty to the petitioners to assail the order dated 08.08.2018.

5.4. Since the Tribunal while deciding the issue in its order dated 14.03.2018, held that in view of the provisions contained under the 2016 Rules, no direction can be issued to the Opp. Parties to regularize the services of the Petitioners taking into account their continuance as Junior Lecturers on contractual basis, the claim as made in the present Writ Petition being of similar nature is also not entertainable. It is also contended that the post of Junior Lecturer subsequently renamed as Post Graduate Teacher belong to State level Class-II category and the recruitment to fill up such post is to be made by the OPSC.

5.5. Pursuant to the aforesaid provisions contained under the 2016 Rules, OPSC issued Advertisement No.6 of 2017-18 and in terms of the said advertisement though 230 Nos. posts were advertised, but 150 candidates were provided with the appointment. Subsequently, in terms of similar advertisement issued by the Commission vide Advertisement No.12 of 2020-21, though 139 posts were advertised, but 124 candidates were selected and provided with the appointment. It is contended that after coming into

force of the aforesaid 2016 Rules, Regular Vacancies can only be filled up by way of direct recruitment to be conducted in terms of the provisions contained under Rule-6 and 7 of the aforesaid 2016 Rules.

5.6. It is also contended that the submissions made by the learned Senior Counsel appearing for the Petitioners that they are protected by the provisions contained in the Preamble to the 2016 Rules, cannot be made applicable as the petitioner all through were engaged on contractual basis as against 72 nos. of contractual posts so created by the Govt.-O.P. No.1.

5.7. It is also contended that provisions contained under Rule-17 of the 1976 Rules, can only be relaxed for a limited purpose and objective of such Rules does not permit total suspension of the Rules and recruitment dehors the Rules. In support of his aforesaid submission, learned Addl. Govt. Advocate relied on a decision of the Hon'ble Apex Court in the case of ***State of Odisha and Others Vrs. Sukanti Mohapatra and Others***, 1993 (2) SCC 486. Hon'ble Apex Court in Para 8 of the Judgment has held as follows:-

> *"**8.** The Rules were made under the proviso to Article 309 for regulating the method of recruitment to the posts of Lower Division Assistants in the offices of the Heads of Departments. The method of recruitment set out in Rule 3 is through a competitive examination to be held once in every year. According to Rule 4 this competitive examination has to be conducted by a Board of Examiners after the Chairman of the Board has invited applications from those desirous of appearing at the examination through public advertisement. Rule 8 lays down the eligibility criteria as regards age, educational qualification, knowledge of Oriya language, etc. Rule 9 sets out the syllabus of the examination and Rule 10 provides for allotment of successful candidates to different departments. Rule 11 is somewhat important since it lays down the procedure for filling up vacancies after the list of candidates is exhausted. Where the vacancy has arisen after the list is exhausted such vacancy may be filled by a successful candidate of the previous year and failing that by any qualified candidate on a temporary basis till the result of the next year's examination is declared. Rule 12 provides the period of probation while Rule 13 lays down the rule for fixation of seniority. It says that the relative seniority of each candidate shall be determined with reference to his position in the competitive examination in any particular year. Where, however, a candidate of the previous year is selected under Rule 11 for appointment in the subsequent year he shall rank just below the successful candidates of the year in which the appointment was made. To this a proviso has been added as under:*
>
> *"Provided that those appointed as junior assistants, in relaxation of provisions under Rule 14, shall in that year rank below all candidates who have been validly recruited under Rule 3 and under first part of Rule 11 of the said rules."*
>
> *Rule 14 we have already extracted earlier. Rule 15 provides for reservations and concessions to SC/ST and other candidates. Rule 16 stipulates that these rules shall have overriding effect notwithstanding anything inconsistent therewith contained in any other recruitment rules, orders, etc. It becomes clear from these rules that after they came into force they alone held the field. Secondly, the method of recruitment is only one, namely, direct recruitment through a competitive examination to be conducted by the Board of Examiners. The only exception that we find is in Rule 11 which permits a temporary appointment till the next year's examination result is declared. Despite the Rules having*

come into force with effect from January 1, 1976, appointments were made in disregard of the Rules from 1976 and onwards. It is this batch of irregularly appointed employees whose services were sought to be regularised under Rule 14 by the orders of January 3, 1985 and February 14, 1985. Counsel for the regular recruits contend that what the Government has done in exercise of power under Rule 14 is to set at naught the entire body of the Rules as if they never existed. The power of relaxation, contend counsel, cannot be so used as to render the Rules non est. In support of this contention strong reliance was placed on the following observations in the case of R.N. Nanjundappa v. T. Thimmiah [(1972) 1 SCC 409 : AIR 1972 SC 1767 : 1972 SLR 94] : (SCC pp. 416-17, para 26)

"... If the appointment itself is in infraction of the rules or if it is in violation of the provisions of the Constitution, illegality cannot be regularised. Ratification or regularisation is possible of an act which is within the power and province of the authority but there has been some non-compliance with procedure or manner which does not go to the root of the appointment. Regularisation cannot be said to be a mode of recruitment. To accede to such a proposition would be to introduce a new head of appointment in defiance of rules or it may have the effect of setting at naught the rules."

In the present case also the appointments of the employees whose services are sought to be regularised were dehors the Rules. Rule 14 merely permits relaxation of any of the provisions of the Rules in public interest but not the total shelving of the Rules. The orders do not say which rule or rules the Government considered necessary and expedient in public interest to relax. What has been done under the impugned orders is to regularise the illegal entry into service as if the Rules were not in existence. Besides the reasons for so doing are not set out nor is it clear how such regularisation can subserve public interest. Rule 14 has to be strictly construed and proper foundation must be laid for the exercise of power under that rule. The Rules have a limited role to play, namely, to regulate the method of recruitment, and Rule 14 enables the Government to relax any of the requirements of the Rules pertaining to recruitment. The language of Rule 14 in the context of the objective of the Rules does not permit total suspension of the Rules and recruitment dehors the Rules. In the present case the recruitments had taken place years back in total disregard of the Rules and now what is sought to be done is to regularise the illegal entry in exercise of power under Rule 14. Rule 14, we are afraid, does not confer such a blanket power; its scope is limited to relaxing any rule, e.g., eligibility criteria, or the like, but it cannot be understood to empower Government to throw the Rules overboard. If the rule is so construed it may not stand the test of Article 14 of the Constitution. The proviso to Rule 13 can come into play in the matter of fixation of seniority between candidates who have successfully cleared the examination and a candidate who cleared the examination after availing of the benefit of relaxation. We are, therefore, of the opinion that the Tribunal committed no error in understanding the purport of Rule 14."

5.8. Making all these submissions, learned Addl. Govt. Advocate contended that since the petitioners were all engaged on contractual basis and they were never recruited as against the vacant Sanctioned Regular Post by facing due recruitment process as provided under the 2016 Rules, they are not eligible and entitled to get the benefit of Regularization as claimed. Not only that similar prayer for regularization having been not entertained by the Tribunal while disposing the batch of Original Applications vide order dated 04.03.2018 taking into account the provision contained under 2016 Rules, similar prayer cannot be entertained by this Court. It is accordingly contended that the

impugned order does not require any interference and the petitioner be directed to face the recruitment process, so conducted by the Commission to fill up the post in question in term of 2016 Rules if they are otherwise eligible.

6. To the submissions made by the learned Addl. Govt. Advocate, learned Senior Counsels appearing for the Petitioners contended that 72 nos. of posts so created on contractual basis in the year 2006 vide Department order No.30136 dated 28.07.2006, basing on which the present petitioners were engaged on contractual basis in the year 2006, have already been regularized with creation of 72 nos. of Regular Posts vide office order dated 16.06.2016 of the Govt. in the ST & SC Development Department. Contents of letter dated 16.06.2016 is reproduced hereunder:-

"From:

R. Raghu Prasad, IFS
Director (ST)-cum-Additional Secretary to Govt.

To,

The Accountant General (A & E) Odisha, Bhubaneswar.

Sub: Creation of Regular Posts for, 8 upgraded Higher Secondary Schools (+2 Science & Commerce Colleges) of ST & SC Development Deptt. under State Plan.

Sir,

I am directed to convey the sanction of Governor to the creation of following regular posts for the 8 upgraded Higher Secondary School (+2 Science & Commerce Colleges) of the ST & SC Development Department on abolition of 72 contractual posts of Jr. Lecturers created vide this Department order No.30136 dated 28.07.2006, for smooth functioning of the Higher Secondary Schools. A detailed Statement indicating the name of the Higher Secondary Schools and the number of posts created under different categories is enclosed at Annexure-A

i) 8 (Eight) posts of Post Graduate Teachers in Physics, one post for each upgraded Higher Secondary School carrying scale of pay of Rs.9300-34,800/- + Grade Pay Rs.4600/- in Pay Band-2.

ii) 8 (Eight) posts of Post Graduate Teachers in Chemistry, one post for each upgraded Higher Secondary School carrying scale of pay of Rs.9300-34,800/- + Grade Pay Rs.4600/- in Pay Band-2.

iii) 8 (Eight) posts of Post Graduate Teachers in Mathematics, one post for each upgraded Higher Secondary School carrying scale of pay of Rs.9300-34,800/- + Grade Pay Rs.4600/- in Pay Band-2.

iv) 8 (Eight) posts of Post Graduate Teachers in Botany, one post for each upgraded Higher Secondary School carrying scale of pay of Rs.9300-34,800/- + Grade Pay Rs.4600/- in Pay Band-2.

v) 8 (Eight) posts of Post Graduate Teachers in Zoology, one post for each upgraded Higher Secondary School carrying scale of pay of Rs.9300-34,800/- + Grade Pay Rs.4600/- in Pay Band-2.

vi) 16 (Sixteen) posts of Post Graduate Teachers in English, two posts for each upgraded Higher Secondary School carrying scale of pay of Rs.9300-34,800/- + Grade Pay Rs.4600/- in Pay Band-2.

vii) 16 (Sixteen) posts of Post Graduate Teachers in Odia, two posts for each upgraded Higher Secondary School carrying scale of pay of Rs.9300-34,800/- + Grade Pay Rs.4600/- in Pay Band-2.

viii)16 (Sixteen) posts of Post Graduate Teachers in Commerce, two posts for each upgraded Higher Secondary School carrying scale of pay of Rs.9300-34,800/- + Grade Pay Rs.4600/- in Pay Band-2.

2. The Charge is debitable to Dernand No.11-2225-Welfare of SCs, STs and OBCs State Plan- District Sector-02-Welfare of STs-227-Education 1923-Higher Secondary Schools (+2 Science College)

3. The concerned Principal/Headmaster (Principal-in-Charge) of the upgraded Higher Secondary School of ST & SC Development will be the DDO. The Director (ST)-cum-Addl. Secretary to Govt., ST & SC Development Department is the controlling officer and ST & SC Development Deptt. is the Administrative Deptt. in respect of the expenditure.

4. The recruitment to the teaching posts shall be made through OPSC following the relevant recruitment rules and provisions of ORV Act.

5. Creation of those posts has been concurred in by the Finance Department vide their UOR No.233 SS-II dated 12.12.2012."

6.1. It is also contended that since 72 nos. of post of Junior Lecturer now designated as Post Graduate Teacher so created on contractual basis vide order dated 28.07.2006 have been abolished with creation of equal nos. of Regular Post vide order dated 16.06.2016, petitioners who will now be around 27 in numbers, can very well be accommodated and regularized as against such 72 nos. of post so created on regular basis.

6.2. It is also contended that since the petitioners w.e.f. their initial date of engagement in the month of Aug, 2006 continued on contractual basis without getting any protection from any Court of law till the year 2018, in view of the provisions contained under Para-44 of the decision in the case of ***Uma Devi*** as cited (supra) coupled with the decision in the case of ***Nihal singh***, petitioners are otherwise eligible to get the benefit of regularization as prayed for. It is also contended that basing on the selection process conducted by OPSC, all the posts so advertised have not been filled up.

6.3. It is also contended that after passing of the impugned order on 08.08.2018, the earlier order passed by the Tribunal on 14.03.2018, no more subsists and it merged with the impugned order dated 08.08.2018. Not only that in view of the provisions contained under the Preamble to the 2016 Rules, the Tribunal having committed an illegality in not relying on the said provisions while disposing the matters vide order dated 14.03.2018, there is no bar on the part of this Court to pass appropriate order while exercising the power under Artile-226 of the Constitution of India. In support of the aforesaid submission Mr. Routray, learned Senior Counsel relied on the following decision.

Hon'ble Apex Court in the case of ***State of U.P. and Another Vrs. Synthetics and Chemicals Ltd. and Another*** reported in ***(1991) 4 SCC 139*** in Para-41 has held as follows:-

"41.Does this principle extend and apply to a conclusion of law, which was neither raised nor preceded by any consideration. In other words can such conclusions be considered as declaration of law? Here again the English Courts and jurists have carved out an exception to the rule of precedents. It has been explained as rule of sub-silentio. A decision passed sub-silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not

perceived by the Court or present to its mind" (Salmond 12th Edition). In Lancaster Motor Company {London) Ltd. v. Bremith Ltd. 1941 1KB 675, the Court did not feel bound by earlier decision as it was rendered "without any argument, without reference to the crucial words of the rule and without any citation of the authority". It was approved by this Court in 290330 . The Bench held that, "precedents sub-silentio and without argument are of no moment". The Courts thus have taken recourse to this principle for relieving from injustice perpetrated by unjust precedents. A decision which is not express and is not founded on reasons nor it proceeds on consideration of issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141 Uniformity and consistency are core of judicial discipline. But that which escapes in the judgment without any occasion is not ratio decedendi. In Shama Rao v. State of Pondicherry AIR 1967 SC 1680 it was observed, "it is trite to say that a decision is binding not because of its conclusions but in regard to its ratio and the principles, laid down there-in". Any declaration or conclusion arrived without application of mind or preceded without any reason cannot be deemed to be declaration of law or authority of a general nature binding as a precedent. Restraint in dissenting or overruling is for sake of stability and uniformity but rigidity beyond reasonable limits is inimical to the growth of law."

6.4. In support of the submission that order passed by the Tribunal on 14.03.2018 merged with order dated 08.08.2018 and accordingly there is no bar on the part of this Court to pass appropriate order, learned Senior Counsels appearing for the Petitioners relied on a decision of the Hon'ble Apex Court in the case of ***Commissioner of Income Tax, Bombay Vrs. Amritlal Bhogilal and Co.***, reported in (1958) 34 ITR 130. Hon'ble Apex Court in Para-10 of the judgment has held as follows:-

"10. There can be no doubt that, if an appeal is provided against an order passed by a tribunal, the decision of the appellate authority is the operative decision in law. If the appellate authority modifies or reverses the decision of the tribunal, it is obvious that it is the appellate decision that is effective and can be enforced. In law the position would be just the same even if the appellate decision merely confirms the decision of the tribunal. As a result of the confirmation or affirmance of the decision of the tribunal by the appellate authority the original decision merges in the appellate decision and it is the appellate decision alone which subsists and is operative and capable of enforcement; but the question is whether this principle can apply to the Income-tax Officer's order granting registration to the respondent."

Reliance was also placed in the case of ***Shankar Ramchandra Abhyankar Vrs. Krishnaji Dattatreya Bapat***, reported in (1969) 2 SCC 74. Hon'ble Apex Court in Para-7 of the judgment has held as follows:-

*"7. It may be useful to refer to certain other decisions which by analogy can be of some assistance in deciding the point before us. In **U.J.S. Chopra v. State of Bombay** the principal of merger was considered with reference to **Section 439** of the Criminal Procedure Code which confers revisional jurisdiction on the High Court. In the majority judgment it was held, inter alia, that a judgment pronounced by the High Court in the exercise of its appellate or revisional jurisdiction after issue of a notice and a full hearing, in the presence of both the parties would replace the judgment of the lower court thus constituting the judgment of the High. Court-the only final judgment to be executed in accordance with law by the court below. In **Chandi Prasad Chokhani v. The State of Bihar** it was said that save in exceptional and special circumstances this*

*Court would not exercise its power under **Article 136** in such a way as to bypass the High Court and ignore the latter's decision which had become final and binding by entertaining an appeal directly from orders of a Tribunal. Such exercise of power would be particularly inadvisable in a case where the result might lead to a conflict of decisions of two courts of competent jurisdiction. In our opinion the course which was followed by the High Court, in the present case, is certainly one which leads to a conflict of decisions of the same court. "*

Reliance was also placed in the case of ***Kunhay Yammed and Others Vrs. State of Kerala and Another*** reported in (2000) 6 SCC 359. Hon'ble Apex Court in Para-42 and 44(iii) of the said judgment has held as follows:

"42. To merge means to sink or disappear in something else; to become absorbed or extinguished; to be combined or be swallowed up. Merger in law is defined as the absorption of a thing of lesser importance by a greater, whereby the lesser ceases to exist, but the greater is not increased; an absorption or swallowing up so as to involve a loss of identity and individuality. (See Corpus Juris Secundum, Vol. LVII, pp. 1067-1068)

*44. (iii) Doctrine of merger is not a doctrine of universal or unlimited application. It will depend on the nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or capable of being laid shall be determinative of the applicability of merger. The superior jurisdiction should be capable of reversing, modifying or affirming the order put in issue before it. Under **Article 136** of the Constitution the Supreme Court may reverse, modify or affirm the judgment-decree or order appealed against while exercising its appellate jurisdiction and not while exercising the discretionary jurisdiction disposing of petition for special leave to appeal. The doctrine of merger can therefore be applied to the former and not to the latter. "*

Similarly decision reported in the case of ***Experion Developers Private Limited Vrs. Himanshu Dewan and Sonali Dewan and Others***, reported in 2023 LiveLaw (SC) 674 was also relied on by the learned Senior Counsels for the petitioners. Hon'ble Apex Court in Para-32 of the said Judgment has held as follows:-

*"32. The dismissal of the appeal in the case of **Pawan Gupta** (supra) without any reasons being recorded would not attract **Article 141** of the Constitution of India as no law was declared by the Supreme Court, which will have a binding effect on all courts and tribunals in India. There is a clear distinction between the binding law of precedents in terms of **Article 141** of the Constitution of India and the doctrine of merger and res judicata. To merge, as held in **Kunhayammed** (supra), and **Khoday Distilleries Ltd.** (supra) means to sink or disappear in something else, to become absorbed or extinguished. The logic behind the doctrine of merger is that there cannot be more than one decree or operative orders governing the same subject matter at a given point of time. When a decree or order passed by an inferior court, tribunal or authority is subjected to a remedy available under law before a superior forum, then the decree or order under challenge continues to be effective and binding; nevertheless, its finality is put in jeopardy. Once the superior court disposes the dispute before it in any manner, either by affirming the decree or order, by setting aside or modifying the same, it is the decree of the superior court, tribunal or authority, which is the final binding and operative decree. The decree and order of the inferior court, tribunal or authority gets merged into the order passed by the superior forum. However, as has been clarified in both decisions, this doctrine is not of universal or unlimited application. The nature of jurisdiction exercised by the superior court and the content or subject matter of challenge laid or could have been laid will have to be kept in view. "*

Similarly reliance was also placed in the case of ***Mary Pushpam Vrs. Telvi Curusumary and Others*** in Civil Appeal No.9941 of 2016 decided on 03.01.2024. Hon'ble Apex Court in Para-17 of the said Judgment has held as follows:-

> *"17. The doctrine of merger is a common law doctrine that is rooted in the idea of maintenance of the decorum of hierarchy of courts and tribunals.*
>
> *The doctrine is based on the simple reasoning that there cannot be, at the same time, more than one operative order governing the same subject matter. The same was aptly summed up by this Court when it described the said doctrine in* ***Kunhayammed & Ors. v. State of Kerala & Anr.1:***
>
> *"44 (i) Where an appeal or revision is provided against an order passed by a court, tribunal or any other authority before superior forum and such superior forum modifies, reverses or affirms the decision put in issue before it, the decision by the subordinate forum merges in the decision by the superior forum and it is the latter which subsists, remains operative and is capable of enforcement in the eye of the Law."*

7. I have heard Mr. B. Routray and Mr.Manoj kumar Mishra, learned Senior Counsels appearing for the petitioners and Mr. S.K. Samal, learned Addl. Govt. Advocate for the State. On the consent of the learned counsels appearing for the parties and with due exchange of pleadings, the matter was heard at the stage of admission and disposed of by the present order.

8. Having heard learned counsel for the parties and after going through the materials available on record, this Court finds that pursuant to the decision taken by the Government-O.P. No.1 under Annexure-1 and 2 and with due creation of 72 nos. of post of Junior Lecturer on contractual basis vide order No.30136 dated 28.07.2006, petitioners as per the criteria of selection decided in the proceeding of the meeting dated 07.06.2006 under Annexure-2, participated in the selection process in terms of the advertisement issued to that effect on 28.06.2006 by the O.P. No.2 for the post of Junior Lecturer. Since by the time petitioners face the recruitment process in terms of the advertisement issued on 28.06.2006 under Annexure-3, there was no recruitment rule governing the field, petitioners were selected and engaged in terms of the eligibility criteria so fixed by the committee in its proceeding dated 07.06.2006 under Annexure-2. In terms of the advertisement issued under Annexure-3, petitioners on being found suitable in all respect, were engaged as Junior Lecturers on contractual basis vide order of engagement issued in the month of Aug, 2006.

8.1. Petitioners on being so engaged on contractual basis w.e.f. Aug, 2006 were allowed to continue as such with due extension of their services vide orders issued on 09.07.2009 and 19.07.2012 under Annexure-5 series. All such extensions were also issued with due concurrence of the Finance Department. Not only that the remuneration of the petitioners was also enhanced from time to time with due concurrence of the finance department and the same is also reflected in order dated 09.12.2011 under Annexure-6.

8.2. It is also found from the record that after such engagement as Junior Lecturer on contractual basis in the month of Aug, 2006, petitioners were allowed to continue without any break in engagement and without any protection from any court of law. However, during pendency of the matter before the Tribunal In O.A.No.1225(C) of 2015

and batch, pursuant to coming into force of the 2016 rules and basing on the requisition made by the department, when OPSC issued the advertisement vide Advertisement No.6 of 2017-18, to fill up the post of Junior Lecturer/Post Graduate Teacher on regular basis, petitioners when challenged the same by filing appropriate applications in the pending OAs, the Tribunal for the first time in the year 2018 passed an interim order protecting the interest of the petitioners.

8.3. It is not the case of the Opp. Parties that the petitioners were earlier protected by virtue of any interim order passed by any Court of law. Petitioners since from their initial date of engagement in the month of Aug, 2006, were allowed to continue as Junior Lecturer (Post Graduate Teacher) on contractual basis without any interim protection from any Court of law, till such interim order was passed in the year 2018, placing reliance on the decision in the case of ***Uma Devi*** as cited (supra). It is the view of this Court that the petitioners by the time they were protected by the Tribunal with passing of the interim order in the year 2018, had otherwise become eligible to get the benefit of regularization having completed more than 10 (ten) years of service on contractual basis.

8.4. Not only that as found from the Preamble to the 2016 Rules, the said rules were framed in supersession of the earlier Rules/Regulations/Orders/Instructions except as respect to things done. Since by virtue of the instructions/circulars issued by the Govt. under Annexure-1 and 2, with due creation of the 72 nos. of contractual posts vide Office Order No.30136 dated 28.07.2006, petitioners were all engaged on contractual basis, in view of the provisions contained in the Preamble "except as respect to things done" and the decision in the case of ***Anushka Rengunthwar*** as cited (supra), it is the view of this Court that petitioners are protected with regard to their selection and engagement as Jr. Lecturers in terms of Annexures-1 and 2 and they are not covered under the provisions of 2016 Rules.

8.5. However, on the face of such provision contained in the Preamble to the 2016 Rule, the Tribunal while disposing the batch of Original Applications vide order dated 14.03.2018, though held that no such direction can be issued in violation to the provisions contained under 2016 Rules and accordingly directed for consideration of the claim of the petitioners to get the benefit of regularization taking recourse to the provisions contained under Rule-17 of the said Rules, but the directions so issued by the Tribunal in its order dated 14.03.2018 merged with the impugned order dated 08.08.2018. Placing reliance on the decision in the case of ***Kunhay Yammed, Experion Developers Private Limited, Shankar Ramchandra Abhyankar, Amritlal Bhogilal and Co. and Mary Pushpam*** as cited (supra), it is the view of this Court that order passed by the Tribunal on 14.03.2018 merged with the impugned order dated 08.08.2018 and it cannot be taken as a bar for this Court to reconsider the claim of the petitioners to get the benefit of regularization as made in the present batch of the Writ Petition while exercising the power under Article-226 of the Constitution of India.

8.6. Since the provisions contained under the Preamble to 2016 rules clearly protects any action or things done prior to enactment of the Rules in question, petitioners since in terms of the earlier instruction issued by the Govt. under Annexure-1 and 2,were

selected and engaged on contractual basis, they are not required to face the direct recruitment for their selection and appointment on regular basis in terms of 2016 Rules. The tribunal as per the considered view of this Court passed order dated 14.03.2018 without proper appreciation of the Preamble to the 2016 Rules and in view of the decision in the case of ***State of U.P. and Another*** as cited (supra), it cannot be taken as a bar on the part of this Court to consider the claim of the petitioners to get the benefit of regularization.

8.7. Since 72 nos. of contractual posts of Jr. Lecturer so created vide order dated 28.10.2006, have now been sanctioned on regular basis vide order dated 16.06.2016, there is no impediment on the part of the Opp. parties to absorb the petitioners as against such sanctioned Regular Posts.

8.8. In view of the aforesaid analysis, it is the view of this Court that petitioners because of their continuance on contractual basis w.e.f. Aug, 2006, are eligible and entitled to get the benefit of regularization. While holding so, this Court directs Opp. parties to pass appropriate order in regularizing the services of the petitioners as Junior Lecturers (Post Graduate Teacher) as against the 72 nos. of post created on regular basis with due abolition of the 72 nos. of contractual post. This Court directs O.P. No.1 to pass appropriate order in regularizing the services of the petitioners, within a period of 2 months from the date of receipt of this order. Till such an order is issued as directed, interim order passed in the present batch of Writ Petitions shall continue.

09. All the Writ Petitions are accordingly disposed of.

—— o ——

2024 (II) ILR-CUT-693

SANJAY KUMAR MISHRA, J.

