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M/s. S.A.Plywood Industry (P) Ltd., Kolkata. -V- M/s. Tirupati Enterprises, Cuttack.
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State of Odisha & Ors. -V- Shri Manas Ku. Pradhan & Ors.
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Manas Kumar Jena & Ors. -V- State of Orissa & Ors.
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ODISHA EXCISE ACT, 2008 – Section 75 r/w Rule 58 of Odisha Excise Rules, 2017 – Whether the Excise Commissioner is empowered

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Smt. Shankuntala@Shakuntala Sahoo -V- State of Odisha & Ors.
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Rabindra Mohapatra & Ors. -V- State of Orissa & Ors.
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Manoj Kumar Pattnaik -V- State of Odisha (OPID)
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SEBAYAT RIGHT – Whether Sebayats right is transferable? – Held, No, it is heritable if there is any transfer of sebayatship either through seva samarpan patra or otherwise.

Sri Radhamohan Deb & Anr. -V- Radhamohan Deb Bije Bharatipur & Ors.
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SERVICE LAW – Appointment – The appellants claim appointment as their names find place in the panel list prepared for filling up of the post of Juniors Engineers/Diploma Engineers – Whether such claim is admissible under law ? – Held, No – Empanelling in the select list/panel list does not give any indefeasible right to be appointed against the vacant posts.

Manas Kumar Jena & Ors. -V- State of Orissa & Ors.
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SERVICE LAW – Regularization – The respondent/workman retrenched from service in the year 2003 – The workman received the retrenchment benefits – He did not raise any industrial dispute challenging the retrenchment – Whether the workman can claim for re-engagement and questioned the action of retrenchment after eleven years? – Held, No.

State of Odisha & Ors. -V- Saroj Kumar Dash
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SPECIFIC RELIEF ACT, 1963 – Section 19(b) r/w Order 1, Rule 10(2) of the Civil Procedure Code – The petitioner is a subsequent purchaser of the suit land – No specific performance is sought against the petitioner – The petitioner filed an application U/o. 1, Rule 10(2) to implead him as a party to the final decree – The learned sub-ordinate

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Bijay Ram Dash -V- Prafulla Chandra Mohapatra & Ors.
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Sanjukta Swain -V- Kusum Manjari Rana & Anr.
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SMC Power Generation Ltd. -V- Odisha Industrial Infrastructure Development Corporation & Anr.
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TRANSFER OF PROPERTY ACT, 1882 – Section 123 r/w Section 68 of Evidence Act – The registered deed of gift has been admitted in evidence and marked as Ext.1 & the same has been signed by appellant as well as by respondent – The appellant is not an illiterate person, he has signed on the registered deed of gift in odia putting the date – Whether the appellant can challenge the deed on the ground of a manufacturing document when he is a witness to the document? – Held, No – The appellant is estopped from questioning the execution of the deed of gift which has been registered carring the legal presumption.

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Satya Jena -V- Basistha Jena
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Krushna Ch. Behera Pradhan & Anr. -V- Government of Odisha
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2024 (II) ILR-CUT-763

CHAKRADHARI SHARAN SINGH, C.J & SAVITRI RATHO, J.

W.A. NOS. 1311 & 1237 OF 2022

MANAS KUMAR JENA & ORS. ……Appellants

-V-

STATE OF ORISSA & ORS. ..…..Respondents

(A) SERVICE LAW – Appointment – The appellants claim appointment as their names find place in the panel list prepared for filling up of the post of Juniors Engineers/Diploma Engineers – Whether such claim is admissible under law ? – Held, No – Empanelling in the select list/panel list does not give any indefeasible right to be appointed against the vacant posts.

(B) ODISHA DIPLOMA ENGINEER'S SERVICE (METHODS OF RECRUITMENT & CONDITIONS OF SERVICE) RULES, 2012 – The effective date of enforcement of said Rule was modified & extended to 31.03.2014 by subsequent notification – Whether the state is under obligation to follow the old practice for filling up of the posts, which were vacant prior to 31.03.2014 ? – Held, No – The posts vacant prior to coming into force of the Rules of 2012 are required to be filled up in accordance with the Rules framed subsequently.

Case Laws Relied on and Referred to :-

1. (2023) 3 SCC 773 : Anurag Sharma & Ors. v. State of Himachal Pradesh & Ors.
2. (1991) 3 SCC 47: Shankarsan Dash v. Union of India.
3. (1983) 3 SCC 284 : Y.V. Rangaiah v. J. Sreenivasa Rao.

For Appellants : Mr. Kishore Ku. Patel & Mr. Sapan Kumar Pal.
Mr. Jayant Ku.Rath, Sr. Adv.& Mr. D.N. Rath. (W.A.No.1237/2022)

For Respondents: Mr. M. K. Khuntia, A.G.A (in both)

JUDGMENT Date of Judgment : 26.06.2024

CHAKRADHARI SHARAN SINGH, C.J.

1. In exercise of power under the proviso to Article 309 of the Constitution of India, the State of Odisha has framed Odisha Diploma Engineers' Service (Methods of Recruitment and Conditions of Service) Rules, 2012 (in short, 'Rules of 2012') which lays down, *inter alia*, the method of recruitment for the posts in the cadre of Odisha Diploma Engineers' Service. Before the aforesaid Rules of 2012 were framed, the posts of Diploma Engineers' were being filled up from a panel of candidates prepared for the said purpose.

2. The said Rules of 2012, came into force on the date of their publication in the Odisha Gazette i.e. 05.01.2013. It is an admitted fact that by a subsequent notification, the effective date of enforcement of the said Rules of 2012 was modified and extended to 31.03.2014. It is also an admitted fact that as on 31.03.2012

the total number of vacancies in different Departments of the Government was against the post of Diploma Engineers. A requisition was, however, made for filling up of 1869 posts. Based on the said requisition, 1612 posts were filled up from the panel and 257 posts remained vacant.

3. The sole question which has arisen in the present intra-Court appeal for determination is as to whether the State is under obligation to follow the practice of filling up of the posts, which were vacant prior to 31.03.2014 based on the past practice, from the panel so prepared or whether the posts should be filled in accordance with the statutory rules framed under the proviso to Article 309 of the Constitution of India.

4. We have heard Mr. Kishore Kumar Patel, learned counsel appearing on behalf of the appellants and Mr. M.K. Khuntia, learned Additional Government Advocate (AGA) appearing on behalf of the respondents-State of Odisha.

5. The appellants have put to challenge in the present intra-Court appeals a common judgment and order passed by a learned Single Judge of this Court dated 17.08.2022 in WPC (OAC) No.2645 of 2014, WPC (OAC) No.1048 of 2014 and batch of cases. The facts of the case are not at all in dispute. The appellants are the Diploma holders in Engineering in different disciplines. There was a procedure being followed by the Government of Odisha of maintaining a panel of Diploma Engineers for their appointment as Junior Engineers. Based on the said panel, names were sponsored by a Committee of Chief Engineers and Engineers-in-Chief to different departments under the State Government as well as the Public Sector Undertakings. In the meanwhile, the rules as noted above came to be notified regulating the method for recruitment. As has been noted above, the Rules of 2012 had not been made effective till 31.03.2014, exercising power under Rule 19 of 2012 Rules, which reads as under:

> *"**19. Relaxation**— When the Government are of the opinion that it is considered necessary or expedient so to do, in public interest, it may, by order, for reasons to be recorded in writing, relax any of the provisions of these rules in respect of any class or category of employees in consultation with the Commission"*

Admittedly till 31.03.2014, the appointments were made from the panel so prepared of candidates having Diploma qualification.

6. It is apparent from the records that in accordance with the provisions under the Rules of 2012, the Odisha Public Service Commission (OPSC) issued an advertisement on 04.08.2014 inviting applications for filling up of the posts of Junior Engineers by way of direct recruitment. The said advertisement was challenged by filing O.A No. 2645(C) of 2014 along with batch of original applications before the Odisha Administrative Tribunal (in short 'Tribunal), mainly, on the ground that the posts which were vacant prior to coming into force of Rules of 2012 ought to have been filled up from the existing panel of Diploma Engineers. The Tribunal disposed of the said O.A. No. 2645(C) of 2014 and batch, with the

following observation as has been noted in the impugned judgment of the learned Single Judge:-

> *"xxx xxx xxx xxx*
> *8. xxx xxx xxx xxx*
> *21. Accordingly, the grievance of the applicants to quash the impugned advertisement and the statutory rule is not allowed and the O.As are not entertainable and maintainable.*
>
> *However, keeping in view the fact that the applicants are waiting for long years for appointment, it is desirable that Government as a model employer may take a decision as one time measure and consider to relax the relevant provision under the rule for appointment of the applicants and for that purpose, if necessary, may fix certain quota in future recruitment.*
> *xxx xxx xxx xxx"*

7. The said order of the Tribunal was challenged before this Court by filing writ petitions giving rise to W.P.(C) No.8877 of 2017 and batch. By an order dated 28.02.2019, the order passed by the Tribunal was set aside and the matter was remanded back to the Tribunal for fresh adjudication.

8. During the pendency of the Original Applications on remand before the Tribunal, the Tribunal came to be abolished and, accordingly, the Original Applications stood transferred to this Court and registered as WPC (OAC) No.2645 of 2014 and other similar matters.

9. This is the brief background in which the matters were heard by the learned Single Judge of this Court. It was urged before the learned Single Judge that all the vacancies as on 31.03.2014 were required to be filled up from the panel and the action of the Government in allowing the Commission to go for direct recruitment in accordance with the Rules of 2012 was illegal. The learned Single Judge, however, rejected the said contention, mainly, relying on a recent Supreme Court's decision in case of ***Anurag Sharma and others v. State of Himachal Pradesh and others; (2023) 3 SCC 773***.

10. Mr. Patel, learned counsel appearing on behalf of the appellants has vehemently argued that admittedly as on 31.03.2014, a large number of vacancies of Diploma Engineers were available. The panel was still surviving as on 31.03.2014. He has argued that it is an admitted fact that out of total number of vacancies, i.e. 2773, requisitions were sent for 1869 posts only. Those 1869 posts ought to have been filled up from the panel and till all those number of posts, i.e. 1869 were not filled up from the panel, the State ought not to have proceeded for appointment of Junior Engineers on the basis of direct recruitment in accordance with the Rules of 2012. He has submitted that this is an admitted position that out of 1869 posts for which the requisition was made, only 1612 posts could be filled up and 257 posts still remained vacant. He contends it was obligatory on the part of the State to fill up these at least 257 posts from the panel. He has argued that there is no plausible justification available on record put forth by the State why those 257 posts could not

be filled up from the panel. He has heavily relied on a Constitution Bench decision of the Supreme Court in case of ***Shankarsan Dash v. Union of India***, reported in ***(1991) 3 SCC 47***, in support of his contention that though the appellants do not have an indefeasible right to be appointed against the vacant posts, the State could not have refused to fill up the vacancies without any valid reason. He has also argued that the learned Single Judge has not duly appreciated the law laid down by the Supreme Court in case of ***Anurag Sharma*** (*supra*). In support of his submission, he has relied on paragraphs 23 and 29 thereof:

> *"23. Regardless of its origin, the doctrine of pleasure incorporated under our constitutional scheme is to subserve an important public purpose. In paras 44 and 45 of Tulsiram Patel [**Union of India v. Tulsiram Patel, (1985) 3 SCC 398 : 1985 SCC (L&S) 672**], this Court has explained the purpose and object of incorporating this principle : (SCC pp. 442-43)*
>
> *"44. Ministers frame policies and legislatures enact laws and lay down the mode in which such policies are to be carried out and the object of the legislation achieved. In many cases, in a Welfare State such as ours, such policies and statutes are intended to bring about socio-economic reforms and the uplift of the poor and disadvantaged classes. From the nature of things the task of efficiently and effectively implementing these policies and enactments, however, rests with the civil services. The public is, therefore, vitally interested in the efficiency and integrity of such services. Government servants are after all paid from the public exchequer to which everyone contributes either by way of direct or indirect taxes. Those who are paid by the public and are charged with public administration for public good must, therefore, in their turn bring to the discharge of their duties a sense of responsibility. The efficiency of public administration does not depend only upon the top echelons of these services. It depends as much upon all the other members of such services, even on those in the most subordinate posts. For instance, the Railways do not run because of the members of the Railway Board or the General Managers of different railways or the heads of different departments of the railway administration. They run also because of engine-drivers, firemen, signalmen, booking clerks and those holding hundred other similar posts. Similarly, it is not the administrative heads who alone can see to the proper functioning of the post and telegraph service. For a service to run efficiently there must, therefore, be a collective sense of responsibility. But for a government servant to discharge his duties faithfully and conscientiously, he must have a feeling of security of tenure. Under our Constitution, this is provided for by the Acts and rules made under Article 309 as also by the safeguards in respect of the punishments of dismissal, removal or reduction in rank provided in clauses (1) and (2) of Article 311. It is, however, as much in public interest and for public good that government servants who are inefficient, dishonest or corrupt or have become a security risk should not continue in service and that the protection afforded to them by the Acts and rules made under Article 309 and by Article 311 be not abused by them to the detriment of public interest and public good. When a situation as envisaged in one of the three clauses of the second proviso to clause (2) of Article 311 arises and the relevant clause is properly applied and the disciplinary enquiry dispensed with, the government servant concerned cannot be heard to complain that he is deprived of his livelihood. The livelihood of an individual is a matter of great concern to him and his family but his livelihood is a matter of his private interest and where such livelihood is provided by the public exchequer and the taking away of such*

livelihood is in the public interest and for public good, the former must yield to the latter. These consequences follow not because the pleasure doctrine is a special prerogative of the British Crown which has been inherited by India and transposed into our Constitution adapted to suit the constitutional set-up of our Republic but because public policy requires, public interest needs and public good demands that there should be such a doctrine.

45. It is thus clear that the pleasure doctrine embodied in Article 310(1), the protection afforded to civil servants by clauses (1) and (2) of Article 311 and the withdrawal of the protection under clause (2) of Article 311 by the second proviso thereto are all provided in the Constitution on the ground of public policy and in the public interest and are for public good." *(Emphasis supplied)*

xxx xxx xxx "

"29. The first case which followed Rangaiah [Y.V. Rangaiah v. J. Sreenivasa Rao, (1983) 3 SCC 284 : 1983 SCC (L&S) 382] is P. Ganeshwar Rao v. State of A.P. [P. Ganeshwar Rao v. State of A.P., 1988 Supp SCC 740 : 1989 SCC (L&S) 123] The Court was concerned about recruitment to the post of Assistant Engineer governed by the Special Rules. [A.P. Panchayat Raj Engineering Services (Special) Rules, 1963.] The question that arose for consideration was whether the vacancies arising in the category of Assistant Engineers before the amendment to the Special Rules were to be considered as per the amended or the unamended Rules. Having considered Explanation (c) and the proviso of the Special Rules which used the expression "vacancies arising in the category", the Court concluded that the intendment of the amended rule itself is to fill vacancies based on the rules that existed prior to the amendment of the rules. This is a case that turned on the wording of the amended rule itself."

Mr. Patel, learned counsel has also drawn the Court's attention to an order dated 11.10.2018 whereby the State Government relaxed the rule by one time measure in order to give appointment to 63 left out candidates as special case by invoking Rule 19 of the Rules of 2012. He has submitted based on the said order that it is apparent that till 2018, the appointments were made from the said panel.

11. Mr. Khuntia, learned AGA, representing the State of Odisha, on the other hand, has submitted that only because the names of these appellants were there in the panel prepared for filling up of the posts of Junior Engineers/Diploma Engineers, they did not have any indefeasible right to be appointed against the vacant posts. He has further argued that there is valid reason why those 257 posts were not filled up from the panel. Referring to the specific averments made in the counter affidavit, he has submitted that those 257 posts could not be filled up as those are reserved for the Scheduled Tribe (ST) and the Scheduled Caste (SC) categories and as the ST and SC eligible candidates were not available, therefore, the said posts could not be filled up. He has, accordingly, submitted that the Supreme Court's decision in case of ***Shankarsan Dash*** (*supra*), has no application in the present set of facts. He has also argued that the Supreme Court's decision in case of ***Anurag Sharma*** (*supra*), has rightly relied on by learned Single Judge wherein it has been categorically held that the posts vacant prior to coming into force of the Rules of 2012 are required to be filled up in accordance with the Rules framed subsequently.

12. Mr. Khuntia, learned AGA appearing on behalf of the respondent-State of Odisha refuting the last contention raised by Mr. Patel, learned counsel for the appellants that appointments were made from the said panel upto 2018, has submitted that the said order was issued in the light of an order passed by the Tribunal to fill up the posts out of the unfilled 257 posts, which were reserved for SC and ST candidates. He contends that all the 63 candidates, who were permitted to be appointed to the posts based on the panel, were ST candidates.

13. After carefully hearing the learned counsel and going through the records and the decision of the Supreme Court, we are not convinced with the submission advanced on behalf of the appellants that the State was under obligation to fill up all the vacancies existing prior to 31.03.2014 from the panel prepared by the State Government for the said purpose. This is for two reasons. Firstly, only because of inclusion of the names of the appellants in the panel, they did not acquire any indefeasible right to be appointed against the vacancies which were existing. Secondly, it cannot be said that based on the present set of facts that the State without any valid reason decided not to fill up the said 257 posts. There is some explanation which has been tendered as to why those 257 posts could not be filled up and this appears to be justifiable. The appellants do not belong to ST or SC category. So they could not claim their appointment against those 257 posts.

14. In our considered opinion, the decision rendered in case of ***Shankarsan Dash*** (*supra*), does not favour the case of the appellants at all. It is noted that in case of ***Shankarsan Dash*** (*supra*), the Constitution Bench, in no uncertain terms, has held that the State is under no legal duty to fill up any vacancies. The relevant portion of the said decision rendered in case of ***Shankarsan Dash*** (*supra*) is quoted herein below:

> *"7. It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by this Court, and we do not find any discordant note in the decisions in State of Haryana v. Subhash Chander Marwaha and Others, [1974] 1 SCR 165; Miss Neelima Shangla v. State of Haryana and Others, [1986] 4 SCC 268 and Jitendra Kumar and Others v. State of Punjab and Others, [1985] 1 SCR 899."*

15. In the recent decision in case of ***Anurag Sharma*** (*supra*), the Supreme Court, after having dealt with a catena of decisions on the point, has concluded in paragraphs 82 to 85 as under:

*"**Analysis***

82. A review of the fifteen cases that have distinguished Rangaiah [Y.V. Rangaiah v. J. Sreenivasa Rao, (1983) 3 SCC 284 : 1983 SCC (L&S) 382] would demonstrate that this Court has been consistently carving out exceptions to the broad proposition formulated in Rangaiah [Y.V. Rangaiah v. J. Sreenivasa Rao, (1983) 3 SCC 284 : 1983 SCC (L&S) 382] . The findings in these judgments, that have a direct bearing on the proposition formulated by Rangaiah [Y.V. Rangaiah v. J. Sreenivasa Rao, (1983) 3 SCC 284 : 1983 SCC (L&S) 382] are 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 [Y.V. Rangaiah v. J. Sreenivasa Rao, (1983) 3 SCC 284 : 1983 SCC (L&S) 382] must be understood in the context of the rules involved therein. [Deepak Agarwal v. State of U.P., (2011) 6 SCC 725, para 26 : (2011) 2 SCC (L&S) 175; Union of India v. Krishna Kumar, (2019) 4 SCC 319, para 10 : (2019) 1 SCC (L&S) 655]

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. [Deepak Agarwal v. State of U.P., (2011) 6 SCC 725, para 26 : (2011) 2 SCC (L&S) 175; Union of India v. Krishna Kumar, (2019) 4 SCC 319, para 10 : (2019) 1 SCC (L&S) 655]

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. [K. Ramulu v. S. Suryaprakash Rao, (1997) 3 SCC 59, paras 12 & 13 : 1997 SCC (L&S) 625; Shyama Charan Dash v. State of Orissa, (2003) 4 SCC 218, para 9 : 2003 SCC (L&S) 449; State of Punjab v. Arun Kumar Aggarwal, (2007) 10 SCC 402, para 38 : (2008) 2 SCC (L&S) 377; Deepak Agarwal v. State of U.P., (2011) 6 SCC 725, para 28 : (2011) 2 SCC (L&S) 175] 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. [G. Venkateshwara Rao v. Union of India, (1999) 8 SCC 455, para 4 : 2000 SCC (L&S) 72] 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. [Rajasthan Public Service Commission v. Chanan Ram, (1998) 4 SCC 202, para 15 : 1998 SCC (L&S) 1075; K. Ramulu v. S. Suryaprakash Rao, (1997) 3 SCC 59, para 15 : 1997 SCC (L&S) 625]

82.4. The principle in Rangaiah [Y.V. Rangaiah v. J. Sreenivasa Rao, (1983) 3 SCC 284 : 1983 SCC (L&S) 382] need not be applied merely because posts were created, as it is not obligatory for the appointing authority to fill up the posts immediately. [Delhi Judicial Services Assn. v. Delhi High Court, (2001) 5 SCC 145, para 5 : 2001 SCC (L&S) 776]

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. [Deepak Agarwal v. State of U.P., (2011) 6 SCC 725, para 25 : (2011) 2 SCC (L&S) 175]

83. The above-referred observations made in the fifteen decisions that have distinguished Rangaiah case [Y.V. Rangaiah v. J. Sreenivasa Rao, (1983) 3 SCC 284 : 1983 SCC (L&S) 382] demonstrate that the wide principle enunciated therein is

substantially watered-down. Almost all the decisions that distinguished Rangaiah [Y.V. Rangaiah v. J. Sreenivasa Rao, (1983) 3 SCC 284 : 1983 SCC (L&S) 382] hold that there is no rule of universal application to the effect that vacancies must necessarily be filled on the basis of law that existed on the date when they arose. This only implies that decision in Rangaiah [Y.V. Rangaiah v. J. Sreenivasa Rao, (1983) 3 SCC 284 : 1983 SCC (L&S) 382] is confined to the facts of that case.

84. The decision in Deepak Agarwal [Deepak Agarwal v. State of U.P., (2011) 6 SCC 725 : (2011) 2 SCC (L&S) 175] is a complete departure from the principle in Rangaiah [Y.V. Rangaiah v. J. Sreenivasa Rao, (1983) 3 SCC 284 : 1983 SCC (L&S) 382] inasmuch as the Court has held that a candidate has a right to be considered in the light of the existing rule. That is the rule in force on the date the consideration takes place. This enunciation is followed in many subsequent decisions including that of Union of India v. Krishna Kumar [Union of India v. Krishna Kumar, (2019) 4 SCC 319 : (2019) 1 SCC (L&S) 655] . In fact, in Krishna Kumar [Union of India v. Krishna Kumar, (2019) 4 SCC 319 : (2019) 1 SCC (L&S) 655] Court held that there is only a "right to be considered for promotion in accordance with rules which prevail on the date on which consideration for promotion takes place".

85. The consistent findings in these fifteen decisions that Rangaiah case [Y.V. Rangaiah v. J. Sreenivasa Rao, (1983) 3 SCC 284 : 1983 SCC (L&S) 382] must be seen in the context of its own facts, coupled with the declarations therein that there is no rule of universal application to the effect that vacancies must necessarily be filled on the basis of rules which existed on the date on which they arose, compels us to conclude that the decision in Rangaiah [Y.V. Rangaiah v. J. Sreenivasa Rao, (1983) 3 SCC 284 : 1983 SCC (L&S) 382] is impliedly overruled. However, as there is no declaration of law to this effect, it continues to be cited as a precedent and this Court has been distinguishing it on some ground or the other, as we have indicated hereinabove. For clarity and certainty, it is, therefore, necessary for us to hold:

85.1. The statement in Y.V. Rangaiah v. J. Sreenivasa Rao [Y.V. Rangaiah v. J. Sreenivasa Rao, (1983) 3 SCC 284 : 1983 SCC (L&S) 382] 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.