W.P.(C) NO.42401 OF 2023

NATIONAL INSURANCE CO. LTD, CUTTACK ……Petitioner

-V-

BHAGABATI SINGH & ORS. ……Opp.Parties

MOTOR VEHICLE ACT, 1988 – Section 158(6) – The I.O did not act in terms of the provisions enshrined under sub-Section (6) of Section 158 of the Act – The petitioner/insurance company filed application to summon the I.O for examination which was rejected – Whether the impugned order is sustainable? – Held, No – The court below was not justified in rejecting the application of the Insurance Company.

Case Laws Relied on and Referred to :-

1. AIR 1989 SC 630 : M/s. Madan and Co. Vs. Wazir Jaivir Chand.
2. (2023) 4 SCC 381 : Gohar Mohammed vs. Uttar Pradesh State Road Transport Corporation and others.
3. 2021 (2) T.A.C. 353 (S.C) : Bajaj Allianz General Insurance Co. Vs. Union of India & Ors.

For Petitioner : Mr. P.K. Mahali.
For Opp.Parties : None.

JUDGMENT Date of Hearing & Judgment : 08.05.2024

S.K MISHRA, J.

Though the matter is listed under the heading "For Orders", regarding valid service of notice on Opposite Parties, on the request of the learned Counsel for the Petitioner, matter is taken up for hearing and final disposal as despite valid service of notice, the claimants, those who have been arrayed as Opposite Party Nos.1 to 3 and the owner of the vehicle, who has been arrayed as Opposite Party No.5, so also one of the co-claimants, who has been arrayed as Opposite Party No.4, on whom notice is deemed to be sufficient in view of the judgment of the apex Court reported in AIR 1989 SC 630 (***M/s. Madan and Co. Vs. Wazir Jaivir Chand***), go unrepresented.

2. The Writ Petition has been preferred challenging the order dated 07.11.2023 passed by the 1st M.A.C.T.-Cum-District Judge, Balasore in M.A.C. No.121 of 2021, vide which the petition dated 03.11.2023 filed by the Petitioner-Insurance Company (Opposite Party No.2 before the Court below) to summon the Investigating Officer (I.O.) for his examination was rejected on the ground that such petition filed by the Petitioner-Insurance Company does not deserve any merit.

3. The brief background facts, which led to filing of the present Writ Petition, as alleged by the Opposite Party Nos.1 to 4, who are claimants before the Court below, are that on 24.03.2021 at about 12.30 P.M., while the deceased-Hadibandhu Singh was returning from Balasore towards Soro in a Honda Activa Scooter bearing Regd. No.OD-22E-7029, at that time a Tanker bearing Regd. No.RJ-47GA-1764 coming from his backside in a rash and negligent manner and dashed to the scooter of the deceased, as a result of which the deceased-Hadibandhu Singh sustained grievous injuries. Thereafter, the deceased was shifted to F.M. Medical College & Hospital, Balasore, where the injured succumbed to the injuries. The claim petition has been filed by the wife, sons and daughter of the deceased claiming compensation before the Court below.

4. After receiving notice from the Claims Tribunal, the Petitioner Insurance Company appeared and filed its written statement disputing the alleged accident so also its liability, followed by a petition dated 03.11.2023 to summon the I.O. to adduce evidence in M.A.C. No.121 of 2021. To justify the said prayer, a ground was taken to the effect that there are serious discrepancies in the pleadings of the claimants in the claim petition and in the evidence on record as to the cause and manner of accident and liability of the Petitioner-Insurance Company so also alleged involvement of the I.O. to make a claim against the Petitioner-Insurance Company, who is the Insurer of the offending vehicle (Tanker) bearing Regd. No.RJ-47GA-1764. On filing of such petition, the case was posted to 07.11.2023 for filing Objection and hearing on the petition dated 03.11.2023 filed by the Insurance Co.

(Present Petitioner). Though no written objection was filed in response to the said petition, the Court below, after hearing both the sides, rejected the said petition on the very same day taking a view therein that the I.O. is not at all required to be examined in the said case. Hence, this Writ Petition.

5. To substantiate the prayer made in the Writ Petition, Mr. Mahali, learned Counsel for the Petitioner-Insurance Company, relying on the judgment of the apex Court in ***Gohar Mohammed vs. Uttar Pradesh State Road Transport Corporation and others,*** reported in (2023) 4 SCC 381 so also various provisions under the Motor Vehicles Act, 1988, shortly, the Act, 1988, submitted that in view of the stand taken in the written statement by the Petitioner and the grounds taken in the petition, which was rejected, so also the legal provisions under the Act, 1988 and the ratio decided in ***Gohar Mohammed*** (supra), the Court below ought to have allowed the petition filed by the Petitioner-Insurance Company, instead of rejecting the same on the ground that the I.O. is not required to be examined in the said case and the same will allegedly cause delay in adjudication of the case on merit.

6. Mr. Mahali, learned Counsel for the Petitioner further submitted that the accident occurred on 24.03.2021 and then the provisions of Section 158 of the Motor Vehicles Act, 1988 was in vogue. In terms of sub-section (6) of Section 158 of the Act, 1988, as soon as any information regarding any accident involving death or bodily injury to any person is recorded or report under the said provision is completed by a Police Officer, the Officer-in-Charge of the Police Station shall forward a copy of the same within thirty days from the date of recording of information or, as the case may be, on completion of such report to the Claims Tribunal having jurisdiction. A copy thereof to the concerned Insurer, and where a copy is made available to the Owner, he shall also, within thirty days of receipt of such report, forward the same to the concerned Claims Tribunal and Insurer. But, in the present case, the I.O. did not act in terms of the provisions enshrined under sub-section (6) of Section 158 of the Act, 1988. That apart, the Petitioner managed to get the charge sheet against the driver of the Tanker taking police into confidence as the insurance policy of the Honda Activa Scooter does not cover the risk of the Driver.

7. Mr. Mahali further submitted that since his client disputed the alleged liability on the said ground, the Tribunal ought to have summoned the I.O. at the cost of his client for examination, as was rightly prayed before it by filing an application to the said effect indicating therein the reasons to justify such prayer. He further submitted, the Court below failed to appreciate the legal provisions which the I.O. failed to follow so also settled position of law and rejected such application in a mechanical manner and without application of mind, even though no written objection was filed opposing to such prayer made by his client.

8. In view of such submission made by the learned Counsel for the Petitioner, it would be apt to extract below Section 158 of the Act, 1988, which was in vogue at the time of accident.

"158. **Production of certain certificates, licence and permit in certain cases. -** *(1) Any person driving a motor vehicle in any public place shall, on being so required by a police officer in uniform authorised in this behalf by the State Government, produce -*
(a) the certificate of insurance;
(b) the certificate of registration;
(c) the driving licence; and
(d) in the case of a transport vehicle, also the certificate of fitness referred to in section 56, and the permit, relating to the use of the vehicle.

(2) If, where owing to the presence of a motor vehicle in a public place an accident occurs involving death or bodily injury to another person, the driver of the vehicle does not at that time produce the certificates, driving licence and permit referred to in sub-section (1) to a police officer, he shall produce the said certificates, licence and permit at the police station at which he makes the report required by section 134.

(3) No person shall be liable to conviction under sub-section (1) or sub-section (2) by reason only of the failure to produce the certificate of insurance if, within seven days from the date on which its production was required under sub-section (1), or as the case may be, from the date of occurrence of the accident, he produces the certificate at such police station as may have been specified by him to the police officer who required its production or, as the case may be, to the police officer at the site of the accident or to the officer-in-charge of the police station at which he reported the accident:
Provided that except to such extent and with such modifications as may be prescribed, the provisions of this sub-section shall not apply to the driver of a transport vehicle.

(4) The owner of a motor vehicle shall give such information as he may be required by or on behalf of a police officer empowered in this behalf by the State Government to give for the purpose of determining whether the vehicle was or was not being driven in contravention of section 146 and on any occasion when the driver was required under this section to produce the certificate of insurance.

(5) In this section, the expression "produce the certificate of insurance" means produce for examination the relevant certificate of insurance or such other evidence as may be prescribed to prove that the vehicle was not being driven in contravention of section 146.

(6) ***As soon as any information regarding any accident involving death or bodily injury to any person is recorded or report under this section is completed by a police officer, the office incharge of the police station shall forward a copy of the same within thirty days from the date of recording of information or, as the case may be, on completion of such report to the Claims Tribunal having jurisdiction and a copy thereof to the concerned insurer, and where a copy is made available to the owner, he shall also within thirty days of receipt of such report, forward the same to such Claims Tribunal and Insurer."*** (Emphasis supplied)

Apart from the same, Sections 133 and 134 of the Act, 1988, being relevant, are also extracted below for ready reference:

*"**133. Duty of owner of motor vehicle to give information.-** The owner of a motor vehicle, the driver or conductor of which is accused of any offence under this Act shall, on the demand of any police officer authorized in this behalf by the State Government, give all information regarding the name and address of, and the licence held by, the driver or conductor which is in his possession or could by reasonable diligence be ascertained by him."*

> *" **134. Duty of driver in case of accident any injury to a person.-** When any person is injured or any property of a third party is damaged, as a result of an accident in which a motor vehicle is involved, the driver of the vehicle or other person in charge of the vehicle shall-*
>
> *(a) unless it is not practicable to do so on account of mob fury or any other reason beyond his control, take all reasonable steps to secure medical attention for the injured person, [by conveying him to the nearest medical practitioner or hospital, and it shall be the duty of every registered medical practitioner or the doctor on the duty in the hospital immediately to attend to the injured person and render medical aid or treatment without waiting for any procedural formalities], unless the injured person or his guardian, in case he is a minor, desires otherwise;*
>
> *(b) give on demand by a police officer any information required by him, or, if no police officer is present, report the circumstances of the occurrence, including the circumstances, if any, for not taking reasonable steps to secure medical attention as required under clause (a), at the nearest police station as soon as possible, and in any case within twenty-four hours of the occurrence.*
>
> *(c) give the following information in writing to the insurer, who has issued the certificates of insurance, about the occurrence of the accident, namely:-*
> *(i) insurance policy number and period of its validity;*
> *(ii) date, time and place of accident;*
> *(iii) particulars of the persons injured or killed in the accident;*
> *(iv) name of the driver and the particulars of his driving licence."*

9. Mr. Mahali, relying on the judgment of the apex Court reported in 2021 (2) T.A.C. 353 (S.C) (***Bajaj Allianz General Insurance Company Vs. Union of India & others***), further submitted that the apex Court in the said judgment gave a direction that the jurisdictional police station shall report the accident under Section 158(6) of the Act (Section 159 post 2019 Amendment) to the Tribunal and the Insurer within first 48 hours either over email or through a dedicated website. It was further held that police shall collect the documents relevant to the accident for computation of compensation and shall verify the information and documents which shall form part of the report. The Police shall report to the Tribunal and the Insurer within three months. Similarly, the claimants may also be permitted to email the application for compensation with supporting documents, under Section 166 to the Tribunal and the Insurer within the same time. Paragraph 2 of the said judgment, being relevant, is extracted below for ready reference:

> *"2. It is now agreed as per Table I of the note submitted by the learned Additional Solicitor General that the following agreed directions can be issued:*
>
> *A. Accident Information Report- The jurisdictional police station shall report the accident under Section 158(6) of the Act (Section 159 post 2019 Amendment) (hereinafter "the report") to the Tribunal and insurer within first 48 hours either over email or a dedicated website.*
>
> *B. Detailed Accident Report- Police shall collect the documents relevant to the accident and for computation of compensation and shall verify the information and documents. These documents shall form part of the report. It shall email the report to the Tribunal and the insurer within three months. Similarly the claimants may also be permitted to email the application for compensation with supporting documents, under Section 166 to the Tribunal and the insurer within the same time.*

C. The Tribunal shall issue summons along with the report or the application for compensation, as the case may be, to the insurer by email.

D. The insurer shall email their offer for settlement/response to the report or the application for claim to the Tribunal along with proof of service on the claimants.

E. After passing the award, the Tribunal shall email an authenticated copy of the award to the insurer.

F. The insurer shall satisfy the award by depositing the awarded amount into a bank account maintained by the Tribunal by RTGS or NEFT. For this purpose the Tribunal shall maintain a bank account and record the relevant account details along with the directions for payment to the insurer in the award itself.

G. Each Tribunal shall create an email-ID peculiar to its jurisdiction for receiving the emails from the police and the insurer as mentioned above. Similarly, all insurer throughout India shall also create an email-ID peculiar to the jurisdiction of each claim Tribunal. These email-IDs would be prominently displayed at Tribunal, the police stations and the office of the insurers for the benefit of the claimants. Similarly, these email-IDs shall also be prominently displayed on the website maintained by the Tribunal and the insurer.

H. Insurers shall appoint nodal officers for each Tribunal and provide their contact details, phone and mobile phone numbers, and email address to Director Generals of State Police and the Tribunals."

10. Mr. Mahali further submitted that in view of the said settled position of law, since the guidelines fixed by the apex Court have not been followed by the I.O. in the present case, rightly the Petitioner-Insurance Company moved an application to summon the I.O., which was illegally rejected by the Court below. He further submitted that the prayer made in the Writ Petition is covered by the recent judgment of this Court dated 05.03.2024 passed in W.P.(C) No.36138 of 2023.

11. As is revealed from the written statement filed by the Petitioner-Insurance Company before the Court below in M.A.C. No.121 of 2021, as at Annexure-2, apart from disputing various facts and figures of the claim petition, in Paragraph Nos.9 & 10 of the written statement, the Petitioner-Insurance Company has also disputed about the occurrence of the alleged accident and involvement of the vehicle bearing Registration No.RJ-47GA-1764 (Tanker) so also the said claim case to be a collusive one and various irregularities committed by the I.O. while registering the F.I.R. and submission of investigation report and steps to be taken in terms of the provisions of the Act, 1988. That apart, in para-10 of the Written Statement, a specific stand has been taken that since Insurance Policy of the Honda Activa Scooter does not cover the risk of the driver of the said vehicle, the Petitioners/Claimants have managed to get charge sheet against the driver of the vehicle bearing Regd. No.RJ-47GA-1764 (Tanker) taking the police into confidence, so that they can avail the compensation from the Insurer of the said vehicle. It is further revealed from the petition dated 03.11.2023 that such a stand was taken by the Petitioner before the Claims Tribunal to justify its prayer to summon the concerned I.O. for his examination/cross-examination. Relevant portion of the petition dated 03.11.2023 is extracted below:

"Since the insurance policy of the said Honda Activa Scooter does not cover the risk of the driver of the said vehicle the petitioners have managed to get the charge sheet against the driver of the vehicle bearing Regd. No.RJ-47GA-1764 (Tanker) taking police into confidence, so that the petitioners can avail the compensation from the insurers of the said tanker knocking the door of the justice. Hence, the O.P. No.2 is not liable to pay any compensation for the death of the deceased Hadibandhu Singh and this case may be dismissed against this O.P. and to substantiate the same the O.P. No.2 want to examine the then investigating officer of Khantapada P.S. Case No.94 dt. 24.03.2021. Hrudaya Madhab Das Pattanayak. ASI of Police for efficacious adjudication of this case."

12. In ***Gohar Mohammed*** (supra), so far as claim cases arising out of road accidents, the apex Court gave the following directions.

"62. Accordingly, this appeal is decided with the following directions:

i) The appeal filed by the owner challenging the issue of liability is hereby dismissed confirming the order passed by the High Court and MACT.

ii) On receiving the intimation regarding road accident by use of a motor vehicle at public place, the SHO concerned shall take steps as per Section 159 of the M.V. Amendment Act.

iii) After registering the FIR, Investigating Officer shall take recourse as specified in the M.V. Amendment Rules, 2022 and submit the FAR within 48 hours to the Claims Tribunal. The IAR and DAR shall be filed before the Claims Tribunal within the time limit subject to compliance of the provisions of the Rules.

iv) The registering officer is duty bound to verify the registration of the vehicle, driving licence, fitness of vehicle, permit and other ancillary issues and submit the report in coordination to the police officer before the Claims Tribunal.

v) The flow chart and all other documents, as specified in the Rules, shall either be in vernacular language or in English language, as the case may be and shall be supplied as per Rules. The Investigating Officer shall inform the victim(s)/legal representative(s), driver(s), owner (s), insurance companies and other stakeholders with respect to the action taken following the M.V. Amendment Rules and shall take steps to produce the witnesses on the date, so fixed by the Tribunal.

vi) For the purpose to carry out the direction No. (iii), distribution of police stations attaching them with the Claim Tribunals is required. Therefore, distribution memo attaching the police stations to the Claim Tribunals shall be issued by the Registrar General of the High Courts from time to time, if not already issued to ensure the compliance of the Rules.

vii) ***In view of the M.V. Amendment Act and Rules, as discussed hereinabove, the role of the Investigating Officer is very important. He is required to comply with the provisions of the Rules within the time limit, as prescribed therein.*** *Therefore, for effective implementation of the M.V. Amendment Act and the Rules framed thereunder, the specified trained police personnel are required to be deputed to deal with the motor accident claim cases. Therefore, we direct that the Chief Secretary/Director General of Police in each and every State/Union Territory shall develop a specialized unit in every police station or at town level and post the trained police personnel to ensure the compliance of the provisions of the M.V. Amendment Act and the Rules, within a period of three months from the date of this order.*

viii) On receiving FAR from the police station, the Claims Tribunal shall register such FAR as Miscellaneous Application. On filing the IAR and DAR by the Investigating Officer in connection with the said FAR, it shall be attached with the same Miscellaneous

Application. The Claims Tribunal shall pass appropriate orders in the said application to carry out the purpose of Section 149 of the M.V. Amendment Act and the Rules, as discussed above.

ix) The Claim Tribunals are directed to satisfy themselves with the offer of the Designated Officer of the insurance company with an intent to award just and reasonable compensation. After recording such satisfaction, the settlement be recorded under Section 149(2) of the M.V. Amendment Act, subject to consent by the claimant(s). If the claimant(s) is not ready to accept the same, the date be fixed for hearing and affording an opportunity to produce the documents and other evidence seeking enhancement, the petition be decided. In the said event, the said enquiry shall be limited only to the extent of the enhancement of compensation, shifting onus on the claimant(s).

x) The General Insurance Council and all insurance companies are directed to issue appropriate directions to follow the mandate of Section 149 of the M.V. Amendment Act and the amended Rules. The appointment of the Nodal Officer prescribed in Rule 24 and the Designated Officer prescribed in Rule 23 shall be immediately notified and modified orders be also notified time to time to all the police stations/stakeholders.

xi) If the claimant(s) files an application under Section 164 or 166 of the M.V. Amendment Act, on receiving the information, the Miscellaneous Application registered under Section 149 shall be sent to the Claims Tribunal where the application under Section 164 or 166 is pending immediately by the Claims Tribunal.

xii) In case the claimant(s) or legal representative(s) of the deceased have filed separate claim petition(s) in the territorial jurisdiction of different High Courts, in the said situation, the first claim petition filed by the claimant(s)/legal representative(s) shall be maintained by the said Claims Tribunal and the subsequent claim petition(s) shall stand transferred to the Claims Tribunal where the first claim petition was filed and pending. It is made clear here that the claimant(s) are not required to apply before this Court seeking transfer of other claim petition(s) though filed in the territorial jurisdiction of different High Courts. The Registrar Generals of the High Courts shall take appropriate steps and pass appropriate order in this regard in furtherance to the directions of this Court.

xiii) If the claimant(s) takes recourse under Section 164 or 166 of the M.V. Amendment Act, as the case may be, he/they are directed to join Nodal Officer/Designated Officer of the insurance company as respondents in the claim petition as proper party of the place of accident where the FIR has been registered by the police station. Those officers may facilitate the Claims Tribunal specifying the recourse as taken under Section 149 of the M.V. Amendment Act.

xiv) Registrar General of the High Courts, States Legal Services Authority and State Judicial Academies are requested to sensitize all stakeholders as early as possible with respect to the provisions of Chapters XI and XII of the M.V. Amendment Act and the M.V. Amendment Rules, 2022 and to ensure the mandate of law.

xv) ***For compliance of mandate of Rule 30 of the M.V. Amendment Rules, 2022, it is directed that on disputing the liability by the insurance company, the Claims Tribunal shall record the evidence through Local Commissioner and the fee and expenses of such Local Commissioner shall be borne by the insurance company.***

xvi) The State Authorities shall take appropriate steps to develop a joint web portal/platform to coordinate and facilitate the stakeholders for the purpose to carry out the provisions of M.V. Amendment Act and the Rules in coordination with any technical agency and be notified to public at large." (Emphasis supplied)

13. As held in ***Gohar Mohammed*** (supra), if the Insurance Company disputes its liability, the Claims Tribunal shall record the evidence through the Local Commissioner and the fee and expenses of such Local Commissioner shall be borne by the Insurance Company. However, in the present case, apart from disputing its liability not only in the Written Statement, a stand has been taken as to connivance of the Petitioner/Claimants with the I.O. to manage to get the charge sheet against the driver of the vehicle Regd. No.RJ-47GA-1764 (Tanker) of which the Petitioner is the Insurance Company but also the said fact was also reiterated in the petition dated 03.11.2023 which has been extracted above. However, the Claims Tribunal, though observed vide the impugned order that it is settled position of law that any witness can be examined at any stage of proceeding if his evidence is essential for just and effective adjudication of dispute and the party applying the Court for issuance of summons to the witness, must satisfy the Court that the evidence of the witness is highly essential for effective adjudication of the dispute, or else, the application filed by the party is liable to be rejected, but while rejecting the said petition of the Petitioner-Insurance Company, the Claims Tribunal observed as follows:

> *"Now, the question arises, whether in this factual background examination of the IO is essential to adjudicate the issue involved in the present claim application. There is no dispute at bar that the IO is the post occurrence witness, who visited the spot much after the accident. Therefore, he cannot have any direct knowledge with regard to the cause and manner of the accident. The investigation of the IO is based on the statement of the eyewitness to the occurrence and other witnesses. Only the witnesses examined by the IO can prove the factum of the accident. But the IO whom the OP No.2 wants to examine on its behalf being the post occurrence witness cannot say how, when and where the accident in question took place and his evidence with regard to the cause and manner of accident is only hearsay evidence. Therefore, on the basis of such hearsay evidence, the issue involved in the present claim application cannot be effectively adjudication.* ***The claim application was filed before this Tribunal in the year 2021 which is subjudice till now. After two years of filing the claim application, the claimants are unable to get their claim application adjudicated for getting their legitimate dues. If under such circumstance the IO would be summoned for his examination on behalf of the OP No.2, the claim application would be further delayed and the claimants would be harassed in getting their legitimate dues.***
>
> ***It is settled position of law that any witness can be examined at any stage of proceeding if his evidence is essential for just and effective adjudication of dispute. The party applying the Court for issuance of summons to the witness, must satisfy the Court that the evidence of the witness is highly essential for effective adjudication of the dispute, or else, the application filed by the party is liable for rejection****. In the present case the OP No.2 could not satisfy the Court as to how the evidence of the IO is essential for deciding the crux of the dispute. So, in absence of any satisfactory material, the IO of this case cannot be summoned to appear before this Tribunal to adduce evidence."* (Emphasis supplied)

14. From the above, it is well evident that the Claims Tribunal failed to take note of the grounds agitated before it justifying the prayer to summon the I.O. for his examination/cross-examination by the Petitioner-Insurance Company. It misread the petition filed by the Petitioner-Insurance Company and erroneously observed vide

the impugned order that the I.O. being post occurrence witness, who visited the spot much after the accident, cannot have any direct knowledge with regard to the cause and manner of the accident and only the witnesses examined by the I.O. can prove the factum of the accident and his evidence with regard to cause and manner of accident is only hearsay evidence, basing on which the issue involved in the said claim application cannot be effectively adjudicated. That apart, the Claims Tribunal also rejected the application on the plea that the matter is pending for about two years and if the I.O. would be summoned for his examination on behalf of Opposite Party No.2, the claim application would be further delayed and the Claimants would be harassed in getting their legitimate dues. The said reason is also contrary to its own observation made vide the impugned order, vide which the Court below observed that the party can apply to the Court for summoning a witness at any stage and must satisfy the Court that the evidence of the witness is highly essential for effective adjudication of the dispute.

15. In view of the facts as detailed above, the reasons assigned in the petition filed by the Insurance Company (Opposite Party No.2 before the Court below), the legal provisions extracted above and the settled position of law, this Court is of the view that the Court below was not justified in rejecting the application of the present Petitioner to summon the I.O., as prayed for and the impugned order deserves interference. Accordingly, the order dated 07.11.2023 passed in M.A.C. No.121 of 2021 is set aside.

16. The Court below is directed to allow the petition of the Petitioner Insurance Company (Opposite Party No.2 before the Court below) and summon the concerned I.O. through Special Messenger at the cost of the Petitioner Insurance Company and proceed further in accordance with law and conclude the said proceeding at the earliest, preferably within a period of six months from the date of production of the certified copy of this order.

17. Needless to mention here that the concerned I.O., who's name finds place in the prayer portion of the Petition dated 03.11.2023, being summoned, shall cooperate with the Claims Tribunal and remain present on the date fixed with relevant documents, if any, for his examination. The parties are also directed to cooperate with the Claims Tribunal for conclusion of the proceeding within the stipulated time frame, as observed above.

18. Accordingly, the Writ Petition is allowed and disposed of. No order as to cost.

—— o ——

2024 (II) ILR-CUT-702

CHITTARANJAN DASH, J.

CRLA NO. 447 OF 2012

FAYAZ ALI ……Appellant

-V-

STATE OF ORISSA (G.A. DEPT) ……Respondent

PREVENTION OF CORRUPTION ACT, 1988 – Section 13(1)(e) – In the instance case the disproportionate amount determined by the Trial Court is meagre (₹ 22,120/-) – Whether the offence outline in Section 13(1)(e) of the Act would make out? – Held, No – It would falls within the margin where benefit of doubt can be extended, as calculated the appellants conviction for criminal misconduct cannot be sustained solely on the basis of the disproportionate assets.

Case Laws Relied on and Referred to :-

1. (2007) 6 SCC 1991 : V. K. Puri Vs. C.B.I.
2. 1981 AIR 1186 : State of Maharashtra Vs Wasudeo Ramchandra Kaidalwar.
2. (2013) 14 SCC 653 : Prem Kaur Vs. State of Punjab and Ors.
3. AIR 1977 SC 796 : Krishnanand Vs. State of Madhya Pradesh.
4. 1996 AIR 484 : B.C.Chaturvedi Vs. Union of India.

For Appellant : Mr. S.K. Mund.

For Respondent : Mr. Sanjay Kumar Das, SC (Vigilance)

JUDGMENT Date of Judgment : 14.05.2024

CHITTARANJAN DASH, J.

1. The Appellant, namely Fayaz Ali faced the trial on the charges under Section 13(2) read with Section 13(1)(e) of the Prevention of Corruption Act, 1988 (in short, herein after referred to "P.C. Act") before the learned Special Judge (Vigilance), Bhawanipatna, Kalahandi (Dist.) for having criminally misconducted himself by possessing disproportionate assets beyond his known source of income wherein, the learned court found him guilty in the offences charged as above, convicted and sentenced the Appellant to undergo rigorous imprisonment for 2 (two) years for the offence under 13(2) read with Section 13(1)(e) of the P.C. Act and to pay a fine of ₹25,000/-, in default, to undergo R.I. for 6 (six) months more.

2. The prosecution case in brief is that Ch. Hrudayananda served as the Inspector of Police (Vigilance) for the Bhawanipatna Unit in the year 2001, while the Accused-Appellant, Fayaz Ali, held the position of Junior Engineer at R.W.S.S., Bhawanipatna, within the Kalahandi district. Upon receiving information from a reliable source regarding the present Appellant's possession of disproportionate assets, the complainant (Inspector, Vigilance) initiated an enquiry. It was revealed during the investigation that the Appellant originally hailed from Madhya Pradesh. His father, a retired mechanic from the P.H. Division in Bhawanipatna, owned only a dwelling house in the area. The Appellant's siblings were married and residing separately, and his parents were also living apart from him. The Appellant got engaged as a Junior Engineer in the P.H. Division, Bhawanipatna, on an ad-hoc basis in October 1985, his service was confirmed in 1988. He was later posted to the Lift Irrigation Division, Bhawanipatna. Subsequently, he joined the R.W.S.S. Department as a Junior Engineer in 1991. He married Anis Begum in 1987 and had two sons and a daughter, all attending English medium Schools in Bhawanipatna during the period of scrutiny, from January 1, 1998, to June 27, 2001, as determined

by the prosecution. Despite not receiving significant gifts from his father-in-law during the marriage, Fayaz Ali, during his position until relatively short tenure of service, acquired a solidly built house in Paradesipada, Bhawanipatna, and several house plots in Bhawanipatna Town. He also donated heavily to secure a shopping complex under his wife's name under the Bhawanipatna Municipality. Additionally, he possessed valuable household items and maintained substantial bank deposits. On June 27, 2001, the Vigilance Police, Bhawanipatna, conducted searches at the Appellant's office, government quarters, and his father's residence in P.H.E.D. Colony, Bhawanipatna, under warrants issued by the C.J.M., Berhampur, to ascertain details of his assets. The search revealed that the majority of his assets were acquired between January 1998 and June 27, 2001, prompting the prosecution to fix this period for scrutiny. During this period, the Appellant accumulated assets totaling to ₹2,45,627/-, whereas his legal income amounted to ₹2,29,880/-. The expenditure incurred by the Appellant and his family during this period exceeded his legal income resulting in a belief that the excess amount was unlawfully obtained income. In total, the Appellant possessed disproportionate assets amounting to ₹2,67,899/- during the check period. The Appellant failed to justify the possession of assets disproportionate to his known income, thereby constituting criminal misconduct as a public servant, punishable under Section 13(2) read with Section 13(1)(e) of the Prevention of Corruption Act, 1988. Consequently, Ch. Hrudayananda, the then Inspector of Police (Vigilance) for the Bhawanipatna Unit, submitted a report against Fayaz Ali to the S.P., Vigilance, Berhampur, leading to the registration of Vigilance Case No. 35 of 2001. Upon registration, the S.P. directed the Inspector of Police (Vigilance), Bhawanipatna Unit, to investigate the case.

3. In the course of investigation, the investigating officer (I.O.) conducted a house search of the Appellant at Ramsagarpada, where he discovered various articles and prepared seizure list vide Ext. 1. He searched another house located at the backside of the D.I. of School, Bhawanipatna, and compiled a list of the articles found. The valuation of the articles listed in the inventory belonged to the Appellant, along with the year of acquisition. Moreover, he gathered information from the L.I.C. office regarding deposits, electricity expenses, telephone expenses, and educational expenses from educational institutions. In his capacity as the investigating officer, he also collected salary particulars of the Appellant. Upon obtaining the income and expenditure particulars from the Appellant during the final stages of the investigation, he determined the disproportionate asset to be ₹2,52,152/-. Subsequently, he submitted the entire case record to the sanctioning authority for approval and engaged in a pre-sanction discussion with the sanctioning authority, who, after careful consideration, granted sanction for the prosecution of the Appellant. Furthermore, the I.O. conducted a statistical survey of the Appellant's usual expenses with the assistance of a statistician and submitted a report. After receiving the sanction order, he reviewed the case record and confirmed that the Appellant possessed disproportionate assets, and hence, submitted the charge sheet.

4. The case of the defense is one of complete denial and false implication. Further case of the defense is that the consideration money for the purchase of the house at Bhawanipatna by his wife was advanced by his father-in-law and the Appellant had informed the authorities about the same in prior.

5. To bring home the charge, the Prosecution examined 15 witnesses in all. P.W.1 (Nilachal Sahu) and P.W.4 (Mahesh Kumar Dalai) are search witnesses to the search of the Appellant's residential quarters P.W.3 (Goura Chandra Pattnaik) and P.W.14 (Netrananda Pradhan are search witnesses of the Appellant's parental house in Bhawanipatna. P.W.2 (Biswajit Thakur) and P.W.9 (Jharamani Kumar) are tenants of the house owned by the Appellant's wife. P.W.5 (Deba Prasad Nayak) is the seizure witness of the Appellant's service book and personal file. P.W.6 (Arjuna Prasad Panda) is the Executive Engineer in-charge, Bhawanipatna Municipality, who provided information to the Vigilance regarding the allotment of the shop-room to the Appellant's wife. P.W.7 (Markanda Muna) proved the pay particulars of the appellant from October 1988 to November 1991. P.W.8 (Bikram Kishore Singh) is the S.D.O., Electrical, Bhawanipatna, who confirmed payment of certain electrical charges. P.W.10 (Rosily Antony) and P.W.11 (Ranjana Sazzu) is the Principal who verified the educational expenses incurred for the Appellant's children. P.W.12 (Santosh Kumar Jagat) is the District Sub-Registrar, Bhawanipatna, who provided certified copies of R.S.D. No. 1339/1999 and 2297/1989. P.W.13 (Kirtan Dakua) is the tenant of the shop-room allocated to the Appellant's wife. P.W.15 (Ch. Hrudayananda) is the Informant and I.O.

6. The defense on the other hand, produced two witnesses from their side. D.W.1 (Jakir Hussain) being the property dealer of the house and D.W.2 (Bapudev Palaka) being the head clerk in R.W.S.S. Division, Bhawanipatna.

7. The learned trial court having believed the evidence of the prosecution witnesses found the prosecution to have proved its case beyond all reasonable doubt and held the Appellant guilty and convicted him awarding sentence as described above.

8. The learned counsel for the Appellant while assailing the impugned judgment submits that as per the requirement of law, the prosecution must prove, beyond reasonable doubt, the known sources of income, expenditure, and assets acquired by the public servant during the check period. Once the prosecution establishes these essential elements, the burden shifts to the accused to explain the possession of disproportionate assets. However, the trial court failed to assess the Appellant's income, expenditure, and assets during the check period. The judgment lacks a detailed examination of the appellant's income sources, relying on only one witness, P.W. 7, who provided irrelevant salary particulars. Similarly, there is insufficient evidence regarding the appellant's expenditure and assets during the check period. The judgment also lacks adherence to Section 354 of Cr.P.C., which requires a reasoned judgment outlining points for determination, decisions, and reasons. Without proper evaluation of evidence and reasoning, the judgment lacks

validity. Moreover, there is no finding on the disproportionate assets possessed by the appellant, further undermining the judgment's substantiation of guilt. The evidence presented fails to establish the appellant's income during the check period, as P.W.7's testimony pertains to an irrelevant timeframe. Additionally, the prosecution's evidence regarding expenditure is insufficient, with discrepancies in the payment of electrical dues. The evidence related to asset acquisition lacks specificity, causing prejudice to the Appellant during the trial. Overall, the absence of detailed mention of income, expenditure, and assets in the charge-sheet prejudiced the Appellant's defense in court. The learned counsel for the Appellant has relied on the following two judgments: ***V. K. Puri Vs. C.B.I. (2007) 6 SCC 1991 & Prem Kaur Vs. State of Punjab and Ors. (2013) 14 SCC 653***.

9. The learned counsel for the State (Vigilance), on the other hand while supporting the impugned judgment to be akin to the evidence led by prosecution, submitted that the prosecution has well presented evidence establishing the possession of disproportionate assets by the Appellant, during the specified period from January 1, 1998, to June 27, 2001. The Appellant being a Junior Engineer within the R.W.S.S. Department, Bhawanipatna, displayed a significant disparity between his known income and the assets acquired during the said period, thereby raising legitimate suspicions of illicit enrichment. The prosecution's case rests on solid grounds, supported by thorough investigation and compelling evidence. Appellant's acquisition of substantial assets, including a house in Paradesipada, Bhawanipatna, and multiple house plots in Bhawanipatna Town, coupled with generous donations for securing a shopping complex under his wife's name, underscores the magnitude of his unexplained financial standing. Despite his relatively short tenure of service, Appellant failed to account for the vast disparity between his legal income and the amassed assets, amounting to ₹2,67,899/- during the check period. The I.O. has meticulously scrutinized Appellant's financial transactions, including bank deposits, expenditures, and salary particulars, to corroborate the accumulation of disproportionate assets. The investigation revealed that the investigative search uncovered valuable articles at multiple locations associated with the Appellant, substantiating the guilt. The sanctioning authority's approval for prosecution, following a pre-sanction discussion and thorough review of the case record, further validates the strength of the prosecution's case. Hence, the impugned judgment suffers from no infirmity and requires no interference to establish the Appellant's culpability under Section 13(2) read with Section 13(1)(e) of the Prevention of Corruption Act, 1988.

10. 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) ***
(e) if he, or any person on his behalf, is in possession or has, at any time during the period of his office, been in possession for which the public servant cannot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income.
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 one year but which may extend to seven years and shall also be liable to fine.

11. The ingredients of the offence of criminal misconduct[1] under section 13(2) read with section 13(1)(e) are the possession of pecuniary resources or property disproportionate to the known sources of income for which the public servant cannot satisfactorily account. To substantiate the charge, the prosecution must prove the following facts before it can bring a case under section 13(1)(e), namely,

(1) it must establish that the accused is a public servant,
(2) the nature and extent of the pecuniary resources or property which were found in his possession,
(3) it must be proved as to what were his known sources of income i.e. known to the prosecution, and
(4) it must prove quite objectively, that such resources or property found in possession of the accused were disproportionate to his known sources of income.

Once these four ingredients are established, the offence of criminal misconduct under section 13(1)(e) is complete, unless the accused is able to account for such resources or property. In scrutinizing the impugned judgment in question, the pivotal concern emerges regarding the accuracy of the assessment pertaining to the income and assets of the appellant. There arises a pertinent query as to whether the trial court erred in its evaluation of the appellant's financial resources and possessions. Therefore, as prayed by the learned counsels for both the parties, it becomes imperative to deliberate on the necessity of remanding the judgment for further scrutiny and rectification. The pivotal question at hand necessitates a comprehensive re-evaluation to ensure equitable adjudication and uphold the principles of justice. There is no doubt that the Appellant here was a public servant at the relevant time in question, however, the declared income and acquired assets is a critical factor in determining compliance with legal and ethical standard.

12. In the instant case, it is essential to meticulously define and differentiate these terms to accurately assess whether the appellant's assets are indeed disproportionate

1. *State of Maharashtra Vs* Wasudeo *Ramchandra Kaidalwar* 1981 AIR 1186

to their known sources of income, as alleged by the prosecution. Understanding these definitions is crucial for the court in scrutinizing the evidence presented and determining the appellant's culpability under the applicable legal provisions. The pecuniary sources of income pertain to the official income and any other lawful earnings or financial gains derived from his position as a public servant, which includes his salary and allowances received during the check period, bonuses, incentives, or performance-related payments provided by the government or relevant authorities, any additional income earned through permissible activities, subject to legal and ethical constraints, as well as reimbursements or allowances for official expenses incurred in the course of duty, more so the travel allowances or accommodation reimbursements. The trial court's failure to adequately explain the definitions of key terms in the context of the present case undermines the clarity and understanding of the legal framework applied in assessing the appellant's alleged criminal misconduct.

13. It is acknowledged that there was a discrepancy regarding the check period mentioned in the F.I.R., initially stated as 1985 to 2001 but later amended to 1998 to 2001. While this change may suggest the possibility that the appellant's job confirmation occurred after 1998, thereby justifying the revised check period, it is imperative to approach this adjustment with caution. The trial court's acceptance of this change without further scrutiny or clarification raises questions about the consistency and reliability of the proceedings. While recognizing the potential rationale behind the modification, it remains essential to ensure that such adjustments are made transparently and with due consideration to all relevant factors. Therefore, while the possibility of the appellant's job confirmation post-1998 is duly noted, a comprehensive assessment of the implications of this change is warranted to ascertain its impact on the overall proceedings. Additionally, the FIR initially indicated total assets of Rs. 4,10,037, income of Rs. 5,37,500, and expenditure of Rs. 7,20,391. However, the figures presented in the chargesheet differed, with total assets listed as Rs. 2,45,627, total income as Rs. 2,29,880, and expenditure as Rs. 2,67,899. The discrepancy between the figures mentioned in the FIR and those presented in the chargesheet raises questions about the consistency and reliability of the prosecution's case. Such inconsistencies undermine the credibility of the evidence and cast doubt on the prosecution's ability to establish the guilt of the appellant beyond a reasonable doubt. The difference in figures significantly affects the assessment of disproportionate assets and the appellant's ability to account for them. Furthermore, the trial court's failure to delve into the glaring disparity between the figures provided in the FIR and those presented in the chargesheet is a profound lapse in judicial scrutiny. Rather than meticulously examining this inconsistency and seeking clarification on the reasons behind it, the court inexplicably overlooked the issue, thereby neglecting its duty to conduct a thorough and impartial assessment of the evidence. This oversight is particularly egregious considering the potential implications for the appellant's defense and the

overall integrity of the trial proceedings. By failing to address this critical discrepancy, the trial court missed a crucial opportunity to ensure transparency and fairness in the adjudication of the case, ultimately undermining the appellant's right to a rigorous and comprehensive legal scrutiny. This omission deprives the court of essential context necessary for accurately assessing the alleged disproportionate assets. Without a baseline for comparison, the court's ability to make a fair and informed judgment regarding the appellant's financial status is severely compromised. Thus, the trial court's failure to address these issues undermines the integrity of the trial process and jeopardizes the appellant's right to a fair trial.

14. Some financial information can be derived from the testimonies of the prosecution witnesses, consequently. P.W.2 served as a Forest Guard who has stated that he resided as a tenant in the residence of the Appellant in Paradesipada of Bhawanipatna town for seven months starting from August 2001. He paid a monthly rent of ₹800 to the Appellant. P.W.6, the Executive Officer of Bhawanipatna Municipality, reported that on December 31, 2001, upon request from the Vigilance Inspector, he provided information about shops numbered 24 and 25 allotted to Niaja Alii and Anis Begum. The tenants contributed ₹33,501 and ₹42,000 respectively as donations, and each paid rent of ₹40,500 from July 1, 1995, to March 31, 2001. Additionally, a sum of ₹1322 was deposited as holding tax for holding No. 91/96 from 1999 to 2001. P.W.7, a Senior Clerk of Lift Irrigation Division, Bhawanipatna, during 2002, provided pay particulars of the Appellant from October 1988 to November 1991. He mentioned that ₹12,880 was refunded to the Appellant for G.I.S. and C.P.F. P.W.8, the S.D.O. of Electricals, Bhawanipatna, on July 31, 2002, supplied information on electrical charges amounting to ₹1267 for Anis Begum. He clarified that the amount was shown as arrears against the consumer. P.W.9, a tenant under the Appellant, stated that he paid ₹800 per month for house rent, which was increased to ₹900 presently. He also mentioned that the landlord paid for electricity. P.W.10, the Principal of Vimala Convent School, Bhawanipatna provided information on the educational expenses of the Appellant's children. P.W.11, the Principal of Nabajyoti Bidyalaya, Nuapada, provided information on the educational expenses of the Appellant's children on July 11, 2002. P.W.12, the District Sub-Registrar of Bhawanipatna on February 2, 2002, supplied information on stamp duty and registration fees for two registered sale deeds as per the Vigilance Inspector's request. He detailed the amounts paid for stamp duty and registration fees for both deeds and provided certified copies of the sale deeds. P.W.13, another tenant under the Appellant, operated a salon from 1994 to 2001 in the rented house of Fayaz Ali's wife, which was a Municipality stall. He paid a monthly rent of ₹1000, although there was no written agreement regarding the rent.

15. In the impugned judgment, it was noted that there was a property in dispute owned by the wife of the appellant, which played a pivotal role in the proceedings. However, crucial details regarding the acquisition of this property emerged during the trial. D.W.1, the broker involved in the transaction, provided testimony confirming

that the payment for the disputed property was indeed made by the father-in-law of the appellant. This revelation adds significant context to the case, as it directly addresses the source of funds for the acquisition of the property and corroborates the defense's assertion regarding the legitimate ownership of the asset. The learned trial court's conclusion that the contribution from the father-in-law towards the purchase of the house after 12 years of marriage is absurd lacks justification and fails to consider cultural or familial practices regarding such contributions. Additionally, the court's failure to carefully evaluate the financial information presented by both parties, assess the credibility of witnesses, and determine whether the prosecution established guilt beyond a reasonable doubt indicates shortcomings in the trial process.

16. In light of the prosecution's failure to thoroughly dissect the figures provided in the chargesheet, the following calculation is made to ascertain the disproportion in assets with respect to income and expenditure of the appellant. Moreover, the failure to provide information about the appellant's assets before the check period is a critical omission which is essential for accurately calculating disproportionate assets using the accepted formula, as it provides a baseline for comparison with assets acquired during the check period. Be that as it may, the following observation can be made from the evidence in hand.

17. Basing upon the financial information provided –

Known Income: ₹2,29,880.
Total expenditure: ₹2,52,000.
The value of assets acquired: ₹2,45,627.
Disproportionate amount = Total value of assets - Known income
= ₹2,45,627 - ₹2,29,880 = ₹15,747
So, the disproportionate amount is ₹15,747.

Now, let's calculate the percentage of the disproportionate amount compared to the known income:

Percentage of disproportionate amount = (Disproportionate amount/Known income) × 100 = (15,747 / 2,29,880) × 100 = 6.85%

To determine how much the assets should be in relation to the known sources of income, we need to establish a proportionate relationship between the income and assets.

Given the information provided:
- Total Income: ₹2,29,880/-
- Total Assets: ₹2,45,627/-

The court has found that the assets possessed by the appellant and their family members exceed their known sources of income, indicating a disproportionate accumulation of assets.

To calculate how much the assets should be in proportion to the income, you can use the following steps:

Proportionate Asset Value = Total Income / Total Assets
Proportionate Asset Value = ₹2,29,880 / ₹2,45,627 = 0.935
Proportionate Assets = Proportionate Asset Value × Total Income
Proportionate Assets = 0.935 × ₹2,29,880 = ₹2,14,897

Based on this calculation, the assets should be approximately ₹2,14,897/- in proportion to the known sources of income. However, the actual assets possessed by the appellant and their family members are ₹2,45,627/-, indicating an excess of ₹30,730/- over the expected proportionate assets.

Therefore, the assets should ideally be around ₹2,14,897/- based on the income, and any excess beyond this amount may be considered disproportionate.
To calculate the percentage of disproportionate assets, we compare the excess assets over the proportionate amount to the total income.

Given:
- Total Income: ₹2,29,880/-
- Excess Assets: ₹30,730/- (calculated as Total Assets - Proportionate Assets)

To find the percentage of disproportionate assets:

Excess Assets Percentage = (Excess Assets / Total Income) × 100
Excess Assets Percentage = (₹30,730 / ₹2,29,880) × 100
Excess Assets Percentage = 13.38%

Therefore, the percentage of disproportionate assets in this case is approximately 13.38%. This indicates that the value of assets possessed by the appellant and their family members exceeds what would be expected based on their known sources of income by approximately 13.38%. Furthermore, the disposable amount is the amount of income remaining after deducting total expenditure from legal income. It represents the amount available for saving or acquiring assets. The calculation would be

Disposable Income = Legal Income - Total Expenditure
Disposable Income = ₹2,29,880 - ₹2,52,000 = ₹-22,120

A positive disposable income indicates that the appellant's income exceeds their expenditure, leaving room for saving or acquiring assets, whereas a negative disposable income indicates that the appellant's expenditure exceeds their income, suggesting that they may have incurred debt or utilized savings to cover expenses. In the instant case, since the disposable income is negative (₹-22,120), suggesting that the total expenditure exceeds the legal income.

18. The Apex Court, in the matter of ***Krishnanand Vs. State of Madhya Pradesh AIR 1977 SC 796***, has held that –

> 33. It will, therefore, be seen that as against an aggregate surplus income of Rupees 44,383.59 which was available to the appellant during the period in question, the appellant possessed total assets worth Rupees 55,732.25. The assets possessed by the appellant were thus in excess of the surplus income available to him. but since the excess is comparatively small - it is less than ten per cent of the total income of ₹1,27,715.43 - we do not think it would be right to hold that the assets found in the

> possession of the appellant were disproportionate to his known sources of income so as to justify the raising of the presumption under Sub-section (3) of Section 5. We are of the view that, on the facts of the present case the High Court as well as the Special Judge were in error in raising the presumption contained in Sub-section (3) of Section 5 and convicting the appellant on the basis of such presumption.

19. It is incumbent to note that in the matter of ***B.C. Chaturvedi Vs. Union of India 1996 AIR 484***, the Apex Court has well explained the manner in which the exceeded assets are taken into consideration. It is held that –

> It is true that a three-judge Bench of this Court in Krishnanand's case (supra) held in para 33, that if the excess was comparatively small (it was less than 10% of the total income in that case), it would be right to hold that the assets found in the possession of the accused were not disproportionate to his known source of income raising the presumption under sub-section (3) of Section 5. It is to be remembered that the said principle was evolved by this Court to give benefit of doubt, due to inflationary trend in the appreciation of the value of the assets. The benefit thereof appears to be the maximum. The reason being that if the percentage begins to rise in each case, it gets extended till it reaches the level of incredulity to give the benefit of doubt. It would, therefore, be inappropriate, indeed undesirable, to extend the principle of deduction beyond 10% in calculating disproportionate assets of a delinquent officer. The salary of his wife was not included in the assets of the appellant. The alleged stridhana of his wife and fixed deposits or gifts of his daughter, in appreciation of evidence, were held to be the property of the appellant. It is in the domain of appreciation of evidence. The Court/Tribunal has no power to appreciate the evidence and reach its own contra conclusions.

20. Upon examination of the case record, the evidence tendered by both the prosecution and defense, and the testimonies of witnesses, the trial court concluded that the appellant had amassed assets disproportionate to his known sources of income. Notably, the court's analysis has relied on the calculation of proportionate assets, as the prosecution did not establish the total assets at the beginning of the check period. While the value of assets exceeded the known sources of income, it's imperative to recognize that the percentage of disproportionate assets, approximately 13.38%, is an approximation and slightly exceeds the threshold for marginal relief as laid down in Krishnanand Agnihotri (*supra*), which typically falls within a 10% range. Additionally, the defense's argument regarding the property gifted by the appellant's father-in-law to his wife was acknowledged and accepted by this court, further complicating the assessment of disproportionate assets. Given these factors and the lack of detailed financial dissection by the prosecution and trial court, the alleged disproportionate assets may warrant allowance.

21. As said, it is trite to reiterate that the handling of disproportionate assets proceedings underscores the critical importance of greater diligence, attention to detail, and adherence to procedural fairness in the judicial process as it carries significant implications on individuals and their lives. Disproportionate assets cases involve complex financial analyses and intricate legal principles, making it imperative for courts to conduct thorough and meticulous examinations of the evidence presented. By ensuring diligent scrutiny of financial records, testimonies,

and relevant documentation, courts can uphold the principles of justice and fairness. Attention to detail is essential to uncovering inconsistencies, discrepancies, and mitigating factors that may influence the outcome of the case.

22. Moreover, adherence to procedural fairness guarantees that all parties have a fair opportunity to present their arguments and evidence, thereby safeguarding the integrity and credibility of the judicial process. In cases involving allegations of disproportionate assets, these principles are paramount to achieving just outcomes and maintaining public trust in the legal system.

23. After careful consideration of the entire gamut of evidence and thorough review of the case record, this Court finds that the disproportionate amount determined by the trial court falls within the margin where benefit of doubt can be extended, as calculated and the appellant's conviction for criminal misconduct cannot be sustained solely on the basis of the disproportionate assets.

24. In essence, the essential elements required to establish the offense outlined in Section 13(1)(e) of the Prevention of Corruption Act have not been substantiated. As a result, the corresponding offense under Section 13(2) does not apply. Therefore, it is unequivocal that the prosecution has failed to demonstrate the appellant's guilt beyond a reasonable doubt, and the Appellant as such is entitled to an acquittal.

25. In view of the discussions made above, since the material available in the evidence is sufficient to answer the question in this Appeal, it does not warrant a remand of the case.

26. 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)(e) read with Section 13(2) of the P.C. Act of the P.C. Act are hereby set aside.

—— o ——

2024 (II) ILR-CUT-713

SIBO SANKAR MISHRA, J.