85.2. The rights and obligations of persons serving the Union and the States are to be sourced from the rules governing the services."

16. The submission made on behalf of the appellants finds a direct answer in the Supreme Court's decision in case of ***Anurag Sharma*** (*supra*) wherein the Supreme Court unequivocally held that the law as stated in ***Y.V. Rangaiah v. J. Sreenivasa Rao***; reported in ***(1983) 3 SCC 284*** to the effect that "*the vacancies which occurred prior to the amended rules would be governed by the rules and not by the amended rules, does not reflect the correct proposition of law governing the service under the Union and the State under Part XIV of the Constitution of India*". The proposition of law laid down in case of ***Y.V. Rangaiah v. J. Sreenivasa Rao*** (*supra*) has thus been specifically overruled by the Supreme Court in case of ***Anurag Sharma*** (*supra*).

17. We are also of the view that the appellants cannot claim parity with those 63 candidates, who were subsequently appointed from the panel as those 63 candidates

belonged to ST category and who came to be appointed in the light of certain orders passed by the Tribunal.

18. Situated thus, we do not find any legal infirmity in the impugned judgment rendered by the learned Single Judge requiring this Court's interference in the present intra-Court appeals.

19. These appeals are, accordingly, dismissed.

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2024 (II) ILR-CUT-771

CHAKRADHARI SHARAN SINGH, C.J & MISS. SAVITRI RATHO, J.

W.A. NO. 1036 OF 2022

STATE OF ODISHA & ORS. ……Appellants

-V-

SAROJ KUMAR DASH ...…Respondent

SERVICE LAW – Regularization – The respondent/workman retrenched from service in the year 2003 – The workman received the retrenchment benefits – He did not raise any industrial dispute challenging the retrenchment – Whether the workman can claim for re-engagement and questioned the action of retrenchment after eleven years? – Held, No.

For Appellants : Mr. M.K. Khuntia, A.G.A

For Respondent : Mr. Karunakar Nayak

JUDGMENT Date of Judgment : 02.07.2024

CHAKRADHARI SHARAN SINGH, C.J.

1. Heard Mr. M.K. Khuntia, learned Additional Government Advocate (AGA) appearing for the appellants and Mr. Karunakar Nayak, learned counsel for the sole respondent.

2. The appellants-State of Odisha has put to challenge, in the present intra court appeal, an order dated 16.11.2021 passed by a learned Single Judge of this Court in W.P.(C) (OAC) No.2766 of 2015 whereby the learned Single Judge has quashed an order dated 22.01.2015 passed by the Engineer-in-Chief, Department of Water Resources, Odisha whereby the respondent's claim for regularization of his service was rejected.

3. After having quashed the said order of rejection dated 22.01.2015, the learned Single Judge has recorded in the impugned order that there was no reason not to reengage the respondent, he being senior to 35 number of employees, who had been re-engaged in 2008. After having held so, the learned Single Judge, by the impugned order has remitted the matter back to the authority for a fresh consideration in accordance with law as expeditiously as possible preferably within

a period of three months form the date of communication of the impugned order. Operation of the impugned order was stayed by a co-ordinate Bench of this Court passed in the present intra-court appeal by an order dated 17.03.2023.

4. It would be beneficial to take note of the foundational facts which are not at all in dispute, to consider sustainability of the impugned order. The respondent was engaged as a Daily Labour (DLR) worker as a skilled labour in the office of the Superintending Engineer, Eastern Circle, Cuttack (Appellant No.3). Subsequently, by a notice dated 03.03.2003, in pursuance of the Department's letter dated 24.02.2003, the services of the DLR personnel engaged in WRCP Division, Marshaghai was notified to be no more required since all the work packages of the Division had already been completed. The notices further mentioned that the wages for February, 2003 along with one month's wages in lieu of one month's notice and the compensation amount due shall be disbursed by 25.03.2003. Once such notice was communicated to the respondent also. It is a specific case of the appellants as asserted in the counter affidavit that the respondent had soon thereafter received the retrenchment benefits. The respondent, more than 11 years thereafter, filed a writ petition before this Court giving rise to W.P.(C) No.23682 of 2014 which came to be disposed of by an order dated 23.12.2014 by the learned Single Judge, which reads thus:-

> "Heard Mr. B. Lenka, learned counsel for the petitioner.
>
> The petitioner has filed this application seeking following relief:
>
> "*…..this Hon'ble Court be graciously pleased to admit the writ petition, issue a rule nisi and call for a show cause from the opposite parties as to why they shall not be directed to pay compensation and re-engagement of the petitioner in an immediate effect. And in the event the opposite parties fail to show cause or show insufficient cause then after hearing the petitioner, the Hon'ble Court may be pleased to direct the opposite parties more specifically opposite party nos. 3 and 4 to pay compensation and reengage the petitioner in the organization within a specific period and the Hon'ble Court may be pleased to pass any other order/orders just, proper and favourable in the interest of the petitioner to which though he is entitled but unable to pray specifically*."
>
> Mr. Lenka, learned counsel for the petitioner states that the petitioner may be permitted to make a fresh representation highlighting his grievances before the authority, who shall consider the same in accordance with law.
>
> In view of the limited nature of grievance, without expressing any opinion on the merits of the case, this writ petition is disposed of directing the petitioner to file a fresh representation highlighting his grievances within two weeks from the date of passing of this order. If such a representation is filed, the authorities are directed to consider the same and pass appropriate orders in accordance with law within a period of three months from the date of receipt of a copy of such representation. The petitioner is directed to produce a certified copy of this order along with copy of the writ petition with all its annexures and a fresh representation before the authorities, who shall act upon the same within the time stipulated.
>
> Requisites for communication of this order along with copy of the writ petition and annexures be filed within a period of three days.

> Issue urgent certified copy of this order as per rules.
>
> Sd/- Dr. B.R. Sarangi, J."

5. In compliance of the aforesaid order of this Court dated 23.12.2014, the respondent's representation was disposed of by the Engineer-in-Chief, Water Resources (Appellant No.2) by an order dated 22.01.2015 disposed of rejecting his claim for re-engagement in the following terms:-

> "Whereas Govt. in Finance Department has completely banned engagement of Work-charged/ NMR/ DLR employees after 12.4.93. When it came to notice of Govt. in Water Resources Department that in spite of this complete ban, still such employees were being engaged after 12.4.93, instruction was issued vide WR Department Letter No.19955 dt. 30.5.2022 to disengage such employees i.e. who were engaged after 12.4.93. Accordingly Sri Saroj Kumar Das who was engaged as DLR employee in defunct WRCP Division, Marshaghai on 1.11.96 was retrenched in March 2003 (Anexure-2, of the Writ petition). He has also received the retrenchment benefits. After lapse of 11 years he has filed WP(C) No.23682/2014 before Hon'ble High Court seeking reengagement citing that some retrenched NMRs have been reengaged recently by virtue of court orders.
>
> And whereas the Hon'ble High Court in its order dated 23.12.2014 in WP(C) No.23682/2014 has directed the petitioner to file a fresh representation before the authorities highlighting his grievances who will consider the same and pass appropriate orders in accordance with law within three months.
>
> And whereas the petitioner has filed representation dt. 13.1.15 before the undersigned highlighting his grievances. <u>On scrutiny, it is seen that after dismissal of WP(C) No.457/2010 and subsequent SLP(C) No.3402(C)/2013 filed by Govt. before High Court and Supreme Court respectfully, the award dt. 8.7.2009 in ID Case No.8/2004 was implemented by Govt. as a result of which the retrenched NMRs involved in that case have been reengaged. Their re-engagement after win in court case does not confer any right on the petitioner Sri Dash to claim reengagement. Besides Sri Dash was retrenched in 2003 and he received the retrenchment benefits. After 11 years he has come up with this case to reengage him when his claim is hopelessly barred by limitation. It is also not his case that his junior retrenched employee has been reengaged ignoring him</u>.
>
> Now therefore in compliance to the order dt. 23.12.2014 of Hon'ble High Court and in consideration of the facts stated above the representation dt. 13.01.15 of Sri Dash is hereby disposed of and his claim for reengagement is hereby rejected."
>
> (Emphasis added)

6. The respondent thereafter filed another writ application before this Court giving rise to W.P.(C) No.8332 of 2015 seeking regularization of his service under the State authority. While recording that this Court did not have the jurisdiction to entertain the writ application, the learned Single Judge disposed of the same by an order dated 22.06.2015 in the following terms:

> "Heard Mr. B. Lenka, learned counsel for the petitioner.
>
> The petitioner files this application seeking for regularization of service under the State Authority.
>
> This Court has no jurisdiction to entertain this application. However, liberty is granted to the petitioner to move the appropriate forum in accordance with law, if he is so advised.

With the aforesaid liberty, the writ petition stands disposed of.

Sd/- Dr. B.R. Sarangi, J"

7. The respondent thereafter filed an Original Application (OA) before the Odisha Administrative Tribunal (in short, 'Tribunal') giving rise to O.A. No.2766(C) of 2015 seeking quashing of the order dated 22.01.2015 and direction to the State to reengage/reinstate the respondent in service.

8. The respondent asserted in the said application that he had worked continuously since the date of his appointment without any break till his retrenchment in March, 2003 and, therefore, he was entitled to protection under Section 25 of the Industrial Disputes Act, 1947 (in short, 'ID Act'). He questioned the order of retrenchment on the ground of non-compliance of the statutory requirement under the ID Act. He also pleaded that his juniors were reengaged after retrenchment adopting pick and choose method, with reference to various examples. He also asserted that the retrenchment notification in relation to similarly situated employees of Jajpur Division for selfsame reason was quashed by this Court by a judgment, which was affirmed by the Supreme Court of India.

9. A counter affidavit was filed by the State of Odisha stating therein, *inter alia*, that the respondent's plea for reengagement based on dismissal of W.P.(C) No.457 of 2010 and SLP (C) No.3402(C) of 2013 by the Supreme Court and implementation of an award dated 08.07.2009 in I.D. Case No.8 of 2004 did not have any merit as the reengagement of such employees consequent upon the decision in I.D. Case No.8 of 2004 does not confer any right on the applicant (the respondent herein) to claim his reengagement. A plea was also taken that nearly 11 years after he was retrenched, for the first time he approached this Court by filing a writ petition seeking direction for reengagement and later for regularization. Denying the plea that the workmen junior to the applicant had been re-engaged, it was specifically stated in the counter affidavit that each organization has a set of list of DLR workers and it is maintained in that organization. No DLR employee from WRCP Division, Marshaghai, junior to the applicant had been reengaged. A plea was also taken when an *inter se* seniority list was prepared by Engineer-in-Chief, Water Resources Department, the respondent's name was submitted in the list of NMRs/DLRs by the Executive Engineer, Kendrapara, Irrigation Division, Kendrapara for inclusion in the list. It was also pleaded that it was clarified by letter No.33552/WR dated 20.12.2012 that a category wise data base panel of all DLR/NMR and work charged employees in order of seniority was prepared for future reference and record. No decision regarding re-engagement/retrenchment NMR/DLR and work charged employee had been taken by the Government.

10. A rejoinder affidavit was filed on behalf of the respondent to the counter affidavit filed by the State before the Tribunal. In the rejoinder affidavit, the respondent pleaded that similarly situated persons of Jajpur Irrigation Division had filed a case before the Labour Court challenging the illegal retrenchment from

service. The Labour Court had directed for reinstatement with consequential service and monetary benefits. The said decision of the Labour Court was challenged by the State before the High Court by filing W.P.(C) No.457 of 2010 which was disposed of on 26.12.2010 confirming the award passed by the Labur Court.

11. During pendency of the original application before the Tribunal, the Tribunal came to be abolished, consequent upon which O.A. No.2766(C) of 2015 stood transferred to this Court which came to be registered as WPC (OAC) No.2766 of 2015. Learned Single Judge has disposed of the said writ petition by the impugned order dated 16.11.2021 with the following reasons:-

> "8. Having heard learned counsel for the parties and after going through the records, this Court finds that the petitioner was engaged as DLR/NMR under the opposite party no.3. As he was disengaged, he filed WP(C) No. 23682 of 2014 seeking reengagement and this Court, vide order dated 23.12.2014, permitted the petitioner to file representation before the authority concerned for considering his grievance, but such representation was rejected by opposite party no.2 vide Annexure-8 dated 22.01.2015, which has been impugned in this application. But fact remains, if some of the juniors to the petitioner have been regularized and the Engineer-in-Chief has recommended the case of the petitioner for absorption taking into consideration the fact that his juniors have been taken over to regular establishment, the petitioner should not have been deprived of getting such benefit. In the counter affidavit though it has been contended that no workman junior to the petitioner has been given re-engagement, but this fact is totally different from that of the contention raised by the opposite parties in the counter affidavit. The petitioner has also filed rejoinder affidavit, enclosing therewith a copy of the office order dated 07.02.2009 as Annexure-14, from which it is clearly evident that some of the juniors to the petitioner have been re-engaged. In view of such position, this Court is the considered view that when juniors to the petitioner have been given reengagement in service, there is no valid and justifiable reason to deprive the petitioner of getting such benefit. More so, the Engineer-in-Chief has also vide letter dated 10.03.2015 categorically indicated that 35 nos. of employees who are already re-engaged, are junior to 69 nos. of employees, including the petitioner, therefore, they should also be considered for reengagement, and that in the meantime out of 67 nos. of retrenched employees 7 nos. have crossed the age of superannuation and 25 nos. have filed cases before the Court.
>
> 9. In view of such position, if the petitioner is admittedly senior to those 35 nos. of employees, who have been re-engaged in the year 2008, there is no reason not to re-engage the petitioner and, as such, the reason for rejection of the claim of the petitioner vide Annexure-8 also cannot sustain in the eye of law. Therefore, the order under Annexure-8 dated 22.01.2015 is hereby quashed. The matter is remitted back to the authority concerned for fresh consideration in accordance with law as expeditiously as possible preferably within a period of three months from the date of communication of this order."

12. Mr. Khuntia, learned AGA appearing on behalf of the appellants has submitted that the respondent's claim of his reengagement on the ground that the persons engaged as DLR (skilled labour) after the respondent had been reengaged has no merit for the reason that the aforesaid 35 DLR workers were from different circles i.e. Drainage Circle, Cuttack whose gradation list was maintained and

confined to the said circle whereas the respondent was engaged under WRCP Division, Marshaghai under Eastern circle, Cuttack where a different gradation list was maintained from amongst DLR/NMR workers under the said circle. He, accordingly, submits that the direction issued by the learned Single Judge to consider the respondent's case for reengagement on the ground that 35 workers junior to him were reengaged is erroneous and unsustainable. He has submitted that the respondent did not raise any dispute after issuance of the retrenchment notice in 2003 and more than 11 years thereafter, he approached this Court seeking a direction for his reengagement. Such claim, he submits could not have been entertained and was rightly rejected by the Engineer-in-Chief, Water Resources by the impugned order dated 22.01.2015, which is just and proper.

13. Mr. Karunakar Nayak, learned counsel appearing on behalf of the respondent has submitted with reference to the facts asserted in the applications/ petitions that the respondent's retrenchment itself was contrary to the provisions of Section 25(g) of the ID Act and was in clear violation of the principles of natural justice and Articles 14 and 16 of the Constitution of India. He has submitted that several persons similarly situated have been reengaged, ignoring the respondent's case.

14. He has vehemently argued that the notice of retrenchment dated 03.03.2003 in case of the respondent was bad and in similar circumstance, the Labour Court held such order of retrenchment illegal. The said finding of the Labour Court in an industrial dispute has been upheld by this Court by a judgment rendered in W.P.(C) No. 457 of 2010. This Court's decision in W.P.(C) No.457 of 2010 has not been interfered with by the Supreme Court, he contends.

15. It can be easily discerned from the pleadings on record and submissions advanced on behalf of the parties that admittedly, the notice of retrenchment in respect of the respondent was issued in March, 2003. He had received the retrenchment benefits. It further transpires that some of the DLR/NMR had raised an industrial dispute against their retrenchment giving rise to I.D. Case No.8 of 2004. No such dispute was raised by the respondent. In the said I.D. Case No.8 of 2004 an award was passed by the Labour Court on 08.07.2009 holding the retrenchment order illegal. The award of the Labour Court was challenged before this Court in W.P.(C) No.457 of 2010 filed by the State of Odisha which was dismissed. SLP(C) No.3402 of 2013 filed by the State Government before the Supreme Court, was against the High Court's order also dismissed. Consequent upon dismissal of the writ petition and the SLP, retrenched NMRs, who had raised the industrial dispute were re-engaged so as to implement the award dated 08.07.2009. In such view of the matter, the claim of respondent, who did not raise any industrial dispute, based on implementation of the award by a Labour Court in favour of some of the employees is not at all justified. The respondent's claim of parity with the employees reengaged for implementation of an award passed by the Labour Court is wholly misconceived after he availed the retrenchment benefit.

16. Secondly, admittedly, the respondent after having accepted the retrenchment benefits could not have validly raised a claim for reengagement and questioned the action of retrenchment, 11 years after he was retrenched. The respondent's claim was rightly rejected by the appellant No.2-Engineer-in-Chief, Water Resources by an order dated 22.01.2015 which does not suffer from any illegality.

17. For the aforesaid reasons, we respectfully disagree with the opinion of the learned Single Judge recorded in the impugned order, as we are of the view that the order impugned in the writ proceedings dated 22.01.2015 does not suffer from any illegality requiring this Court's interference.

18. In our considered view, thus, the impugned order passed by the learned Single Judge cannot be sustained. Accordingly, the order dated 16.11.2021 passed in WPC (OAC) No.2766 of 2015 is set aside.

19. The writ appeal is allowed. The writ petition i.e. WPC (OAC) No.2766 of 2015 is dismissed.

All pending interlocutory applications, if any, stand disposed of. No order as to costs.

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2024 (II) ILR-CUT-777

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

W.A. NOS. 226 & 141 OF 2022 AND W.A.NO.738 OF 2024

STATE OF ODISHA & ORS. …..Appellants

-V-

SHRI MANAS KU. PRADHAN & ORS. ..…Respondent(s)

(A) CONSTITUTION OF INDIA, 1950 – Article 226 – Parameters which are required to be considered while exercising the jurisdiction under Article 226 – Discussed with reference to case laws.

(B) INDIAN REGISTRATION ACT, 1908 – Sections 22-A & 77(1) – Whether the remedy of filing a suit U/s. 77(1) of the Registration Act against the order of refusal U/s. 22-A by Registrar is optional? – Held, No – A statutory remedy gives a forum for resolution of the dispute – Though there is no compulsion for a person to avail that remedy, but at the same time, he cannot take advantage of failure to exercise the said option so as to make out a case of maintainability of a writ petition under Article 226 of the Constitution of India. (Paras 50-53)

Case Laws Relied on and Referred to :-

1. AIR 1962 SC 1912 : Kumar Bimal Chandra Sinha (deceased) v. State of Orissa & Ors.
2. 2014 (II) OLR 801: Dhabal Prasad Pradhan Vs. State of Orissa & Ors.
3. 2010 (8) SCC 110 : United Bank of India v. Satyawati Tandon.
4. 1985 (1) SCC 260 : Assistant Collector of Central Excise v. Dunlop India Ltd.

5. 2009 (1) SCC 168 : City & Industrial Dev. Corporation v. Dosu Aardeshir Bhiwandiwala.
6. 2022 (8) SCC 210 : Asset Reconstruction Company (India) Limited v. S.P. Velayutham.

For Appellants : Mr. D.K.Mohanty, AGA
Mr. Jagannath Bastia, in-person (WA No.141/2022)
Mr. A.K. Mohapatra-1, Mr. V. Mohapatra & Mr.P.R. Parida. (W.A.No. 738/2024)

For Respondents : Mr. K.K.Mishra, Mr. Parthendu Ray (Proforma Respondent)
Mr. D.K.Mohanty, AGA (W.A.No.738/2024)

For Intervenor : Mr. A.K. Mohapatra-1 & Mr. V. Mohapatra.

JUDGMENT Date of Judgment : 15.07.2024

CHAKRADHARI SHARAN SINGH, C.J.

An order dated 10.12.2021 passed by a learned Single Judge of this Court in W.P.(C) No.25695 of 2021 is under challenge in the present intra-court appeals whereby the learned Single Judge has set aside an order dated 28.10.2020 passed by the District Sub-Registrar, Puri (in short, 'Sub-Registrar') refusing registration of a sale deed executed by the pro forma respondents No.1 and 2 in favour of the respondent-Manas Kumar Pradhan in respect of a piece of land situated at Puri Sadar having following description:-

> "Sabik Mouza-Goudabadasahi Touzi No.268 out of Sabik Khata No.l, Sabik Plot No. 136 (P) of 1885 and 1922 ROR measuring an area Ac.0.500 decimal corresponding to Hal Plot No.90, 91, 95/210 and 95/211 measuring area Ac.0.040, 0.460, 0.090 and 0.600 decimal respectively under Hal Khata No.11 of Mouza-Baliapanda, PS-Puri Town, PS No.5, Dist: Puri. (*hereinafter referred to as 'disputed land'*)".

2. The Sub-Registrar had refused to register the said sale deed on various grounds including the bar under Section 22-A of the Indian Registration Act, 1908 (in short, 'Registration Act') which has been inserted in the Registration Act by way of an amendment vide Odisha Act 1 of 2014 that came into force with effect from 22.02.2014. The said order of the Sub-Registrar was subsequently confirmed by the Registrar by an order dated 14.07.2021, which order has also been set aside by the learned Single Judge with a direction to the Sub-Registrar to register the documents forthwith upon presentation.

3. W.A. No.226 of 2022 has been filed by the State of Odisha assailing the impugned judgment of the learned Single Judge, justifying the orders which were passed by the Sub-Registrar and the Registrar. W.A. No.141 of 2022 has been filed by one Shri Jagannath Bastia, who was not a party in the writ proceeding and has been granted leave to prefer the appeal. Further, W.A. No.738 of 2024 has been filed by one Ayananshu Dutt, who too was not a party in the writ proceeding, by seeking leave of this Court to assail the impugned order. It is his contention that suppressing material facts, the respondents obtained the impugned order without impleading him as a party though he being a necessary party in the facts and circumstances.

4. For the convenience, we have treated W.A. No.226 of 2022 preferred by the State of Odisha as the lead case.

5. In the present judgment, for clarity, the respondent-Shri Manas Kumar Pradhan, who was the writ petitioner, is being referred to as the purchaser and the *pro forma* opposite parties in the writ proceeding as the vendors.

W.A.No.226 of 2022

6. In nutshell, it is the case of the purchaser that the *pro forma* opposite parties (opposite parties No.2, 5 and 6 to the writ petition, hereinafter referred to as "the vendors") are the descendants of original *sabik* recorded tenant, who succeeded the entire rayati interest in respect of the disputed land. The purchaser, upon examining their title had agreed to purchase the said land and had paid part of the consideration amount to the vendors. Learned Single Judge has relied on a judgment delivered by the Supreme Court in the case of ***Kumar Bimal Chandra Sinha (deceased) v. State of Orissa and others, AIR 1962 SC 1912*** and has concluded that the dispute in the said case was between the predecessor-in-interest of the vendors of the writ petitioner and the State of Odisha.