CRLMC NO.3139 OF 2023

SANJAY KUMAR SAMAL@SANJAY SAMAL ……Petitioner

-V-

STATE OF ODISHA (VIGILANCE) ……Opp.Party

PREVENTION OF CORRUPTION (AMENDMENT) ACT, 2018 – Section 7 r/w section 482 of Cr.P.C – The petitioner has accepted the money from the informant and immediately handed over the tainted notes to another person – Phenolphthalein powder test was also conducted on the petitioner – The demand of bribed amount is not denied – Whether

the Court should exercise inherent jurisdiction to quash the entire criminal proceeding? – Held, No. (Para 13)

Case Laws Relied on and Referred to :-

1. (2015) 10 SCC 152 : P. Satyanarayana Muthy Vrs. District Inspector of Police, State of Andhra Pradesh & Anr.
2. (2022) 88 OCR 763 : Rajeev Ranjan vrs. Republic of India.
3. CRLMC No.1325 of 2021 : Bamadev Sankhula vrs. State of Odisha (Vigilance).

For Petitioner : Mr. Soumendra Pattanaik.

For Opp.Party : Mr. Niranjan Mahanara, Addl. Standing Counsel (Vigilance)

JUDGMENT Date of Hearing : 20.03.2024 : Date of Judgment : 05.04.2024

SIBO SANKAR MISHRA, J.

1. The Petitioner has invoked the inherent jurisdiction of this Court under Section 482 Cr.P.C. seeking quashing of the entire criminal prosecution initiated against him by the Vigilance Department of the State.

2. The Petitioner is an accused in Rourkela Vigilance P.S. Case No.19 of 2022 corresponding to VGR No.16 of 2022 under Section 7 of the Prevention of Corruption(Amendment) Act, 2018 (in short "the P.C. Act"). The case of the prosecution is that one Mahadev Lakra being the complainant has lodged the F.I.R. *inter alia* stating that on 25.08.2022, he has requested the Petitioner for issuance of School Leaving Certificate, Mark Sheet and Migration Certificate of his daughters. Both the daughters of the complainant were studying in Kumjharia Government High School, wherein the Petitioner was the Headmaster. The Petitioner demanded a bribe of Rs.12,000/- from the complainant for issuance of the certificate of his daughters. Therefore, he reported to the Vigilance Department.

3. On 26.08.2022, a trap was laid down on the basis of the complaint of one Mahadev Lakra. As per the trap plan, the demanded bribe was handed over to the Petitioner. The Petitioner after receiving the said tainted money handed over the same to one Sri Parameswar Ray, the Electrician. The tainted money was recovered from Sri Parameswar Ray. After the recovery of the tainted money, Sodium Carbonate Solution Test was conducted, which was found to be positive. The Petitioner stated that he has handed over Rs.17,500/- to Sri Parameswar Ray, which included Rs.12,000/- which he received from Mr. Lakra. Therefore, the prime defence of the Petitioner is that the money is not recovered from his possession.

4. After investigation, the Vigilance Department filed a charge-sheet on 09.02.2023 for the alleged offence under Section 7 of the P.C. Act. The learned Special Judge (Vigilance), Sundargarh took cognizance of offence under Section 7 of the P.C. Act on 21.04.2023. The Petitioner has assailed the aforementioned proceeding in the present petition.

5. Heard Mr. Soumendra Pattanaik, learned counsel for the Petitioner and Mr. Niranjan Maharana, learned Additional Standing Counsel for the Vigilance at length.

6. The primary attack of Mr. Pattanaik, learned counsel for the Petitioner to the prosecution case is on three grounds namely:-

(i) The tainted money was not recovered from the exclusive possession of the accused/ petitioner.

(ii) There was no occasion for demand made by the petitioner.

(iii) Mere turning of finger tip does not hold a person guilty. It is to be seen under what circumstances it turned pink."

7. Mr. Pattanaik, learned counsel for the Petitioner has elaborated all the three aforementioned grounds in very detail. He submits that there was no occasion for demanding the bribe from the complainant. The money paid by him was the outstanding dues of his daughters, which was supposed to be paid at the time of taking final certificates from the School. He has relied upon a register maintained in the School which indicates that all the students those who have taken certificates had to take no due certificate after paying the outstanding dues. Insofar as the daughter of the complainant namely Priya Lakra is concerned, Rs.12,000/- is shown as outstanding against her. Relying upon the said document, learned counsel for the Petitioner submits that the amount so paid by the complainant is nothing but towards the discharge of the liability and to get the no due certificate. In order to support the said stand, he has also relied upon various circulars issued by the School & Mass Education Department of the Government. Primarily, he is relying upon a notification dated 20.02.2018 issued by the Government of Odisha, School & Mass Education Department and the letters dated 30.12.2022 & 22.08.2022 issued by the Block Education Officer, Kuarmunda. On the strength of the aforementioned Government orders, he submits that the School was well within its power to demand fee and the fees so demanded was due insofar as the daughters of the complainant are concerned. While issuing the final certificate, he was supposed to demand the amount and issue no due certificate to all the outgoing students. Therefore, he has attacked the very ingredient of "demand" to sustain the charge of Section 7 of the P.C. Act."

8. Mr. Pattanaik, further submits that it is apparent on record that the tainted money was not recovered from the physical possession of the Petitioner. It was recovered from Sri Parameswar Ray. Relying upon the statement of Sri Parameswar Ray, he submits that Sri Ray has *inter alia* stated that he has received Rs.17,500/- from the Petitioner and he has paid that money to a Contractor for the purpose of cleaning of the latrine tank of the School. Had it been bribe money, he would not have utilized the same for the School. Therefore, it was School's due and was used for the School.

9. If the statements of Sri Ray and the Contractor namely Shivanarayan Lohar are weighed with the documents he has relied upon as discussed above, neither the factum of demand nor the acceptance could be proved on record. No doubt, the Petitioner has a very strong point of defence. However, at what stage, the said probable defences of the Petitioner would be taken into consideration is the vital question in the present proceeding.

10. Mr. Maharana, learned Additional Standing Counsel for the Vigilance submits that enough materials on record are available which prima facie establish the case under Section 7 of the P.C. Act. This is a trap case and onus is absolutely on the Petitioner to prove his case.

11. Mr. Pattanaik, learned counsel for the Petitioner has relied upon a judgment of the Hon'ble Supreme Court in the case of ***P. Satyanarayana Muthy vrs. District Inspector of Police, State of Andhra Pradesh and another*** reported in ***(2015) 10 SCC 152***. He supplies emphasis of paragraphs-20 & 21, which reads as under:-

> *"20.This Court in A. Subair v. State of Kerala[3], while dwelling on the purport of the statutory prescription of Sections 7 and 13(1)(d) of the Act ruled that (at SCC p. 593, para 28) the prosecution has to prove the charge thereunder beyond reasonable doubt like any other criminal offence and that the accused should be considered to be innocent till it is established otherwise by proper proof of demand and acceptance of illegal gratification, which are vital ingredients necessary to be proved to record a conviction.*
> *21. In State of Kerala v. C.P. Rao[4], this Court, reiterating its earlier dictum, vis-à-vis the same offences, held that mere recovery by itself, would not prove the charge against the accused and in absence of any evidence to prove payment of bribe or to show that the accused had voluntarily accepted the money knowing it to be bribe, conviction cannot be sustained."*

Further, he relies upon paragraph-10 of the judgment of this Court in the case of ***Rajeev Ranjan vrs. Republic of India*** reported in ***(2022) 88 OCR 763*** which reads as under:-

> *"10. Law is well settled that mere receipt of money by the accused is not sufficient to fasten his guilt, in the absence of any evidence with regard to demand and acceptance of the same as illegal gratification. In order to constitute an offence under section 7 of 1988 Act, proof of demand is a sine qua non. (Ref: **V. Sejappa -Vrs.- The State** reported in (2016) 64 Orissa Criminal Reports (SC) 364, **B. Jayaraj** (supra), **K. Shanthamma** (supra), **Sidhartha Kumar Nath** (supra), **N. Vijay Kumar** (supra)). The burden rests on the accused to displace the statutory presumption raised under section 20 of the 1988 Act by bringing on record evidence, either direct or circumstantial, to establish with reasonable probability, that the money was accepted by him, other than as a motive or reward as referred to in section 7 of the 1988 Act. While invoking the provision of section 20 of the 1988 Act, the Court is required to consider the explanation offered by the accused, if any, only on the touchstone of preponderance of probability and not on the touchstone of proof beyond all reasonable doubt. For arriving at the conclusion as to whether all the ingredients of the offence i.e. demand, acceptance and recovery of illegal gratification have been satisfied or not, the Court must take into consideration the facts and circumstances brought on the record in its entirety. The standard of burden of proof on the accused vis-à-vis the standard of burden of proof on the prosecution would differ. The proof of demand of illegal gratification is the gravamen of the offence under sections 7 and 13(1)(d)(i) and (ii) of 1988 Act and in absence thereof, unmistakably the charge therefore, would fail. Mere acceptance of any amount allegedly by way of illegal gratification or recovery thereof, dehors the proof of demand, ipso facto, would thus not be sufficient to bring home the charge under these two sections of the Act. As a corollary, failure of the prosecution to prove the demand for illegal gratification would be fatal and mere recovery of the amount from the person of accused of the offence under sections 7 or 13 of the Act would not entail his conviction thereunder. The evidence of the complainant should be corroborated in material particulars and the complainant cannot be placed on any better footing than that of an accomplice and corroboration in material particulars connecting the accused with the crime has to be insisted upon. (Ref: **Satyananda Pani -Vrs.- State of Orissa (Vig**.) reported in (2017) 68 Orissa Criminal Reports 795, **Debananda Das** (supra),**Punjabrao***

(supra), ***Shyam Sundar Prusty*** *(supra),* ***N.Vijay Kumar*** *(supra),* ***Dnyaneshwar Laxman Rao Wankhede*** *(supra)).*

In case of ***Krishan Chander -Vrs.- State of Delhi*** *reported in (2016) 3 Supreme Court Cases 108, it is held that the demand for the bribe money is sine qua non to convict // 26 // Page 26 of 47 the accused for the offences punishable under sections 7 and 13(1)(d) read with section 13(2) of the 1988 Act. In case of* ***P. Satyanarayana Murthy -Vrs.- District Inspector of Police*** *reported in (2015) 10 Supreme Court Cases 152, it is held that the proof of demand has been held to be an indispensable essentiality and of permeating mandate for offences under sections 7 and 13 of the Act. Qua section 20 of the Act, which permits a presumption as envisaged therein, it has been held that while it is extendable only to an offence under section 7 and not to those under section 13(1)(d)(i) & (ii) of the Act, it is contingent as well on the proof of acceptance of illegal gratification for doing or forbearing to do any official act. Such proof of acceptance of illegal gratification, it was emphasized, could follow only if there was proof of demand. Axiomatically, it was held that in absence of proof of demand, such legal presumption under section 20 of 1988 Act would also not arise. In the case of* ***C.M. Girish Babu*** *(supra), it is held that it is well settled that the presumption to be drawn under section 20 of 1988 Act is not an inviolable one. The accused charged with the offence could rebut it either through the cross-examination of the witnesses cited against him or by adducing reliable evidence. If the accused fails to disprove the presumption, the same would stick and then it can be held by the Court that the prosecution has proved that the accused received the amount towards gratification. It is equally well settled that the burden of proof placed upon the accused person against whom the presumption is made under section 20 of 1988 Act is not akin to that of burden placed on the prosecution to prove the case beyond a reasonable doubt. In the case of* ***Khaleel Ahmed*** *(supra), it is held that the presumption raised under section 20 for the offence under section 7 is concerned, it is the settled law that the presumption raised under section 20 is a rebuttable presumption, and that the burden placed on the accused for rebutting the presumption is one of preponderance of probabilities."*

Relying upon the aforesaid judgments, he submits that from the factual narration of the prosecution case neither the demand nor the acceptance could be proved on record. Therefore, the statutory presumption under Section 20 of the P.C. Act does not operate against the Petitioner.

12. Mr. Pattanaik, has also relied upon the judgment of this Court passed in CRLMC No.1325 of 2021 in the case ***Bamadev Sankhula vrs. State of Odisha (Vigilance)***. He supplies emphasis of paragraphs-20 & 24, which read as under:-

"20. Further, taking cognizance on 13.11.2017 by the learned Special Judge Vigilance, Dhenkanal in T.R. No.72 of 2017 also suffers from certain glaring infirmities in so far as the tainted bribe amount which was never delivered to the petitioner by the complainant and at the time of presence of co-accused i.e., Nilamani Pradhan at the quarter of the petitioner. Neither was the complainant present nor was the over hearing witness present. Hence, the Court below should have been extra careful while framing charge and directing the petitioner to be tried under two charge heads u/s 13(2) r/w s.7 & 13(1)(d) of the Prevention of Corruption Act 1988 vide order dated 20.01.2018 in T.R. No.72 of 2017. It is a settled principle of law that mere recovery of tainted bribe money cannot prove the charges of the prosecution.

24. In catena of judgments rendered by the Hon'ble Apex Court held that demand of illegal gratification is sine qua non to constitute the said offence and mere recovery of currency notes cannot constitute the offence under Section 7 unless it is proved beyond all reasonable doubt that the accused voluntarily accepted the money knowing it to be a bribe. ***B. Jayraj Vs State of Andhra Pradesh (supra) C.M. Sharma v. State of A-P.2 and C.M., Girish Babu v. CBP (supra), P. Satyanarayana Murthy vs District Inspector of Police, State of Andhra Pradesh and Another (supra)*** *and so on are some of the sheet anchor of similar sentiments. These precedents vindicate the stand of the petitioner legally."*

13. I have perused the record and gave a conscious consideration to the submission made by the learned counsel for the Petitioner. The Petitioner by relying upon the documents placed on record of the present case has tried to create a doubt on the prosecution story regarding the demand and acceptance of the bribe. On the strength of the judgments relied upon, he submits that demand of illegal gratification is sign qua non to constitute the offence and mere recovery of currency notes per-se will not attract the offence under Section 7 of the P.C. Act. Unless, it is proved beyond all reasonable doubt that the accused has voluntarily accepted the money knowing it to be the bribe, no offence is made out. In the instant case to begin with the Petitioner has accepted the money from the informant. However, he immediately handed over the tainted notes to one Parameswar Ray. Phenolphthalein powder test was also conducted on the Petitioner. Therefore, prima facie the story of the prosecution regarding acceptance is brought on record by the prosecution. Insofar as the demand is concerned, the fact that the Petitioner has asked the complainant to pay Rs.12,000/- is not denied. However, the petitioner suggests that the said money was demanded towards the outstanding dues against the daughters of the complainant. Therefore, the factum of demand per-se is also borne out from the record. However, reasons for such demand being a fact to be proved on record during the trial alone. Therefore, the petitioner may have a case to create doubt regarding the "demand" and "acceptance". However, the same needs to be proven during rigors of the trial. The judgments relied upon by the learned counsel for the petitioner will not enure to the benefit of the Petitioner on facts which are distinguishable. Therefore, I am not inclined to entertain the petition under the jurisdiction of Section 482 Cr.P.C. at this stage.

14. Accordingly, the CRLMC is dismissed. However, liberty is granted to the Petitioner to raise all the points at the appropriate stage of the trial.

—— o ——

2024 (II) ILR-CUT-718

SIBO SANKAR MISHRA, J.

CRLMC NOS. 3460 WITH BATCHES

[CRLMC NOS.3460, 3657, 3783 OF 2023 AND CRLMC NO.78 OF 2024
& CRLMC NO. 5412/2023]

ROJALIN ROUT & ANR. ……Petitioners

-V-

STATE OF ODISHA & ANR. ……Opp.Parties

CODE OF CRIMINAL PROCEDURE, 1973 – Sections 320 & 482 – Offences U/ss. 363,366,376(1) of the IPC r/w with section 4 of the POCSO Act – Prayer for quashing of the criminal case pursuant to settlement of dispute between the parties – The question crops-up that, whether the offences being non compoundable, can be quashed? – Held, the criminal case can be quashed by exercising the power under this section – The circumstances under which the case can be quashed, discussed.

Case Laws Relied on and Referred to :-

1. (2010) 15 SCC 118 (2J) : Gian Singh v. State of Punjab.
2. (2003) 4 SCC 675 : B.S. Joshi and Ors. vs. State of Haryana and Anr.
3. AIR 2009 SC 428 : Nikhil Merchant v. Central Bureau of Investigation.
4. (2012) 10 SCC 303 : Gian Singh v. State of Punjab (3J).
5. (2017) 9 SCC 641 : Parbatbhai Aahir @ Parbatbhai Bhimsinbhai Karmur & Ors v. State.
6. 2022 SCC Online SC 1030: Kapil Gupta vs. State of NCT of Delhi and Anr.
7. 2023 SCC Online Del 8452: Amar Kumar & Anr. vs. The State (GNCT of Delhi) & Anr.
8. 2023 SCC Online Del 4735 : Arjun Kamti vs The State of GNCT of Delhi Thru'Sho & Ors.
9. 2023 LiveLaw (Ker) 234 : Vishnu v. State of Kerala & Anr. and other connected matters.
10. 2023 0 Supreme (P&H) 1013 : Rajveer Singh and Anr vs. State of Punjab & Anr.
11. 2022 LiveLaw (Bom) 200 : Nauman Suleman Khan v State of Maharashtra & Anr.
12. 2022 LiveLaw (Del) 1077 : AK vs State Govt. of NCT of Delhi and Anr.
13. Crl.M.C. No.2153 of 2021 : Vijay Kumar v. The State Govt. of NCT of Delhi & Anr.
14. WP(CRL) No.1681 of 2023 : Amit Kumar Vs State NCT of Delhi.
15. Crl.O.P.No.3323/2024 : Kamal S/o. Subramani vs. State (Rep.by The Inspector of Police.
16. (2017) 9 SCC 641 : Parbathbhai Aahir @ Parbathbhai Vs. State of Gujrath.
17. (2019) 2 MLJ Crl 10 : The State of Madhya Pradesh v. Dhruv Gurjar and Anr.
18. 2022 SCC Online Megh 66 : Skhemborlang Suting & Anr. v. State of Meghalaya & Anr.
19. 2021 SCC OnLine HP 7834 : Sakshi & Another vrs. State of H.P. Through Secretary (Home to the Government of Himachal Pradesh) & Ors.
20. 2020 SCC Online DEL 1267 : Dharmander Singh vs. The State (Govt. of NCT, Delhi)

For Petitioners : Mr. S. Mohanty, Ms. G. Das, N. Mohanty, S. Jena, S. Satapathy.
Mr. M.K.Chand, R.R.Mishra, A.K.Sahoo, P.S.Das, S.K.Gouda.
Mr. S.S.Pattnaik, Mr. N.Behuria (Amicus Curiae).
Mr. P.K.Das, D.Sahoo, D.K.Raj, Mr. D.K.Sahoo.

For Opp.Parties : Mr. B.K. Ragada, AGA, Ms. G. Patra, Mr. K.Panda,
Mr. S.N.Biswal, Mr. M.K.Pati.
Mr. P.K.Maharaj, ASC & Mr. G.B.Singh.

JUDGMENT Date of Hearing : 09 & 15.02.2024 : Date of Judgment: 22.04.2024

SIBO SANKAR MISHRA, J.

1. A common question regarding quashing of criminal prosecution initiated against the petitioners for alleged sexual offences involving POCSO Act by invoking inherent jurisdiction of this Court under section 482 Cr.P.C has been post in the present proceedings, therefore, all the matter are taken up for hearing analogously and being decided by this common judgment.

2. **Brief necessary facts are enumerated hereunder**:-

In CRLMC No.3460 of 2023

This petition has been filed by the Petitioners with a prayer to quash the criminal proceedings initiated in Special G.R. Case No.30 of 2019 arising out of Kujang P.S. Case No.134 of 2019 pending in the Court of the learned Adhoc Additional District Judge, FTSC (POCSO), Jagatsingpur for the offence under Sections 363, 366, 376(1) of the I.P.C. read with Section 4 of the POCSO Act.

The informant-Opposite Party No.2 lodged an F.I.R. on 16.06.2019 against the Petitioner No.2 alleging therein that her daughter has been kidnapped by the present Petitioner No.2. F.I.R., Kujang P.S. Case No.134 of 2019 has been registered under Sections 363 and 34 of I.P.C. and the Petitioner No.2 was taken into judicial custody on 28.06.2019. After completion of investigation, the charge-sheet under Sections 363, 366, 376(1) of the I.P.C. read with Section 4 of the POCSO Act was submitted by the police against the Petitioner No.2. Thereafter, the Petitioner No.2 moved an application bearing BLAPL No.8867 of 2022 for enlarging him on bail. When the bail application was pending, the victim-Petitioner No.1 filed an affidavit before this Court *inter alia* stating that she is ready and willing to marry the Petitioner No.2 and the Petitioner No.2 is also ready and willing to marry her, and jointly do not wish to proceed with the prosecution proceedings against the accused/Petitioner no.2. The coordinate Bench of this Court in I.A. No.2297 of 2022 taking into consideration the affidavit filed by the Petitioner No.1 released the Petitioner No.2 on interim bail for a period of three months with a condition that he will join with the victim in matrimony and further directed the Petitioner No.2 to surrender after expiry of the bail period. The coordinate Bench of this Court on 05.04.2023 granted bail taking into account the surrender certificate filed by the Petitioner No.2 along with the marriage certificate vide Certificate No. 230750500002/ 2023 that the Petitioner No.2 has already married the victim on 15.02.2023. Now both the Petitioners got married and leading happy conjugal life. They have filed this petition for quashing the criminal proceedings in Special G.R. Case No.30 of 2019 arising out of Kujang P.S. Case No.134 of 2019 pending in the Court of the learned Adhoc Additional District Judge, FTSC(POCSO), Jagatsingpur for the offences under Sections 363, 366, 376(1) of I.P.C. read with Section 4 of the POCSO Act.

In CRLMC No.3657 of 2023

Petitioner has filed this petition seeking quashing of the criminal proceedings initiated in Kodinga P.S. Case No.10 of 2023 corresponding to T.R. Case No.03 of 2023 pending in the Court of the learned Additional Sessions Judge-cum-Special POCSO Court, Nabarangpur.

Prosecution alleges that on 14.08.2023 at about 2.30 P.M., the informant-Opposite Party No.2 received a mobile call from one of his nephews informing that few hours ago her minor daughter namely Opposite Party No.3 had gone outside to attend the call of nature and by that time the Petitioner restrained her daughter and committed sexual over tact with her. Hearing hulla, some persons reached there and detained the Petitioner and on asking the victim-Opposite Party No.3, she disclosed that the Petitioner has sexually assaulted her without her consent. On the basis of such incident, the informant-Opposite Party No.2 lodged an F.I.R. on 15.01.2023 in the Kodinga P.S. Case No.10 of 2023, registered under Section 376(3) of I.P.C. read with Section 4 of the POCSO Act against the Petitioner.

After completion of investigation, the charge-sheet under Section 376(1) of the I.P.C. read with Section 4 of the POCSO Act has been submitted by the police against the Petitioner, keeping further investigation open under Section 173(8) of Cr.P.C. During the course of investigation, the statements of the victim under Sections 161 & 164 Cr.P.C. have been recorded and the victim-Opposite Party No.3 *inter alia* stated that Petitioner forcibly subjected her to have physical relationship with him. Thereafter, the Opposite Party No.3 filed an affidavit before this Court *inter alia* stating that the matter has been settled amicably between them and she has been happily married and leading a happy conjugal life with the Petitioner and does not want to proceed with the case further. Now they have made a joint prayer before this Court to quash the said criminal proceedings.

In CRLMC No.3783 of 2023

This petition has been filed by the Petitioner with a prayer to quash the criminal proceedings in Dasarathpur P.S. Case No.111 of 2023 corresponding to C.T. Special Case No.73 of 2023 pending in the Court of the learned Additional District & Sessions Judge-cum-Special Court under POCSO Act, Jajpur.

The victim-Opposite Party No.2 has lodged an F.I.R. on 06.07.2023 *inter alia* alleging that the accused/Petitioner had promised her to marry and on 27.07.2020 made a proposal to marry and subsequently established physical relationship. It is further alleged that the complainant-victim had given a sum of Rs.90,000/- to the Petitioner for buying a car. The Petitioner had returned only Rs.40 000/-. On the basis of the said complaint, the F.I.R. was registered on 06.07.2023 under Section 376(2)(n) and Section 6 of the POCSO Act. During the course of investigation, the statement of the victim-Opposite Party No.2 has been recorded under Section 161 Cr.P.C. While the matter stood thus, both the Petitioner and Opposite Party No.2 have filed a joint affidavit before this Court indicating therein that due to misunderstanding between them, the F.I.R. was lodged. On the intervention of the local gentries and well-wishers, the matter has been amicably settled between them and they do not want to proceed with the case further.

In CRLMC No.78 of 2024

This petition has been filed by the Petitioner with a prayer to quash the criminal proceedings in connection with Chandabali P.S. Case No.75 of 2017 corresponding to Special POCSO Case No.03 of 2018 pending in the Court of the learned Additional District Judge-cum-Special Judge under POCSO Act, Bhadrak.

Prosecution alleges that on 22.04.2017 at about 3.30 P.M., the Informant-Opposite Party No.3 lodged an F.I.R. before the Chandabali Out-Post under Sections 363, 366(A), 109 and 34 of I.P.C. stating therein that his daughter, the victim-Opposite Party No.2 has been missing since 17.04.2017. After searching for the whereabouts of his daughter on 20.03.2017 he came to know that, one Biju Nayak has kidnapped and taken his daughter to Tamilnadu. On the basis of the said F.I.R., the investigating agency conducted investigation and on 25.08.2023 submitted charge-sheet under Sections 363, 366, 376(2)(n), 294, 323 and 34 of I.P.C., read with Section 6 of the POCSO Act showing the Petitioner as absconder. The learned Court below has taken cognizance under Sections 363,366,376(2)(n) of IPC read with Section 6 of the POCSO Act against

the Petitioner. While the matter stood thus, the Opposite Party No.2 being the victim has filed an affidavit stating therein that she has voluntarily left her house with the Petitioner and in the meantime, she has already married the Petitioner and leading a happy conjugal life with him. The Opposite Party No.3 being the father of the victim has also filed an affidavit before this Court stating the same fact and they do not want to proceed with the matter against the Petitioner as the case has already been settled between them.

In CRLMC No.5412 of 2023

This petition has been filed by the Petitioner with a prayer to quash the order dated 14.12.2021 passed by the learned Adhoc Additional Sessions Judge-cum-Special Judge, Keonjhar in Special Case No.294/34 of 2021-2022 in connection with Keonjhar Sadar P.S. Case No.107 of 2021 whereby the charges for the offences under Sections 417, 376(3), 323 and 506 of I.P.C. read with Section 6 of the POCSO Act has been framed against him.

The case of the prosecution in a nutshell is that the Petitioner by giving assurance of marriage to the victim-Opposite Party No.2, kept physical relationship with her and when the victim became pregnant, the Petitioner refused to accept her. Therefore, after the birth of a male child, the victim-informant lodged a written complaint against the Petitioner in Keonjhar Sadar P.S., on the basis of which F.I.R. No.107 dated 25.03.2021 was registered for the offences under Sections 417, 376(2)(n), 323 and 506 of IPC read with Section 6 of the POCSO Act. Accordingly, the Petitioner was arrested and thereafter applied for bail being BLAPL No.5216 of 2022. On 16.09.2022, the coordinate Bench of this Court granted interim bail accepting the submission of the Petitioner that the Petitioner is ready and willing to marry the victim girl and to take care of the child, as the victim by then had attained the age of majority. The Petitioner availed the concession of interim bail and married with the victim girl. Thereafter, the bail application was disposed of on 20.12.2022 by the coordinate Bench of this Court recording the fact that the Petitioner has already married to the victim girl. Now the victim girl and the Petitioner seek intervention of this Court for quashing of the entire proceeding pending against the Petitioner.

3. The facts scenario in all the above cases where prayers have been made for quashing of the respective criminal cases under Section 482 Cr.P.C., on the ground that the parties have settled their disputes and they no longer desire to pursue the prosecution.

The aforesaid cases could be broadly categorized as follows:-

(a) After the offence being committed and the criminal law is set in motion, during the pendency of ongoing proceedings, the victim and the accused/offender agree to marry and intended to lead marital life.

(b) Where after elopement and consensual sex over a period of time, the victim and the accused/offender have ended in marriage.

(c) Where accused on the pretext/promise of marriage, had consensual sex with the victim over a period of time but when the victim got pregnant, accused did not agree to marry her. However, after lodging of F.I.R., during subsequent proceedings agreed for marriage and settlement.

(d) Where a minor girl has been subjected to sexual assault but after the incident and lodging of F.I.R., during subsequent proceedings, the victim and the accused married, and they arrived at a settlement.

(e) Sexual abuse by a person who is major and subsequently agreed to marry the victim.

(f) Cases in which, sexual assault caused by the offender on false promises of marriage, but subsequently wriggle out from the promise of marriage.

(g) Minors in romantic relationship develop sexual intimacy with mutual consent, however, such relationships results in marriage in some cases.

Therefore, the common grievances raised by the parties regarding quashing of criminal proceedings where offence under the POCSO Act is involved on the ground of settlement are decided by this Court by a common judgment.

4. The POCSO Act, 2012 provides for stringent punishments depending upon the gravity of the offence. The punishments range from simple to rigorous imprisonment of varying periods which extend to life imprisonment along with the provision of fines too. The abetment of an offence under the Act would also attract the same punishment as that of the offence committed. The Act defines and deals with many types of sexual offences against children such as Penetrative sexual assault (Sections-3 & 4), Aggravated penetrative sexual assault (Section-5), Sexual assault (Sections-7 & 8), Aggravated sexual assault (Sections-9 &10), Sexual harassment (Sections-11&12), Using child for pornographic purposes (Sections-13&14), Abetment (Section-16). In cases of penetrative sexual assault on a girl below 16 years and in aggravated penetrative sexual assaults where the offences are committed by a person in a position of trust or authority of child such as a member of armed or security forces, police officer, public servant, by any staff, principal or the management or staff of the hospital or any institution and any place of custody or care or protection, minimum punishment of imprisonment of 20 years extendable to life and fine.

5. The growing instances where teenagers were involved in a romantic relationship with each other falls victim to the offences under the POCSO Act is a matter of concern. The teenage romance often turns into cohabiting consensually and the girl alleges rape due to pressure from the family, fear of the society or when the boy refuses to marry. Since sexual intercourse with a minor is considered "statutory rape", the criminal case is registered. The question is, can such sexual offences against the minor be quashed by exercising inherent jurisdiction of this Court under Section 482 of Cr.P.C.?

6. The tribulation of a protracted trial is a painful experience for the parties, and it is often in the best interest of the parties that the victim and the accused in a criminal case reach a mutual agreement or settlement, resulting in the acquittal of accused. Section 320 of the Code of Criminal Procedure (Cr.P.C) mentions certain offences as compoundable, certain other offences as compoundable with the permission of the Court, and the other offences as non-compoundable vide Section 320(7) of the Cr.P.C. These offences can be settled by the parties involved, meaning they can be settled through a compromise between the victim and the accused. Section 320 of the Cr.P.C categorizes offences into two parts: Part I and Part II. Part-I specifies offences which can be settled without the Court's permission like Voluntarily causing hurt, Theft, Dishonest misappropriation of property, Cheating etc. While Part-II specifies offences which cannot

be settled without the Court's permission and they do not fall under the category of heinous offences, like Causing miscarriage, Criminal breach of trust, Marrying again during the lifetime of a husband or wife etc. Provisions of Section 320 of the Cr.P.C., serves many laudable objectives like promoting justice and fairness to the satisfaction of both parties, saving time and resources, encouraging reconciliation, reducing the burden on courts. However, Section 320 of the Cr.P.C., brings about an important distinction between Compoundable and Non-compoundable offences thereby limiting the scope of its operation guided by the principle that grave and heinous crimes are offences against the society deserving trial and punishment and a private settlement in case of heinous crimes like rape, murder, offence against children beset with extreme aberrational elements like cruelty, violence, depravity etc. should not shield the person accused of such crimes to escape due punishment. While Section 320 of the Cr.P.C., clearly bars compromise in non-compoundable offences, can the bar be raised under Section 482 of Cr. P.C.?

7. The interplay between Section 320 and 482 of Cr.P.C., no more res integra. In the case of ***Gian Singh v. State of Punjab*** reported in ***(2010) 15 SCC 118 (2J)***, the two-Judge Bench of the Hon'ble Apex Court doubted the correctness of the three decisions in ***B.S. Joshi and others vs. State of Haryana and another*** reported in ***(2003) 4 SCC 675***, ***Nikhil Merchant v. Central Bureau of Investigation*** reported in ***AIR 2009 SC 428*** and ***Manoj Sharma v. State 2008*** reported in ***(4) KLT 417 (SC)*** and referred the question as regards the permissibility of indirectly permitting compounding of non-compoundable offences recoursing to Section 482 of Cr.P.C. to a larger Bench. Finally, the issue was settled by a three-Judge Bench in ***Gian Singh v. State of Punjab (3J)*** reported in ***(2012) 10 SCC 303*** which held that if for the purpose of securing the ends of justice, quashing of F.I.R. becomes necessary, Section 320 would not be a bar to the exercise of power of quashing. It is well settled that the powers under section 482 Cr.P.C. have no limits. Of course, where there is more power, it becomes necessary to exercise utmost care and caution while invoking such powers.

8. Article 15 of the Constitution, *inter alia*, confers upon the State powers to make special provision for children. Further, Article 39, inter-alia, provides that the State shall in particular direct its policy towards securing that the tender age of children is not abused and their childhood and youth are protected against exploitation and they are given facilities to develop in a healthy manner and in conditions of freedom and dignity.

9. The United Nations Convention on Rights of Children, ratified by India on 11th December, 1992, requires the State Parties to undertake all appropriate National, By-lateral and Multi-lateral measures to prevent (a) the inducement or coercion of a child to engage in any unlawful sexual activity; (b) the exploitative use of children in prostitution or other unlawful sexual practices; and (c) the exploitative use of children in pornographic performances and materials.

10. Benefit would be to refer to the judgment of the Hon'ble Supreme Court in the case of ***Gian Singh vs. State of Punjab and another*** reported in ***2012 (10) SCC 303***. The relevant part of the judgment reads as under: -

"52. The question is with regard to the inherent power of the High Court in quashing the criminal proceedings against an offender who has settled his dispute with the victim of the crime but the crime in which he is allegedly involved is not compoundable under Section 320 of the Code.

55. In the very nature of its constitution, it is the judicial obligation of the High Court to undo a wrong in course of administration of justice or to prevent continuation of unnecessary judicial process. This is founded on the legal maxim quando lex aliquid alicui concedit, conceditur et id sine qua res ipsa esse non potest. The full import of which is whenever anything is authorised, and especially if, as a matter of duty, required to be done by law, it is found impossible to do that thing unless something else not authorised in express terms be also done, may also be done, then that something else will be supplied by necessary intendment. Ex debito justitiae is inbuilt in such exercise; the whole idea is to do real, complete and substantial justice for which it exists. The power possessed by the High Court under Section 482 of the Code is of wide amplitude but requires exercise with great caution and circumspection.

58. Where High Court quashes a criminal proceeding having regard to the fact that dispute between the offender and victim has been settled although offences are not compoundable, it does so as in its opinion, continuation of criminal proceedings will be an exercise in futility and justice in the case demands that the dispute between the parties is put to an end and peace is restored; securing the ends of justice being the ultimate guiding factor. No doubt, crimes are acts which have harmful effect on the public and consist in wrong doing that seriously endangers and threatens well-being of society and it is not safe to leave the crime- doer only because he and the victim have settled the dispute amicably or that the victim has been paid compensation, yet certain crimes have been made compoundable in law, with or without permission of the Court. In respect of serious offences like murder, rape, dacoity, etc; or other offences of mental depravity under IPC or offences of moral turpitude under special statutes, like Prevention of Corruption Act or the offences committed by public servants while working in that capacity, the settlement between offender and victim can have no legal sanction at all. However, certain offences which overwhelmingly and predominantly bear civil flavour having arisen out of civil, mercantile, commercial, financial, partnership or such like transactions or the offences arising out of matrimony, particularly relating to dowry, etc. or the family dispute, where the wrong is basically to victim and the offender and victim have settled all disputes between them amicably, irrespective of the fact that such offences have not been made compoundable, the High Court may within the framework of its inherent power, quash the criminal proceeding or criminal complaint or F.I.R if it is satisfied that on the face of such settlement, there is hardly any likelihood of offender being convicted and by not quashing the criminal proceedings, justice shall be casualty and ends of justice shall be defeated. The above list is illustrative and not exhaustive. Each case will depend on its own facts and no hard and fast category can be prescribed.

61. The position that emerges from the above discussion can be summarised thus: the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz; (i) to secure the ends of justice or (ii) to prevent abuse of the process of any Court. In what cases power to quash the criminal proceeding or complaint or F.I.R may be exercised where the offender and

victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not private in nature and have serious impact on society. Similarly, any compromise between the victim and offender in relation to the offences under special statutes like Prevention of Corruption Act or the offences committed by public servants while working in that capacity etc.; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and pre- dominatingly civil flavour stand on different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, ***High Court may quash criminal proceedings if in its view, because of the compromise between the offender and victim, the possibility of conviction is remote and bleak and continuation of criminal case would put accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim.*** *In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and wrongdoer and whether to secure the ends of justice, it is appropriate that criminal case is put to an end and if the answer to the above question(s) is in affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding."*

11. In ***Parbatbhai Aahir @ Parbatbhai Bhimsinbhai Karmur & Ors v. State of Gujarat & Anr*** reported in ***(2017) 9 SCC 641***, the Hon'ble Supreme Court has observed as under:

"16. The broad principles which emerge from the precedents on the subject, may be summarised in the following propositions:

16.1. Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new powers. It only recognises and preserves powers which inhere in the High Court.

16.2. The invocation of the jurisdiction of the High Court to quash a first information report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of Section 320 of the Code of Criminal Procedure, 1973. The power to quash under Section 482 is attracted even if the offence is non-compoundable.

16.3. In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power.

16.4. While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised (i) to secure the ends of justice, or (ii) to prevent an abuse of the process of any court.

16.5. The decision as to whether a complaint or first information report should be quashed on the ground that the offender and victim have settled the dispute, revolves ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated.

16.6. In the exercise of the power under Section 482 and while dealing with a plea that the dispute has been settled, the High Court must have due regard to the nature and gravity of the offence. Heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute. Such offences are, truly speaking, not private in nature but have a serious impact upon society. The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences.

16.7. As distinguished from serious offences, there may be criminal cases which have an overwhelming or predominant element of a civil dispute. They stand on a distinct footing insofar as the exercise of the inherent power to quash is concerned.

16.8. Criminal cases involving offences which arise from commercial, financial, mercantile, partnership or similar transactions with an essentially civil flavour may in appropriate situations fall for quashing where parties have settled the dispute.

16.9. In such a case, the High Court may quash the criminal proceeding if in view of the compromise between the disputants, the possibility of a conviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice; and

16.10. There is yet an exception to the principle set out in propositions 16.8. and 16.9. above. Economic offences involving the financial and economic well-being of the State have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance."

12. In the light of the law laid down by the Hon'ble Supreme Court, the principle of application of inherent jurisdiction is the facts scenario in the individual case. Different High Courts have dealt with the similar matters. However, conflicting views have been taken by different High Courts. Precisely, I have taken into consideration the views taken by the High Court of Delhi and High Court of Kerala.

13. In the case of ***Kapil Gupta vs. State of NCT of Delhi and another*** reported in ***2022 SCC Online SC 1030***, the relevant part of the judgment reads as follows:

"12. "It can thus be seen that this Court has clearly held that though the Court should be slow in quashing the proceedings wherein heinous and serious offences are involved, the High Court is not foreclosed from examining as to whether there exists material for incorporation of such an offence or as to whether there is sufficient evidence which if proved would lead to proving the charge for the offence charged with. The Court has also to take into consideration as to whether the settlement between the parties is going to result into harmony between them which may improve their mutual relationship.

13. "The Court has further held that it is also relevant to consider as to what is stage of the proceedings. It has been observed that if an application is made at a belated stage wherein the evidence has been led and the matter is at the stage of arguments or judgment, the Court should be slow to exercise the power to quash the proceedings.

However, if such an application is made at an initial stage before commencement of trial, the said factor will weigh with the court in exercising its power.

15. In both the cases, though the charge-sheets have been filed, the charges are yet to be framed and as such, the trial has not yet commenced. It is further to be noted that since Respondent 2 herself is not supporting the prosecution case, even if the criminal trial is permitted to go ahead, it will end in nothing else than an acquittal. If the request of the parties is denied, it will be amounting to only adding one more criminal case to the already overburdened criminal courts.

16. In that view of the matter, we find that though in a heinous or serious crime like rape, the Court should not normally exercise the powers of quashing the proceedings, in the peculiar facts and circumstances of the present case and in order to give succour to Respondent 2 so that she is saved from further agony of facing two criminal trials, one as a victim and one as an accused, we find that this is a fit case wherein the extraordinary powers of this Court be exercised to quash the criminal proceedings.

17. In that view of the matter, the appeal is allowed and proceedings in the criminal cases arising out of the following FIRs are quashed and set aside:"

14. In the case of ***Amar Kumar and another vs. The State (Govt. of NCT of Delhi)*** and another reported in ***2023 SCC Online Del 8452*** held as under:-

"It is reflecting that the petitioner no.1 and respondent no.2 after liking each other had developed intimacy. The respondent no.2 came to know about her pregnancy with petitioner no.1 and subsequently delivered a child. The respondent no.2 was stated to be a minor at the time of registration of FIR on 21.12.2020. The statements of the respondent no.2 were recorded under section 161 and section 164 Cr.P.C wherein the respondent no.2 primarily stated that she had a relationship with the petitioner no.1 out of her own free will and subsequently came to know about her pregnancy with the petitioner no.1 and thereafter they got married with each other".

The Hon'ble High Court of Delhi have relied on Gian Singh vs State of Punjab and another (Supra) and have quoted para-57 of the said Judgment.

Moreover have relied on Daxaben V. The State of Gujrat & Ors., SLP Criminal No.1132-1155 of 2022 decided on 29.07.2022 and have quoted para 38 of the said Judgment which state the power of the High Court u/s-482 Crpc for quashing of FIR or complaint.

The Hon'ble High Court of Delhi taking into note of the above decisions rendered by the Hon'ble Apex court and taking into facts and circumstances of the case and have stated that "there is remote and bleak possibility of conviction and continuance of legal proceedings arising out of FIR bearing no. 0843/2020 shall cause great oppression and prejudice to the petitioner no.1 and respondent no.2 as they shall be subjected to extreme injustice and as such to put an end to legal proceedings arising out of FIR bearing no. 0843/2020 would be appropriate and be in the interest of society".

15. The Hon'ble High Court of Delhi in ***Arjun Kamti vs The State of GNCT of Delhi Through Sho & Ors***, reported in ***2023 SCC Online Del 4735*** dealt with similar issue:-

"wherein the facts remains that FIR was got registered on the basis of complaint made by the respondent no. 2 wherein he suspected that some unknown person has kidnapped his daughter i.e. respondent no. 3 after taking out from his Guardianship. During the investigation the petitioner was arrested and Final Report as per section 173 Cr.P.C/

charge sheet was filed for the offence under sections 363/376 IPC and under section 6 of the Protection of Children from Sexual Offences, Act 2012(POCSO) wherein the petitioner was implicated.

In the said judgment Hon'ble High court of Delhi has relied on a decision rendered by the Hon'ble Supreme Court in Shiji alias Pappu and others V Radhika and Anr, (2011) 10 SCC 705 wherein it has been observed that simply because an offence is not compoundable under section 320 Code of Criminal Procedure is by itself no reason for the High Court to refuse exercise of its power under section 482 Code of Criminal Procedure.

In the said judgment Gian Singh vs State of Punjab and another (Supra) has also been relied and have quoted para-57 of the said judgment.

In the said case the decision rendered in State of Madhya Pradesh V Laxmi Narayan & Ors., 2 (2019) 5 SCC 688 which recapitulated principles laid down in Gian Singh was also taken into consideration and also decision rendered by the Hon'ble Apex court in Ramgopal & another V State of Madhya Pradesh, Criminal Appeal No. 1489 of 2012 decided 29th September, 2021 and in Daxaben V. The State of Gujrat & Ors., SLP Criminal No.1132-1155 of 2022 decided on 29.07.2022.

Further taken note of the fact that Gian Singh in broad perspective prohibits quashing of FIR pertaining to rape, but have considered the facts and circumstances of the case and considering the fact that there is remote and bleak possibility of conviction and continuance of legal proceedings shall cause great oppression and prejudice to the petitioner and the respondent no. 3 as they shall be subjected to extreme injustice and as such to put an end to legal proceedings would be appropriate and be in the interest of society and quashed the criminal proceeding against the petitioner."

16. The High Court of Kerala in the case of ***Vishnu v. State of Kerala & Anr. and other connected matters*** reported in ***2023 LiveLaw (Ker) 234*** dealt with the similar issue :-

"wherein a bunch of cases filed U/s-482 of Crpc for quashing of the complaint of FIR wherein offences under the POCSO Act was alleged was taken altogether and the fact in all those cases remained that there has been settlement/compromise between the parties i.e. petitioner and victim. Herein the Hon'ble court was poised with the question whether court can quash any proceeding with regard to sexual offences against women and children wherein settlement between the parties have taken place.

Paragraphs-16, 18 and 19 of the said judgment read as under:-

16. "From the precedents and law on the subject enunciated above, it can be concluded that though the High Court should not normally interfere with the investigation/criminal proceedings involving sexual offences against women and children only on the ground of settlement, it is not completely foreclosed in exercising its extraordinary power under section 482 of Cr. P.C or Article 226 of the Constitution of India to quash such proceedings in 'extraordinary circumstances' to do complete justice to the parties. However, it is always a difficult task for the Court to identify the so-called 'extraordinary circumstance'. The interest of the victim and the societal interest often clash, making the job of Courts more complex. The issue must be considered from different perspectives, the pros and cons must be weighed, and a rational view must be taken. A holistic approach is called for in identifying the cases fit for compromise."

18. "There is a clear distinction between rape and consensual sex. There is also a distinction between a mere breach of a promise and not fulfilling a false promise. It is trite that in a prosecution for rape on the false promise of marriage, the crucial issue to be considered is whether the allegation indicates that the accused had given a promise to the victim to marry, which at the inception was false and based on which the victim was induced into a sexual relationship. Without such an allegation or proof, the offence of rape will not be attracted. If the accused has not made the promise to seduce the prosecutrix to indulge in sexual acts, such an act will not amount to rape. So also, in a case where the allegation is that the accused had sexual intercourse with the victim after obtaining her consent by giving a promise of marriage and when he subsequently marries her, it really means fulfilment of the promise made by the accused to the prosecutrix and the offence may not get attracted. In cases where the married woman had consensual sex with a man, or an unmarried woman had sex with a married man knowing that he was married induced by the promise of marriage, the offence of rape will not get attracted since she knew well that marriage by or with a married person is illegal, and such a promise cannot be honoured. Recently, this Court in xxx v. State of Kerala and Another has held that the promise alleged to have been made by the accused to a married woman that he would marry her is a promise which is not enforceable in law as it is against public policy in view of the mandatory provisions contained in Section 23 of the Indian Contract Act and such an unenforceable and illegal promise cannot be the basis for the prosecution to contend that the consent of the woman, who had sexual relationship with the accused, was obtained on the basis of the misconception of fact as understood in Explanation 2 of Section 375 of the IPC and Section 90 of the IPC. Similarly, if the allegations and materials disclose that the victim agreed to have sexual intercourse on account of her love and passion for the accused or where the accused could not marry her on account of circumstances beyond his control, the offence will not be attracted. In these types of cases, there is no point in not exercising the jurisdiction under Section 482 of Cr.P.C. to quash the proceedings on the ground of compromise between the accused and the sexual assault victim."

19. "There is yet another category of cases where though the victim alleged that the sexual assault or rape was forceful or against her will, later, they settled the dispute, got married and led a peaceful life. In most of those cases, the victim admits that the allegation of rape was levelled only because the accused refused to marry her. Allowing prosecution to continue in those cases would only result in the disturbance of their happy family life. On the contrary, the closure of such a case would promote their family life. In such cases, the ends of justice demand that the parties be allowed to compromise. However, the Court must ensure that the marriage is not a camouflage to escape punishment and the consent given by the victim for compromise was voluntary. The Court must also be satisfied after considering all the facts and circumstances of the case that quashing the proceedings would promote justice for the victim and the continuation of the proceedings would cause injustice to her".

17. The High Court of Punjab and Haryana in case of ***Rajveer Singh and Anr vs. State of Punjab & Anr*** reported in ***2023 0 Supreme (P&H) 1013*** observed in para-5 as under:

"5. From the perusal of the enclosed FIR, report of the Trial Court and compromise arrived between the parties, it transpires that contesting parties have amicably resolved their issue, thus, no useful purpose would be served by continuing the proceedings. The offence of rape is not simple brutality or cruelty upon person of a female whereas it

amounts to quelling sole, heart and mind of a victim as well her entire family members which in Indian context drastically affects their social, moral and matrimonial life. The possibilities of getting suitable matrimonial match abysmally reduce. In the present case, the petitioner has not simply made an offer of marriage whereas he has already solemnized marriage with the victim and she is happily cohabiting with the petitioner, thus, denial of prayer of the petitioner not only would be against the interest of petitioner but also victim and her family members .Further, there appears to be no chance of conviction, thus, the continuance of the proceedings would just waste valuable judicial time and it is well-known fact that courts are already over burdened."

18. The High Court of Madras in the case of ***Vijayalakshmi & Anr. Vs. State Rep. By The Inspector of Police, All Women Police Station & Anr.*** (Crl.O.P.231 of 2021, decided on 27.01.2024) had taken note of a passage from ***Vishnu*** (supra) and said:-

"22. The High Court of Madras while quashing a criminal proceeding initiated under the POCSO Act on the ground of settlement between the accused and the victim held that punishing an adolescent boy for entering a relationship with a girl below 18 years of age was never an objective of this act. "What came to be a law to protect and render justice to victims and survivors of child abuse can become a tool in the hands of certain sections of the society to abuse the process of law".

19. In ***Nauman Suleman Khan v State of Maharashtra & Anr*** reported in ***2022 LiveLaw (Bom) 200***, The Bombay High Court quashed an FIR under Protection of Children from Sexual Offences Act (POCSO Act) for penetrative sexual assault, as the victim girl (now a major) said that she and the accused were allegedly in love and are now to be married. The court observed it was "inclined to accept the request for quashing the FIR, only by considering their future. If the prosecution still remains, it will come in their peaceful life."

20. In ***AK vs State Govt. of NCT of Delhi and Anr.*** reported in ***2022 LiveLaw (Del) 1077***, The Delhi High Court held that the intention of The POCSO Act was to protect the children from sexual abuse and not criminalize consensual romantic relations.

21. In Crl.M.C. No.2153 of 2021, titled as ***Vijay Kumar v. The State Govt. of NCT of Delhi & Anr.***, wherein, in similar circumstances, Delhi High Court held as under:

"6. Even though the judicial principles state that High Court must show restraint in quashing the FIR under section 6 POCSO, in the instant case, respondent No. 2 is in love with petitioner and has married him out of her own free will and choice.
7. The respondent No. 2 is a major now and wishes to stay with the petitioner as his wife along with their minor child. In this case, if the FIR is not quashed, three lives will be ruined. I am of the view that the minor child must get the due love and affection and upbringing from both the parents."

22. In WP(CRL) No.1681 of 2023, **Amit Kumar Vs State NCT of Delhi** decided on 13.12.2023 whereby Delhi High Court allowed the petition and quashed the FIR and held that the FIR should be quashed in the interest of justice and the betterment of the future of the parties involved. The court considered the following factors:

(i) The petitioner and the prosecutrix were in a relationship for a long time and had gotten married;

(ii) The prosecutrix had consented to the relationship and was not under any coercion or pressure.

(iii) The parents of the prosecutrix had accepted the marriage and were supporting the couple and the continuation of the FIR would have a negative impact on the prosecutrix, the petitioner, and their child.