7. One of the moot questions which has arisen in the present intra-Court appeal is as to whether based on the nature of pleadings in the writ proceeding, a conclusive finding could be recorded by the learned Single Judge, in a proceeding under Article 226 of the Constitution of India that the parties before the Supreme Court in case of ***Kumar Bimal Chandra Sinha*** *(supra)* were the predecessors-in-interest of the vendor (*pro forma* opposite parties in the writ petition) of the writ petitioner.

8. In order to appreciate the controversy in hand, we need to take note of the case set up by the purchaser seeking the reliefs, which have been granted by the learned Single Judge by the impugned order.

9. It was pleaded in the writ petition that one Rani Harsa Mukhi Dassi was the executrix of the estate after the death of *sabik* recorded tenants whose name was reflected in the Record of Rights (RoR). The vendors are the descendants of original *sabik* recorded tenants. Upon enforcement of the Orissa Estates Abolition Act, 1951 (in short, 'OEA Act') the entire estate of the executrix vested with the Government free from all encumbrances in the year 1953 including the rayati land of the proprietor of the Paikpara Estate. The predecessor of the vendors, being aggrieved by illegal vesting of rayati land, had filed a writ petition giving rise to OJC No.191 of 1956 challenging the decision of the Collector before this Court, which was dismissed. The said decision of this Court was challenged before the Supreme Court of India in Civil Appeal No.177 of 1960 which was allowed and their right over the said land was declared as rayati right and it was further declared that the State Government had illegally taken possession over the disputed land. The said decision of the Supreme Court has been reported in ***AIR 1962 SC 1912 (Kumar Bimal Chandra Sinha (deceased) Vs. State of Orissa and others***. After their death, the

vendors inherited the suit land. The purchaser further asserted that in the RoR published in the year 1987, the said Mouza was recorded in the name of the State Government. The vendors were not present in the State of Odisha during the relevant point in time because of which final RoR was erroneously published in the name of the State Government. Further, in the *Hal* RoR, several such outsiders, who did not have any interest managed to get their names reflected in the remarks column on the basis of void and sham lease deeds executed by the Puri Municipality. Similarly, one Jyotish Chandra Dutta (not impleaded a party in the writ proceeding), who was the caretaker of the vendors also managed to obtain the lease deed in his favour by way of registered lease deed in the year 1968 but subsequently when the Puri Municipality learnt that it was not the owner of the property, it did not further renew the lease.

10. The purchasers being interested in purchase of the suitable piece of land for residential purpose came in contact with the vendors and upon thoroughly examining the title and the Supreme Court's decision in the case of ***Kumar Bimal Chandra Sinha (deceased)*** *(supra)* entered into an agreement to purchase the disputed land and paid to them a part of the consideration amount.

11. It is significant to note, which has been stated in the writ petition itself, that the prospective vendors filed a revision petition under Section 15(b) of the Orissa Survey and Settlement Act, 1958 (in short, 'OSS Act') to revise the RoR and record the name of the vendors, in the Court of Commissioner of Land Records, Bhubaneswar giving rise to revision petition i.e. R.P. No.95 of 2020 which was pending then. The said R.P. No.95 of 2020 is still pending.

12. The purchaser asserted in the writ petition that in the revisional Court, several cases were pending and there was no likelihood of early hearing of the case in near future. However, considering this Court's decision in the case of ***Dhabal Prasad Pradhan Vs. State of Orissa and other*** reported in ***2014 (II) OLR 801***, he had agreed to purchase the land on payment of part consideration amount. Relying on the said decision of the learned Single Judge, the respondents asserted that the Sub-Registrar did not have any jurisdiction to insist on submission of final RoR in the name of the vendors.

13. Earlier, when the sale deed was not accepted for registration on the ground of non-submission of RoR, the purchaser had filed a writ petition giving rise to W.P.(C) No.22425 of 2020, which was disposed of with an order permitting him to re-tender the instrument before the Sub-Registrar for registration within a period of seven days and in such event, the Sub-Registrar was required to pass an award on the registrability or otherwise, however, taking into consideration the Supreme Court's decision after giving personal hearing to him. It is in the light of the said order of this Court that the sale deed was re-tendered but the Sub-Registrar, without giving the petitioner an opportunity of hearing, passed an order on 20/28.10.2020 by putting a back date. Being aggrieved by the order of the Sub-Registrar, the respondent

had preferred an appeal before the Registrar *vide* Registration Appeal No.1 of 2020 before the Registration under Section 72 of the Registration Act. The said appeal was dismissed by an order dated 14.07.2021. The purchaser asserted in the writ petition that the Sub-Registrar and the Registrar declined to entertain the registration of the sale deed mainly on the ground that the RoR had not been corrected in favour of the vendors.

14. The purchaser also asserted in the writ petition that though the Supreme Court's decision in the case of ***Kumar Bimal Chandra Sinha (deceased)*** *(supra)* was taken note of by the Sub-Registrar, he failed to understand the purport of the judgment and erroneously held that the disputed land had vested in the Government pursuant to a notification under Section 3 of the OEA Act. In the background of the facts noted above, the purchaser asserted that the decision of the Registrar and the Sub-Registrar not to register the document is contrary to the provisions of the Registration Act which lays down the necessary requisites for entertaining the registration of any deed of transfer. No provision under the Registration Act authorizes the Sub-Registrar to make an inquiry as regards the existence of title of the parties. The purchaser further asserted that the subject matter of the sale deed consisted of two-storey building and some vacant land standing over the rayati interest of the intermediary. The predecessors-in-interest of the vendors being aggrieved by the illegal vesting of the above nature of land had approached the then Collector to exclude the present land and building as well as other lands of the similar nature, which dispute was set at rest by the Constitution Bench of the Supreme Court in the case of ***Kumar Bimal Chandra Sinha (deceased)*** *(supra)*. The purchaser further asserted in the writ petition that in view of clear finding of the Supreme Court there is no doubt that the vendors are the real owners of the disputed land and the registration of the sale deed could not be refused mainly because the same had been recorded in the name of the State Government. The purchaser also asserted that Section 22-A of the Registration Act does not confer jurisdiction on the Registering Officers to decide the right, title and interest over the landed property and such approach of the Registering Authority negates the settled position of law that RoR is not a document of title and RoR can neither create nor extinguish title. Further, preventing a person from selling his land acquired on the strength of the judgment of the Apex Court would be contrary to the provision under Section 8 of the Transfer of Property Act.

15. A counter affidavit was filed in the writ proceeding on behalf of the State of Odisha raising a preliminary objection to the effect that the writ petition was not maintainable as the petitioner had not exhausted alternative remedy under Section 77 of the Registration Act by filing a suit. A specific plea was taken in the counter affidavit that the vendors were not the successors of the intermediary and not a single chit of document was produced before the authority to that effect. As per the Hal RoR which was published in the year 1987-88, the disputed land was recorded in the name of State Government and Jyotish Chandra Dutta was shown in illegal

possession of the suit land as reflected in the RoR. Responding to the assertions made in the writ petition, it was averred in the counter affidavit of the State that Paikpara Estate had vested in the State of Odisha by virtue of notification under Section 3 of the Act on 22.08.1953. The Intermediary, at the relevant point of time, had approached this Court vide OJC No.191 of 1956 challenging the action of the State officials taking illegal possession of Tauzi in the year 1954 alleging that the property in question were rayati land of intermediary and the State officials had no authority to take possession of the same in view of Section 5(h) (sic) of the OEA Act. The said application filed by the intermediary was turned down whereafter the intermediary had approached the Supreme Court. The Supreme Court, while adjudicating the aforementioned civil appeal categorically held that the rayati interest of the appellants in that case, in the lands and in the buildings standing on those lands had not been affected with the abolition of his interest as proprietors and that the State authorities had illegally taken possession over the same.

16. After disposal of the appeal by the Supreme Court, neither the then intermediary nor the legal heirs of the said intermediary approached the authority under the OEA Act for resumption of the land and, accordingly, the suit land was rightly recorded in the name of the State Government and RoR was published nearly 28 years after disposal of the appeal by the Supreme Court. Nearly six decades thereafter the vendors filed a case under Section 15(b) of the OSS Act giving rise to R.P. Case No.95 of 2020 for revision in RoR before the Commissioner, Land Records, Bhubaneswar.

17. It was also asserted in the counter affidavit that the purchaser produced the sale deed along with the power of attorney which was executed at Kolkata for registration. The opposite parties, accordingly, refused to register the document on valid grounds duly applying the provisions under Section 22-A of the Registration Act.

18. Non-joinder of Jyotish Chandra Dutta in the writ petition was also taken as a ground on behalf of the State for dismissal of the writ petition, there being dispute pending between the pro forma respondents and said Jyotish Chandra Dutta relating to correction of the RoR.

19. A rejoinder affidavit was also filed on behalf of the purchaser to the counter affidavit filed on behalf of the Appellant. The said rejoinder affidavit does not dispute any fact asserted in the counter affidavit though legal issues raised in the counter affidavit justifying refusal to register the documents have been refuted.

20. After having considered the pleadings on record and submissions advanced on behalf of the parties, learned Single Judge has allowed the writ application by the impugned order and upon quashing the orders passed by the Sub-Registrar and the Registrar, directed the Sub-Registrar to register the documents if the same is re-tendered by the respondent.

21. It would be appropriate to mention at this stage that an interlocutory application (I.A.) seeking interim order against the impugned order of the learned Single Judge was filed on behalf of the appellant vide I.A. No.585 of 2022. On 04.03.2022, while issuing notices to the *pro forma* respondents, this Court had passed the following order for maintaining status quo:-

> **"W.A. No.226 of 2022 & I.A. No.585 of 2022**
>
> 1. Issue notice.
>
> 2. Mr. Mohanty accepts notice on behalf of contesting Respondents.
>
> 3. Notice be now issued to Proforma-Respondent by Registered Speed Post returnable by the next date. Requisites shall be filed within three working days. Tracking report be placed on record.
>
> 4. Till the next date of hearing, status quo shall be maintained as regards the property in question. Till further orders, the further proceedings in CONTC No.1166 of 2022 shall remain stayed.
>
> 5. List on 9th May, 2022."

22. Subsequently, by an order passed on 09.05.2022 in the present appeal, the interim order passed earlier was directed to continue during pendency of the appeal. Despite the interim order passed by this Court in the present intra-Court appeal as noted above, the Registering Authority had passed an order directing registration of the sale deed in compliance of the impugned order passed by the learned Single Judge. Taking exception to such conduct of the Registrar, this Court by an order dated 01.12.2023 had directed the learned Addl. Government Advocate to seek instructions as to how an order for registration was passed despite an interim order of status quo passed by this Court. An affidavit has been filed accordingly by the District Sub-Registrar, Puri stating therein that the document re-tendered by the respondent was admitted for registration under Section 58 of the Registration Act on 24.01.2022. However, the signature of the District Sub-Registrar, Puri in the endorsement had not been completed under Sections 60 and 62 of the said Act and, thus, the document has not been delivered to the respondents. After passing of the interim order dated 26.02.2022, nothing has proceeded further as regards completion of the registration.

W.A. No.141 of 2022

23. The appellant-Shri Jagannath Bastia in W.A. No.141 of 2022 claims to be a journalist, environment activist and a former Member of the Odisha Coastal Zone Management Authority. He has filed the said intra-Court appeal assailing the impugned order passed by the learned Single Judge with a plea that the disputed land comes within the existing sweet water zone where sale/lease/transfer/renewal of lease of land is strictly prohibited by virtue of a direction issued under Section 5 of the Environment Protection Act, 1986 by the Odisha Coastal Zone Management Authority *vide* letter No.73/OCZMA dated 16.09.2017. He has asserted in his memo of appeal that the disputed land stands recorded in Government Khata in 1987-88 *Hal* settlement. He has asserted that the claim of the purchaser was not substantiated

by filing any piece of document before the District Sub-Registrar, Puri regarding their flow of title and ownership of the suit land except this Court's order passed in OJC No.191 of 1956 and the Supreme Court's order in Civil Appeal No.177 of 1960.

24. By an order dated 15.09.2023, leave was granted to the appellant of W.A. No.141 of 2022 to pursue the intra-Court appeal against the impugned order, who was not a party to the writ proceeding but claimed to be one of the affected persons.

W.A. No.738 of 2024

25. W.A. No.738 of 2024 has been filed by one Ayananshu Dutta, who was not a party in the writ proceedings, assailing the same order of the learned Single Judge dated 10.12.2021.

26. An application has been filed *vide* I.A.No.1975 of 2024 seeking leave of this Court to prefer the present appeal against the impugned order of the learned Single Judge and by filing I.A.No.1976 of 2024 the appellant of W.A. No.738 of 2024 has sought for condonation of delay of 820 days in preferring the appeal. Explaining the reasons for delay in preferring the appeal, it has been stated that the appellant learnt about the impugned order dated 10.12.2021 when the respondent came to the disputed property to disturb the appellant's possession on the strength of the said order. He filed an application in the disposed of writ petition for recall of the order dated 10.12.2021 passed by the learned Single Judge. Later, when he learnt that the State had preferred a writ appeal giving rise to W.A. No.226 of 2022 against the said order and the order has been stayed by this Court, the appellant filed an intervention application in the writ appeal instead of preferring the present writ appeal, which according to him, was a *bona fide* mistake. He has, accordingly, sought for condonation of delay of 820 days in preferring the appeal.

27. So as to sustain his *locus standi*, it is the case of this appellant that Puri Municipality had leased out the disputed land to late Dr. Raibahadur Haridhan Dutt for a period of 20 years which was renewed from time to time and lastly in the year 1995 for a further period of 20 years in the name of the appellant's father and his uncle. According to him, the lease has not been renewed thereafter as the disputed land stood reverted back to the State Government. It has been stated that the appellant's father and his uncle have filed a suit for declaration of title and permanent injunction against the State of Odisha and others in the Court of the learned Civil Judge (Senior Division), Puri registered as Civil Suit No.41 of 2004, which has been decreed in their favour *vide* judgment dated 24.03.2011. It has accordingly been asserted that on the strength of the said impugned order of the learned Single Judge dated 10.12.2021 the respondent and his henchmen are threatening forcible eviction of this appellant from the disputed land because of which the appellant has filed a suit in the Court of the learned Civil Judge (Senior Division), Puri seeking permanent injunction. The said suit for injunction which has been registered as Civil Suit No.89 of 2022 is pending disposal.

28. Considering the facts and circumstances as noted above in these applications, the prayer of the appellant-Ayananshu Dutt to grant leave to prefer the present appeal is allowed. The delay in preferring the appeal stands condoned. We make it clear that we have heard learned counsel for the parties on the point of condonation of delay and grant of leave to prefer the appeal.

Submissions

29. We have heard learned counsel for the parties in the respective cases.

30. Mr. Debakanta Mohanty, learned AGA appearing on behalf of the State-appellants in W.A. No.226 of 2022 has submitted that the writ petition ought not to have been entertained by the learned Single Judge in view of the alternative statutory remedy available under Section 77 of the Registration Act which provides for filing of a suit in Civil Court by the aggrieved party where the Registrar refuses to order a document to be registered under Section 72 of the said Act. He contends that though a specific stand was taken by the State in this regard, learned Single Judge entertained the writ petition and allowed the same by passing the impugned order. He has further submitted that it was pleaded in the counter affidavit that a dispute between the State, the vendors and Jotish Chandra Dutta relating to correction of the RoR was *sub judice* before the competent authority. The writ petition was, therefore, liable to be dismissed due to non-joinder of necessary party since the said Jyotish Chandra Dutta was not impleaded as party in the writ proceeding. He has also submitted that the registration of the sale deed was rightly rejected, applying the provision under Section 22-A of the Indian Registration Act. Further, there is no material on record based on which it can be inferred that the vendors are the successors of the ex-intermediary Rani Harsamukhi Dasi. The suit land stands recorded in the name of the State Government in the Hal RoR published in the year 1987-88 with a note of possession in favour of one Jyotish Chandra Dutta. The correctness of the entry in the Hal RoR in 1987-88 is now under challenge and *sub judice* in R.P. Case No.95 of 2020, which has been instituted by the vendors themselves. In this connection, he has submitted, reiterating the stand taken in the counter affidavit that the suit land belonged to Paikapara Estate which stood vested in the State Government by operation of Section 3 of the OEA Act. The vesting order was challenged before this Court on the ground that the State Government was not entitled to take possession of the same by virtue of Section 5(h) of the OEA Act. The matter had travelled to the Supreme Court wherein it was declared that the Rayati interest in the lands had not been affected by the OEA Act and taking over possession by the State Government was illegal. No order was passed, however, for restitution of the property in favour of ex-intermediary and it further transpires that after death of ex-intermediary, no one claiming to be the legal heirs approached the authority under the OEA Act for resumption of possession of the disputed land, as a result of which, the Settlement Authority recorded the suit land in the name of the State Government in the year 1987, nearly 26 years after the disposal of the case by the Supreme Court. Fifty eight years after disposal of the case by the Supreme Court,

one of the vendors filed a case for correction of the entries in the RoR which gave rise to R.P. Case No.95 of 2020 under Section 15(b) of the OSS Act, which is still pending. At this stage, vendors are said to have intended to transfer the suit land in favour of the purchaser, the sale deed for which was presented for registration before the Sub-Registrar that was refused in the background of the admitted fact that in the Hal RoR published in 1987-88 the land stood entered in the name of the State Government with a note regarding possession in favour of one Jyotish Chandra Dutta. He has argued that this Court's decision in case of ***Dhabal Prasad Pradhan*** *(supra)* relied on by the purchasers is not applicable in the present set of facts because in accordance with the amendment under Section 22-A of the Registration Act, registration of a sale deed cannot be allowed unless flow of title in favour of the vendor was established. In the present case, the respondent failed to establish flow of right, title, interest and possession in favour of the vendors as on the date, in respect of the suit land. It has also been argued that the suit land is admittedly under the sweet water zone and according to the Government of Odisha notification, any sale, lease or construction is prohibited in respect of the land situated within the said zone. He has also argued that a title suit has also been filed by the persons in occupation of the suit land *vide* C.S No.89 of 2022 for declaration of right, title and interest in respect of the suit land in which the purchaser is a party.

31. Mr. A.K. Mohapatra, learned counsel representing the appellant in W.A. No.738 of 2024 has argued that the impugned order passed by the learned Single Judge is hit by non-joinder of necessary parties as the legal heirs of Dr. Raibahadur Haridhan Dutta including the appellant who were necessary parties particularly in view of the fact that in the earlier writ petition i.e., W.P.(C) No.22425 of 2020, the legal heir of Dr. Raibahadur Haridhan Dutta, namely, Kamal Kumar Dutt was impleaded as opposite party No.5 by the writ petitioner. He has submitted that the writ petitioner intentionally did not implead the appellant as party respondent knowing well that he was in possession of the land in question and in view of the fact that the lease deeds, the ROR and the judgment in Civil Suit No.41 of 2004 clearly demonstrate that the appellant and his family members are in peaceful possession over the disputed land as on the date of vesting with effect from 23.08.1953 and as such the appellant's family perfected their title over the disputed land. He has submitted accordingly that the impugned order passed by the learned Single Judge declaring title over the suit land in favour of vendors of the writ petitioner is unsustainable and therefore deserves interference.

32. Mr. K.K. Mishra, learned counsel appearing on behalf of the respondent No.1/writ petitioner (the purchaser) has submitted that the impugned order of the learned Single Judge has already been carried out by the Sub-Registrar and the sale deed has already been executed and registered on the date of filing of the present writ appeal. He has argued that so as to skip the rigours of contempt proceeding, this appeal has been preferred on flimsy grounds, suppressing material facts as regards registration of the sale deed. He has argued that the respondent is a *bona fide*

purchaser and has purchased the land in question from the vendors on payment of stamp duty and the registration fees, the same cannot be called in question in the present appeal. He has, however, conceded that the respondent has been impleaded in the title suit being C.S. No.89 of 2022 by the intervener/appellant in W.A. No.738 of 2024, *inter alia*, praying for declaration of the right, title and interest and permanent injunction based on cause of action of execution of the sale deed in question in favour of the respondents.

33. Based on the pleadings on record and submissions, which have been advanced on behalf of the parties as noted above, following questions emerge for this Court to consider in the present intra-Court appeal:-

> (i) Whether the finding recorded by the learned Single Judge that the vendor is raiyat of the disputed land, relying on the Supreme Court's decision in the case of ***Kumar Bimal Chandra Sinha*** *(supra)* is sustainable ?
>
> (ii) Whether the opinion of the learned Single Judge that sub-section (2) of Section 22A of the Registration Act is not applicable to the vendor is sustainable?
>
> (iii) Whether the decision in the case of ***Dhabal Prasad Pradhan*** *(supra)* has been rightly applied by the learned Single Judge with reference to sub-section (2) of Section 22A of the Registration Act ?
>
> (iv) Whether the opinion recorded by the learned Single Judge that Section 77(1) of the Registration Act merely gives an option to the person aggrieved by the order of the Registrar to file a suit, which may or may not be exercised and, therefore, a writ petition would be maintainable?
>
> (v) Whether in the light of the notification issued by the Government of Odisha, as the disputed land is located under sweet water zone, registration of the sale deed in respect of the suit land is permissible or not?

Question No.(i)

34. It would be apt to note at the outset, the affidavit, which was filed by the purchaser in the writ petition to support the pleadings thereof:-

> *"AFFIDAVIT*
>
> *I, Sri Manas Kumar Pradhan aged about 35 years son of Prahalad Pradhan, resident of Khadikadanda, GP-Kusupur P.S- Balikuda Dist-Jagatsinghpur, do hereby solemnly affirm and state as follows;-*
>
> *1. That I am the petitioner in the present interim application and I have carefully gone through the writ petition and understood the same.*
>
> *2. That the facts stated above are true to the best of my knowledge and belief."*

35. To say the least, the affidavit is not only vague, but also it does not fulfill the requirement of Rule 3(iv) of Chapter-VI of Part II of the Rules of the High Court of Orissa, 1948, which prescribes the formant in which the affidavits are required to be filed. The said format is reproduced hereunder:

> *"FORM OF AFFIDAVIT*
> *IN THE HIGH COURT OF ORISSA, CUTTACK*

In the matter of:

xxx xxx xxx

(5) If the facts stated are true to the best of the knowledge and belief of the deponent/declarant/petitioner/Advocate or otherwise.

(Declaration in the following proforma)

"I…………….the Applicant/Respondent/Petitioner/Opposite Party/Deponent above named do hereby solemnly affirm that the facts stated in Paragraphs ………….and…………. are true to my own knowledge and in paragraph ……… and ……….. are true to the best of my information which I obtained from the following sources ……

I believe the information to be true for the following reasons:……………………….

Solemnly declare at …………….the above said this ....day of ……….20.....

SIGNATURE
BEFORE ME
COMMISSIONER OF OATH"

35.1. Secondly, based on the pleadings on behalf of the purchaser in the writ petition and the rejoinder, we are of the definite view that the purchaser cannot be said to have indisputably established that his vendors were the successors-in-interest of ***Kumar Bimal Chandra Sinha***.

36. Thirdly, it is also evident from the facts noted above that there were disputes in relation to the disputed land pending before the Revenue Authority in R.P. No.95 of 2020 under Section 15(b) of the OSS Act and a Title Suit *vide* C.S No.89 of 2022 was also pending within the knowledge of the purchaser. It, thus, cannot be said that the title of the vendors over the disputed land was an admitted fact based on the Supreme Court's decision in case of ***Kumar Bimal Chandra Sinha*** *(supra)* and that their title was not in dispute otherwise.