23. Recently the Madras High Court in Crl. O.P. No.3323 of 2024, ***Kamal S/o. Subramani vs. State represented by The Inspector of Police*** quashed the proceedings pending in a Special Sessions Case under the POCSO Act. The victim girl, who was present in court, stated that she had married the petitioner and had a child with him. She expressed her desire to not pursue the case further as both families had accepted the marriage and she was living happily with the petitioner. The court noted that the case was still in the trial stage and that the parties had decided to settle the dispute amicably. The court also observed that the victim girl was not interested in prosecuting the case further. The court held that in the interest of justice and considering the victim's wishes, it was appropriate to quash the proceedings under Section 482 Cr.P.C. relying on the guidelines laid down by the Supreme Court in ***Parbathbhai Aahir @ Parbathbhai Vs. State of Gujrath, (2017) 9 SCC 641*** and ***The State of Madhya Pradesh v. Dhruv Gurjar and Another, (2019) 2 MLJ Crl 10***.

24. The Indian Human Rights law framework thus acknowledges adolescents sexuality and encourages States to strike a balance between protection and evolving autonomy by ensuring that consensual sexual activity among adolescents is not criminalized. Several High Courts have recognised that adolescent relationships are normal, and criminalisation of such acts affects both parties and is not in keeping with the objectives of the POCSO Act. In ***Vijayalakshmi(supra),*** the Madras High Court quashed proceedings of kidnapping, penetrative sexual assault, and child marriage against a man in his early 20s, observing that the POCSO Act did not intend to punish "an adolescent boy who enters into a relationship with a minor girl by treating him as an offender". It cited evidence that "adolescent romance is an important developmental marker for adolescents' self-identity, functioning and capacity for intimacy" and concluded that criminalization would be counterproductive. It drew attention to the persecution that would result from incarceration and emphasized the need for support and guidance instead. Similarly, in the case of ***Agavai v. the State of Tamil Nadu***, the petitioner child in conflict with the law was 15 years old and the victim girl was 17 years old when they entered into a sexual relationship. The Madras High Court observed that the issue of consensual sex between minors is a legal grey area in India and concluded that, "punishing the minor boy who enters into a relationship with a minor girl who were in the grips of their hormones and biological changes which is otherwise normative development in the children, is against the principles of the best interest of the child." In ***Skhemborlang Suting and anr v. State of Meghalaya and anr*** reported in ***2022 SCC Online Megh 66***, the petitioners were a married couple, and a case was lodged after a medical check-up when the wife became pregnant. The High Court of Meghalaya quashed the proceedings on the reasoning that the act could not be termed an "assault", as no threat or attempt to inflict offensive physical or bodily harm on the minor wife had been made out.

While marriage between the parties appears to have influenced by several High Courts and resulted in the quashing of romantic cases under the POCSO Act, sexual behavior is normative during adolescence, and relationships may not always end in marriage.

25. In case of ***Sakshi and Another vrs. State of H.P. Through Secretary (Home to the Government of Himachal Pradesh) and others*** reported in ***2021 SCC OnLine HP 7834***, the Hon'ble Himachal Pradesh High Court has observed in paragraphs-9 and 10 as under: -

> *"**9**. It is quite apparent from the aforesaid exposition of law that High Court has inherent power to quash criminal proceedings even in those cases which are not compoundable, but such power is to be exercised sparingly and with great caution. In the judgments, referred hereinabove,* ***Hon'ble Apex Court has categorically held that Court while exercising inherent power under Section 482 Cr.P.C., must have due regard to the nature and gravity of offence sought to be compounded. Hon'ble Apex Court has though held that heinous and serious offences of mental depravity, murder, rape, dacoity etc. cannot appropriately be quashed though the victim or the family of the victim have settled the dispute, but it has also observed that while exercising its powers, High Court is to examine as to whether the possibility of conviction is remote and bleak and continuation of criminal cases would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal cases.*** *Hon'ble Apex Court has further held that Court while exercising power under Section 482 Cr.P.C. can also be swayed by the fact that settlement between the parties is going to result in harmony between them which may improve their future relationship. Hon'ble Apex Court in its judgment rendered in State of Tamil Nadu supra, has reiterated that Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice and has held that the power to quash under Section 482 is attracted even if the offence is non-compoundable. In the aforesaid judgment Hon'ble Apex Court has held that while forming an opinion whether a criminal proceedings or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power.*
>
> ***10.*** *Though offence alleged to have been committed by the petitioner falls in the category of heinous crime as has been held by the Hon'ble Apex Court in Judgment (supra) and as such, this court should be reluctant in exercising power under Section 482 Cr.PC, for quashing of FIR, but in the peculiar facts and circumstances, where petitioner-accused and victim-prosecutrix have solemnized marriage and out of their wedlock, one female child has born, this Court, in the interest of the victim prosecutrix as well as her minor child, deems it fit to exercise power under Section 482 Cr.PC, for accepting the prayer made by the petitioner for quashing of FIR. In case, prayer made on behalf of the petitioner accused is not accepted at this stage, great prejudice would be caused to petitioner No. 1-victim-prosecutrix, who has not only solemnized marriage with the petitioner-accused, but has also given birth to one female child. In case, petitioner-accused is made to face the trial in terms of FIR sought to be quashed and ultimately he is convicted, it is petitioner No. 1-victim-prosecutrix, who would be the ultimate sufferer. No doubt, while exercising power under Section 482 Cr.PC, for quashing of FIR, this court is also required to take into consideration interest of the society at large, but in the present case, interest of petitioner No. 1-victim-prosecutrix appears to be more important than of the society and as such, in the peculiar facts and*

circumstances of the case, this Court while exercising powers under Section 482 Cr.PC., deems it fit to quash the FIR lodged against the petitioner under Section 376 IPC. Moreover, chances of conviction of the petitioner are very remote and bleak in view of the statements made by petitioner No. 1-victim-prosecutrix and petitioner No. 3 Savita and as such, no fruitful purpose would be served in case FIR as well as consequent proceedings are allowed to sustain."

26. On perusal of the aforementioned judgments would lead to inference that the extraordinary power of the High Court under Section 482 Cr.P.C. is not completely foreclosed to be exercising in the cases where the parties have settled their dispute though the allegations are regarding the serious sexual offences against women and children. If the Court arrived at a conclusion that due to the settlement between the parties, the prosecutrix is likely to depose in favour of the accused or against the prosecution, there is a remote and bleak possibility of conviction and continuation of the legal proceeding shall cause great oppression and prejudice to the accused or the victim and they shall be subjected to extreme injustice, the Court can intervene and quash the proceedings.

27. It is also apt to analyze the object of the POCSO Act vis-à-vis the prevalent customs and the conflicting statutory provisions. The aim of the POCSO Act is to protect minors from rapacious sexual offences and sexual violence by predators and criminals but does not aim to criminalize consensual sex of teenagers who have not attained the age of majority. The object is certainly not to punish teenagers who have not attained the age of majority in romantic or consensual relationship and accused them as offenders under the POCSO Act. In change of the fabric of the society, there has been a rise of love relationship wherein one of the party is below the age of 18 years or both the parties are underage but due to some petty reasons or/and there is rift between them a case is filed invoking the POCSO Act offence.

28. As per the Act, a child below the age of 18 years is incapable of giving consent for sexual relations. Thus, any sexual relationship with a child below the age of 18 years would lead to an offence under the POCSO Act. However, this position stands to be challenged in the face of personal laws, wherein children are eligible to get married below the age of 18 years. As per the Muslim personal law, minimum age of marriage of a girl is when the girl attains the age of puberty. The puberty is presumed in the absence of evidence on completion of the age of fifteen years. Therefore, it can be generally presumed that the minimum age of a girl, unless the age of puberty is different, is 15 years. Now a question arises if a valid marriage between a man and a girl below the age of 18 years is consummated, will the husband be liable under the POSCO Act? This doubt arises even in the face of Section 42A of the POCSO Act, which gives it an overriding effect.

"42A. Act not in derogation of any other law- The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions of this Act shall have overriding effect on the provisions of any such law to the extent of the inconsistency."

29. In the Rural India as well, particularly in tribal hamlets, the provisions of the POCSO Act have caused widespread injustice, resulting in the uncalled for arrest and

incarcerations. Adivasi and the tribal have their unique customs and traditions with girls and boys marrying and living together after reaching puberty. The marriage in these communities marked as a tradition from adolescence to adulthood and men are considered ready for marriage based on their physical fitness. Unfortunately, many grooms over the age of 21 years have been arrested for marrying brides under the age of 18 years. The tribal population in India is mostly illiterate. Hence, they often fall into the grips of the POCSO Act.

30. The aforementioned statutory and customary conflict needs to be taken into consideration while exercising the jurisdiction, particularly, when the accused and the victim have settled their dispute and leading a happy marital life.

31. The POCSO Act was enacted with the ultimate objective of prohibiting non-consensual and forced sexual relationships with children, including child sexual abuse and sexual harassment. While the stringent provisions of the POCSO Act have contributed positively to reducing instances of sexual violence against children, they have also led to an increase in vindictive litigation, with false cases being filed against individuals under the act. However, it was never the legislature's intention to prosecute romantic relationships between young adults. The doctrine of balancing needs to be pressed to service, while evaluating the facts of each individual case and exercising the jurisdiction under Section 482 Cr.P.C. The High Court, under its inherent powers, can interpret and harmonize these provisions to ensure effective implementation of both statutes while safeguarding the rights of the accused and the victim.

32. While dealing with a Bail Application of the accused charged with offences under the POCSO Act and the adverse Presumption under Section 29 of the Act, the High Court of Delhi in the case of ***"DHARMANDER SINGH vs. THE STATE (GOVT. OF NCT, DELHI)"*** reported in ***2020 SCC Online DEL 1267*** had occasion to observe as under:

> *"77. Though the heinousness of the offence alleged will beget the length of sentence after trial, in order to give due weightage to the intent and purpose of the Legislature in engrafting section 29 in this special statute to protect children from sexual offences, while deciding a bail plea at the post-charge stage, in addition to the nature and quality of the evidence before it, the court would also factor in certain real life considerations, illustrated below, which would tilt the balance against or in favour of the accused :*
>
> *a. the age of the minor victim : the younger the victim, the more heinous the offence alleged;*
> *b. the age of the accused : the older the accused, the more heinous the offence alleged;*
> *c. the comparative age of the victim and the accused : the more their age difference, the more the element of perversion in the offence alleged;*
> *d. the familial relationship, if any, between the victim and the accused : the closer such relationship, the more odious the offence alleged;*
> *e. whether the offence alleged involved threat, intimidation, violence and/or brutality;*
> *f. the conduct of the accused after the offence, as alleged;*
> *g. whether the offence was repeated against the victim; or whether the accused is a repeat offender under the POCSO Act or otherwise;*
> *h. whether the victim and the accused are so placed that the accused would have easy access to the victim, if enlarged on bail : the more the access, greater the reservation in granting bail;*

i. the comparative social standing of the victim and the accused : this would give insight into whether the accused is in a dominating position to subvert the trial;
j. whether the offence alleged was perpetrated when the victim and the accused were at an age of innocence : an innocent, though unholy, physical alliance may be looked at with less severity;
k. whether it appears there was tacit approval-in-fact, though not consent-in-law, for the offence alleged;
l. whether the offence alleged was committed alone or along with other persons, acting in a group or otherwise;
m. other similar real-life considerations.
78. The above factors are some cardinal considerations, though far from exhaustive, that would guide the court in assessing the egregiousness of the offence alleged; and in deciding which way the balance would tilt. At the end of the day however, considering the myriad facets and nuances of real-life situations, it is impossible to cast in stone all considerations for grant or refusal of bail in light of section 29. The grant or denial of bail will remain, as always, in the subjective satisfaction of a court; except that in view of section 29, when a bail plea is being considered after charges have been framed, the above additional factors should be considered.

33. It is thus seen that the important and relevant factors that weighed in the minds of different Constitutional Courts relating to sexual offences against the minor centered around the following factors:

i) Age of victim & accused and/or age difference between them.

ii) Nature of relationship between victim and the accused including Trustee or fiduciary relationship.

iii) The nature, magnitude, and consequences of the crime.

iv) Cases wherein the allegations reek of force, depravity, perversity, or cruelty.

v) Consensual relationships ending in marriage.

vi) Consensual relationships that start with assurance/expectation of marriage but do not materialize in marriage due to family disapproval, change in circumstances or other reasons.

vii) Parties are not interested to prosecute the cases further and jointly approached the court for quashing of proceedings.

viii) The possibility of conviction in the backdrop of parties having come to an agreed terms and not willing to prosecute the case further.

ix) The criminal prosecution will result in injustice to the victims and its closure would only promote their well-being.

x) The continuance of the criminal proceedings and the participation of the victim in that proceedings would adversely affect the mental, emotional, and educational well-being of the victim and protracted trial may possibly stigmatize the victim herself.

xi) The natural disposition and instinct of the victim who has settled in her life with the accused husband to protect her husband and her present and future progenies in the best interest of the family.

xii) In the cases where trial is at advance stage and evidence of the victim has already been recorded, High Court should be circumspect while exercising plenary jurisdiction under section 482 Cr.P.C

The conditions for exercising the jurisdiction under Section 482 Cr.P.C for quashing the criminal proceedings in such cases cannot be exhaustively postulated, therefore, every case has to be dealt with on its own facts in the light of parameters enumerated hereinabove.

34. Coming to the present cases at hand, except in CRLMC No.3657 of 2023, where the genesis of sexual relationship between the accused and the victim can be said to be forcible, unilateral act by the accused, in all other cases, the sexual act was consensual, voluntary though uncontrolled and impulsive indiscretions out of mutual love and affection. All the cases except in CRLMC No.3783 of 2023, ended in marriage between accused and the victim at different stages of proceedings after F.I.R. was registered and charge-sheet was filed. The parties are purportedly leading happily married conjugal lives and have approached jointly praying for quashing the respective proceedings. In view of the fact that the victims are not desirous of pursuing the matter further, the possibility of securing a conviction is not only remote but it may adversely affect the mental, emotional, and educational well-being of the victim and the happy conjugal and family life they are leading with perhaps one or more children born out of such union. It can be said that the real life situation of the victims of the POCSO offences have turned out to be in the best interest of the victims and the offences which created impediments for the victims and their families in the societal perspective in the forms of loss of reputation, dignity, diminished chances of marriage for the victim and her kins have been substantially mitigated when the accused married her and started a family had the added effect of reforming the accused and restored the dignity and the chances of normalcy and a good life for the victim and her family. In this view of the matter, continuing the proceedings for prosecuting and punishing the accused will have the undesired and self-defeating effect of punishing the victim as well which will go against the avowed objective and purpose of the Act itself.

35. I am, therefore, of the opinion that the discretionary power under Section 482 of Cr.P.C. should be exercised in the facts and circumstances of each case. Therefore, all the five CRLMCs. are allowed.

36. Accordingly, in **CRLMC No.3460 of 2023**, the criminal proceeding in Special G.R. Case No.30 of 2019 arising out of Kujang P.S. Case No.134 of 2019 pending in the Court of the learned Adhoc Additional District Judge, FTSC (POCSO), Jagatsingpur; in **CRLMC No.3657 of 2023**, the criminal proceeding in Kodinga P.S. Case No.10 of 2023 corresponding to T.R. Case No.03 of 2023 pending in the Court of the learned Additional Sessions Judge-cum-Special POCSO Court, Nabarangpur; in **CRLMC No.78 of 2024**, the criminal proceeding in connection with Chandabali P.S. Case No.75 of 2017 corresponding to Special POCSO Case No.03 of 2018 pending in the Court of the learned Additional District Judge-cum-Special Judge under POCSO Act, Bhadrak; in **CRLMC No.3783 of 2023**, the criminal proceeding in Dasarathpur P.S. Case No.111 of 2023 corresponding to C.T. Special Case No.73 of 2023 pending in the Court of the learned Additional District & Sessions Judge-cum-Special Court under POCSO Act, Jajpur and in **CRLMC No. 5412 of 2023**, the criminal proceeding in Special Case No. 294/34 of 2021-2022 in connection with Keonjhar Sadar P.S. Case No.107 of 2021 pending in the Court of the learned Additional Sessions Judge-cum-Special Judge,

Keonjhar and the consequential proceedings arising therefrom qua the Petitioners in the respective cases are quashed.

37. This Court records appreciation for the able assistance given by the learned counsel appearing for the Petitioners, Mr. B. K. Ragada, Mr. P. K. Maharaj, learned counsel appearing for the State and Mr. N. Behuria, learned Amicus Curiae.

—— o ——

2024 (II) ILR-CUT-738

A.C. BEHERA, J.

SA NO. 216 OF 2002

RAMESH CHANDRA BEHERA ……Appellant

-V-

RAMA BEHERA & ORS. ……Respondents

PROPERTY LAW – Agreement to sell – Whether suit for permanent injunction is maintainable on the basis of an agreement to sell? – Held, No – An agreement to sell by itself does not create any interest or charge in immovable property, because property title does not pass on execution of an agreement to sell until sale is completed.

Case Laws Relied on and Referred to :-

1. AIR 1988 Bombay 296: Laxman Pandu Khadke vs. Pandharinath Purushottam Rane.
2. 2018 (3) Civil Court Cases: 348 (P & H): Dholan Singh Vs. Iliyas.
3. Civil Appeal No.1509 of 2019 & 2019 (I) CLR (SC) 1033 : Balkrishna Dattatraya Galande vs Balkrishna Rambharose Gupta & Anr.
4. 2019 (I) CLR 137: Praharaj Palatasingh Vs. Arjuna Fatusingh & Ors.
5. 2021 (3) CCC 504 (SC): Balasubramanian & Anr. Vs. M. Arockiasamy (dead) through LRs.
6. 1999 AIHC 3785 (Bombay) : Mathurbai Kadu Koli & Ors. Vs. Roopchand Lalji Koli & Anr.
7. 2009 (2) CCC 638: Kumar Gonsusab & Ors vs Sri Mohammed Miyan @ Baban & Ors.
8. 2009 (1) CCC 766 (A.P): Irruvuru Ramachandra Reddy Vs. vs Koppala Bhushanam.
9. 2021 (2) CCC 245 (SC) : 2021 (1) OLR (SC) 601: Venigalla Koteshwaramma Vs. Malampati Suryamba & Ors.
10. 2021 (4) Civil Court Cases 458 (P & H): Sarita Devi Vs. Sultan Singh (since deceased) now represented by his LRs & Ors.
11. 2024 (1) CCC 103 (Karn) : Master Thejas & Anr. Vs. C.R. Babu & Ors.

For Appellant : Mr. P.K. Sahoo
For Respondents : Mr. B.N. Tripathy

ORDER Date of Hearing :14.03.2024 : Date of Order : 24.04.2024

A.C. BEHERA, J.

This 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.52 of 1997 and he was the appellant before the 1st Appellate Court in the 1st Appeal vide T.A. No.83 of 2000.

The respondents of this 2nd Appeal were the defendants before the trial court in the suit vide T.S. No.52 of 1997 and they were the respondents before the 1st Appellate Court in the 1st Appeal vide T.A. No.83 of 2000.

3. The suit of the plaintiff vide T.S. No.52 of 1997 was a suit for permanent injunction.

4. The case of the plaintiff (appellant of this 2nd Appeal) before the trial court in the suit vide T.S. No.52 of 1997 against the defendants (respondents of this 2nd Appeal) was that, the suit properties are house and homestead properties. The said suit properties were originally the properties of two brothers i.e. Damei and Bipini (defendant No.2). Though, the record of the suit properties stands jointly in the name of Damei and Bipini, but as per amicable partition in the year 1982 in respect of the suit properties along with their other properties between Damei & Bipini (defendant No.2), the suit properties had fallen into the share of Damei and since then Damei was in separate possession over the suit properties. Damei died leaving behind his widow wife (defendant No.1) and two sons i.e. defendant Nos.3 and 4. After the death of Damei, the suit properties devolved upon his widow wife and two sons i.e. upon the defendant Nos.1,3 & 4. The widow of Damei i.e. defendant No.1 was maintaining her two sons i.e. defendant Nos.3 and 4. While the defendant No.1 was in separate possession over the suit properties, she (defendant No.1) entered into an agreement on dated 20.10.1996 for selling the suit properties to the plaintiff receiving the full consideration money thereof i.e. Rs.40,000/- in order to execute and register the sale deed of the suit properties in favour of the plaintiff within one year since 20.10.1996. Subsequent thereto, the defendant No.2 instigated the defendant No.1 to disown the said agreement to sell dated 20.10.1996 with plaintiff in respect of the suit properties. To which, the defendant No.1 did not agree, for which, the defendant No.2 filed a suit vide T.S. No.18 of 1997 and Misc. Case No.37 of 1997 against the defendant No.1 in order to restrain her (defendant No.1) from transferring the suit properties in favour of the plaintiff. In that suit vide T.S. No.18 of 1997, the defendant No.1 appeared and filed her written statement admitting the execution of the agreement for sale dated 20.10.1996 in respect of the suit properties in favour of the plaintiff. Thereafter, the defendant No.2 was able to take the defendant No.1 into his clutches in order to defeat the above agreement to sell dated 20.10.1996 in favour of the plaintiff. So, according to the plaintiff, when the defendant No.1 has executed an agreement for sale dated 20.10.1996 in respect of the suit properties in his favour and the said agreement for sale subsists, then, the defendant No.1 has no right to sell the suit properties in favour of the defendant No.2 causing loss to the plaintiff. As he (plaintiff) came to know that, the defendant Nos.1 and 2 are chalking out a plan for execution and registration of the sale deed by the defendant No.1 in respect of the suit properties in favour of the defendant No.2 causing irreparable loss to the plaintiff, then, without getting any way, he (plaintiff) approached the Civil Court by filing the suit vide T.S. No.52 of 1997 against the defendants praying for injuncting the defendant Nos. 1,3 and 4 permanently from

transferring the suit properties in favour of the defendant No.2 and for injuncting all the defendants permanently from interfering with the possession of the plaintiff over the suit properties along with other reliefs, to which, he (plaintiff) is entitled for by stating specifically in his plaint that, through an order dated 01.07.1997 passed in Misc. Case No.105 of 1997 both the parties were directed to maintain status quo over the suit properties, but despite such order of status quo, the defendant Nos.1,3 and 4 executed and registered a sale deed on dated 01.07.1997 in respect of the suit properties in favour of the defendant No.2. For which, that sale deed dated 01.07.1997 executed by the defendant Nos.1,3 & 4 in respect of the suit properties in favour of the defendant No.2 is void ab initio, because the said deed has been executed in contravention of the restrain order. As such, sale deed dated 01.07.1997 executed by the defendant Nos.1,3 & 4 in favour of the defendant No.2 in respect of the suit properties being void and illegal, the same does not convey any title and possession of the suit properties in favour of the defendant No.2. Therefore, he (plaintiff) is entitled for the decree of injunction against the defendants.

5. Having been noticed from the trial court in the suit vide T.S. No.52 of 1997, the defendant Nos.1,3 & 4 filed their statement jointly, whereas, the defendant No.2 filed his written statement independently challenging the suit of the plaintiff taking identical stands by all the defendants in their respective written statements denying the allegations alleged by the plaintiff in his plaint against them (defendants).

As per the pleadings of the defendants in their written statements, the suit of the plaintiff is not maintainable. According to them (defendants), the suit properties are their house and homestead properties having their residential houses thereon and the said suit properties have not been partitioned between them (defendants) through metes and bounds partition. The defendant No.1 has not executed any agreement for sale on dated 20.10.1996 in favour of the plaintiff after receiving Rs. 40,000/-. She (defendant No.1) had engaged an advocate in the previous suit filed by the defendant No.2 vide T.S. No.18 of 1997, the said advocate being connived with the plaintiff of the present suit filed the W.S. in that suit vide T.S. No.18 of 1997 admitting the execution of the so called agreement dated 20.10.1996 by her in favour of the plaintiff in respect of the suit properties without any instruction from her (defendant No.1). The so called agreement dated 20.10.1996 has been manufactured by the plaintiff without the knowledge of the defendant No.1. They (defendant Nos. 1,3 & 4) have already sold the suit properties in favour of the defendant No.2 by executing and registering a sale deed dated 01.07.1997 after receiving due consideration amount thereof. Therefore, the plaintiff is not entitled for the relief i.e. injunction as prayed for by him. Because, the plaintiff is not in possession over the suit properties, but the defendant No.2 is in the possession over the suit properties. Therefore, the suit of the plaintiff for injunction against them (defendants) is liable to be dismissed with cost.

6. Basing upon the aforesaid pleadings and matters in controversies between the parties, altogether 5 numbers of issues were framed by the Trial Court in the suit vide T.S. No.52 of 1997 and the said issues are:

ISSUES

1. Whether the suit is maintainable in law?

2. Whether the plaintiff has got right, title, interest and possession over the suit land?

3. Whether there is cause of action for the plaintiff to bring the suit against the defendants?

4. Whether the plaintiff is entitled to the relief, prayed for?

5. To what other relief, if any, the plaintiff is entitled for?

7. In order to substantiate the aforesaid relief sought for by the plaintiff against the defendants, he (plaintiff) examined 3 numbers of witnesses from his side including him as P.W.1 and relied upon the documents vide Exts.1 to 2.

On the contrary, in order to nullify/defeat the suit of the plaintiff, the defendants also examined 3 witnesses including the defendant Nos.1 & 2 as D.Ws.1 & 3 from their side and exhibited the documents vide Exts.A to D on their behalf.

8. After conclusion of hearing and on perusal of the materials, documents and evidence available in the record, the trial court answered all the issues against the plaintiff and in favour of the defendants and basing upon the findings and observations made by the trial court in all the issues against the plaintiff and in favour the defendants, the trail court dismissed the suit of the plaintiff vide T.S. No.52 of 1997 on contest against the plaintiff without cost as per its Judgment and Decree dated 25.09.2000 and 23.10.2000 respectively assigning the reasons that, the pleadings and evidence as well as the so called agreement to sell dated 20.10.1996 vide Ext.1 are not going to show about the delivery of possession of the suit properties by the defendant No.1 in favour of the plaintiff. Rather, the registered sale deed executed by the defendant Nos.1,3 & 4 in favour of the defendant No.2 in respect of the suit properties vide Ext.A dated 01.07.1997 is going to show that, after purchasing the suit properties through sale deed vide Ext.A, the defendant No.2 is possessing the suit properties, but, the plaintiff has/had never in possession of the same, for which, the plaintiff is not entitled for the decree i.e. injunction against the defendants.