37. The law is well settled that questions of title should not be adjudicated upon in the writ proceedings. We reiterate that we do not find any conclusive evidence on record based on which learned Single Judge could have arrived at a definite finding that the vendors were the successors-in-interest of Kumar Bimal Chandra Sinha. We have noticed an attested copy of a genealogical certificate of 'Sinha' family issued by one Goutam Haldar, Councilor (Ward No.4), Kolkata Municipal Corporation, which was brought on record by way of Annexure-7 to the rejoinder affidavit filed by the purchaser to the counter affidavit filed by the State in the writ proceeding. We are of the considered opinion that based on such document and the pleadings, one cannot reach a definite conclusion that the vendors are successors-in-interest of Kumar Bimal Chandra Sinha. These are questions of fact that could be adjudicated upon in a duly framed suit.

We, accordingly, answer question No.1 and hold that the finding of fact recorded by the learned Single Judge relying on the judgment of Supreme Court in case of ***Kumar Bimal Chandra Sinha*** *(supra)* that the vendors were the successors-in-interest and, thus, rayats of the disputed land is unsustainable.

Question No.(ii)

38. In order to answer question No.(ii), it would be profitable to reproduce Section 22-A of the Registration Act, which reads thus:

> *"**22.A. Refusal to register certain documents**-(1) The registering officer shall refuse to register-*
>
> *(a) any instrument relating to the transfer of immovable properties by way of sale, gift, mortgage, exchange or lease-*
>
> *(i) belonging to the State Government or the Local Authority;*
>
> *(ii) belonging to any religious institution to which the Odisha Hindu Religious Endowments Act, 1951 is applicable,*
>
> *(iii) belonging to or recorded in the name of Lord Jagannath, Puri.*
>
> *(iv) donated for Bhoodan Yagna and vested in the Odisha Bhoodan Yagna Samiti established under Section 3 of the Odisha Bhoodan and Gramdan Act, 1970;*
>
> *(v) belonging to Wakfs which are under the supervision of the Odisha Wakf Board established under the Wakf Act, 1995;*
>
> *Unless sanction in this regard issued by the competent authority as provided under the relevant Act or in absence of any such authority, an authority so authorised by the State Government for this purpose, is produced before the registering officer;*
>
> *xxx xxx xxx*
>
> *(b) The instrument relating to cancellation of sale deeds without the consent of the person claiming under the said deed; and*
>
> *(c) any instrument relating to transfer of immovable property, the alienation or transfer of which is prohibited under any State or the Central Act.*
>
> *(2) Notwithstanding anything contained in this Act, the registering officer shall not register any document presented to him for registration unless the transferor produce the record of rights for the satisfaction of the registering officer that such transferor has right title and interest over the Property so transferred.*
>
> *xxx xxx xxx"*

39. It is apparent on plain reading of Section 22-A of the Registration Act that it mandates the registering officer not to register an instrument in certain circumstances, which includes instruments relating to transfer of immovable properties belonging to the State Government or the local authority, unless a sanction in this regard issued by the competent authority as provided under the relevant Act or in absence of such authority, an authority so authorised by the State Government for the said purpose, is produced before the registering officer. It is an admitted position that in the RoR, the name of State Government was entered against the disputed land. We are conscious of the legal position that entries in the RoR do not conclusively determine the title. However, Section 22-A(1) of the Registration Act, casts statutory duty upon the registering authority not to register lands belonging to the State Government or local authority, and after having seen the entry in the RoR to the aforesaid effect, the registering authority could not have registered the instrument, going against the requirement under Section 22-A(1) of the Registration Act. It has been noted hereinabove that the vendors have approached

the Commissioner, Land Records, Bhubaneswar for correction of the revenue records by filing R.P. No.95 of 2020. It is also noted that the legality of the provision under Section 22-A is not under challenge and thus, the registering authority, apparently, taking into account entry in the RoR in the name of the State Government, declined to register the sale deed. It is also pertinent to note that this was not the only ground why the registering authority had declined to register the sale deed. Following were the reasons mentioned by the Sub-Registrar, Puri for refusal to register the sale deed:-

> *"(A). As per Govt. in Revenue & Disaster Management Department Order No.Stamp-10/06-33287, dated 05.08.2008, Sub-Section of Indian Stamp Act, 1899 (2 of 1899) read with clause (b) of Sub section (2), the Stamp Duty chargeable is the instruments specified in division (b) (c) (iii) of Article-23 of the scheduIe-l-A of the said Act-the or value of the consideration for such conveyance as set forth therein or the market value of the property whichever is higher, five percent of Stamp Duty will be levied in the whole of State of Odisha.*
>
> *(B). The power of attorney executed in the State of West Bengal has not been adjudicated by the Collector, U/s.31, 32 and 33 of the Indian Stamp Act, 1899. As per the Indian Stamp (Odisha Amendment) Act, 2014, the power of attorney deed authorising the person other than those mentioned in clause (g) of Article-48 to sale conveyance, the Stamp duty is payable on the instrument on the basis of market value of the property which is subject matter of such instrument."*

40. The appellate authority i.e. the Registrar dismissed the appeal by an order dated 14.07.2021, on the following grounds:

> *"i) The Hon'ble Apex Court has not spelt anything regarding registration of restitution of property in favour of the intermediary.*
>
> *ii) The intermediary has not approached the OEA Collector for restitution/resumption of the property in his favour though in the meanwhile 58 years have already been passed.*
>
> *iii) The ambit of the Registering Authority is limited. As per the registration (Odisha Amendment) 2013 Section 22-(l)(a), the registering officer shall refuse to register any instrument relating to transfer of immovable properties by way of sale, gift, mortgage, exchange or lease. The property belongs to the State Government or the Local Authority and also confirmed the observations made by the Opp.Party No.3 relating to execution of power of attorney."*

41. The reason assigned by learned Single Judge for non-application of Section 22-A of the Registration Act is that the said disputed land was already declared rayati land of the appellant(s) before the Supreme Court. The said decision was rendered in the year 1962. It is specific case of the State that the said land remained in possession of the State throughout as neither the then intermediaries nor the legal heirs of the intermediaries approached the authority under the OEA Act for resumption of land and accordingly after 25 years of disposal of the case by the Supreme Court, the land was rightly recorded in the name of the State in 1987.

42. The impugned judgment of learned Single Judge has the effect of a declaration that the disputed land is not a Government land after having declared

rayati land of the appellants before the Supreme Court, despite the subsequent developments as noted above.

43. We make it clear our aforementioned observations may not be construed as our opinion that the said disputed land belongs to the State of Odisha. It is a question of fact, which would require adjudication by appropriate authority/Court in accordance with law.

44. Accordingly, we are in respectful disagreement with the opinion formed by the learned Single Judge as regards applicability or otherwise of Section 22A of the Registration Act, in the present set of facts as noted above.

<u>Question No.(iii)</u>

45. Relying on a Single Bench decision of this Court in case of ***Dhabal Prasad Pradhan*** *(supra),* learned Single Judge has held that Sub-Section (2) of Section 22A of the Registration Act does not require production of RoR by the transferer in which land transferred is recorded in the transferer's name. We do not take a different view than what has been taken in case of ***Dhabal Prasad Pradhan*** *(supra)* which is based on the principle that RoR neither creates nor extinguishes title. However, the case of ***Dhabal Prasad Pradhan*** *(supra)* is clearly distinguishable as in that case the vendor had produced not only registered sale deed executed by his vendor, but also the RoR in which land purchased by the vendor including the land proposed to be sold by the vendor to the vendee stood recorded in the name of the vendor's vendor. The vendor in that case had filed documents to establish the flow of title to him. On the contrary, in the present case, there was absolutely no proof of flow of title to the vendors in respect of the disputed land, in their favour. We are accordingly of the view that the learned Single Judge wrongly applied the decision in case of ***Dhabal Prasad Pradhan*** *(supra).*

<u>Question No.(iv)</u>

46. Section 77 of the Registration Act reads as under:

> *"77.* ***Suit in case of Order of refusal by Registrar****.—(1) Where the Registrar refuses to order the document to be registered, under Section 72 or Section 76, any person claiming under such document, or his representative, assign or agent, may, within thirty days after the making of the order of refusal, institute in the Civil Court, within the local limits of whose original jurisdiction is situate the office in which the document is sought to be registered, a suit for a decree directing the document to be registered in such office if it be duly presented for registration within thirty days after the passing of such decree.*
>
> *(2) The provisions contained in Sub-sections (2) and (3) of Section 75 shall, mutatis mutandis, apply to all documents presented for registration in accordance with any such decree, and, notwithstanding anything contained in this Act, the document shall be receivable in evidence in such suit."*

47. In no uncertain terms Section 77 provides a statutory remedy to a person where the Registrar refuses to order the document to be registered under Section 72

or Section 76 of the Registration Act by instituting a suit within thirty days after making of order of refusal. There are two aspects which need consideration in this regard. Firstly, the purchaser or the vendor did not institute the suit under Section 77 of the Registration Act challenging the order of the Registrar dated 14.07.2021. They allowed the limitation of one month as stipulated under Section 77 (1) of the Registration Act to expire and presented the writ petition soon thereafter on 24.08.2021. It is true that the existence of an alternative statutory remedy is not a bar for this Court to entertain a writ petition under Article 226 of the Constitution of India. Such power conferred upon the High Court is wide and there is no express limitation on exercise of that power. At the same time, we cannot be oblivious of rules of self-imposed restraint evolved by the constitutional courts, in such matters.

48. In case of ***United Bank of India v. Satyawati Tandon, 2010 (8) SCC 110***, the Supreme Court has held that rule of exhaustion of alternative remedy is a rule of discretion and not one of compulsion. The Supreme Court, however, held that it is difficult to fathom any reason why the High Court should entertain a petition filed under Article 226 of the Constitution ignoring the fact that the litigant could avail effective alternative remedy by filing application, appeal, revision, etc. when a particular legislation contains a mechanism for redressal of his grievance. In case of ***Assistant Collector of Central Excise v. Dunlop India Ltd., 1985 (1) SCC 260***, the Supreme Court has observed that 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. The Supreme Court held "but then the Court must have good and sufficient reason to bypass the alternative remedy provided by the statute". In ***City and Industrial Development Corporation v. Dosu Aardeshir Bhiwandiwala, 2009 (1) SCC 168*** , the Supreme Court has highlighted the parameters which are required to be kept in view while exercising the jurisdiction under Article 226 of the Constitution of India, paragraph 29 and 30 thereof are being reproduced herein below for the benefit of the reference:

> *"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."

49. The present case is a classical example where the purchaser, in order to avoid the remedy under Section 77 of the Registration Act, allowed the limitation to lapse and thereafter filed the writ petition with the plea of non-availability of alternative remedy which was available to him.

50. We do not agree with the view of learned Single Judge that the remedy of filing a suit under Section 77 of the Registration Act is optional. In our opinion, Section 77 is a statutory remedy to party in case the Registrar refuses to order a document to be registered.

51. In case of ***Asset Reconstruction Company (India) Limited v. S.P. Velayutham, 2022 (8) SCC 210***, the Supreme Court has lucidly dealt with the distinction between the execution of a document and registration of the document and observed that an attack on the authority of the executant of a document, is not to be mixed with the attack on the authority of the Registering Officer to register the document. A challenge to the very execution of document, is a challenge to its very DNA and any defect or illegality on the execution, is congenital in nature. Paragraph-53 to 56 can be usefully noted in this context. On the scope of the exercise of the High Court's jurisdiction under Article 226 of the Constitution of India, the Supreme Court in case of ***Asset Reconstruction Company (India) Limited*** *(supra)* held in paragraphs-57 to 61 as under:

"57. In suits for declaration of title and/or suits for declaration that a registered document is null and void, all the aforesaid three steps which comprise the entire process of execution and registration come under challenge. If a party questions the very execution of a document or the right and title of a person to execute a document

and present it for registration, his remedy will only be to go to the civil court. But where a party questions only the failure of the registering authority to perform his statutory duties in the course of the third step, it cannot be said that the jurisdiction of the High Court under Article 226 stands completely ousted. This is for the reason that the writ jurisdiction of the High Court is to ensure that statutory authorities perform their duties within the bounds of law.

58. It must be noted that when a High Court, in exercise of its jurisdiction under Article 226 finds that there was utter failure on the part of the registering authority to stick to the mandate of law, the Court merely cancels the act of registration, but does not declare the very execution of the document to be null and void. A declaration that a document is null and void, is exclusively within the domain of the civil court, but it does not mean that the High Court cannot examine the question whether or not the registering authority performed his statutory duties in the manner prescribed by law.

59. It is well settled that if something is required by law to be done in a particular manner, it shall be done only in that manner and not otherwise. Examining whether the registering authority did something in the manner required by law or otherwise, is certainly within the jurisdiction of the High Court under Article 226. However, it is needless to say that the High Courts may refuse to exercise jurisdiction in cases where the violations of procedure on the part of the registering authority are not gross or the violations do not shock the conscience of the Court. Lack of jurisdiction is completely different from a refusal to exercise jurisdiction.

60. In the case on hand, the appellant has not sought a declaration from the High Court that the execution of the document in question was null and void or that there was no title for the executant to transfer the property. The appellant assailed before the High Court, only the act of omission on the part of the registering authority to check up whether the person who claimed to be the power agent, had the power of conveyance and the power of presenting the document for registration, especially in the light of the statutory rules. Therefore, the learned Single Judge rightly applied the law and allowed the writ petition filed by the appellant, but the Division Bench got carried away by the sound and fury created by the contesting respondents on the basis of:

(i) pendency of the civil suits;

(ii) findings recorded by the Special Court for CBI cases; and

(iii) the order passed by this Court in the SLP arising out of proceedings under Section 145 Cr.PC.

61. Arguments were advanced on the question whether the registering authority is carrying out an administrative act or a quasi-judicial act in the performance of his statutory duties. But we think it is not relevant for determining the availability of writ jurisdiction. If the registering authority is found to be exercising a quasi-judicial power, the exercise of such a power will still be amenable to judicial review under Article 226, subject to the exhaustion of the remedies statutorily available. On the contrary if the registering authority is found to be performing only an administrative act, even then the High Court is empowered to see whether he performed the duties statutorily ordained upon him in the manner prescribed by law."

52. After having held as above, the Supreme Court made the following observation in the case of ***Asset Reconstruction Company (India) Limited*** *(supra)* which is apt in the present set of facts, relevant portion of paragraph-64 reads thus:-

> *"If the Registering Officer under the Act is construed as performing only a mechanical role without any independent mind of his own, then even Government properties may be sold and the documents registered by unscrupulous persons driving the parties to go to civil court. Such an interpretation may not advance the cause of justice."*

53. Further, we are of the opinion that a statutory remedy gives a person a forum for resolution of the dispute. There is no compulsion for a person to avail that remedy, but at the same time, he cannot take advantage of failure to exercise the option of availing that remedy so as to make out a case of maintainability of a writ petition under Article 226 of the Constitution of India.

Question No.(v)

54. Neither in the order passed by the Registering authority nor the appellate authority, there is any reference to the disputed land located under Sweet Water Zone as a ground to refuse the registration of the instrument. Such stand was however taken in the counter affidavit filed on behalf of the State in the writ proceeding. In the wake of nature of order which we intend to pass, it is not desirable for us in the present proceeding to deal with this question.

55. In view of the discussions as noted above and the conclusions arrived at with reference to Questions No.(i) to (iv), we are of the considered view that the findings of the learned Single Judge in the impugned judgment and consequential direction issued to register the sale deed cannot be sustained.

56. We must notice at this juncture, at the cost of repetition, that the registering authority refused to register the sale deed on two grounds both relating to the provisions under the Indian Stamp Act. The said aspect has not been dealt with by the appellate authority/Registrar on the point of deficiency of stamp duty and adjudication by the Collector on the power of attorney executed in the State of West Bengal under Sections 31, 32 and 33 of the Indian Stamp Act, 1899.

57. The impugned judgment and order passed by the learned Single Judge is accordingly set aside. W.A. No. 226 of 2022 is accordingly allowed.

58. We make it clear that no observation made in the present judgment shall be construed as this Court's opinion on the right, title and interest of the parties in relation to the disputed land, which involves complex issues and requires adjudication by a competent Court of civil jurisdiction.

59. We also observe at the same time that this judgment does not amount to restraining the parties from presenting fresh instruments for registration before the registering authority by making good the deficiencies which were noticed by the registering authority and the appellate authority and at the same time, it will be equally open for the registering authority to act in accordance with law.

60. Since the impugned judgment and order of the learned Single Judge has been set aside, WA No.141 of 2022 and WA No.738 of 2024 also stand disposed of. Interlocutory applications, if any, stand disposed of.

61. There shall be no order as to costs.

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2024 (II) ILR-CUT-796

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

W.P(C) NO. 12361 OF 2015

MALAY KAR ……Petitioner

-V-

UNION OF INDIA & ORS. ……Opp.Parties

INCOME TAX ACT, 1961 – Section 205 – The tax has been deducted at source i.e. from the salary of assessee by the employer/deductor but the same has been partly transmitted to the central government resulting mismatch in income tax return and thereby the assessee was noticed U/s. 143(1) & also charged interest U/s. 234(B) & (C) – Whether such demand notice is valid without taking into account the TDS deducted by the employer? – Held, No – Section 205 of the I.T Act puts a bar for tax credit mismatch which cannot be enforced coercively against the assessee. (Paras 12-15)

Case Laws Relied on and Referred to :-

1. (2015) 276 CTR (All) 379 : (2014) 365 ITR 143 (All) : Rakesh Ku.Gupta v. Union of India.
2. (2021) 132 taxmann.com 293 (Gujarat) : (2022) 440 ITR 11 (Gujarat) : Kartik Vijaysinh Sonavane v. Deputy Commissioner of Income Tax, Circle-8.
3. (2023) 149 taxmann. Com 190 (Gujarat) : Milan Arvindbhai Patel v. Assistant Commissioner of Income Tax.
4. (1876) 1 Ch D 426 : Taylor v. Taylor.
5. AIR 1936 PC 253 : Nazir Ahmad v. King Emperor.
6. AIR 1964 SC 358 : State of Uttar Pradesh v. Singhara Singh.
7. AIR 1999 SC 3558 : Chandra Kishore Jha v. Mahabir Prasad.
8. (1999) 3 SCC 422 : Babu Verghese v. Bar Council of Kerala.
9. AIR 2001 SC 1512 : Dhananjay Reddy v. State of Karnataka.
10. AIR 2008 SC 1921 : Gujurat Urja Vikas Nigam Ltd. v. Essar Power Ltd.
11. (2009) 6 SCC 735 : Ram Deen Maurya v. State of U.P.
12. (2015) 7 SCC 690 : Zuari Cement Limited v. Regional Director, Employees' State Insurance Corporation, Hyderabad & Ors.
13. 2016 (I) OLR 922 : Subash Chandra Nayak v. Union of India.
14. 2021 (I) OLR 844 : Rudra Prasad Sarangi v. State of Orissa.
15. 132 (2021) CLT 927: 2021 (Supp.) OLR 674 : Bamadev Sahoo v. State of Orissa.
16. 2022 (II) OLR 415 : Raj Kishor Deo v. State of Odisha.

For Petitioner : Mr. R.P.Kar, Sr. Adv. with M/s. A.K. Dash & S.S. Mohapatra.

For Opp.Parties : Mr. S.C. Mohanty, Sr. Standing Counsel, (I.T. Dept)

JUDGMENT Date of Judgment : 03.05.2024

Dr. B.R. SARANGI, J.

The petitioner, by means of this writ petition, challenges inaction of opposite party no.4 in granting credit of the tax deducted at source amounting to Rs.2,68,733/- under Section 143(1)(c) of the Income Tax Act, 1961 for the assessment year 2013-14.

2. The factual matrix of the case, in brief, is that the petitioner, being a salaried employee, is an assessee under the Income Tax Act, 1961 (for short "I.T. Act"). He had been filing his return of income with opposite party no.4 regularly. For the assessment year 2013-14, vide acknowledgement no. 682834840260713 dated 26.07.2013, he filed the return of income electronically. During the period April, 2012 till October, 2012, the petitioner was employed under opposite party no.6-M/s. Corporate Ispat alloys Ltd. and received gross salary of Rs.25,39,766/-, out of which a sum of Rs.5,90,112/- was deducted as tax at source under Section 192 of the I.T. Act. Upon repeated request, opposite party no.6 did not issue Form 16 for the assessment year 2013-14.

2.1. Form 26AS drawn from the Income Tax Department's website reflects a sum of Rs.3,21,379/- was deducted and deposited by opposite party no.6. There was a difference of Rs.2,68,733/- in between the tax deducted by opposite party no.6 and the amount reflected in Form 26AS. Upon processing of the return of income, opposite party no.4 issued intimation under Section 143(1) of the I.T. Act on 26.07.2014 without taking into account TDS of Rs.2,68,733/- deducted by opposite party no.6 and while issuing such intimation, he also charged interest under Section 234B and 234C of the I.T. Act amounting to Rs.55,417/- for shortfall in payment of prepaid taxes.

2.2. Upon receipt of the intimation from opposite party no.4, the petitioner sent letter dated 05.08.2014 addressing to the Managing Director, M/s. Corporate Ispat Alloys Ltd.-opposite party no.6 for mis-match of tax deducted under Section 192 of the I.T. Act. Thereafter, he also sent letter dated 12.08.2014 to the Commissioner of Income Tax (TDS), Patna for initiation of appropriate action against the deductor/ employer, i.e., opposite party no.6.

2.3. As per the provision contained in Section 143(1)(c) of the I.T. Act, opposite party no.4 is under legal obligation to take into account the tax deducted at source, tax collected at source, advance tax, etc. In spite of communication being made to the Commissioner of Income Tax (TDS), Patna on 12.08.2014, the petitioner did not receive any communication with regard to the steps taken by the very same authority. Therefore, there was inaction by opposite party no.4 in granting credit of tax amounting to Rs.2,68,733/- deducted at source by the deductor/employer during the assessment year 2013-14 along with interest of Rs.55,417/- levied under Section 234B and 234C of the I.T. Act in total determined the amount of Rs.3,24,150/- under Section 143(1)(c) of the I.T. Act. Hence, this writ petition.

3. Mr. R.P. Kar, learned Senior Counsel appearing along with Mr. A.K. Dash, learned counsel for the petitioner vehemently contended that since the tax has been

deducted at source by the deductor-opposite party no.6 under Section 192 of the I.T. Act during the assessment year 2013-14, so far as petitioner is concerned in PAN-AHNPK0207H for the period from April 2012 to October 2012, a total amount of Rs. 5,90,112/-, the petitioner is entitled to get credit of tax deducted at source of the entire amount. He has also made reference to the salary statement, wherein the income tax deduction has been shown at source containing at page-12 to 18 of the brief. Therefore, the tax having been deducted at source by the deductor, obligation casts on the deductor to transmit the amount to the Income Tax authority as against gross salary of 25,39,766/-. It is further contended that on the basis of Form 26AS, drawn from the Income Tax Department website, it is seen that Rs.3,21,379/- was deducted and deposited by the deductor-opposite party no.6. Thereby, there is difference of Rs.2,68,733/- in between the tax deducted by opposite party no.6 and the amount reflected in Form 26AS. It is contended that even if tax has been deducted at source by the deductor and a part of the amount has not been transmitted to the Income Tax Department, the petitioner is not held responsible for that. For inaction of the deductor in transmitting the amount, the assessee has been put to difficulty by not giving credit of tax deducted amounting to Rs.2,68,733/- which also carries interest of Rs.55,417/- under Section 234B and 234C of the I.T. Act for shortfall of prepaid taxes. It is further contended that Section 205 of the I.T. Act specifically provides bar against direct demand on assessee and the same has been clarified by the Central Board of Direct Taxes (CBDT), vide circular dated 01.06.2015, and in the office memorandum issued on 11.03.2015. Therefore, necessary compliance has to be made thereof and without doing so, demand raised under Annexure-4 amounting to Rs.3,24,149 for the assessment year 2013-14 cannot be sustained in the eye of law. To substantiate his contentions, he has relied upon ***Rakesh Kumar Gupta v. Union of India***, (2015) 276 CTR (All) 379 : (2014) 365 ITR 143 (All); ***Kartik Vijaysinh Sonavane v. Deputy Commissioner of Income Tax, Circle-8,*** (2021) 132 taxmann.com 293 (Gujarat) : (2022) 440 ITR 11 (Gujarat) and ***Milan Arvindbhai Patel v. Assistant Commissioner of Income Tax***, (2023) 149 taxmann.Com 190 (Gujarat).

4. Mr. S.C. Mohanty, learned Senior Standing Counsel appearing for the Income Tax Department vehemently contended that the petitioner-assessee filed his return for the assessment year 2013-14 in ITR-1, vide acknowledgement number. 682834840260713 dated 26.07.2013 with total assessed income of Rs.59,75,009/- and total tax and interest payable of Rs. 16,57,158/-. The assessee has claimed TDS of Rs.13,12,938/- and Self Assessment Tax of Rs.3,44,226/- as taxes paid in his return of income. The return of the assessee for the assessment year 2013-14 was processed under Section 143(1) of the I.T. Act on 26.07.2014 raising a demand of Rs.3,24,150/- which includes interest under Section 234B and 234C of the Act owing to TDS mismatch of Rs. 2,68,733/- from the deductor- M/s Corporate Ispat Alloys Limited (TAN- RCHCO1143C). On verification of the documents, it is found that the petitioner was employed under the deductor-M/s Corporate Ispat Alloys

Limited during the Finance Year 2012-13. The assessee received gross salary of Rs.25,39,766/- from the deductor during the period under consideration, out of which a sum of Rs.5,90,112/- was deducted at source as income tax under Section 192 of the I.T. Act. However, only TDS of Rs.3,21,379/- is getting reflected in the Form 26AS of the assessee for assessment year 2013-14 out of total TDS claim of Rs.5,90,112/- in respect of the TAN-RCHC01143C of the deductor-M/s Corporate Ispat Alloys Limited. This has resulted in TDS mismatch of Rs.2,68,733/- and the demand of Rs.3,24,150/- thereon. It is further contended that as per provisions contained in Section 200 of the I.T. Act, it is the duty of the person deducting tax to pay within the prescribed time period to the credit of the Central Government or as the Board directs. As such, the liability of depositing the tax deducted from the salary of the employee within prescribed time period squarely lies with the deductor (in the instant case, M/s Corporate Ispat Alloys Limited). Therefore, it is clearly evident that there is failure on the part of M/s Corporate Ispat Private Ltd. to deposit the entire TDS of Rs.5,90,112/- deducted from the salary of the petitioner for the Financial Year 2012-13. It is further contended that the deductor upon failure to pay to the credit of Central Government, the tax so deducted is the jurisdictional Assessing Officer (TDS). In the instant case, the deductor, who failed to pay to the Central Government the tax deducted amounting to Rs.2,68,733/- is M/s Corporate Ispat Alloys Limited. It is further contended that on verification from the database, the jurisdictional Assessing Officer (TDS) of the defaulting deductor is DCIT/ACIT, TDS Circle, Ranchi. Therefore, the grievance made by the petitioner under Annexure-6 has to be taken into consideration by the very same authority at Ranchi and, more so, it is contended that the issue has been intimated to the DCIT/ACIT, TDS Circle, Ranchi with copy to the CIT (TDS), Patna, vide office letter no.5856 dated 15.02.2023, to take appropriate action in the instant case. It is further contended that though counter affidavit has been filed, what steps have been taken by the CIT (TDS), Patna, learned Senior Standing Counsel appearing for the Income Tax Department has not received any instructions, although in the meantime more than one year has elapsed.

5. This Court heard Mr. R.P. Kar, learned Senior Counsel along with Mr. A.K. Dash, learned counsel appearing for the petitioner and Mr. S.C. Mohanty, learned Senior Standing Counsel appearing for the Income Tax Department in hybrid mode. Pleadings have been exchanged between the parties and with the consent of learned counsel appearing for the parties, the writ petition is being disposed of finally at the stage of admission.

6. On the basis of the factual matrix, as discussed above, the only consideration is left to be decided with regard to difficulty faced by the assessee (tax payer) relating to the credit of tax deducted at source (TDS) which has been paid by the deductor. But, a part of the same has been transmitted to the Central Government, whereas a part of the same has not been transmitted by the deductor. Therefore, the Court found that a less percentage of the cases where the asessee is

entitled to be given to the credit of TDS which has been deducted by the deductor, but has not been given credit by income tax on account of the fact that TDS has not been reflected in Form 26AS for various reasons. Obviously, there are different grounds and one of such grounds is that where the deductor failed to upload the true particulars of TDS, which has been deducted, as a result of which, the assessee was not given credit of tax paid. It has also been brought to the notice of this Court that there are cases where the details uploaded by the deductor and the details furnished by the assessee in income tax returns were mismatched, on that count credit was not given to the assessee. Due to such mismatch, the assessee is required to approach the Income Tax authority for rectification of their earlier intimation and based on the character entries and pray for refund of TDS, but the same is not attended to, which has happened in the present case. It has been brought to the notice of this Court by the Department that these problems are apparent, real and enormous and has escalated because of centralized computerization and problem associate with incorrect/wrong data which was uploaded by the tax deductor. Therefore, the issue of not giving credit of the TDS deducted by the deductor is one of the general governance, failure of administration, fairness and arbitrariness.

7. While entertaining this writ petition, this Court directed the learned counsel for the Income Tax Department to file affidavit as to what step has been initiated against the employer for non-depositing of the tax collected and deducted at source from the salary of the petitioner. In compliance thereof, the Department has not filed affidavit. However, on 15.12.2022 this Court protected the interest of the petitioner by passing interim order to the following effect:

"Till the next date of hearing, no coercive steps shall be taken against the petitioner."

8. Section 205 of the Income Tax Act reads as follows:-

"205. Where tax is deductible at the source under [the foregoing provisions of this Chapter], the assessee shall not be called upon to pay the tax himself to the extent to which tax has been deducted from that income."

In view of the aforementioned provision, it is made clear that the assessee shall not be called upon to pay the tax himself to the extent to which tax has been deducted from that income.

9. There is no dispute before this Court that tax has not been deducted by the deductor at source of the assessee. To mitigate such situation, the CBDT, vide clause-2 of its circular dated 01.06.2015, envisaged as follows:

"2. As per Section 199 of the Act credit of Tax Deducted at Source given to the person only if it is paid to the Central government Account. However, as Section 205 of the Act the assessee shall not be called upon to pay the tax to the extent tax has been deducted from his income where the tax is deductible at source under the provision of Chapter – XVII. Thus the Act puts a bar on direct demand against the assessee in such cases and the demand on account of tax credit mismatch cannot be enforced coercively."

10. Referring to such circular dated 01.06.2015, the CBDT also issued office memorandum on 11.03.2016, paragraph-3 whereof reads as follows:

> *"3. In view of the above, the Board hereby reiterated the instructions contained in its letter dated 1-6-2015 and directs the assessing officers not to enforce demands created on account of mismatch of credit due to non-payment of TDS amount to the credit of the Government by the deductor. These instructions may be brought to the notice of all assessing officers in your Region for compliance."*

Needless to say both the circular and the office memorandum have been issued in consonance with the provisions contained in Section 205 of the I.T. Act. In the office memorandum dated 11.03.2016, it has been mentioned that the Board had issued directions to the field officers that in case of an assessee whose tax has been deducted at source but not deposited to the Government's account by the deductor, the deductee assessee shall not be called upon to pay the demand to the extent tax has been deducted from his income. It was further specified that Section 205 of the I.T. Act puts a bar on direct demand against the assessee in such cases and the demand on account of tax credit mismatch in such situations cannot be enforced coercively.

11. In ***Taylor v. Taylor***, (1876) 1 Ch D 426, it was laid down that where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden. This doctrine has often been applied to Courts.

Lord Roche in ***Nazir Ahmad v. King Emperor***, AIR 1936 PC 253 followed the aforesaid principle. Subsequently, the said principle has been well recognized by the apex Court and is holding the field till today, as would be evident from ***State of Uttar Pradesh v. Singhara Singh***, AIR 1964 SC 358; ***Chandra Kishore Jha v. Mahabir Prasad***, AIR 1999 SC 3558, ***Babu Verghese v. Bar Council of Kerala***, (1999) 3 SCC 422; ***Dhananjay Reddy v. State of Karnataka***, AIR 2001 SC 1512; ***Gujurat Urja Vikas Nigam Ltd. v. Essar Power Ltd***., AIR 2008 SC 1921; ***Ram Deen Maurya v. State of U.P***., (2009) 6 SCC 735 and ***Zuari Cement Limited v. Regional Director, Employees' State Insurance Corporation, Hyderabad and others***, (2015) 7 SCC 690. The said principle has also been referred by this Court in the case of ***Subash Chandra Nayak v. Union of India***, 2016 (I) OLR 922; ***Rudra Prasad Sarangi v. State of Orissa***, 2021 (I) OLR 844; ***Bamadev Sahoo v. State of Orissa***, 132 (2021) CLT 927: 2021 (Supp.) OLR 674; and ***Raj Kishor Deo v. State of Odisha***, 2022 (II) OLR 415.

12. Section 205 of the I.T. Act read with CBDT circular, referred to above, being statutory one, the said provision has to be adhered to in letter and spirit and to give effect to such provision, CBDT circular was issued on 01.06.2015 and the office memorandum was issued on 11.03.2016. Therefore, for tax credit mismatch cannot be enforced coercively against the petitioner-assessee.

13. In ***Rakesh Kumar Gupta*** (supra), the High Court of Allahabad held in paragraphs-12, 14 and 15 as follows:

> *"12. The petitioner has suffered a tax deduction at source but has not been given due credit in spite of the fact that he has been issued a TDS certificate by a Government department. There is a presumption that the deductor has deposited the TDS amount in the Government account especially when the deductor is a Government department. By denying the benefit of TDS to the petitioner because of the fault of the deductor causes not only harassment and inconvenience but also makes the assessee feel cheated. There is no fault on the part of the petitioner. The fault, if any, lay with the deductor. In the instant case, nothing had been indicated that the fault lay with the petitioner in furnishing false details.*
>
> *Xxx xxx xxx*
>
> *14. Further, section 243 relates to payment of interest on delayed refund. For facility, the said provision is extracted hereunder:*
>
> *243(1) If the Assessing Officer does not grant the refund,--*
>
> *(a) In any case where the total income of the assessee does not consist solely of income from interest on securities or dividends, within three months from the end of the month in which the total income is determined under this Act, and*
>
> *(b) In any other case, within three months from the end of the month in which the claim for refund is made under this Chapter, the Central Government shall pay the assessee simple interest at fifteen percent per annum on the amount directed to be refunded from the date immediately following the expiry of the period of three month aforesaid to the date of the order granting the refund.*
>
> *Explanation:-If the delay in granting the refund within the period of the three months aforesaid is attributed to the assessee, whether wholly or in part, the period of the delay attributable to him shall be excluded from the period for which interest is payable.*
>
> *2) Where any question arises as to the period to be excluded for the purposes of calculation of interest under the provisions of this section, such question shall be determined by the Chief Commissioner or Commissioner whose decision shall be final.*
>
> *3) The provisions of this section shall not apply in respect of any assessment for the assessment year commencing on the 1st day of April, 1989, or any subsequent assessment years.*
>
> *15. In the light of the aforesaid, we find from the perusal of the counter-affidavit, the respondents have denied refunding the TDS on the ground that the refund that would only be granted when the TDS matches with the details mentioned in Form 26AS. Since the mismatching is not attributable to the assessee and the fault solely lay with the deductor, we find that a case has been made out for grant of a mandamus for refund of the TDS amount. The petitioner has also made out a case for payment of interest since we find that the delay in refunding the amount was attributable solely with the Income-Tax Department and there is no fault on the part of the assessee."*

Thereby, writ of mandamus was issued commanding the opposite party to refund an amount of Rs.1,88,631/- along with interest as per the law within a period of three weeks from the date of the production of a certified copy of the order.

14. Similarly, in ***Kartik Vijaysinh Sonavane*** and ***Milan Arvindbhai Patel*** (Supra), Gujarat High Court came to a conclusion that the employer, which had

deducted tax at source from the salary of its employee-assessee but had not deposited the amount to the Central Government's account, the assessing officer would not deny the benefit of tax deducted at source by the employer to assessee and shall give credit of TDS amount to him.

15. The facts and law, as discussed above, are directly applicable to the present case and in view of the provisions contained in Section 205 of the I.T. Act, which provides that where tax is deductible at the source the assessee shall not be called upon to pay the tax himself to the extent to which tax has been deducted from that income and its applicability is not depending upon the credit for tax being given under Section 199 of the I.T. Act. Thereby, the department shall not deny the benefit of tax deducted at source by the employer during the relevant financial years to the petitioner. The credit of the tax shall be given to the petitioner and if in the interregnum, any recovery or adjustment is made by the department, the petitioner shall be entitled to the refund, with the statutory interest, within eight weeks from the date of receipt of the copy of this judgment.

16. 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.

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2024 (II) ILR-CUT-803

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

W.P(C) NO. 4882 OF 2024

SMT. SHANKUNTALA@SHAKUNTALA SAHOO ……Petitioner

-V-

STATE OF ODISHA & ORS. ……Opp.Parties

ODISHA EXCISE ACT, 2008 – Section 75 r/w Rule 58 of Odisha Excise Rules, 2017 – Whether the Excise Commissioner is empowered to compound the offences U/s. 75 of the Act? – Held, No – As the power has been vested with the Collector or the empowered Officer, they alone can exercise such authority, but no other person can do even a higher officer in hierarchy – Therefore the impugned order passed by the Excise Commissioner is not sustainable in the eyes of law.

Case Laws Relied on and Referred to :-

1. (2009) 14 SCC 338 : 2009 SCC OnLine SC 573 : Godrej Sara Lee Ltd. v. Asst. Commissioner (AA) & Anr.
2. (1998) 8 SCC 1: Whirlpool Corporation v. Registrar of Trade Marks.
3. (2003) 2 SCC 107 : Harbanslal Sahnia v. Indian Oil Corporation Ltd.
4. (2009) 2 SCC 630 : Mumtaj Post Graduate Degree College v. Vice-Chancellor.
5. (2005) 12 SCC 508 : Bangalore Development Authority v. R. Hanumaiah.

For Petitioner : Mr. P.K. Rath, Sr. Adv.with M/s. S. Rath, A. Behera, S.K. Behera, S. Das, P.K. Basantia, A. Rout, C. Purohit, A. Mohanty & V. Mishra.

For Opp.Parties: Mr. P.K. Muduli, A.G.A

JUDGMENT Date of Judgment : 09.05.2024

Dr. B.R.SARANGI, J.

The petitioner, by means of this writ petition, seeks to quash the letter/order no.1935/Ex. dated 19.02.2024 under Annexure-1, by which opposite party no.2-Excise Commissioner, Odisha, Cuttack has directed to opposite party no.4-Superintendent of Excise, Cuttack to dispose of the Special Investigation Report (SIR) No.03/2023-24 drawn by the Inspector of Excise, Athgarh Range against the petitioner's "ON" shop in the name and style "New Millan IMFL ON Shop", Athgarh and to compound the offence by imposing fine, as well as to quash the consequential demand notice no.1749/Ex. dated 23.02.2024 under Annexure-2 issued by opposite party no.4.

2. The factual matrix of the case, in brief, is that the petitioner was issued with a license to operate IMFL "ON" shop in the name and style "New Millan IMFL Restaurant" over Plot No.440/1649 and Plot No.440/2264 under Khata No.212/1922 and Khata No.212/1505 of Mouza-Birakishorepur, Athgarh in the district of Cuttack. The said license was initially granted to the petitioner for the period from 01.04.2023 to 31.05.2023 and subsequently, it was renewed up to 31.03.2024.

2.1. On 29.11.2023, one SIR was drawn against the petitioner by the O.I.C., Athgarh Excise Station containing allegation that on 29.11.2023 at about 5.25 PM on a surprise visit to the "ON" shop of the petitioner, it was found that the Sales Manager of the shop was conducting Counter Sale of IMFL & Beer just as IMFL "OFF" shop. In the said SIR, the petitioner-licensee was asked to submit explanation, pursuant to which the petitioner submitted explanation on 14.12.2023 contending that in an "OFF" shop, sale of liquor of different sizes is permitted in the Excise Policy of the year 2023-24 and the particular customer after having purchased a small size bottle, ran away from the shop and, therefore, Counter Sale of IMFL is not attributable to the petitioner. Accordingly, the petitioner's explanation and the SIR were submitted to opposite party no.2-Excise Commissioner, Odisha, Cuttack.

2.2. Opposite party no.2 fixed the date of hearing to 09.01.2024 by issuing notice dated 28.12.2023. But, it is claimed that opposite party no.2, without considering the representation and without giving any findings on the explanation of the petitioner, passed the impugned order dated 19.02.2024 under Annexure-1 levying a duty of IMFL amounting to Rs.53,31,732/- stating that the calculation of the said amount is an indicative calculation of penalty to be imposed on the licensee while disposal of SIRs, which cannot be taken as a conclusive one and during handing over the demand notice to the licensee, the District Excise Office should take all precautionary measure to deduct the dry days and any period for which the Local

Administration has closed the shop for any reason. As a consequence thereof, a demand notice was issued by the Superintendent of Excise, Cuttack under Annexure-2 dated 23.02.2024 for an amount of Rs.52,52,858/-. Hence, this writ petition.

3. Mr. P.K. Rath, learned Senior Counsel along with Mr. S. Rath, learned counsel appearing for the petitioner contended that on perusal of Annexure-1 dated 19.02.2024, it would be evident that the Excise Commissioner, Odisha, Cuttack issued the order/letter dated 19.02.2024 compounding the offence demanding Rs.53,31,732/-and consequentially, the Superintendent of Excise, Cuttack issued demand notice on 23.02.2024 under Annexure-2 raising a demand of Rs.52,52,858/- for realization of such dues. It is contended that if it is in the nature of compounding of offence, then as per Section 75 of the Odisha Excise Act, 2008, which deals with compounding the offences and releasing property liable to confiscation, read with Rule 58 of the Odisha Excise Rules, 2017, liberty has been granted to compounding the offence in lieu of cancellation of license on payment of a sum of Rs.5000/-, which may be extended upto Rs.50,000/-, to be determined by the Authorized Officer or the Collector, as the case may be. But, in the present case, though compounding of offence was made for which Rs.53,31,732/- has been levied, but, on the basis of the letter dated 19.02.2024 issued by the Excise Commissioner, that while issuing demand notice the District Excise Office should take all precautionary measure to deduct the dry days and any period of which the Local Administration has closed the shop for any reason. Thereby, vide Annexure-2 dated 23.02.2024, a demand of Rs.52,52,858/- has been raised. It is further contended that the demand so raised by the Excise Commissioner pursuant to SIR is without jurisdiction and he seeks for quashing of the same. It is further contended that even if there is availability of alternative remedy in the statute, that may not be a bar to approach this Court by filing the writ petition under Articles 226 and 227 of the Constitution of India. To substantiate his contentions, Mr. P.K. Rath, learned Senior Counsel has relied upon judgments of the apex Court in ***Godrej Sara Lee Limited v. Assistant Commissioner (AA) and anr.***, (2009) 14 SCC 338 : 2009 SCC OnLine SC 573; ***Whirlpool Corporation v. Registrar of Trade Marks***, (1998) 8 SCC 1 and ***Harbanslal Sahnia v. Indian Oil Corporation Ltd.***, (2003) 2 SCC 107.

4. Mr. P.K. Muduli, learned Addl. Government Advocate raised a preliminary objection with regard to maintainability of the writ petition contending that since the petitioner has challenged the order dated 19.02.2024 under Annexure-1 compounding the offence by imposing fine, that itself is revisable and as a consequence thereof, the Superintendent of Excise, vide Annexure-2 dated 23.02.2024 raised a demand of Rs.52,52,858/-, which is also appealable before the Collector. Instead of availing such forum, the petitioner should not have approached this Court by filing this writ petition. Therefore, he seeks for dismissal of the writ petition.

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

6. Before delving into the merits of the case, for just and proper adjudication of the case, Section 75 of the Odisha Excise Act, 2008 is extracted below:-

> *"Section 75.* ***Compounding of offences and releasing property liable to confiscation*** *:– (1) The Collector or any Excise Officer specially empowered by the State Government in this behalf, not below the rank of Superintendent of Excise may, subject to any restrictions as may be prescribed, accept from any person whose exclusive privilege, licence, permit or pass is liable to be cancelled or suspended under clause (a), (b) or (c) of Sub-section (1) of Section 47 or who is reasonably suspected of having committed an offence punishable under any section of this Act other than Sections 55,58,59 and 67, payment of a sum of money as may be prescribed in lieu of such cancellation or suspension or by way of composition for such offence, as the case may be, and in any case in which any property has been seized being liable to confiscation under Section 71, may release the property on payment of equal sum of the prevailing market value thereof as estimated by the Collector or such Excise Officer :*
>
> *Provided that where such person intended to evade excise revenue, the sum to be paid by such person in lieu of cancellation or suspension or by way of composition for such offence as aforesaid shall in no case be less than five times of such revenue intended to be evaded:*
>
> *Provided further that where the property so seized is a liquor manufactured in contravention of this Act, such liquor shall not be released but shall be disposed of in such manner as may be prescribed.*
>
> *(2) When the payments referred to in Sub-Section (1) have been duly made, the person, if in custody, shall be discharged, and the property seized if any, shall be released and no further proceedings shall be taken against such person or property."*

7. To give effect to the provisions of the Odisha Excise Act, 2008, in exercise of the powers conferred by Section 90 read with Section 94 of the Odisha Excise Act, 2008 (Odisha Act 10 of 2013) and in supersession of the Odisha Excise Rules, 1965, the Board's Excise Rules, 1965, the Odisha Excise Exclusive Privilege Rules,1970, the Odisha Excise (Exclusive Privilege) Foreign Liquor Rules,1989, the Odisha Excise (Methyl Alcohol) Rules, 1976 and the Odisha Excise (Mohua Flower) Rules,1976 except as respects things done or omitted to be done before such supersession, the State Government framed the rules, called the Odisha Excise Rules, 2017

8. Rule 58 of the Odisha Excise Rules, 2017, being relevant for the purpose of the case, is extracted hereunder:-

> *"Rule 58.* ***Compounding of offences****. — Subject to provision of section 75 any person whose exclusive privilege, license, or pass is liable to be cancelled under clause (a),*

clause (b) or clause (c) of sub-section(1) of section 47 is suspected of committing an offence other than sections 55, 58, 59 and 67 shall be at liberty to compound the offence in lieu of cancellation of licence on payment of a sum of five thousand rupees which may be extended upto fifty thousand rupees, to be determined by the authorized officer or the Collector, as the case may be."