9. On being dissatisfied with the aforesaid Judgment and Decree of the dismissal of the suit of the plaintiff vide T.S. No.52 of 1997 passed by the trial court on dated 25.09.2000 and 23.10.2000 respectively, he (plaintiff) challenged the same by preferring the 1st Appeal vide T.A. No.83 of 2000 being the appellant against the defendants by arraying them (defendants) as respondents.

10. After hearing from both the sides, the 1st Appellate Court dismissed that 1st Appeal vide T.A. No. 83 of 2000 of the plaintiff (appellant) concurring/accepting to

the findings and observations made by the Trial Court as per its Judgment and Decree dated 27.03.2002 and 05.04.2002 respectively passed in T.A. No.83 of 2000.

11. On being aggrieved with the aforesaid Judgment and Decree of the dismissal of the 1st Appeal of the appellant (plaintiff) vide T.A. No.83 of 2000, he (plaintiff) challenged the same by preferring this 2nd Appeal being the appellant against the defendants by arraying them (defendants) as respondents.

This 2nd Appeal was admitted on formulation of the following substantial question of law i.e.

> *I. Whether the Courts below are justified in saying that a suit for injunction is not maintainable without a prayer for enforcement of an agreement for sale?*

12. I have already heard from the learned counsels of both the sides.

13. During the course of hearing of the appeal, the learned counsel for the appellant relied upon the decision reported in **AIR 1988 Bombay 296: Laxman Pandu Khadke vs. Pandharinath Purushottam Rane** for setting aside the Judgment and Decree of the trial court and 1st Appellate Court, wherein it has been held that:

> *Specific Relief Act (47 of 1963), Ss.37, 10—Suit for injunction—Person entering into possession of suit property lawfully on basis of agreement of sale—Can maintain suit for injunction simpliciter without adding prayer for specific performance of agreement. (Limitation Act (36 of 1963), S.27).*

14. It appears from the pleadings and evidence of the parties and the Judgments of the Trial Court and 1st Appellate Court that, the plaintiff (appellant of this 2nd Appeal) has prayed for injunction against the defendants on the basis of the agreement for sale dated 20.10.1996 vide Ext.1 said to have been executed by the defendant No.1 in his favour for the transfer of the suit properties.

It is the concurrent findings of the trial court and 1st Appellate Court on appreciation of oral and documentary evidence of the parties taking into account to their pleadings that, he (plaintiff) has niether pleaded in his plaint nor has adduced any evidence in the court during trial as P.W.1 about the delivery of possession of the suit properties by the defendant No.1 in his favour on the basis of the agreement to sell vide Ext.1.

The contents of the said agreement vide Ext.1 are going to show that, the delivery of possession of the suit land shall be given to the plaintiff after execution and registration of the sale deed.

So, nothing has been elicited from the pleadings and evidence of the plaintiff along with the contents of the Ext.1 about any physical delivery of possession of the suit properties in favour of the plaintiff. Rather, the pleadings and evidence of the defendant Nos.1,3 and 4 and defendant No.2 are going to show that, the defendant Nos. 1,3 & 4 have sold the suit properties to the defendant No. 2 by

executing and registering the sale deed vide Ext.A and they (defendant Nos.1,3 & 4) have delivered the possession of the suit properties to the defendant No.2 and the said defendant No.2 is non-else, but he is the own brother-in-law of the defendant No.1 and own uncle of the defendant Nos.3 and 4. Therefore, plaintiff has no interest in the suit properties. Because, the so-called agreement to sale vide Ext.1 has not created any interest in his favour in respect of the suit properties, for which, he (plaintiff) is not entitled for the decree of injunction against the defendants.

15. The above concurrent findings of the trial court and 1st Appellate Court regarding the absence of possession of the plaintiff over the suit properties due to lack of pleadings and evidence finds support from the recital of the so-called agreement to sell vide Ext.1 (on which, the plaintiff is relying upon) is going to show that, possession of the suit properties has not at all been delivered by the defendant No.1 in favour of the plaintiff through the so-called agreement to sell dated 20.10.1996 vide Ext.1. Therefore, the plaintiff is not entitled for the decree of injunction against the defendants, because, the defendant No.2 has become the lawful owner and in possession over the suit properties by purchasing the same from the defendant Nos.1,3 and 4 through the registered sale deed dated 01.07.1997 vide Ext.A.

16. The aforesaid concurrent findings of the Trial Court as well as by the 1st Appellate Court against the plaintiff (appellant in this 2nd Appeal) finds support from the ratio of the following decisions:

I. 2018 (3) Civil Court Cases: 348 (P & H): Dholan Singh Vs. Iliyas.

Specific Relief Act, 1963—Sections 37 & 38: Suit for injunction on the basis of possession—Not maintainable when plaintiff is not in possession.

II. Civil Appeal No.1509 of 2019 (Para No.11) & 2019 (I) CLR (SC) 1033:Balkrishna Dattatraya Galande vs Balkrishna Rambharose Gupta & Another.

Specific Relief Act, 1963—Section 38—The plaintiff has to prove his actual possession for grant of permanent injunction.

III. 2019 (I) CLR 137: Praharaj Palatasingh Vs. Arjuna Fatusingh & Others. (Para No.10)

Specific Relief Act, 1963—Section 38—Injunction restraining disturbance of possession cannot be granted in favour of the plaintiff, who is not found to be in possession.

IV. 2021 (3) CCC 504 (SC): Balasubramanian & Another Vs. M. Arockiasamy (dead) through LRs.

Specific Relief Act, 1963—Section 38—Relief of perpetual injunction cannot be granted in cases where plaintiff has failed to establish possession of suit property.

V. 1999 AIHC 3785 (Bombay):Mathurbai Kadu Koli & Others Vs. Roopchand Lalji Koli & Another.

Specific Relief Act, 1963—Section 38—Where plaintiff obtained possession of suit property by way of part performance of agreement, suit simpliciter for perpetual injunction without claiming any relief of a specific performance, is not maintainable.

VI. 2009 (2) Civil Court Cases 638: Kumar Gonsusab & Ors vs Sri Mohammed Miyan @ Baban & Others.

A contract for sell does, of itself, create any interest in or change on immovable property—Proprietary title does not validly pass on execution of agreement to sell, until sale is completed.

VII. 2009 (1) Civil Court Cases 766 (A.P): Irruvuru Ramachandra Reddy Vs. vs Koppala Bhushanam. (Para No.16)

An agreement of sale cannot have any precedence over a sale deed.

VIII. 2021 (2) Civil Court Cases 245 (SC) (Para No.39): & 2021 (1) OLR (SC) 601: Venigalla Koteshwaramma Vs. Malampati Suryamba & Others.

Agreement to sell—Does not by itself create any right in the property, except the right of obtaining sale deed on that basis.

IX. 2021 (4) Civil Court Cases 458 (P & H): Sarita Devi Vs. Sultan Singh (since deceased) now represented by his LRs & Other.

Agreement to sell—Mere agreement to sell does not itself create any interest in or charge on property agreed to be sold as per Section 54 of the T.P. Act.
(Para No.15)
Agreement to sell—Execution of registered agreement to sell coupled with delivery of possession does not result in transfer of immovable property worth more than Rs.100/-.

X. 2024 (1) CCC 103 (Karn.):Master Thejas & Another Vs. C.R. Babu & Others.

Agreement to sell—No right is created under agreement for sale in respect of schedule property, except right to seek specific performance of contract.

17. When it is the settled propositions of law that, suit for injunction in respect of the suit properties filed by the plaintiff against the defendants is not maintainable under law, unless it is proved by the plaintiff that, he is in actual possession over the suit properties and when an agreement to sell by itself does not create any interest in or charge in immoveable property, because, proprietary title does not pass on execution of an agreement to sell until sale is completed and when agreement to sell does not by itself create any right in the property except the right of obtaining sale deed on that basis and when execution of registered agreement to sell coupled with delivery of possession also does not result in transfer of immovable property, when the worth of immovable property is more than Rs.100/- and when agreement to sell cannot have precedence over the sale deed in respect of the suit properties and when as per the discussions and observations made above, the plaintiff has neither pleaded nor has adduced evidence about the delivery of possession of the suit properties by the defendant No.1 in his favour on the basis of the agreement to sell vide Ext.1 and when the contents of the Ext.1 (agreement to sell) on which, the plaintiff is relying, is not going to show about the delivery of possession of the suit properties by the defendant No.1 in his favour (plaintiff) and when the contents of the Ext.1 is going to show that, the delivery of possession of the suit land shall be given after execution and registration of the sale deed and when the suit of the plaintiff is not a suit for specific performance of contract, then, at this juncture, by applying the propositions

of law enunciated in the ratio of the aforesaid decisions indicated in Para No.16 of this Judgment, it is held that, the concurrent findings of the Trial Court and 1st Appellate Court in dismissing the suit of the plaintiff are not erroneous in any manner. For which, the decision relied by the appellant (plaintiff) reported in **AIR 1988 Bombay 296:Laxman Pandu Khadke vs. Pandharinath Purushottam Rane** is not applicable to this suit/appeal at hand on facts, because, it has already been held that, the plaintiff is not in possession over the suit properties.

18. When the concurrent findings of the trial court and 1st Appellate Court for the dismissal of the suit of the plaintiff (appellant in this 2nd Appeal) are not erroneous, then, at this juncture, the question of interfering with the same through this 2nd Appeal filed by the appellant (plaintiff) does not arise.

19. Therefore, the 2nd Appeal filed by the appellant (plaintiff) must fail.

20. In result, this 2nd Appeal filed by the appellant (plaintiff) is dismissed on contest against the respondents (defendants) but without cost.

21. The Judgments and Decrees passed by the trial court and 1st Appellate Court in T.S. No.52 of 1997 and T.A. No.83 of 2000 are confirmed.

—— o ——

2024 (II) ILR-CUT-745

A.C. BEHERA, J.

RSA NO. 290 OF 2002

KHETRAPAL GOSTHI BINODAN KENDRA ……Appellant

-V-

BHAGIRATHI DASH & ORS. ……Respondents

(A) CIVIL PROCEDURE CODE, 1908 – Section 9 – Locus Standi to file the suit – The plaintiffs being the worshipers have filed the suit for protecting the properties of the deity Sri Madan Mohan Dev thereby praying for recovery of possession of the properties of the deity – Whether the plaintiff has locus standi to file the suit? – Held, Yes – Worshiper has right to institute the suit to protect the interest of the deity. (Paras 15-17)

(B) ADVERSE POSSESSION – The suit property belongs to the deity – The appellant association has claimed its title over the suit properties through adverse possession alleging its possession for more than twenty years – Whether the claim of appellant is sustainable? – Held, No – It is the settled proposition of law that, deity is a perpetual minor and there could not be any claim of adverse possession against a minor.

Case Laws Relied on and Referred to :-

1. AIR 1978 (I) 199: Balaji Mahaprabhu & Anr. Vrs. Narasingha Kar & Ors.
2. AIR 1967 (SC) 1044 : Biswanath & Anr. Vrs. Sri Thakur Radha Ballabhji & Ors.
3. 2018(II) CLR 748 : (Sri) Sri Brahmeswar Mohadev, Bije & Ors. Vrs. Baishnab Charan Biswal & Ors.
4. (2020) 1 SCC 1 : M.Siddiq (dead) through legal representatives (Ram Janmabhumi Temple case) Vrs. Mahant Suresh Das & Ors.
5. 38 (1972) CLT 1164 : Kasi Maharana & Anr. Vrs. Pandit Radhakrishna Chowdhury & Anr.
6. 2007 (II) CCC 111 (MP): Dinesh Kumar & Ors. Vrs. Kaushal Chand Jain & Ors.
7. 2014 (I) CLR 830: Chittaranjan Sahoo Vrs. Collector, Khurdha & Ors.
8. 1993(I) OLR 249: Biswanath Chowdhury & Ors. Vrs. Shyam Sundar Chowdhury & after him Narayan Chowdhury & Ors.
9. 110 (2010) CLT 574 : Sri Mangala Thakurani Bije, Kakatpur & Ors. Vrs. State of Orissa & Ors.
10. 42 (1976) CLT 1241 : Sarat Ch. Mohanta & Anr. Vrs. Administrator of Jagannath Temple.

For Appellant : Mr.S.K. Padhi, Sr. Advocate , Mr. S. Sharma

For Respondents : Mr. G.Mukherji, Sr. Advocate

JUDGMENT Date of Hearing : 07.03.2024 : Date of Judgment : 24.04.2024

A.C.BEHERA, J.

This Second Appeal has been preferred against the confirming judgment.

2. The appellant of this Second Appeal was the defendant before the Trial Court in the suit vide T.S. No.72 of 1989 and it was the appellant before the 1st Appellate Court in the first appeal vide T.A. No.96 of 1999.

The respondents of this 2nd Appeal were the plaintiffs before the Trial Court in the suit vide T.S. 72 of 1989 and they were the respondents before the 1st Appellate Court in the 1st appeal vide T.A. No. 96 of 1999.

3. The suit of the plaintiffs (those are the respondents in this 2nd Appeal) against the defendant (appellant in the 2nd appeal) was a suit for declaration, recovery of possession and permanent injunction.

The suit properties are the schedule A properties of the plaint i.e. consolidation Plot No.11, Ac.0.02 decimals and consolidation Plot No.10, Ac.0.04 decimals in total Ac.0.06 decimals (homestead land) under consolidation Khata No.115 which corresponds to part of M.S. Plot Nos. 119 and 120 under M.S. Khata No.12.

4. As per the story narrated in the plaint, the M.S. Plot Nos.119 and 120 under M.S. Khata No.12 corresponds to consolidation Plot Nos.10 and 11 under Khata No.115. The suit properties have been recorded in the name of their family deity Sri Madan Mohan Dev and its Marfatdar as Artatrana Dash in the settlement R.o.R as well as in the consolidation R.o.R.

Artatrana Dash died in the year 1973 leaving behind the plaintiffs as his successors and after the death of Artatrana Dash, the plaintiffs being his successors continued as Sebayats as well as Marfatdars of their family deity Sri Madan Mohan Dev. For which, they (plaintiffs) filed the suit in their personal capacities as well as on behalf of the deity Sri Madan Mohan Dev.

Their predecessor, who was the Marfatdar of the deity i.e. Sri Artatrana Dash had constructed a house on the front portion of the suit Plot No.10 facing to village road, because the village road is running to the adjacent southern side of suit Plot No.10. The remaining portion of that suit plot No.10 along with the suit Plot No.11 are situated at the backside of that constructed house. The adjacent Plot No.8 to the west of suit plot No.10 belongs to the defendant-Association. There are structures on Plot No.8. As the defendant is an association, for which, the activities of the defendant-association has been performing inside the house on Plot No.8. In the year 1974-75, the plaintiff No.1 became a member of the defendant-association and subsequently, he was elected as a member of the executive committee and also he became the Treasurer of the defendant-Association in the month of May 1977. The then President and Secretary of the defendant-Association requested plaintiff No.1 to permit them to use the house over the suit Plot No.10 for the purpose of children's reading room.

Accordingly, as per the permission of the plaintiffs, the defendant-association used the house situated on the suit Plot No.10.

But, subsequent thereto, when, there was final publication of the consolidation R.o.R. in respect of the suit properties in the month of June, 1990, it came to the knowledge of the plaintiffs that, though the suit properties vide consolidation Plot Nos.10 and 11 under consolidation Khata No.115 have been correctly recorded in the name of their family deity Sri Madan Mohan Dev indicating the name of their predecessor i.e. Artatrana Das as the Marfatdar of their family deity, but, there was entry of the note of possession of the defendant-Association in respect of the suit consolidation Plot Nos.10 and 11 as a wrongful possessor of the same since 1967 in the remarks column thereof erroneously, for which, in order to correct the said wrong entry of the noting of possession of the defendant-Association in the remarks column of the suit consolidation Plot Nos.10 and 11, the plaintiff No.1 brought the said wrong entry to the notice of the President and Secretary of the defendant-association for correction of the same. But, though they (President and Secretary) of the defendant-association assured the plaintiff No.1 for correction of the same and also assured the plaintiff No.1 to vacate the possession of the part of suit Plot No.10 in favour of the plaintiffs, but, subsequently the President and Secretary of the defendant-Association denied to vacate, instead of which, the President and Secretary of the defendant-Association claimed title of the defendant over the suit properties and they (President and Secretary of the defendant-Association) started digging out plinth at the rest vacant portion of suit Plot No. 10 and 11 for construction of the houses therein forcibly and collected

building materials for the said purpose. For which, without getting any way, the plaintiffs approached the Civil Court by filing the suit vide T.S. No.72 of 1989 against the defendant-Association through its President and Secretary praying for declaration of the right, title and interest of the plaintiffs over the suit properties and for recovery of possession of the suit properties from the defendant-Association and to injunct the defendant-association permanently from creating any sort of disturbance in the possession of the plaintiffs over the suit properties.

5. Having been noticed from the Trial Court in T.S. No.72 of 1989 filed by the plaintiffs, the defendant-association challenged the same by filing its written statement denying the allegations alleged by the plaintiffs in their plaint by taking its stands specifically that, one Agadhu das and Naranabandhu Patnaik were the owners of the Plot No.4 having an area of Ac.0.38 decimals as per Sabik settlement of the year 1927. One Sadasiva Rath acquired interest of Naranabandhu. The said Plot No.4 and its adjoining eastern side Plots were lying fallow and unproductive.

Therefore, the villagers constructed structures on Plot No.4 as well as on its adjoining eastern side Plots i.e. on Plot Nos.119 and 120 in the year 1954. Agadhu Das transferred Ac.0.04 decimals out of Ac.0.19 of Plot No.4 to the State of Orissa and he also transferred rest Ac.0.15 decimals to the defendant-association on dated 18.10.1960. The western portion of that Plot No.4, which was the property of Sadasiva Rath and which was under the possession of the defendant, the same was allowed to be recorded in the name of the defendant-association with the consent of the heirs of Sadasiva Rath.

Out of total Ac.0.38 decimals, a portion thereof has been left to its southern side as a road and the remaining area thereof, has been recorded as consolidation Plot Nos.7 and 8. The defendant-Association is in possession over the eastern side of suit Plot Nos.119 and 120 since 1954, which corresponds to consolidation suit Plot Nos.10 and 11 respectively.

So, the rest area of the suit Plots were not under the possession of the plaintiffs and the same is under the continuous possession of the defendant-association, for which, the defendant-association has perfected its title over the portions of Plot Nos.119 and 120, which is under the possession of the defendant's Association by way of adverse possession.

Therefore, the suit of the plaintiffs is not maintainable against the defendant-Association and the same is barred by law limitation. The consolidation R.o.R. of the suit properties in the name of the plaintiffs is incorrect. Rather, the Consolidation Authorities were not empowered under law to decide the question of title in respect of non-consolidable homestead land i.e. suit properties. The Consolidation Authorities have noted the possession of the defendant-Association in the remarks column of the suit Plot Nos.10 and 11, as the defendant-Association has perfected its title by way of adverse possession over the suit plots. The plaintiffs have never brought such entry to the notice of the Secretary of the defendant-Association. The

plaintiff No.1 was/is not at all a member of the defendant-Association. As the defendant-Association has its title and possession over the suit properties, for which, the plaintiffs have no right, title, interest and possession over the same.

Therefore, the suit of the plaintiffs is not maintainable under law. The suit of the plaintiffs is also bad for non-joinder of necessary parties.

Therefore, the plaintiffs are not entitled for any relief against the defendant-Association and as such, the suit of the plaintiffs is liable to be dismissed against the defendant.

6. Basing upon the aforesaid pleadings and matters in controversies between the parties, altogether eight numbers of issues were framed by the Trial Court in the suit vide T.S. No. 72 of 1989 and the said issues are:-

I S S U E S

1. Is the suit maintainable?
2. have the plaintiffs any cause of action to file the suit?
3. Whether the plaintiffs have any right, title, interest over the suit property?
4. Whether the defendants have perfected their title to the suit land by adverse possession?
5. Are the plaintiffs entitled for recovery of possession over the suit property?
6. Whether the plaintiffs are entitled for permanent injunction against the defendant from making any sort of construction over the suit property?
7. Whether the suit is bad for non-joinder of necessary parties?
8. To what other relief, or reliefs the plaintiffs are entitled?

7. In order to substantiate the aforesaid relief(s), sought for by the plaintiffs against the defendant, they (plaintiffs) examined 3 witnesses from their side including the plaintiff No.1 as P.W.1 and relied upon the documents vide Exts.1 to 9/a.

On the contrary, in order to nullify/defeat the suit of the plaintiffs, the defendant-Association examined five witnesses on its behalf including its Secretary as P.W.3 and relied upon the documents vide Exts.A to J.

8. After conclusion of hearing and on perusal of the materials, evidence and documents available in the record, the Trial Court answered all the issues in favour of the plaintiffs and against the defendant-Association and basing upon the findings and observations made by the Trial Court in all the issues in favour of the plaintiffs, the Trial Court decreed the suit of the plaintiffs vide T.S. No.72 of 1989 against the defendant-Association on contest as per its judgment and decree dated 24.08.1999 and 06.09.1999 respectively assigning the reasons that, as the suit properties have been recorded in the consolidation R.o.R. by the Consolidation Authorities in the name of the deity Sri. Madan Mohan Dev, indicating the name of the father of the plaintiffs i.e. Artatrana Dash as the Marfatdar of the deity, for which, the Trial Court

declared the title of the plaintiffs over the suit properties and directed the defendant-Association to handover the vacant possession of the suit properties to the plaintiffs and injuncted the defendant-Association permanently from raising any construction over the suit land.

9. On being dissatisfied with the aforesaid judgment and decree passed on dated 24.08.1999 and 06.09.1999 respectively in favour of the plaintiffs and against the defendant-Association in the suit vide T.S. No.72 of 1989, the defendant-Association challenged the same by preferring the 1st Appeal vide T.A. No.96 of 1999 being the appellant against the plaintiffs by arraying them (plaintiffs) as respondents.

10. After hearing from both the sides, the 1st Appellate Court dismissed that first Appeal vide T.A. No.96 of 1999 of the defendant-association concurring/accepting the findings and observations made by the Trial Court in favour of the plaintiffs and against the defendant as per its judgment and decree dated 25.11.2002 and 06.12.2002 respectively.

11. On being aggrieved with the aforesaid judgment and decree of the dismissal of the 1st Appeal vide T.A. No.96 of 1999 of the defendant-Association, the defendant-Association challenged the same by preferring this 2nd appeal being the appellant against the plaintiffs by arraying them (plaintiffs) as respondents.

12. This 2nd Appeal was admitted on formulation of the following substantial questions of law i.e.:-

> 1. Whether the suit was not maintainable at the first instance as it was instituted by the plaintiffs in their personal capacity and in the decree also the title of the plaintiffs (and not the deity) was declared?
>
> 2. Whether the suit was bad in law due to the non-joinder of the deity as a necessary party?
>
> 3. Whether the courts below have taken an erroneous approach which goes to the root of the matter by not taking into consideration the admission of P.W.3 that the defendants are in possession since 20 years?
>
> 4. Whether assuming that it was a lease of immovable property, the suit was barred for non-compliance of statutory notice under Section 106 of the Transfer of Property Act?

13. I have already heard from the learned counsels for the appellant and respondents.

14. In order to have a better appreciation and so also for just decision of this 2nd appeal, it is pertinent to answer the above formulated substantial questions of law serially and chronologically one after another according to the materials available in the record.

15. So far as, the first formulated substantial question of law i.e. Whether the suit was not maintainable at the first instance, as it was instituted by the plaintiffs in

their personal capacity and in the decree also the title of the plaintiffs (and not the deity) was declared is concerned;

Though, there is no indication in the cause title of the plaint about the filing of the suit by the family deity of the plaintiffs Sri Madan Mohan Dev in whose favour the suit properties have been recorded by the Consolidation Authorities, but in the plaint, they (plaintiffs) have specifically stated/averred that, they (plaintiffs) have filed the suit in their personal capacity and on behalf of the deity as well.

16. It is the undisputed case of the parties that, the consolidation R.o.R. of the suit Khata No.115 containing Plot Nos.10 and 11 vide Ext.2 has been published in the name of the deity Sri Madan Mohan Dev. The previous M.S. R.o.R. of the suit properties vide M.S. Khata No.12 has also been published in the year 1967 in the name of the deity Sri Madan Mohan Dev. The plaintiffs have filed the suit for no other reason, but in order to protect the properties of the deity Sri Madan Mohan Dev praying for recovery of possession of the properties of the deity i.e. the suit properties from the defendant-Association alleging that, the defendant-Association is a stranger to the suit properties.

On this aspect, the propositions of law has already been clarified in the ratio of the following decisions of the Hon'ble Courts and Apex Court:-

(i) ***AIR 1978 (I) 199: Balaji Mahaprabhu & Another Vrs. Narasingha Kar & Others—CPC,1908—Section 9***—Worshiper has right to institute thesuit to protect the interest of the deity.

(ii) ***AIR 1967 (SC) 1044—Biswanath & Another Vrs. Sri Thakur Radha Ballabhji & Others***—A person interested in the worship of the Idol can certainly be clothed with an ad-hoc power of representation to protect its interest.

(iii) ***2018(II) CLR 748: (Sri) Sri Brahmeswar Mohadev, Bije and others Vrs. Baishnab Charan Biswal and others—CPC, 1908—Section 9***—Locus standi to file the suit—Plaintiffs alleging to be persons interested in safeguarding the interest of the deity for declaring the sale deed in favour of the defendant No.1 to be void—Plaintiffs have no locus standi to file the suit.

(iii) ***(2020)1 SCC 1—M.Siddiq (dead) through legal representatives (Ram Janmabhumi Temple case) Vrs. Mahant Suresh Das & Others—Para-451***—A worshiper can institute a suit to protect the interests of the deity against a stranger.

(iv) ***38(1972) CLT1164: Kasi Maharana and Another Vrs. Pandit Radhakrishna Chowdhury and another—C.P.C.,1908***—Section 9 read with Order 1 Rule 1—suit for protecting the properties and safeguarding the interest of the Math by the person—Son of the founder of the Math is entitled to file the suit.

17. When, the M.S. R.o.R.and consolidation R.o.R. of the suit properties are in the name of the deity Sri Madan Mohan Dev and the plaintiffs have prayed for recovery of possession of the suit properties from the defendant-Association alleging that, the defendant-Association is a stranger to the suit properties and also for permanent injunction against the defendant-Association for no other reason, but only in order to protect the interest of the deity Sri Madan Mohan Dev, 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 cannot at all be held that, the suit of the plaintiffs was not maintainable without impleading the deity Sri Madan Mohan Dev as party.

Therefore, the findings and observations made by the Trial Court as well as by the 1st Appellate Court that, the suit of the plaintiffs was maintainable under law, cannot be held as erroneous.

18. So far as, the 2nd formulated substantial question of law i.e. whether the suit was bad in law due to the non-joinder of the deity as a necessary party is concerned;

As per the findings and observations made above in the forgoing paragraph in answering the 1st substantial question of law, it cannot be held that, the suit of the plaintiffs was not maintainable under law due to non-joinder of the deity Sri Madan Mohan Dev as a party in the suit.

19. So far as, the third formulated substantial question of law i.e. whether the courts below have taken an erroneous approach, which goes to the root of the matter by not taking into consideration the admission of P.W.3 that, the defendants are in possession since 20 years is concerned;

Undisputedly, on the basis of the unchallenged settlement R.o.R. as well as consolidation R.o.R. vide Exts.1 and 2, the suit properties are the properties of the deity Sri Madan Mohan Dev. The defendant-Association has claimed its title over the suit properties i.e. over the properties of the deity through adverse possession alleging its possession for more than 20 years. It is the settled propositions of law that, deity is a perpetual minor.

As per law, there could not be adverse possession against a minor.

On this aspect, the propositions of law has already been clarified by the Hon'ble Courts in the ratio of the following decisions:-

(i) ***2007 (II) CCC 111 (MP) : Dinesh Kumar & Others Vrs. Kaushal Chand Jain & Others—Para-16***—There could not be adverse possession against a minor.

(ii) ***2014 (I) CLR—830 : Chittaranjan Sahoo Vrs. Collector, Khurdha & Others***—(Para-38)—Adverse possession—Indian Limitation Act, 1963—Article 112—Land belonging to the deity—transfer by the Sevayats—transferee in possession for more than statutory period of limitation—Cannot claim title by adverse possession.

20. Here in this suit at hand, when, the M.S. R.o.R. as well as consolidation R.o.R. of the suit properties stand in the name of deity Sri Madan Mohan Dev and when as per law, the Consolidation Authorities have prepared the R.o.R. of the suit properties in the name of the deity Sri Madan Mohan Dev after deciding the title of the suit properties in favour of the deity Sri Madan Mohan Dev, then at this juncture, any admission of P.W.3 regarding the possession of the defendant-Association over the suit properties cannot culminate such admission of the P.W.3 concerning the

possession of the defendant-Association to a adverse possession, because, the suit properties are the properties of the deity Sri Madan Mohan Dev and the deity Sri Madan Mohan Dev is a perpetual minor.

That apart, the necessary essentials of the adverse possession i.e. from which date, the possession of the defendant-association over the suit properties became adverse or the date on which, the adverse possession of the defendant-Association ripen to title are not available in the pleadings and evidence of the defendant-Association.

In addition to that, the defendant-Association is not claiming its plea of adverse possession against the true owner of the properties i.e. against the deity Sri Madan Mohan Dev, but against its Marfatdars.

When, the pleadings and evidence on behalf of the plaintiffs is going to show that, the defendant-Association is in permissive possession over the suit properties and when, it is the settled propositions of law that, a permissive possession can never become adverse unless hostile animus is expressed from any particular time to the knowledge of the owner of the suit properties and when, it is the settled propositions of law that, heavy burden lies upon the defendant to establish that, when its possession over the suit properties became adverse, because a mere possession for long time does not convert permissive possession into adverse possession, then by applying the above principles of law enunciated in the ratio of the above decisions to this suit/appeal at hand, it cannot at all be held that, the admission of P.W.3 that, the defendant-Association is in possession over the suit properties since 20 years has established the title of the defendant-Association over the suit properties through adverse possession.

21. So far as, the last substantial question of law i.e. whether assuming that, it was a lease of immovable property, the suit was barred for non-compliance of statutory notice under Section 106 of the Transfer of Property Act, 1882 is concerned;

There is no pleadings and evidence on behalf of the defendant-Association about the leasing out of the suit properties by the deity Sri Madan Mohan Dev. There is also no document in the record about the creation of any lease in respect of the suit properties in favour of the defendant-Association. For which, the suit of the plaintiffs cannot be held as bad for non-serving of the notice under Section 106 of the T.P. Act, 1882.

When, all the formulated substantial questions of law are answered above against the defendant/appellant-association and the findings and observations made by the Trial Court and 1st Appellate Court for passing the decree of recovery of possession and permanent injunction against the defendant-Association are not erroneous and when it is held that, the suit properties are the properties of the deity Sri Madan Mohan Dev, but not the properties of the plaintiffs, then at this juncture, the decree of declaration of title of the plaintiffs over the suit properties passed by

the Trial Court and 1st Appellate Court cannot be sustainable under law, but the decree for recovery of possession and permanent injunction passed in favour of the plaintiffs and against the defendant-association are sustainable under law.

On this aspect, the propositions of law has already been clarified by the Hon'ble Courts.

(i) ***1993(I) OLR 249: Biswanath Chowdhury & Others Vrs. Shyam Sundar Chowdhury and after him Narayan Chowdhury and others—(Para-11)***—A Sebait or a Marfatdar is a trustee of the religious institution, the properties belonging to the institution vests in the deity, who is a juristic person and not on the Marfatdar or Sebait.

(ii) ***110 (2010) CLT 574: Sri Mangala Thakurani Bije, Kakatpur & Others Vrs. State of Orissa & Others***—Deity vis-à-vis Marfatdar—Land belong to the deity & not to the Marfatdars.

(iii) ***42 (1976) CLT 1241—Sarat Ch. Mohanta & Another Vrs. Administrator of Jagannath Temple***—The Marfatdars cannot take up the position, that the properties are their own properties.

22. As the Trial Court and 1st Appellate Court have declared the title of the plaintiffs over the suit properties and as the suit properties are the properties of the deity Sri Madan Mohan Dev, but, as per law, the Marfatdars of the deity are not the owners of the properties of the deity because, the properties belong to the deity, then, at this juncture, in view of the principles of law enunciated in the ratio of the aforesaid decisions, the declaration of title of the plaintiffs over the suit properties by the Trial Court and the confirmation of the same by 1st Appellate Court cannot be sustainable under law. For which, the said portion (part) of the judgment and decree passed by the Trial Court and confirmation of the same by the 1st Appellate Court concerning the declaration of title of the plaintiffs over the suit properties is interfereable through this 2nd appeal filed by the appellant/defendant.

Whereas, the other parts of the decree passed by the Trial Court and confirmation of the same by the 1st Appellate Court concerning the decree for recovery of possession of the suit properties against the defendant-Association and the decree for permanent injunction against the defendant-Association are not interfereable through this 2nd appeal filed by the appellant/defendant, for which, there is justification under law for making some interference with the judgment and decree passed by the Trial Court and 1st Appellate Court, through this 2nd appeal filed by the appellant (defendant-Association).

Therefore, the appeal of the appellant/defendant shall succeed in part.

In result, the 2nd appeal filed by the appellant (defendant-Association) is allowed in part on contest against the respondents (plaintiffs), but without cost.

23. The judgments and decrees passed by the Trial Court and 1st Appellate Court concerning the declaration of title of the plaintiffs over the suit properties are set aside.

The judgments and decrees passed by the Trial Court and the confirmation of the same by the 1st Appellate Court concerning the decree for recovery of possession and permanent injunction in favour of the plaintiffs and against the defendant-Association in respect of the suit properties are confirmed.

—— o ——

2024 (II) ILR-CUT-755

A.C. BEHERA, J.

SA NO. 71 OF 1994

DIBAKAR DAS & ORS. ……Appellants

-V-

SRIRAM DAS & ORS. ……Respondents

THE INDIAN EASEMENTS ACT, 1882 – Sections 13 & 15 – Essential ingredients for establishing the right of easement – Discussed with reference to case laws.

Case Laws Relied on and Referred to :-

1. AIR 2005 (SC) 236 & (2005) 1 SCC 471: Justiniano Antao & Others Vs. Bernadette B. Pereira (SMT) (Para No.9)
2. 2004 (4) ALLMR 325 : Tanba Vs. Pandhari.
3. RFA 234 of 2007 : Ravinder Kumar Sejwal & Others Vs. D.D.A.
4. 2012 (4) CCC 520 : Kallen Devi Vs. Raghaban.

For Appellants : Mr. D.P. Mohanty

For Respondents : None

JUDGMENT Date of Hearing :12.03.2024 : Date of Judgment : 25.04.2024

A.C.BEHERA, J.

This 2nd Appeal has been preferred against the confirming Judgment.

2. The appellants of this 2nd Appeal were the defendant Nos.1 & 2 before the Trial Court in the suit vide T.S. No.308 of 1984.

The respondent No.1 of this 2nd Appeal was the sole plaintiff before the Trial Court in the suit vide T.S. No.308 of 1984 and he was the respondent No.1 before the 1st Appellate Court in the 1st Appeal vide T.A. No.20 of 1987.

The respondent Nos.2 to 6 of this 2nd Appeal were the defendant Nos.3 to 7 before the Trial Court in the suit vide T.S. No.308 of 1984 and they were the respondent Nos.2 to 6 before the 1st Appellate Court in the 1st Appeal vide T.A. No.20 of 1987.

The suit of the plaintiff vide T.S. No.308 of 1984 was a suit for declaration of easementary right of way over the suit Plot No. 324 under Hal Khata No. 135 in

Mouza Badagaon under Balikuda Police Station in the District of Jagatsinghpur and for permanent injunction.

3. The case of the plaintiff before the Trial Court in the suit vide T.S. No.308 of 1984 was that, Plot Nos.321 and 326 are his house and homestead properties. Suit Hal Plot No.324 is a Kaccha Road, which joins his above homestead plot Nos.321 & 326 and the village road. He (plaintiff) and his family members are using the said suit Plot No.324 as a road in order to reach in their village main road from the time of their ancestors i.e. since time immemorial. Their cattle, bullock-carts are passing through suit plot No.324. At times cars and trucks etc. comes through that suit plot No.324 to his house. There is no other outlet from his residential house situated over Plot Nos.321 and 326 to the village main road except the suit Plot No.324. By the continuous, uninterrupted and peaceful using to the suit plot No.324 as road, his easementary right of way on the suit plot No.324 has already been created/acquired.

In the Hal Settlement, the suit Plot No.324 has been recorded in the name of the defendant Nos.1 and 2 with Kisam thereof as road. The suit Hal Plot No.324 corresponds to Sabik Plot Nos.124,125,126,128,129 & 130. In the year 1953. When dispute arised among the owners of sabik Plot Nos.124, 125,126,128,129 & 130 concerning the use of the same, then, there was a Faisalanama and that Faisalanama was scribed by Ghanashyam Mohanty of village Kania, in which, it was written that, family members of the plaintiff have right to use the suit plot No.324 as a road. The length and breadth of the suit road is 200 links x 10 links. The defendant No.1 was entrusted with the task for recording the suit properties in the consolidation in favour of both the parties, but, he had managed to record the same in the name of the defendant Nos.1 and 2. In spite of such recording of the suit Hal Plot No.324 in the name of the defendant Nos.1 and 2, he (plaintiff) and his family members have been using the suit plot No.324 as a road as before.

Before filing the suit, the plaintiff had applied to get electric connection to his residential house on plot Nos.321 & 326 by fixing poles on suit Plot No.324, to which, the defendants objected, for which, he (plaintiff) approached the Civil Court by filing the suit vide T.S. No.308 of 1984 against the defendant praying for declaration his easementary right of way over the suit plot No.324 and to injunct the defendants by restraining them (defendants) permannently from creating any sort of disturbance in the use of the suit plot No.324 by him (plaintiff) and his family members as road/way to his house and in alternative to declare him (plaintiff) as a owner of the suit plot No.324.

4. Having been noticed from the Trial Court in the suit vide T.S. No.308 of 1984, the defendants contested the same by filing their joint written statement denying the allegations alleged by the plaintiff in his plaint against them (defendants) taking their stands inter alia therein that:

Plot Nos.321 and 326 belong to the plaintiff. Plot Nos.326 and 327 is adjacent to the village road. Plot Nos.327 is a tank and its embankment. The plaintiff has the way to come to the main road through the embankment of the tank on plot No.327. The suit land i.e. plot No.324 belong to the defendant Nos.1 & 2. They (defendants) have been using the Suit Plot No.324 as their own private passage. The Suit Plot No.324 has been recorded in their names by the consolidation authorities in the consolidation proceeding. Though the plaintiff had objected to such recording of the suit plot No.324 in their names before the consolidation authorities, but such objection of the plaintiff was rejected. The plaintiff has not preferred any appeal or revision before the higher forums of the consolidation. For which, that order against the plaintiff has already been reached in its finality.

The further case of the defendants was that, suit Hal Plot No.324 corresponds to Sabik Plot Nos.124, 125, 126, 128, 129 & 130. The plaintiff has never used the suit plot No.324 as a road in order to reach in the village road. As the plaintiff has claimed easementary right and in alternatively declaration of title over the suit properties simultaneously, then his none of the claim is maintainable under law. For which, the plaintiff is not entitled for any relief. Because the above two claims of the plaintiff simultaneously i.e. one for declaration of his easementary right and another is for declaration of his ownership over the suit properties simultaneously are not entertainable under law. Because, the claim of easement and claim of ownership cannot dwell together as per law. One cannot acquire easementary right over his own land.

The Hal suit Plot No.324 belong to the defendant Nos.1 and 2, in which the plaintiff has no manner of right, title, interest or easementary right. Therefore, 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 5 numbers of issues were framed by the Trial Court and the said issues are:

ISSUES

1. Whether the suit as laid down is maintainable?

2. Whether the suit is hit by Section 51 of Orissa Consolidation Act?

3. Whether the suit land is a passage being used by the plaintiff since long and thereby the plaintiff has acquired right of easement over the same or the plaintiff has right to use the suit land as co-owner?

4. Whether the plaintiff is entitled to get a decree of permanent injunction against the defendants?

5. To what relief, if any, the plaintiff is entitled to?

6. In order to substantiate the aforesaid reliefs sought for by the plaintiff against the defendants, during trial before the Trial Court, he (plaintiff) examined

altogether 4 numbers of witnesses from his side as P.Ws.1 to 4 and relied upon series of documents vide Exts.1 to 3 on his behalf.

On the contrary, in order to nullify/defeat the suit of the plaintiff, the defendants examined 2 numbers of witnesses including the defendant No.1 as D.W.2 and exhibited the documents vide Exts.A to D on their behalf.

One document was also marked as Ext.I at the instance of the court.

7. After conclusion of hearing and on perusal of the materials, documents and evidence available in the record, the Trial Court answered issue Nos.3 and 4 in favour of the plaintiff and against the defendants as issue Nos.1 and 2 were not pressed and as per the findings made in issue No.5, the plaintiff was not entitled for other relief than the relief, to which, he has been entitled in the answers of issue Nos.3 & 4.

As per the findings and observations made in issue Nos.3 and 4 in favour of the plaintiff and against the defendants, the Trial Court decreed the suit of the plaintiff on contest against the defendant Nos.1 to 4 and ex-parte against other defendants and declared that, the plaintiff has right to use the suit plot as a Rasta for himself and for his family members, men, agents, cattles, ploughs and to run his all types of conveyances, men and materials to his residential houses on Plot Nos.321 and 326 and injuncted the defendants permanently restraining them (defendants) from interfering in any manner with the use of the plaintiff to the suit land as road assigning the reasons that, when the Kissam of the suit plot No.324 has been recorded as road and the same is joining the village road, then why the plaintiff will not use the same and why he (plaintiff) and his family members will use the embankment of the tank of Plot No.327 to go to the village road and since time immemorial i.e. for more than the prescribed period of 20 years, he (plaintiff) and his family members have been using the suit Plot No.324 as road to the knowledge of the defendants and their family members, for which, he (plaintiff) has acquired easementary right of way on the suit plot No.324. Therefore, he (plaintiff) is also entitled to get the decree of permanent injunction against the defendants and accordingly, the suit of the plaintiff was decreed by the Trial Court as per its Judgment and Decree dated 31.07.1987 and 12.08.1987 respectively against the defendants.

8. On being dissatisfied with the aforesaid Judgment and Decree passed in T.S. No.308 of 1984 in favour of the plaintiff and against the defendants, they (defendant Nos.1 and 2) challenged the same by preferring the 1st Appeal vide T.A. No.20 of 1987 being the appellant Nos.1 & 2 against the plaintiff.

After hearing from both the sides, the 1st Appellate Court dismissed that 1st Appeal vide T.A. No.20 of 1987 concurring/accepting to the findings and observations made by the Trial Court in favour of the plaintiff as per its Judgment and Decree dated 15.11.1993 and 26.11.1993 respectively in T.A. No.20 of 1987.

9. On being aggrieved with the aforesaid Judgment and Decree of the dismissal of the 1st Appeal of the defendant Nos.1 and 2 vide T.A. No.20 of 1987, they (defendant Nos.1 & 2) challenged the same by preferring this 2nd Appeal being the appellants against the plaintiff arraying him (plaintiff) as respondent No.1 and also arraying the defendant Nos.3 to 7 as other respondents.

This 2nd Appeal was admitted on formulation of the following substantial questions of law i.e.

> *I. Whether the Right of Easement having been granted, as claimed by the plaintiff in respect of one land, if it proper for the courts below to allow the relief in respect of another land?*
>
> *II. Whether the particular easement claimed being right of passage only if the dominant owner can be permitted to put addition burden on the servient tenant by fixing electric lines there over?*

10. I have already heard from the learned counsel for the appellants only, as none appeared from the side of the respondents for hearing of this 2nd Appeal.

11. As per the pleadings of the plaintiff (respondent No.1 of this 2nd Appeal) before the Trial Court in the suit vide T.S. No.308 of 1984, he (plaintiff) has claimed acquisition of his easementary right of way by prescription over the suit plot No.324 on the ground of using the same as road to his house in order to reach the main village road since the time immemorial for more than 20 years, as he (plaintiff) has no alternative way or passage to go to his house from the village road.

As per the Judgments and Decrees of the Trial Court and 1st Appellate Court in favour of the plaintiff, both the courts have held that, the plaintiff has established that, he (plaintiff) and his family members are using the suit Plot No.324 since time immemorial for more than the prescribed period of 20 years as road as of his right peacefully to the knowledge of the defendants, for which, he (plaintiff) and his family members have acquired their easementary right of way on the suit plot No.324 by prescription. So, why, the plaintiff and his family members without using the suit plot No.324 as their road, they will use the embankment of the tank in Plot No.327 as their way to reach in the village road from their house.

The plaintiff has made the above prayer in his plaint for declaration of his right of easement of way by prescription over suit plot No.324 as per Section 15 of The Indian Easements Act, 1882.

It is the settled propositions of law that, when in a suit like this suit at hand, the plaintiff prays for declaration regarding the acquisition of his right of easement of way by prescription over the suit properties against the defendant or defendants, in that suit, burden lies on him (plaintiff) to prove the facts clearly, those are essential as per law for the acquisition of easementary right of way by prescription, *because the law is jealous of a claim to an easement, for the reasons that, owner of the land is prima facie entitled to the exclusive use and enjoyment of his own land*

and of the natural advantages arising from its situations and environments without let or hinderance. For which, the burden of proof of the elements constituting a right of easement lies on the person, who asserts that right of easement and thereby invades the natural right of the occupier (owner of the land), on which, right of easement is claimed.

Therefore, the plaintiff must establish that, **(i)** his/her use to the suit property was open and notorious **(ii)** his use to the suit property was with the knowledge and acquisition of the owner of the servient tenement **(iii)** that his use of the suit properties was continuous and uninterrupted, hostile and under the claim "as of right", exclusive and continued for the period requisite for the acquisition of an easement by prescription without change or material variation.

But, mere fact that, if the plaintiff proves that, he had been using the suit property openly, peaceably and uninterruptedly since very long period cannot lead to a presumption that, he had been using the same "as of right".

Therefore, when a person claims his/her easementary right of way over the suit property by prescription must specifically plead and prove that, he had been enjoying an easement i.e. suit property "as of right".

On this aspect, the propositions of law has already been clarified in the ratio of the following decisions:

I. AIR 2005 (SC) 236 & (2005) 1 SCC 471: Justiniano Antao & Others Vs. Bernadette B. Pereira (SMT) (Para No.9)

The Indian Easements Act, 1882, Sections 15,13 & 14—Acquisition of Right of way by prescription—When it is not the case of the plaintiff that, he has been using the access "as of right" through the property of the defendants for more than 20 years. The suit must fail.

II. 2004 (4) ALLMR 325:Tanba Vs. Pandhari (Para No.9)

The Indian Easements Act, 1882, Sections 15 & 13—An easement can be acquired by prescription under Section 15 of the Easement Act—Every occupier of the land is prima facie entitled to the exclusive use and enjoyment thereof and of the natural advantages arising from its situation and environments without let or hindrance. Every right of easement claimed is a restriction on such exclusive right and is an evasion of it.

Hence, the burden of proof of the element constituting a right of easement lies on the person who asserts that right and thereby invades the natural right of the occupier of the land on which the right is claimed. The law is jealous of a claim to an easement, and the burden is on the party asserting such a claim to prove it clearly.

where an easement is claimed by prescription, he must prove the facts essential to the acquisition of the prescriptive title.

Thus, he must show that, the user was open and notorious, that, it was with the knowledge and acquisition of the owner of the servient tenement that, the use was continuous and uninterrupted hostile and under a claim of right, exclusive and continued for the period requisite for the acquisition of an easement by prescription, without change or material variation.

III. RFA 234 of 2007:Ravinder Kumar Sejwal & Others Vs. D.D.A.

The Indian Easements Act, 1882, Section 15— mere fact that a person proves that he had been using an easement openly, peaceably and uninterruptedly since a very long period does not lead to a presumption that he had been using the same 'as of right'. A person claiming easementary rights by way of prescription must specifically plead and prove that he had been enjoying an easement 'as of right'. ***(Para No.26)***

IV. 2012 (4) CCC 520: Kallen Devi Vs. Raghaban. (Para No.22)

The Indian Easements Act, 1882, Sections 13 & 15—Suit for right of Easement—What should be the pleadings.

Easement being a precarious right, the law insists that there should be precise pleadings and supporting evidence also in that regard.

Pleadings should be precise and definite.

Even assuming that the "C" schedule is the only pathway the other ingredients are conspicuously absent in the pleadings and in the evidence. Plaintiff not entitled to succeed.

12. Here in this suit at hand, there is no pleadings and evidence on behalf of the plaintiff by stating that, the defendnats are the owners of the suit plot No.324 and he (plaintiff) has been using the suit plot No.324 of the defendants as road "as of right" in exercising his right of easement of way thereon by prescription against them (defendants) using the same more than the prescribed period.

For which, the pleadings and evidence of the plaintiff in setting the foundation for acquisition of his right of easement of way by prescription over the properties of the defendants i.e. over the suit properties is deficient.

Therefore, the plaintiff is not entitled under law to get the decree of declaration of his right of easement of way by prescription over the suit plot No.324.

It is the settled propositions of law that, a plaintiff cannot assert his/her right of easement of way over the suit properties without admitting the ownership/ occupation of the defendant/defendants over that suit properties. So, the claim of easement of the plaintiff against defendant/defendants in respect of any suit property itself is an indirect admission to the ownership of the defendant/defendants over the suit properties by plaintiff.

But, in this suit at hand, nowhere in the pleadings and evidence of the plaintiff, he (plaintiff) has admitted the ownership of the defendants over the suit properties. Rather, he (plaintiff) has denied the ownership of the defendants over the suit properties praying for declaration of his title on the same alternatively.

So, the claim of easement of way over the suit properties by the plaintiff against the defendants without admitting them (defendants) as the owners of the suit properties is not entertainable under law.

That apart, the Judgments and Decrees of the Trial Court as well as the 1st Appellate Court are going to show that, the plaintiff has right of access to his village

main road from his house through the embankment of tank on plot No.327, in which, he (plaintiff) is a co-owner.

13. It is forthcoming from the consolidation R.o.R of the suit plot No.324 that, the suit Plot No.324 under Khata No.135 has been recorded in the name of the defendant Nos.1 and 2 as their own private passage.

14. As per the discussions and observations made above, the essential ingredients for establishing the right of easement of way by prescription over the suit plot No.324 according to Section 15 of The Indian Easements Act, 1882 as clarified in the ratio of the aforesaid decisions are conspicuously absent in the pleadings and evidence of the plaintiff. For which, in view of the principles of law enunciated in the ratio of the decisions referred to *supra*, the plaintiff is not entitled to get the decree of declaration of his right of easement of way by prescription over the suit properties i.e. over the suit plot No.324.

Therefore, due to lack of specific pleadings and evidence on behalf of the plaintiff for establishing his right of easement of way by prescription over the suit properties, the Trial Court should not have decreed the suit of the plaintiff declaring his right of easement of way over the suit properties as well as permanent injunction against the defendants. For which, the Judgments and Decrees passed by the Trial Court as well as the 1st Appellate Court in T.S. No.308 of 1984 and T.A. No.20 of 1987 are required to be interfered with through this 2nd Appeal filed by the appellants (defendant Nos.1 and 2).

15. So, there is merit in the 2nd Appeal of the appellants (defendant Nos.1 and 2). The same must succeed.

16. In result, the 2nd Appeal filed by the appellants (defendant Nos.1 and 2) is allowed on contest, but without cost.

17. The Judgments and Decrees passed by the Trial Court in the suit vide T.S. No.308 of 1984 as well as by the 1st Appellate Court in T.A. No.20 of 1987 are set aside.

18. The suit be and the same vide T.S. No.308 of 1984 filed by the plaintiff is dismissed on contest against the defendant Nos.1 to 4 and ex parte against other defendants.

—— o ——