9. Section 75 of the Odisha Excise Act, 2008 read with Rule 58 of the Odisha Excise Rules, 2017, as mentioned above, empowers the Collector or such Excise Officer empowered by the State Government, not below the rank of Superintendent of Excise, is empowered to make compounding of offences and releasing property liable to confiscation. Thereby, the Collector, being the competent authority, is empowered to exercise his power under Section 75 of the Odisha Excise Act, 2008 read with Rule 58 of the Odisha Excise Rules, 2017 or such Excise Officer empowered by the State Government have power to compound the offences. This being the statutory provision governing the field, now the present case has to be examined taking into account the provisions of law, as mentioned above.

10. There is no dispute before this Court that on the basis of SIR submitted by the O.I.C., Athgarh Excise Station, explanation was called for from the petitioner and the matter was submitted to the Excise Commissioner. As per instructions issued by the Excise Commissioner, Odisha, vide Excise Directorate Office Order No.12533/Ex. dated 24.11.2023, the copies of the inspection report and SIR were submitted to the Excise Directorate vide letter No.14052/Ex. dated 30.11.2023 of opposite party no.4 for appropriate order. After submission of the show-cause reply by the petitioner on 14.12.2023, same was forwarded to the Excise Directorate (opposite party no.2), vide letter no.14673/Ex. dated 18.12.2023 of opposite party no.4, with a request for necessary trial at the level of Excise Directorate, pursuant to order issued vide Excise Directorate Office Order No.12533/Ex. dated 24.11.2023. The Excise Commissioner, Odisha conducted hearing on the SIR on 09.01.2024, including both licensee and the Superintendent of Excise, Cuttack. In the hearing, the licensee could not disprove that she did not run her IMFL Restaurant "ON" shop like an "OFF" Shop. The video obtained by the Inspector of Excise, Athgarh Range showed how the said "ON" shop was flouting the license conditions and selling like "OFF" shop. The Excise Commissioner, Odisha concluded that the "ON" shop was operating like an "OFF" Shop. Hence, the licensee is required to pay the requisite consideration money for "OFF" shop as it is envisaged in Para 2.4.4 of the Excise Policy, 2023-24 of IMFL "OFF" shop in rural region of Cuttack district and also to pay the duty thereof as per Para 4.1.1, i.e., Beer-5.52 BL per every Rs.100/- of consideration money and IMFL-3.52 LPL per every Rs.100/- of consideration money. The total revenue liability when calculating since 01.04.2023 (date of license in force till the date of booking of SIR), turned out to be Rs.52,52,858/-, excluding the dry day on 02.10.2023, as per instructions issued vide Excise Directorate letter No.1935/Ex. dated 19.02.2024 (opposite party no.2), therefore, demand was raised against the petitioner.

11. In the counter affidavit nothing has been answered about the jurisdiction of the Excise Commissioner for compounding the offences under Section 75 of the Odisha Excise Act, 2008 read with Rule 58 of the Odisha Excise Rules, 2017, save and except the calculation of compounding the offence made by the authority, who is not the competent to do so and, as such, the said compounding of offence is without jurisdiction. The contentions raised in the counter affidavit show the decision of imposition of such demand raised, but if such demand has been raised by the authority, who is incompetent to do so, the same is without jurisdiction and cannot be sustained in the eye of law.

12. In ***Whirlpool Corporation*** (supra), the apex Court held that even if an alternative remedy is available, that itself cannot oust the jurisdiction of this Court in exercise of power under Article 226 of the Constitution of India and it has also been held that the rule of exclusion of writ jurisdiction by availability of alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, in spite of availability of alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies: (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) when there is failure of principles of natural justice; or (iii) where the orders or proceedings are wholly without jurisdiction or the vires of the Act is challenged.

13. In ***Harbanslal Sahnia*** (supra), the apex Court observed that the rule of exclusion of writ jurisdiction by availability of alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, in spite of availability of alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies: (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) when there is failure of principles of natural justice; or (iii) where the orders or proceedings are wholly without jurisdiction or the vires of the Act is challenged. It is held that since the case falls within the first two contingencies, the petitioners' dealership, which is their bread and butter, came to be terminated for an irrelevant and non-existent cause. In such circumstances, the appellants therein should have been allowed relief by the High Court itself instead of driving them to the need of initiating arbitration proceedings.

14. In ***Godrej Sara Lee Limited*** (supra), the apex Court observed that the appellant, in its writ petition, had not made a specific prayer that Notification SRO No.82/2006 dated 21.01.2006 was ultra vires or otherwise illegal, but had taken a specific ground in that behalf which had been taken note of. Even otherwise, the question as to whether the said notification could have a retrospective effect or retroactive operation being a jurisdiction fact, should have been determined by the High Court in exercise of its writ jurisdiction under Article 226 of the Constitution of India as it is well known that when an order of a statutory authority is questioned on the ground that the same suffers from lack of jurisdiction, alternative remedy may not be a bar. It is a fit case where the High Court should have entertained the writ petition.

Similar view has also been taken by the apex Court in ***Mumtaj Post Graduate Degree College v. Vice-Chancellor***, (2009) 2 SCC 630.

15. In the instant case, since power has been vested with the Collector or such Excise Officer, they are only competent to pass order compounding the offences, as envisaged under Section 75 of the Odisha Excise Act, 2008 read with Rule 58 of the Odisha Excise Rules, 2017. Nothing has been placed on record to indicate that the Excise Commissioner has been given such power to make compounding of offences. Even if the counter affidavit filed by the State is silent about the same. Therefore, in absence of any material before this Court, the order dated 19.02.2024 under Annexure-1 passed by the Excise Commissioner, Odisha, Cuttack under Section 75 of the Odisha Excise Act under the fold of "such Excise Officer" having not been notified nor placed on record is not competent to pass the order under Annexure-1. Thereby, the consequential order under Annexure-2 dated 23.03.2024 raising demand of Rs.52,52,858/- also cannot be sustained in the eye of law.

16. In ***A.R. Antulay v. R.S. Nayak***, AIR 1988 SC 1531, where the apex Court had earlier directed for transferring the case from the Court of Special Judge to the High Court for assigning the matter to a sitting Judge of the High Court, the apex Court held that it was oblivious of the relevant provisions of the law and that the apex Court, by its directions could not confer jurisdiction on the High Court to try any case when it did not possess such jurisdiction under the scheme of the 1952 Act.

17. In ***Bangalore Development Authority v. R. Hanumaiah***, (2005) 12 SCC 508, the apex Court held that the authority vested with the power has to act reasonably and rationally and in accordance with law to carry out the legislative intent.

18. On perusal of Section 75 of the Odisha Excise Act, 2008 read with Rule 58 of the Odisha Excise Rules, 2017, it appears that if the power has been vested with the Collector or such Excise Officer, they alone can exercise such authority, but no other person can do so, may he be in higher position in hierarchy. Therefore, the order dated 19.02.2024 under Annexure-1 passed by the Excise Commissioner, Odisha, Cuttack levying the duty of Rs.53,31,732/- on the petitioner and the consequential order dated 23.02.2024 under Annexure-2 passed by the Superintendent of Excise, Cuttack raising a demand of Rs.52,52,858/- cannot be sustained in the eye of law. Accordingly, they are liable to be quashed and are hereby quashed. Therefore, as a necessary corollary, the matter is remitted to the Collector, Cuttack to examine the SIR, along with the other documents submitted by the petitioner, and pass appropriate order in compliance of the principles of natural justice by affording opportunity of hearing to the petitioner as expeditiously as possible in accordance with law.

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

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2024 (II) ILR-CUT-810

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

W.P.(C) NO. 11697 OF 2015

GOLAKA BIHARI MALLA ……Petitioner

-V-

UNION OF INDIA & ORS. ……Opp.Parties

CENTRAL CIVIL SERVICE (PENSION) RULES, 1972 – Cut-off date for pension – Petitioner was promoted to the Postman cadre against the vacancy arose in the year 2002 – But he joined in the pensionable post of postman after the cut-off date i.e. on dtd. 01.01.2004 – The authority as well as learned Tribunal denied the pensionary benefits as per 1972 Rules – Whether the impugned order is sustainable? – Held, No – Reason indicated. (Paras 7-8)

Case Laws Relied on and Referred to :-

1. (1977) 3 SCC 94 : The Superintendent of Post Offices and others Vrs. P.K. Rajamma.
2. (1983) 1 SCC 305 : D.S. Nakara & Ors. vrs. Union of India.

For Petitioner : Mr. S.K. Ojha.

For Opp.Parties : Mr. D. Gochhayat, CGC

JUDGMENT Date of Hearing & Judgment : 19.06.2024

G. SATAPATHY, J.

1. The writ petitioner while seeking to quash the order dated 16.06.2015 passed by the learned Central Administrative Cuttack Bench, Cuttack (In short the "Tribunal") in O.A. No. 260/00360/2014 has prayed to direct the Opposite Party Nos. 1 to 4 to sanction pension and other benefits taking into account the ratio decided in Gouranga Ch. Sahoo and Narasingh Sahoo. The Tribunal by the aforesaid order has turned down the claim of the Petitioner for pensionary benefit for having been appointed to the post after the cut-off date of 01.01.2004.

2. The facts by which the grievance of the Petitioner in the writ can be adjudicated upon are that the Petitioner was initially appointed as an Extra Departmental Delivery Agent (EDDA) on 06.07.1974 and he was promoted to the post of Postmaster cadre on 04.04.2007 and joined as such on 01.05.2007, but he retired from service on superannuation on 30.09.2013 while working as In-Charge Overseer, Mails, Nayagarh. According to the Petitioner, he was entitled to pensionary benefits, but when he was denied, he approached the Tribunal by filing O.A. No. 260/00053/2014. The Tribunal, however, disposed of the aforesaid O.A. on 11.02.2014 granting liberty to the Petitioner to approach the concerned Authority who was directed to dispose of the representation of the Petitioner within a specific timeline keeping in view the orders passed by the Tribunal in the case of Gouranga Ch. Sahoo and Narasingh Sahoo. The Petitioner, accordingly, made a representation for the pensionary benefit, which was, however, come to be rejected by the

Respondents vide an order passed on 26.03.2014, wherein the Petitioner's claim for pensionary benefit was refused mainly on the grounds that he is not entitled to pensionary benefit under CCS(Pension) Rules, 1972 as he was promoted to the Postman cadre on Departmental Seniority Quota and joined as Postmaster Khandaparagarh SO on 11.05.2007 and he having been appointed as Postmaster after the cut off date of 01.01.2004, his case will be covered under New Pension Scheme(NPS). It was further observed in the order refusing the claim of the Petitioner that the employee Narasingh Sahoo (applicant in O.A. No. 756/2012) and the employee Gouranga Ch. Sahoo (applicant in O.A. No. 310/2010) were appointed as Postman on promotion from the ED Cadre prior to 31.12.2003 and they are thereby entitled to pension under CCS (Pension) Rules, 1972, but the case of the Petitioner is quite different since he was promoted as Postmaster on 11.05.2007 which is much after the cut-off date of 01.01.2004. Finding no alternative, the Petitioner again approached the Tribunal in O.A. No. 260/00360/2014, but the effort of the Petitioner remained in vain.

3. The Respondents herein and before the Tribunal have resisted the claim of the Petitioner by filing counter in the present writ as well as O.A. by mainly taking the ground that the case of Gouranga Ch. Sahoo and Narasingh Sahoo are not similar to the case of the Petitioner for being appointed before and after the cut-off date and thereby, the Petitioner is not eligible for pensionary benefit and in terms of Rule-6 of the Gramin Dak Sevak (Conduct and Engagement) Rules, 2011, the Sevak shall not be entitled to any pension and Rule 3-A (v) and (vi) of the aforesaid rules lays down that a Sevak shall be outside the Civil Service of Union and shall not claim parity with a Government Servant.

4. After having considered the Original Application, Counter Affidavit and Rejoinder to Counter Affidavit upon hearing the parties and on going through their written notes of submissions, the learned Tribunal dismissed the O.A. of the Petitioner refusing to interfere with the order passed by the concerned Authority rejecting the claim of the Petitioner for pensionary benefits. Hence, this writ by the Petitioner.

5. In course of the hearing of the writ petition, Mr. S.K. Ojha, learned counsel appearing for the Petitioner has submitted that although the Petitioner was promoted to the Postman Cadre on Departmental Seniority Quota against the vacancy of the year 2002, but neither the Authority concerned nor the learned Tribunal appreciated the same in accordance with law while refusing to grant the relief of pensionary benefit to the Petitioner since the Petitioner's promotion to the post of Postman is deemed to be from the year 2002 which is much before the cut-off date and the Petitioner cannot be considered to have been appointed on promotion w.e.f. 11.05.2007 on which date the Petitioner joined as Postman and, therefore, the Petitioner is entitled to the benefit of pension in terms of CCA (Pension) Rules, 1972. It is further submitted that there is hardly any dispute about the appointment of

the Petitioner as EDDA on 06.07.1974 and he was promoted to the post of Postman on 04.04.2007 against the vacancy of the year 2002 and, therefore, the Petitioner having rendered service for more than ten years in a pensionable post, he is entitled to pensionary benefit, but the Authority concerned has failed to apply the rules to grant pensionary benefit to the Petitioner and, therefore, the order of the Tribunal passed in O.A. No. 260/00360/2014(Annx-7) is unsustainable in the eye of law. On the aforesaid submissions, learned counsel for the Petitioner while praying to quash Annexure-7 has prayed to direct the Opposite Party Nos. 1 to 4 to sanction pensionary benefit to the Petitioner.

In repelling the submission of learned counsel for the Petitioner, Mr. D. Gochhayat, learned Central Government Counsel appearing for the Opposite Parties has submitted that since the Petitioner was appointed to the post of Postman on 04.04.2007 which is much after the cut-off date of 01.01.2004, he is not entitled to any pensionary benefit and, therefore, the Tribunal has not committed any error in dismissing the O.A. of the Petitioner.

6. After having bestowed an anxious and careful consideration to the rival submissions upon perusal of record together with the documents annexed thereto, the only question which arises for consideration in this writ petition is the eligibility of the Petitioner for pensionary benefits. Admittedly, the petitioner was denied pensionary benefit by the authority concerned on the ground that he joined in the pensionable post of Postman after the cut-off date of 01.01.2004 which was endorsed to by the Tribunal in its order dated 16.06.2015, but the undisputed fact remains that the Petitioner was promoted to the post of Postman against the vacancy of the year 2002 under seniority quota in terms of the order passed by the Senior Superintendent of Post Office, Puri on 05.03.2007 which is found place at Annexure-A/7 to the additional affidavit of the petitioner filed before the learned Tribunal and the same is reflected in the order rejecting representation of the petitioner by the Chief Postmaster General, Orissa Circle on 26.03.2014. True it is that Government employees appointed on or after 01.01.2004 are governed by New Pension Scheme, but person in service prior to that and getting promotion to the next higher grade cannot be denied pensionary benefit by taking refuse of such ground that he has joined after 01.01.2004 to the promotional post. What cannot be lost sight of is that pension is attached to the post, but not to any employee and in this case the petitioner has been promoted to Postman cadre against the vacancy of the year 2002 being recommended by duly constituted Departmental Promotion Committee which is not in dispute, but the petitioner has joined in the promotional post on 01.05.2007, however, such joining cannot be construed as initial appointment to the promotional post and deny the service benefit to the petitioner for joining to the promotional post after the cut-off date of 01.01.2004 since the petitioner was admittedly appointed as EDDA on 06.07.1974 and continuing as such till his promotion.

7. Be it noted, the other two employees namely Gouranga Ch. Sahoo and Narasingh Sahoo who were similarly situated with the petitioner are granted with pensionary benefit by taking into consideration their service rendered as EDDA towards short fall of qualifying service of ten years while extending the pensionary benefits to them, but the petitioner was discriminated by not taking into consideration his service rendered as EDDA by misinterpreting the facts and law to the effect that petitioner was appointed to the promotional post on 01.05.2007, whereas the aforesaid two employees were appointed to the promotional post before the cut-off date of 01.01.2004 which is violative of principle of equality as guaranteed under Articles 14 & 16 of the Constitution of India. It is also not in dispute that the decision rendered by the Tribunal in the cases of the aforesaid two employees were not only affirmed by this Court, but also were confirmed by the Apex Court, but the Tribunal in the case of the present petitioner has fallen in error in dividing the continuous service of the petitioner in two parts; firstly, the service rendered by the petitioner as EDDA and secondly, the service rendered by him in promotional post and misplaced the law by making a erroneous dichotomy that the service rendered by the petitioner as EDDA cannot be taken into consideration to extend pensionary benefit to the petitioner since pension is not admissible to the ED employees and pension is admissible to the cadre of Postman. Further, it cannot be denied that the petitioner was holding a civil post as EDDA and his conditions of service are governed by the Posts and Telegraphs Extra Departmental Agents (Conduct & Service Rules, 1964) as held by the Apex Court in the case of **The Superintendent of Post Offices and others Vrs. P.K. Rajamma; (1977) 3 SCC 94** and, therefore, the service rendered by the petitioner as EDDA can be taken into consideration for the short fall of qualifying service to the promotional post while extending the pensionary benefits to him, but the Tribunal has failed to appreciate the aforesaid law while refusing to entertain the claim of the petitioner. It is reminded that the Pension Scheme or the statute introducing the pension scheme must inform interpretative process and accordingly, it should receive a liberal construction and the Courts may not so interpret such statute as to render them inane as held by a five Judge constitutional Bench of Apex Court in paragraph-30 of the decision in ***D.S. Nakara and others vrs. Union of India; (1983) 1 SCC 305***, wherein it has been further observed as under:-

> *29. xxx "it (pension) is a measure of socio-economic justice which inheres economic security in the fall of life when physical and mental prowess is ebbing corresponding to aging process and, therefore, one is required to fall back on savings. One such saving in kind is when you give your best in the hey-day of life to your employer, in days of invalidity, economic security by way of periodical payment is assured. The term has been judicially defined as a stated allowance or stipend made in consideration of past service or a surrender of rights or emoluments to one retired from service. Thus the pension payable to a government employee is earned by rendering long and efficient service and therefore can be said to be a deferred portion of the compensation or for service rendered. In one sentence one can say that the most practical raison d'etre for pension is the inability to provide for oneself due to old age. One may live and avoid unemployment but not senility and penury if there is nothing to fall back upon."*

8. In view of the discussions made hereinabove and on a conspectus of record, this Court does find substance in the claim of the petitioner for pensionary benefits, but he was erroneously denied such benefit and therefore, the petitioner is entitled to the minimum pensionary benefits as he was promoted to the post of Postman against the vacancy of 2002, which is made available prior to the cut-off date, i.e. 01.01.2004. Accordingly, the order dated 16.06.2015 passed by the Central Administrative Tribunal, Cuttack Bench, Cuttack in O.A. No. 260/00360/2014 under Annexure-7 is unsustainable and liable to be quashed. Accordingly, Annexure-7 is hereby quashed.

9. In the result, the writ petition stands allowed on contest, but in the circumstance there is no order as to costs.

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2024 (II) ILR-CUT-814

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

MATA NO.153 OF 2024

Dr. ABHISEK UPADHYAY …..Appellant

-V-

MANISHA MISHRA …..Respondent

HINDU MARRIAGE ACT, 1955 – Section 23-A r/w Order VIII Rule 1 – Maintainability of counter claim – The civil proceeding was instituted by respondent/wife in the family court for dissolution of the marriage – Appellant/husband, who was respondent also filed counter claim for dissolution of marriage separately after 90 days – Whether the counter claim is maintainable? – Held, Yes – Reason indicated with reference to case laws.

Case Laws Relied on and Referred to :-

1. (2003) 7 SCC 350 : Ramesh Chand Ardawatiya vs Anil Panjwani.
2. (2007) 6 SCC 420 : R.N. Jadi and Brothers v. Subhash Chandra.
3. (2008) 11 SCC 769 : Zolba v. Keshao.

For Appellant : In person

For Respondent : None

JUDGMENT Date of Hearing & Judgment : 26.06.2024

ARINDAM SINHA, J.

1. Appellant is husband appearing in person. He is aggrieved by order dated 9th April, 2024 made by the Family Court, also dismissing his counter claim filed in the civil proceeding instituted by respondent-wife. He submits, the Family Court erred in applying judgment of the Supreme Court in **Ramesh Chand Ardawatiya vs Anil Panjwani**, reported in **(2003) 7 SCC 350**. Having had filed written statement, he did not seek amendment thereto but additionally had filed counter claim. Impugned judgment be reversed in appeal.

2. None appears on behalf of respondent-wife. By order dated 8th May, 2024 we had directed issuance of notice of appeal. Appellant duly complied by putting in the requisites. The postal article has been returned bearing postal endorsement, 'refused'. Hence, there has been good service and respondent goes unrepresented.

3. Considering appellant appears in person, we looked at the brief. It appears, respondent-wife had filed for divorce. Part of the order sheet of the Family Court stands disclosed in the appeal papers. It appears from impugned order dated 9th April, 2024, inter alia, appellant had filed his written statement on 21st September, 2022 and thereafter his counter claim on 10th October, 2023.

4. The civil proceeding instituted by respondent-wife in the Family Court was for dissolution of the marriage. Appellant, who was respondent therein, also counter claimed for dissolution of the marriage. We have to first see whether the counter claim was maintainable. For the purpose section 23-A in Hindu Marriage Act, 1955 is reproduced below.

> *"**23-A. Relief for respondent in divorce and other proceedings**.—In any proceeding for divorce or judicial separation or restitution of conjugal rights, **the respondent may not only oppose the relief sought on the ground of petitioner's adultery, cruelty or desertion, but also make a counter-claim for any relief under this Act on that ground**; and if the petitioner's adultery, cruelty or desertion is proved, the Court may give to the respondent any relief under this Act to which he or she would have been entitled if he or she had presented a petition seeking such relief on that ground."* (Emphasis supplied)

It will appear from above reproduced provision that when a spouse as petitioner files for divorce, the other spouse as respondent may not only oppose the relief sought on the ground of petitioner's adultery, cruelty or desertion but also make a counter claim for any relief under the Act, on that ground.

5. We reproduce paragraph 13 from the wife's petition for divorce.

> *"13. That, since the date of marriage the opp. party is deliberately refusing taking to take care of the petitioner, and did not maintain the minimum marital obligations rather habituated in misbehaving, ill-treating, and tarnishing the societal reputation of the petitioner by inflicting physical as well as mental cruelty against the petitioner, that in the meanwhile number of efforts have been made and lastly on 06.05.2018 by the petitioners father to wellness of the family of her daughter but in vein."*

Appellant filed written statement and opposed allegation of cruelty as would appear from paragraph 13 in the written statement, reproduced below.

> *"13. That the averments made in Para-13 are false and fabricated and she is put to strict proof of the same. The Opp. Party has fulfilled all her marital obligations and always cooperated and supported the Petitioner in her every endeavor."*

6. By his counter claim appellant also claimed dissolution of the marriage on ground of cruelty and desertion. Paragraphs 58 and 59 of his counter claim are reproduced below.

"58. Thus the Petitioner's aforesaid conduct amounts to cruelty towards the Opp. Party which has caused unimaginable suffering and pain to him. That further the Petitioner is guilty of infidelity and cruelty as she kept in contact with her previous lover Nishant Bhaskar Mishra even after marriage with the Opp. Party which caused immense mental agony, pain and suffering to the Opp. Party.

59. That the Petitioner and Opp. Party lived together as husband and wife for a period of only one year and two months. The Petitioner has willfully deserted the Opp. Party since 06.05.2018 without sufficient cause for more than five years and filed this instant suit for Divorce bearing CP No. 575 of 2018 on 11.07.2018 which shows animus desirendi on the part of the Petitioner."

7. We see from last three preceding paragraphs, petitioner, by his written statement had firstly opposed allegation of cruelty made in the petition and then, subsequently counter claimed for divorce on grounds of cruelty and desertion. As such the counter claim was maintainable. The question remains to be answered is whether it ought to have been admitted.

8. The Family Court relied on judgment of the Supreme Court in **Ramesh Chand Ardawatiya** (supra). Proposition of law declared and relied upon was interpretation of rules 1, 6 and 10 in order VIII, Code of Civil Procedure, 1908 as were prior to amendments thereto by Code of Civil Procedure (Amendment) Act, 2002. At the outset we note that the civil proceeding before the Family Court was instituted in year, 2018, long after the Code was further amended with effect from 1st July, 2002. The decision is inapplicable on that fact alone. Nevertheless, we proceed to discuss the provisions considered. By rule 1 there was mandatory provision for the defendant to present written statement before first hearing or within such time as the Court may permit. Inter alia, there was proviso requiring the defendant to produce documents in his possession or power in support of counter claim made in the written statement. Rule 6 in order VIII did not undergo any amendment by said amending Act. It provides for particulars of set-off to be given in the written statement and for it to have same effect as the plaint in a cross suit, so as to enable the Court to pronounce final judgment in respect of both, original claim and the set-off. Said rule is not applicable in the facts because appellant had counter claimed, which is distinct from seeking set-off. Rule 6-A, inserted by amendment with effect from 1st February, 1977 is the rule to be seen. In the judgment of the Supreme Court paragraph 26, rule 6-A also stood interpreted. Paragraph 26 is reproduced below.

*"**26**. A perusal of the abovesaid provisions shows that it is the Amendment Act of 1976 which has conferred a statutory right on a defendant to file a counter-claim. The relevant words of Rule 6-A are—*

"A defendant in a suit may, in addition to his right of pleading a set-off under Rule 6,.....before the defendant has delivered his defence or before the time limited for delivering his defence has expired....".

***These words go to show that a pleading by way of counter-claim runs with the right of filing a written statement** and that such right to set up a counter claim is in addition to the right of pleading a set-off conferred by Rule 6. A set-off has to be pleaded in the*

> *written statement.* ***The counter-claim must necessarily find its place in the written statement. Once the right of the defendant to file written statement has been lost or the time limited for delivery of the defence has expired then neither can the written statement be filed as of right nor a counter-claim can be allowed to be raised, for the counter-claim under Rule 6-A must find its place in the written statement****. The Court has a discretion to permit a written statement being filed belatedly and, therefore, has a discretion also to permit a written statement containing a plea in the nature of set-off or counter-claim being filed belatedly but needless to say such discretion shall be exercised in a reasonable manner keeping in view all the facts and circumstances of the case including the conduct of the defended, and the fact whether a belated leave of the Court would cause prejudice to the plaintiff or take away a vested right which has accrued to the plaintiff by lapse of time.”* (Emphasis supplied)

Rule 10 provides for procedure, when a party fails to present written statement called for by the Court.

9. It appears from impugned order that the written statement of appellant was accepted on 21st September, 2022. However, appellant did not seek or obtain leave for his counter claim being admitted, subsequently filed on 13th October, 2023. Hence, following **Ramesh Chand Ardawatiya** (supra) the Family Court refused to admit the counter claim. Impugned order is a common order, by which the petition of respondent-wife for divorce was dismissed for default as well.

10. We have already reproduced above section 23-A in Hindu Marriage Act, 1955. Under the provision appellant had statutory right to file counter claim. The Code of Civil Procedure providing for procedure to be followed in regard to suits and as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction, said so by section 141 therein, is applicable to all proceedings under the Act of 1955, as provided in section 21 of said Act. The application of the Code is subject to other provisions contained in the Act.

11. While rule-1 in order VIII, prior to 1st July, 2002, mandated filing of written statement at or before the first hearing or within such time as the Court may permit, after the amendment, effective 1st July, 2002, outer limit for filing written statement was prescribed to be 90 days from date of service of summons. The Supreme Court in **R.N. Jadi and Brothers v. Subhash Chandra**, reported in **(2007) 6 SCC 420** declared that the provision in rule 1 of order VIII does not deal with the power of Court nor specifically take away its power to take the written statement on record, though filed beyond time. The Supreme Court by another decision in **Zolba v. Keshao**, reported in **(2008) 11 SCC 769** said that the provision is not mandatory in nature. The declarations were in regard to the provision after amendment effective 1st July, 2002. That means a defendant can file written statement after expiry of 90 days from service of summons provided Court has satisfaction that the defendant was prevented from filing it in time. However, rule 6-A and the interpretation of it by Ramesh Chand Ardawatiya (supra) prevails inasmuch as the counter claim must be included in the written statement itself. Fact is, appellant filed his counter claim separately and later. Reverting back to section 23-A in the Act of 1955 we see that

respondent in a civil proceeding may not only oppose the relief sought but also make a counter claim. In the civil proceeding before the Family Court, appellant opposed the relief sought by respondent-wife seeking dissolution of the marriage. He did so by his written statement. Subsequent thereto, he filed the counter claim, also for dissolution of the marriage. We have discussed these facts above and have already found that appellant's counter claim was maintainable.

12. The counter claim was filed at a stage in the proceeding, till when respondent-wife had not adduced evidence. By order dated 21st September, 2022, the written statement was accepted and the case posted for hearing on 19th October, 2022. Issues were not framed thereafter as respondent-wife went unrepresented till impugned order dated 9th April, 2024 was passed. Trial commences with framing of issues and in the civil proceeding before the Family Court, trial did not commence. In the premises there was no impediment for the counter claim to have been accepted since there could not arise a question of prejudice caused to respondent-wife in appellant having exercised his statutory right to counter claim, which she would have to meet at trial.

13. Also to be seen is that in **Ramesh Chand Ardawatiya** (supra) the question before the Supreme Court arose in a suit filed for declaration, possession and permanent injunction. Procedure for adjudicating matrimonial disputes have largely been provided for by the Acts of 1955 and 1984, read with provisions of the Code as applicable. It is also a distinguishing feature.

14. We set aside impugned judgment and restore the counter claim, for adjudication by the Family Court. We record our expectation that the adjudication will be expeditious and without granting unnecessary adjournments, prayed for or otherwise by continued absence of respondent-wife in that Court, pursuant to notice served to her learned advocate and the counter claim posted to the peremptory Board, for hearing. Registry will communicate our judgment to the Family Court.

15. The appeal is disposed of.

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2024 (II) ILR-CUT-818

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

MATA NO. 81 OF 2022

MONALISHA KHOSLA ……Appellant

-V-

TAPAN KUMAR PARICHHA ……Respondent

CODE OF CIVIL PROCEDURE, 1908 – Order V, Sub-Rule(5) of Rule 9 r/w Order IX, Rule 13 – The summons issued through the registered post was returned back with postal endorsement of 'refusal' – The learned Family Court decided the matter ex-parte and marriage stood dissolved – The appellant filed application U/o. IX, Rule 13 which was dismissed

by the learned Court – Whether the impugned order should be interfered in the present appeal? – Held, No – Service of summons through the registered post as well as by the process server & refusal of the same by the appellant are undisputed – Finding of the Family Court appears to be correct. (Paras 6-7)

Case Law Relied on and Referred to :-

1. Special Leave Petition (Civil) D No.1855 of 2020 (Dated 29th September, 2021) : Vishwabandhu v. Sri Krishna & Anr.

For Appellant : Mr. Laxman Pradhan

For Respondent : Mr. R.L. Pattnaik

JUDGMENT Date of Hearing & Judgment : 01.07.2024

ARINDAM SINHA, J.

1. Appellant, whose marriage stood dissolved by judgment dated 5th August, 2021 of the Family Court, made ex parte against her, is aggrieved. She had applied for setting aside of the judgment. The Family Court on order dated 13th January, 2022 dismissed her application. Hence, she seeks interference in appeal in respect of both, the order and the judgment.

2. Mr. Pradhan, learned advocate appears on behalf of appellant and submits, several grounds were taken in the application for setting aside the judgment made ex parte against his client. At the material time there were talks of settlement and apprehending mischief, his client did not accept the summons. It was an act of ignorance. Her learned advocate in the Family Court also took other grounds on facts. The notice was not affixed to her door and, the application for setting aside the decree was made promptly, within prescribed period of limitation. He submits further, on merits there are good grounds for reversing impugned judgment. The parties are Christian. There could not have been resort to proceeding under Special Marriage Act, 1954. The Divorce Act of 1869 is applicable. Unless there is interference in appeal his client will suffer hardship inasmuch as there is the matter of maintenance, for both, of herself and the daughter, who is with her. No direction was made.

3. Mr. Pattnaik, learned advocate appears on behalf of respondent and submits, it will appear from impugned order that there were several attempts to serve. Service of summons by post and process server were undertaken by the Court, at instance of his client. The postal article was returned on endorsement 'Refused'. Report of the process server was also of refusal. Appellant is not entitled to maintenance and the daughter is being taken care of by his client.

4. His client had relied on **judgment dated 29th September, 2021** of the Supreme Court in **Vishwabandhu v. Sri Krishna and another [Arising out of Special Leave Petition (Civil) D no.1855 of 2020]**. By said judgment the Supreme

Court dismissed the application under order IX rule-13, Code of Civil Procedure, 1908 by relying upon sub-rule (5) in rule 9 of order V. Paragraph-19 from the judgment is reproduced below.

> *"19. The summons issued by registered post was received back with postal endorsement of refusal, as would be clear from the order dated 19.02.1997.* ***Sub-rule (5) of Order V Rule 9 of the Code states inter alia that if the defendant or his agent had refused to take delivery of the postal article containing the summons, the court issuing the summons shall declare that the summons had been duly served on the defendant. The order dated 19.02.1997 was thus completely in conformity with the legal requirements****. In a slightly different context, while considering the effect of Section 27 of the General Clauses Act, 1897, a Bench of three Judges of this Court in C.C. Alavi Haji vs. Palapetty Muhammed and Anr. made following observations:-*
>
> *14. Section 27 gives rise to a presumption that service of notice has been effected when it is sent to the correct address by registered post. In view of the said presumption, when stating that a notice has been sent by registered post to the address of the drawer, it is unnecessary to further aver in the complaint that in spite of the return of the notice unserved, it is deemed to have been served or that the addressee is deemed to have knowledge of the notice. Unless and until the contrary is proved by the addressee, service of notice is deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of business. This Court has already held that when a notice is sent by registered post and is returned with a postal endorsement "refused" or "not available in the house" or "house locked" or shop closed" or addressee not in station", due service has to be presumed. [Vide Jugdish Singh v. Natthu Singh : State of M.P. vs. Hiralal and Ors. and V. Raja Kumari vs. P. Subbarama Naidu and Anr.]."* (Emphasis supplied)

There should be no interference with said order, to result in dismissal as well of the appeal in respect of impugned judgment.

5. Having perused materials on record we propose to first deal with grounds in the appeal taken against order dated 13th January, 2022, dismissing appellant's application made under order IX rule 13. Appellant had been cross-examined. Her father also deposed to corroborate. The Family Court disbelieved contentions of appellant made by pleadings and from the box. The contentions were firstly that the services on the summons were refused by her thinking it was an act of mischief. This contention, if to be believed, must necessarily be seen as respondent inferring mischief upon the postman coming to deliver a registered postal article and the process server of the Court approaching her to serve the summons. These two incidents of service cannot give impression of mischief, even to a person who is illiterate. The Family Court found appellant is a teacher and her father, a practicing advocate.

6. Above facts regarding service of summons by registered post and through process server, both refused by appellant are undisputed. Submission of respondent on reliance of **Vishwabandhu** (supra) was correctly accepted. Sub-rule (5) in rule 9 of order V provides for situation, where service of summons is refused. The law also requires finality of judicial proceedings. The Code has amply provided for opportunity

to a defendant to contest civil proceedings. Under order V, on refusal to accept service of summons the Court can declare good service. Appellant having refused the summons did not soon thereafter approach the Family Court. She having done so in prescribed time of 30 days after impugned order was made gives rise to lawful presumption that she was aware of the proceeding going on and surfaced in Court after it stood decided ex parte against her.

7. Findings of the Family Court appear to be correct as based on the pleadings in the application for setting aside the judgment and evidence adduced. As such, we confirm impugned order dated 13th January, 2022. Having done so, we cannot and will not go behind the order, to visit the judgment on merits. Regarding appellant's claim for maintenance, she must find her remedy.

8. The appeal is found to be without merit and is dismissed.

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2024 (II) ILR-CUT-821

D. DASH, J & V. NARASINGH, J.

W.P.(C) NO. 22033 OF 2021

SMC POWER GENERATION LTD. …….Petitioner

-V-

ODISHA INDUSTRIAL INFRASTRUCTURE DEVELOPMENT CORPORATION & ANR. ……Opp.Parties

(A) INSOLVENCY AND BANKRUPTCY CODE, 2016 – Sections 30, 31 – The Corporate Insolvency Resolution Process was undertaken, claims were invited – The IDCO/O.P.No.1 did not lodge any claim – The IDCO had also not updated the claim during the liquidation process – Thereafter at the stage of liquidation IDCO/O.P.No.1 did not come forward to lodge any such claim – The resolution was approved by the adjudicating authority – Whether the O.P.No.1/IDCO could raise surprise claim after the resolution was approved by the adjudicating authority? – Held, No – Reason indicated with reference to case laws.
(Paras 20-21)

(B) TRANSFER OF PROPERTY ACT, 1882 – Section 100 – Doctrine of constructive notice – Explained.

Case Laws Relied on and Referred to :-

1. (2020) 8 SCC 531:Essar Steel India Ltd,Committee of Creditors Vrs. Satish Ku.Gupta & Ors.
2. (2021) 9 SCC 657 : Ghanashyam Mishra & Sons Pvt. Ltd. Vrs. Edelweiss Asset Reconstruction Company Ltd. & Ors.
3. W.P.(C) No. 8259 of 2019 (disposed of on 21.06.2021) : M/s.Sree Metaliks Ltd. & Anr. Vrs. State of Odisha & Ors.
4. (2024) 2 SCR 258 : Greater Noida Industrial Dev. Authority Vrs. Prabhjit Singh Soni & Anr.
5. (2020) 11 SCC 467 : Maharasthra Seamless Ltd., Vrs. Padmanavan Venketesh & Ors.
6. (2018) 1 SCC 407 : Innovative Industries Vrs. ICICI Bank.

7. (2019) 12 SCC 150 : K. Sashidhar Vrs. Indian Overseas Bank.
8. (2023) 9 SCC 499 : Moser Baer Karmachari Union Vrs. Union of India.
9. (2023) 10 SCC 60 : Paschimanchal Vidyut Vitaran Nigam Ltd., Vrs. Raman Ispat Pvt. Ltd.
10. (2009) 4 SCC 486 : Champdany Industries Ltd. v. Official Liquidator.
11. (1971) 1 SCC 757 : Haji Abadulgafur Haji Husseinbhai.

For Petitioner : Mrs. Pami Rath, Sr. Advocate, Mr.Satyajit Mohanty, D.P. Sahu & A. Acharya

For Opp.Parties: Mr.P.K. Mohanty,Sr. Adv. & P.Pasayat, P.K. Nayak, S.N.Dash. None (for O.P.No.2)

JUDGMENT Date of Hearing :16.04.2024 : Date of Judgment : 17.05.2024

D. DASH, J.

Introduction:-

The Petitioner, SMC Power Generation Limited, a Company registered under the Indian Companies Act, 1956 by filing this writ petition has invoked the jurisdiction of this Court under Articles 226 and 227 of the Constitution of India in advancing the following prayers as against the Opposite Party No.1 (Odisha Industrial Infrastructure Development Corporation (herein after in short, 'the IDCO):-

> "(i) to quash the demand letter dated 28.06.2021 issued by the Opposite Party No.1 under Annexure-25 directing the Petitioner-Company to pay an amount of Rs.13.52 crores towards penalty (damage charge) and GST;
>
> (ii) to direct the Opposite Party No.1 to refund the amount of Rs.1.92 crores paid by the Petitioner-Company under Annexure-23 series towards outstanding statutory dues of SPS/CONCAST for processing Petitioner-Company's application for transfer of land; and
>
> (iii) to direct that the application for transfer/recording of the subject lands be processed and the lands be transferred/recorded in the name of Petitioner-Company as per the order of National Company Law Tribunal in liquidation process under Insolvency and Bankruptcy Code."

2. Initially when the matter was listed on 16.08.2021, this Court passed the following order:-

> *"Issue notice both in the writ petition as well as in the interim application to the Opposite Parties through Speed Post/Registered Post with A.D., fixing the returnable date. Requisites be filed within three days Tracking report be placed on record by the next date. Replies be filed within four weeks from the date of service of notice. Rejoinder thereto, if any, be filed before the next date."*

On 23.09.2021, the following order had been passed:-

> *"1. Mr. P. Mohanty, learned Senior Advocate enters appearance on behalf of IDCO. A complete set of paper books be supplied on him during course of the day. Replies be filed within four weeks. Rejoinder thereto, if any, be filed within four weeks thereafter.*
>
> *2. List on 16th December, 2021.*
>
> *3. Till then no coercive steps shall be taken against the Petitioner pursuant to the impugned demand dated 28th June, 2021.*
>
> *4. The next date of 9th November, 2021 stands cancelled."*

The matter being listed on 16.12.2021 in the interim application (I.A. No.11821 of 2021), this Court has passed the following order:-

> *"Mr. Asok Mohanty, learned Senior Advocate appearing for the Petitioner states that without prejudice to the rights and contentions of the Petitioner, it is prepared to deposit the entire dues as demanded by IDCO with the condition that IDCO will upon such deposit execute a lease in favour of the Petitioner and revoke the cancellation and further subject to the condition that in the event the Petitioner succeeds, the entire amount deposited with interest as the Court may order will be returned to the Petitioner as directed by this Court."*
>
> *2. Mr. P.K. Mohanty, learned Senior Advocate appearing for the IDCO agrees to the above suggestion without prejudice to the rights and contentions of the IDCO.*
>
> *3. Accordingly, it is directed as under:*
>
> *(i) Without prejudice to the rights and contentions of the parties, the Petitioner will deposit with IDCO on or before 3rd January 2022 the entire dues as demanded by IDCO.*
>
> *(ii) Upon such deposit, IDCO will revoke the cancellation order challenged in the present petition and execute a lease in favour of the Petitioner in respect of the plot in question on or before 17th January, 2022.*
>
> *(iii) The above steps are subject to the further condition that in the event that the Petitioner succeeds in this writ petition, the amount deposited by it together with interest as per the direction of this Court will be returned to the Petitioner by IDCO.*
>
> *4. The I.A. is disposed of."*
>
> ***W.P.(C) No.22033 of 2021***
>
> *1. Mr. P.K. Mohanty, learned Senior Advocate appearing for the IDCO states that he will file a reply on or before 10th January, 2022. Rejoinder thereto, if any, be filed before the next date."*

Factual Background

3. The Petitioner-Company SMC Power Generation Limited is a Public Limited Company (hereinafter for short, 'the SMCPGL')incorporated under the Companies Act, 1956 is having its registered office at Hirma, Jharsuguda; the plant and Industrial Growth Center at Kukurjhangha, Badmal in the District of Jharsuguda, Odisha. The Petitioner-Company (SMCPGL) engaged in the business of manufacture and sale of Sponge Iron and Steel goods in all forms. The Petitioner-Company (SMCPGL) has an existing integrated Steel Plant located at village Hirmah, Jharsuguda with a production capacity of 200,000 MTPA of Sponge Iron, 350,000 MTPA of Billets, 250,000 MTPA of TMT Bars and it has also a 33 MW Captive Power Plant.

The Opposite Party No.1-Odisha Industrial Infrastructure Development Corporation (IDCO) is an undertaking of Government of Odisha.

3.1. The Opposite Party No.1 (IDCO) had granted a leasehold right over the land measuring Ac.154.208 dec. at Industrial Growth Center, Jharsuguda to a Company named SPS Steel and Power Limited (hereinafter in short as 'SPSS & PL') in terms of the Memorandum of Understanding (MOU) entered with the State Government for setting up integrated Steel Plaint. Similarly, land of an area of Ac.41.98 dec. had been

allotted in favour of the Pawansut Sponge (P) Limited (hereinafter referred to as 'PSPL') at Industrial Growth Center, Jharsuguda.

By virtue of an order dated 19.02.2010 passed by this Court in COPET No.35 of 2009 approving the scheme of amalgamation, PSPL was amalgamated with SPSS & PL whereby all the properties, rights and interest of PSPL stood transferred in the name of SPSS & PL.

In the same year 2010, SPSS & PL entered into a share transfer agreement with Concast Steel and Power Limited (hereinafter referred to as 'CS & PL). By virtue of that share transfer agreement, the entire shareholding of SPSS & PL was transferred in the name of CS & PL. In pursuance of the said transfer of shares, the name of SPSS & PL was changed to CS & PL with effect from 30.03.2021. And, required under law, fresh Certificate of Incorporation was issued by the Registrar of Companies, Ministry of Corporate Affairs, West Bengal (Annexure-1).

3.2. The above change of the name in the shareholding was duly intimated to the IDCO pursuant to which the Land Officer of IDCO vide letters sought necessary orders from the Chairman-cum-Managing Director of IDCO for procurement of the land in favour of CS & PL with the earlier recommendations issued in favour of SPSS & PL by letter under Annexure-2. Vide letter dated 28.03.2014 issued by the Government of Odisha in the Department of Steel and Mines under Annexure-3 the change of name from SPSS & PL to CS & PL was intimated to all the Authorities including the IDCO (Opposite Party No.1).

Even though the fact regarding change of the name of the Company was intimated to the IDCO which had been acknowledged by the Government of Odisha, the name of SPSS & PL, however, continued as before in the records of the IDCO in so far as the allotted lands are concerned.

3.3 After change of the name of the Company from SPSS & PL to CS & PL, the operation of the Steel Plant was continuing in the name of CS & PL.

On account of labour unrest and disputes the operation of the plant at the site was suspended with effect from 01.01.2017 and due notice in this regard had been given by the CS & PL to the local Administration.

3.4. At this juncture, the IDCO (Opposite Party No.1) vide its letters dated 14/16.03.2017 under Annexure-4 series, addressed to SPSS & PL cancelled the allotment of the land of an area of Ac.154.208 due to default in payment of the statutory dues concerning the allotted land in contravention of the allotment/agreement/ undertaking, and for non-functioning of the unit. It was directed that the possession of the lands be handed over, free from all encumbrances to the concerned Officials of the IDCO at Sambalpur indicating therein that the failure would entail action as deemed proper for vacation of the property at the risk and cost of the possessors. All these letters were issued to SPSS & PL and not CS & PL.

On account of closure of the plant, the above referred letters had not been received by CS & PL. However, when the cancellation letters dated 14/16.03.2017 came to be received, the CS & PL gave a proposal to the IDCO that they would make payment

towards the said outstanding dues of Rs.69,70,523/- in 12 (twelve) equal installments and, therefore, they made a request not to give effect to the order of cancellation of the allotted land. The CS & PL gave the above proposal vide its letters dated 04.05.2017 and 21.08.2017 under Annexure-5 series.

Although IDCO (Opposite Party No.1) received all those letters from CS & PL, no further communication in that regard was made by IDCO (Opposite Party No.1) with CS & PL. Rather the IDCO (Opposite Party No.1) issued the demands for payment in respect of the statutory dues under Annexure-6 and that to without giving effect to the cancellation of the allotment of the lands as intimated earlier.

3.5. When the matter stood thus, the Corporate Insolvency Resolution Process (CIRP) came to be initiated against CS & PL with the invocation of the provisions of Insolvency and Bankruptcy Code, 2016 (hereinafter called as 'the I & B Code') by M/s. Shreeshyam Metaliks Limited.

That was admitted at NCLT, Kolkata Bench by order dated 07.11.2017 (Annexure-7) whereby Interim Resolution Professional (IRP) was appointed. The IRP on 22.11.2017 made a public announcement in that regard by publication through widely circulated Newspapers (Annexure-8) as per the provision contained in section 13 of the I & B Code. The creditors of CS & PL were required to submit their claims/dues before the IRP (Interim Resolution Professional) during that CIRP within the statutory period as per the provisions of I & B Code

In view of the order passed by the NCLT, Kolkata Bench on 07.11.2017 in Company Petition (IB No.446/KB/2017) proceeding on an application under section 9 of the I&BCode filed by the M/s. Shreeshyam Metaliks Private Limited and the Newspaper advertisement/Public Announcement dated 22.11.2017 (Annexure-8), the CS & PL vide its letter dated 04.12.2017 under Annexure-9 informed the IDCO about the said developments and informed that all the dues of IDCO as had been demanded shall now be paid through NCLT route with further request to the IDCO to submit its claim in proper form (Form-B) by 05.12.2017 as per the public announcement.

(Emphasis supplied)

3.6. In that proceeding under I&B Code one Mr. Sanjay Agarwal was appointed as Interim Resolution Professional (IRP). But the Committee of Creditors (CoC) in its first meeting held on 22.12.2017 replaced Mr. Sanjay Agarwal as IRP and in his place appointed Mr. Kshitiz Chhawchharai (Opposite Party No.2) as the Resolution Professional (RP).

The newly appointed RP then made fresh public announcement of CIRP of CS & PL in widely circulated Newspapers on 19.01.2018 and 21.02.2018. The RP also called for Expression of Interest (EoI) as well as the Resolution Plan (RP) from Prospective Resolution Applicants. A public announcement in this regard was made by the RP in widely circulated Newspapers on 21.02.2018. Despite the above efforts, no Resolution Plan came to be received by the RP.

Although IDCO (Opposite Party No.1) was required to submit its claim (outstanding statutory dues and penal interest etc.) relating to CS & PL before the RP as

provided under the provisions of I & B Code, they chose not to submit any such claim during the stipulated time period before the RP.

When the CIRP period of 180 days was to be complete on 05.05.2018, the CoC in its meeting held on 13.04.2018 instructed the RP to make an application under section 12 of the I&B Code for extension of CIRP for a period of ninety days. That was accordingly extended till 04.08.2018.Even during this extension of CIRP period, the RP did not receive any Resolution Plan nor the IDCO (Opposite Party No.1) made any representation before the RP stating its claim towards outstanding statutory dues etc. The IDCO also did not intimate the RP/NCLT regarding the status of the lease land, which was cancelled by it, prior to initiation of CIRP and that the land was still in possession of CS & PL. The CoC in its meeting held on 31.07.2018 instructed the RP to file an application under section 33 of the I&B Code before the Adjudicating Authority (NCLT) to pass necessary order of Liquidation of CS & PL.

3.7. The NCLT, Kolkata Bench passed the order under section 33 of the Code for Liquidation of CS & PL and appointed the Opposite Party No.2 as the Liquidator with a direction to issue Public Announcement (under Annexure-11 series) stating that CS & PL is in liquidation in terms of Regulation 12 of Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 (in short, 'the Liquidation Process Regulations'). After that order dated 26.09.2018 passed by the NCLT, Kolkata Bench for liquidation of CS & PL, there came a public announcement in Form-B, Regulation-12 of the Liquidation Process Regulations on 29.09.2018. On that day all the stake holders of CS & PL were requested to submit the proof of their claim on or before 26.10.2018.

3.8. The IDCO (Opposite Party No.1), however, submitted nothing in support of their claim before the Liquidator (Opposite Party No.2) even though it had the knowledge regarding ongoing CRP/liquidation proceeding as would be evident from the letter dated 06.03.2018 issued by the Chief General Manager, MSME to the Division Head, IDCO, Sambalpur Division directing him to provide certain particulars in detail and documents, such as copy of allotment, lease deed, possession etc., as early as possible for preparation and submission of the petition before the NCLT, Kolkata Bench. In pursuance of the request made by the Liquidator, the Adjudicating Authority (NCLT) vide order dated 16.05.2019 allowed the Liquidator to undertake the exercise of E-auction of the assets of CS & PL.

The Assets Sale Process Memorandum inviting the bids for auction of assets of CS & PL was prepared by the Liquidator on 22.11.2019 in terms of the provisions of Liquidation Process Regulations. The public announcement of E-auction of assets of CS & PL was made by the Liquidator on 23.11.2019 in two leading Newspapers both in Odia and English vide Annexure-14 series inviting interested bidder to participate in the said auction. The IDCO (Opposite Party No.1) even after that initiation of the process for E-auction of assets of CS & PL by the Liquidator, did not lodge any claim before the Liquidator as regards the outstanding dues of CS & PL as had been demanded by them. The E-auction pursuant to the above invitation to the bidders was conducted on 23.12.2019 and this Petitioner-Company (SMCPGL) participated in the bidding process

for purchase of assets of Lot No.4 of CS & PL and it was declared as the highest bidder for that lot of the assets of CS& PL relating to Jharsuguda Plant (the assets of Lot No.4). A Letter of Intent was thus issued in favour of the Petitioner-Company (SMC PGL) on 06.01.2020. Subsequent thereto vide sale deed dated 15.02.2020, the assets of CS & PL relating to Jharsuguda Plaint (assets of Lot No.4) were transferred in favour of the Petitioner-Company (SMCPGL) by the Liquidator on receipt of payment of full bid amount of Rs.288,09,00,797.00 (consideration money) and GST to the tune of Rs.42,19,46,426.00. The lease hold land over which the Jharsuguda Plant (assets of Lot No.4) of CS & PL very much formed part of the deed of sale (Annexure-15) was specifically shown in Schedule-II of the Schedules of assets.

3.9. The Petitioner-Company (SMCPGL) after acquisition of the Jharsuguda Unit of CS & PL vide its letter dated 02.03.2020 under Annexure-16 series made a request to the IDCO (Opposite Party No.1) for transfer of leasehold interest of the land measuring Ac.196.188 under Mouza-Badmal and Kakurjanga in the District of Jharsuguda in its favour. The Liquidator (Opposite Party No.2) in this connection, also made a request to the IDCO vide its letter dated 03.03.2020 under Annexure-16.

Similarly, the Petitioner-Company (SMCPGL) also vide letter dated 04.03.2020 under Annexure-17 requested the Government in the Department of Steel and Mines and Industrial Promotion and Investment Corporation of Odisha Limited (IPICOL) for change of the name of the CS & PL to SMCPGL.

The matter was placed before the 179th State Level Facilitation Committee (SLFC) meeting of IPICOL held on 16.03.2020 and the representative of the IDCO was very much a party to the same. In the said meeting, the proposal for change of name as aforesaid was approved and communicated by IPICOL to the Petitioner-Company (SMCPGL) vide letter dated 18.03.2020. Subsequent thereto, the Government in the Department of Steel and Mines vide its letter dated 20.06.2020 under Annexure-19 approved the said change of name from CS & PL to SMCPGL.

The Liquidator (Opposite Party No.2) issued a letter on 23.03.2020 stating therein that the sale to the Petitioner-Company (SMCPGL) was only of asset under Lot No.4 (Jharsuguda Unit of CS & PL) having no past liabilities pertaining to asset or in the running of unit and the transfer to the Petitioner-Company (SMCPGL) was as such. It was further clarified that the Petitioner-Company (SMCPGL) has assumed no liability towards discharge of any such past dues. It was next clarified that the Petitioner-Company (SMCPGL) had not assumed liability of any nature, whatsoever; in relation to asset under Lot No.4, (Jharsuguda Unit of CS & PL) and that the liabilities which had arisen before the date of sale would be dealt by the Liquidator (Opposite Party No.2) in accordance with section 53 of the Code. The Petitioner-Company (SMCPGL) in order to restart the acquired unit then applied to various Government Authorities in different Departments seeking approval and license. **(Emphasized)**

3.10. When the matter stood thus, the Divisional head of IDCO, Sambalpur vide letter dated 12.08.2020 (Annexure-21) for the first time intimated the Petitioner-Company (SMCPGL) that due to default in payment of statutory dues of the leasehold plots and non-working of plants, the allotment had been cancelled and it was then intimated that

the said outstanding statutory dues of the SPSS & PL was Rs.1,68,55,329.00 and that of CS & PL was Rs.20,44,669.00, stating further that in addition to that damage @ Rs.500 per acre per day coming to Rs.9,57,63,168.00 for the period from 17.03.2017 to 12.08.2020 was also payable. The Divisional Head of IDCO, Sambalpur further stated that in this context, direction had been sought for from the Headquarter.

Basing on the application of the Petitioner-Company (SMCPGL) for transfer of the leasehold land of SPS/ CS& PL, the Petitioner-Company (SMCPGL) then was advised to apply Online as per the prevailing procedure of the IDCO (Opposite Party No.1) for said transfer in IDCO portal. After submission of said application for transfer of the land in IDCO (Opposite Party No.1) portal, the IDCO (Opposite Party No.1) tagged the land details of erstwhile SPS &CSPL into the application of the Petitioner-Company (SMCPGL) and simultaneously, the outstanding dues of those two Companies amounting to Rs.1.92 crores was shown as liability in the hands of the Petitioner-Company.

3.11. The Petitioner-Company (SMCPGL) then represented before the IDCO (Opposite Party No.1) that such dues need be settled at NCLT and not by the Petitioner-Company (SMCPGL) in terms of the letter of the Liquidator (Opposite Party No.2) dated 23.03.2020 under Annexure-20. Since the Petitioner-Company (SMCPGL) was facing problem with the Departments of Government in relation to settlement of the past liabilities of CS & PL, a meeting was held on 09.10.2020 under the Chairmanship of Principal Secretary, Industries Department along with the Chairman-cum-Managing Director of IDCO(Opposite Party No.1) and the Managing Director of IPICOL and the representatives of various other Government Departments and Agencies. It was decided therein that IDCO (Opposite Party No.1) shall be guided by the order of NCLT in the matter. The minutes of the meeting dated 09.10.2020 (Annexure-22) reflect the said state of affair.

Despite the same, the Petitioner-Company (SMCPGL) was informed by the IDCO (Opposite Party No.1) that its application for transfer of land could not be processed till the outstanding dues reflected in the application were fully paid. Under the circumstance, in order to avoid delay being compelled, the Petitioner-Company (SMCPGL) made the online payment of Rs.1,92,24,618.00 on 09.10.2020 vide Annexure-23 series for settlement of outstanding statutory dues of SPSS & PL and CSPL for processing its application for transfer of land even though it was not payable by the Petitioner-Company (SMCPGL).

3.12. The Petitioner-Company (SMCPGL) then intimated the IDCO (Opposite Party No.1) vide letter dated 09.10.2020 that by operation of law as well as by the conduct of the IDCO (the Opposite Party No.1), cancellation of lease stood revoked and the IDCO (Opposite Party No.1) waived its right to claim any amount towards the outstanding dues of SPSS & PL and CS & PL by not participating in the proceeding under the I&B Code. Therefore, the demand of Rs.1.92 crores for processing the application of the Petitioner-Company (SMCPGL) for transfer of the land and subsequent payment of the same by the Petitioner-Company (SMCPGL) under the compelling circumstance is said to be illegal, arbitrary and contrary to law.

3.13. After payment of the outstanding statutory dues of Rs.1.92 crores and odd so as to process the Petitioner-Company's transfer application in order to ensure smooth sail in running the unit, the IDCO then further informed that in terms of Clause-2.11 of the Circular dated 02.11.2016 and 23.07.2016 (Annexure-24 series), the revocation of cancellation of allotment is allowable only on payment of penalty (damage charges) @ Rs.500/- per day from the date of cancellation up-till the date of revocation.

The Chief General Manage, IDCO then issued a letter dated 28.06.2020 under Annexure-25 demanding payment of Rs.13,52,00,322.00 towards penalty (damage charges) and GST for revocation of cancellation of the allotment of IDCO land measuring Ac.154.208 with further stipulation therein that in case the Petitioner-Company (SMCPGL) failed to pay, it would be construed that the Petitioner-Company (SMCPGL) was no more interested for revocation of cancellation of allotment and also not interested for any further progress of its proposal.

3.14. The Petitioner-Company (SMCPGL) states that the impugned demand raised under letter dated 28.06.2021 under Annexure-25 to the tune of Rs.13,52,00,322.00 for revocation of cancellation of allotment is illegal, arbitrary, perverse and contrary to law, i.e., the provisions of I& B Code and Liquidation Process Regulations.

The Petitioner-Company (SMCPGL) having received the demand letter dated 28.06.2021 from the IDCO (Opposite Party No.1) under Annexure-25 again made a representation before the Chairman-cum-Managing Director of the Opposite Party No.1 (IDCO) vide letter dated 15.07.2021 under Annexure-26 with a request for waiver of penalty/damage charge. But that went unheeded.

3.15. The Petitioner-Company (SMCPGL) had participated in the E-auction process with a fixed pre-assessed amount for acquiring the assets of the erstwhile CS & PL which included the leasehold land in question. It is said that the Petitioner-Company (SMCPGL) had infused huge amount in making the plant operational. The industrial unit had revived and is operational having provided employment opportunity for more than 3000 persons besides generating revenue for the Government to the tune of Rs.180 crores per annum. The demand made by the IDCO (Opposite Party No.1) is said to be arbitrary and illegal and as the IDCO (Opposite Party No.1) had failed to file any claim with the RP/Liquidator (Opposite Party No.2), it is said that the IDCO (Opposite Party No.1) cannot now seek to recover the said dues from the Petitioner-Company (SMCPGL) which is in contravention of the provisions of the I&B Code and Liquidation Process Regulations. The IDCO (Opposite Party No.1) being Operational Creditors is bound by the outcome of the CRIP in the same method and manner as provided for all other operational creditors of CS & PL.

3.16. The IDCO (Opposite Party No.1) having the knowledge regarding initiation of CIRP proceeding against CS & PL had never made/lodged any claim before the NCLT nor before the RP or even before the Liquidator (Opposite Party No.2) as regard all the said dues which, are now being demanded.

Therefore, it is stated that the claim of IDCO (Opposite Party No.1) against this Petitioner-Company (SMCPGL) for payment of said outstanding dues of SPSS & PL/CS

& PL and penalty (damage charge) is also unsustainable in the eye of law since the same patently runs counter to the provisions of the I&B Code read with the Liquidation Process Regulations as well as law laid down by the Apex Court.

The CS & PL was in possession of the land when the IDCO (Opposite Party No.1) issued the letter of cancellation of the allotted land to the SPSS & PL and that was fully within the knowledge of IDCO (Opposite Party No.1) as would be revealed from the fact that the CS & PL was seeking to pay the statutory dues in installments and for revocation of the cancellation of the allotment of the land. The IDCO (Opposite Party No.1) pursuant to the same issued statement directing payment of statutory dues of Rs.69,70,523 to CS & PL. So, it is said that the letter of cancellation of allotment of the land was never given effect to and said statutory dues have already been paid by the Petitioner-Company (SMCPGL) on 09.10.2020 (Annexure-23 series). Demand of Rs.1.92 crores by IDCO towards outstanding statutory dues against SPSS & PL/PS & PL for processing of the Petitioner's application for transfer of land and subsequent payment thereof by the Petitioner-Company (SMCPGL) was under the compelling circumstance in order to run the unit which was idle even after huge investment is assailed as illegal, arbitrary and contrary to law and thus it is said that the Petitioner-Company (SMCPGL) is entitled to refund of the said deposited amount as the Petitioner-Company (SMCPGL) is not the original allottee but an auction purchaser in the IBC proceeding. All such demands made by the IDCO (Opposite Party No.1) being for the period prior to the vesting assets of the units upon the Petitioner-Company (SMCPGL) as per the action taken in that IBC proceeding by the order of the NCLT are said to be unsustainable.

4. The IDCO (Opposite Party No.1) in its counter affidavit stated all the background facts of the case as regards the allotment of the land to SPSS&PL and PSPL which then came to the hands of SPSS&PL and finally the same coming to rest with CS & PL which of course, though within the knowledge of IDCO (Opposite Party No.1), there has been no final approval.

It is stated that due to non-payment of statutory dues, letter of cancellation of allotment of the land had been rightly issued by the IDCO under Annexure-D/1 series.

4.1. It is admitted by the Opposite Party No.1 (IDCO) that finally by virtue of the order of NCLT, Kolkata Bench on 26.09.2018, the unit in question of CS & PL which was previously SPSS & PL had been sold to the Petitioner-Company-SMCPGL. It is also admitted that the Opposite Party No.2 had been appointed as the Liquidator and the liquidation process having started was completed on 23.12.2019 and in that process the Petitioner-Company (SMCPGL) was the successful bidder. The Petitioner-Company (SMCPGL) having acquired the unit in the public auction carried out by the Liquidator(Opposite Party No.2) under the I&B Code read with the Liquidation Process Regulations, on 15.02.2020 the sale deed was executed by the Liquidator (Opposite Party No.2) in favour of the Petitioner-Company (SMCPGL) and that the Liquidator (Opposite Party No.2) handed over the possession of the assets to the Petitioner-Company (SMCPGL) on 15.02.2020.

4.2. It is further admitted that the Principal Secretary to Government in the Department of Industries had taken a meeting on 09.10.2020 and the decision therein as reflected in the minutes, was that the IDCO(Opposite Party No.1) shall be guided by the order of the NCLT. It is further admitted that the Petitioner-Company (SMCPGL) had deposited Rs.1,92,24,618.00 on 09.10.20 under Annexure-23 series towards the outstanding dues and the IDCO Board thereafter decided to revoke the cancellation of allotment upon release of the demand from the Petitioner-Company (SMCPGL) towards damage and GST as per their Circular under Annexure-24 series. It is stated that the total area of land in the hands of SPSS & PL was Ac.196.188 and consequent upon the transfer of the share of SPSS & PL in favour of CS & PL, Government in the Department of Steel and Mines vide letter dated 28.03.2014 had observed that this change of the name of the unit would be considered for the acts already done/to be done by the proponent pursuant to the original MOU. So, it is said that IDCO (Opposite Party No.1) had not approved the change of the name of the SPSS & PL.

It is then, however, admitted that PSPL had made a representation to the IDCO (Opposite Party No.1) on 06.06.2017 and 20.06.2017 that due to labour unrest, the unit had been put on suspension of work with effect from 01.01.2017 and it had requested for waiver of the interest and penal interest and to allow them to pay the outstanding dues in installments. It is stated that as per the IDCO norms, there is no provision of waiver of interest. It is also stated that on receipt of the cancellation letters, CS & PL had represented to the IDCO for revocation of cancellation of allotment of land. But the reply had been given that in the default of payment of outstanding dues in deviation of the Clause in the agreement executed between the IDCO and SPSS & PL the allotment had been cancelled and that was intimated vide letter dated 02.06.2017 under Annexure 4/1.

4.3. It is further stated that CS & Pl then vide letter dated 04.12.2017 intimated the IDCO about the initiation of CIRP by the NCLT, Kolkata Bench vide its order dated 07.11.2017. It is also admitted that the CS & PL then had informed the IDCO that the outstanding dues would be paid through NCLT route, in further apprising that the matter had been published in the Company website and English Newspaper (Business Standard) on 22.11.2017 fixing the last date of submission of claims as 08.12.2017. It is also admitted that the IDCO, did not file any claim therein.

It is next stated that IDCO was not aware of the fact regarding change of IRP and appointment of the Opposite Party No.2 as RP. It is stated that IDCO (Opposite Party No.1) being the owner of the leased lands had not received any notice from the RP for filing any claim.

It is next stated that by the time the auction was carried out by the order of the Adjudicating Authority (NCLT), leasehold land was under the occupation of the CS &PL and it had already been cancelled on 16.03.2017 for nonpayment of the statutory dues. Therefore, it is said that cancellation ought to have been revoked before the auction and then the auction ought to have been carried out which has not been done in the present case.

4.4. It is thus asserted that rightly the decision had been taken for revocation of the cancellation of allotment of the land payment since all such outstanding dues including the penalty (damage charges) and GST are payable by the Petitioner-Company (SMCPGL), which has been impliedly consented to by the Petitioner-Company (SMCPGL).

In view of all the aforesaid, it is said that the Petitioner-Company (SMCPGL) has to pay the damage charges with GST to the tune of Rs.11,45,76,544/- and Rs.2,06,23,778/- besides the payment of Rs.1.92 crores already made.

5. The prayer thus now is limited as to refund of the all said demanded amount to the Petitioner-Company (SMCPGL) including what has already been paid.

Submissions:-

6. Mrs. Pami Rath, learned Senior Counsel for the Petitioner-Company (SMCPGL) referring to the provision of section 3(6), 3(10), 3(11), 3(12), 5(7) and 5(8) of I & B Code, particularly to clause (d) thereunder submitted that the IDCO (Opposite Party No.1) and its due were covered by the legislation, i.e., the I&B Code.

She further submitted that sections 6 and 7 of the I&B Code allowed the IDCO (Opposite Party No.1) to initiate Insolvency Resolution Process and thus IDCO (Opposite Party No.1) was squarely covered under the I&B Code as regards its dues. According to her, section 14, particularly Clause (d) of sub-section (1) of said section of the I&B Code protects the right of possession over any property of the Corporate Debtor and section 15 provides modalities of public announcement to be made in terms of section 13 of the I&B Code. The said section 13 also postulates appointment of IRP (Interim Resolution Professional). Section 15(1)(d) of the I&B Code states that the IRP shall receive all the claims and the management of the Corporate Debtor shall vest in the IRP as provided in section 17 of the I&B Code. She further submitted that section 18 of the I&B Code provides that the IRP was the person to whom all the creditors are duty bound to make fair disclosure of all liabilities and assets, as per section 21 after collecting all such information and the liabilities, the IRP would form a CoC (Committee of Creditors). She, therefore, submitted that had the IDCO (Opposite Party No.1) made the claim/s as regards the dues which are now demanded against the Petitioner-Company (SMCPGL); it would have been very much a party to it. She also submitted that as per section 34(2) of the I&B Code on the appointment of the Liquidator all powers shall vests in the Liquidator. When section 35(1) (a), (b), (f), (j), (m) and section 36 of the IBC clearly lay down that the Corporate Debtor can no more function and all claims against it and the assets then would be at the disposition of the Liquidator. She further submitted that when section 39 of the I&B Code gives the power to the Liquidator to verify the claim, section 40 empowers the Liquidator to admit or reject the claims and section 41 of the I&B Code gives the exclusive power to the Liquidator to make valuation of the claim whereafter section 42 of the I&B Code provides a forum of Appeal against the decision of the Liquidator and sections 53 of the IBC deals with the distribution of assets whereas section 54 of the I&B Code deals with the dissolution of the Corporate Debtor.

6.1. Mrs. Rath, submitted that in the case at hand, the Corporate Debtor (CS & PL) was in possession of the land of the IDCO (Opposite Party No.1) as the IDCO has never evicted the Corporate Debtor (CS & PL) or taken possession of the same and rather it was with their full knowledge. Therefore, as per section 14(1) (d) of the I&B Code, the right to possession being recognized as a right, was not to be disturbed, once the moratorium was declared. She next submitted that Annexure-2,3,8,9,11,12,13 and 14 being read together, it would be evident that the IDCO (Opposite Party No.1) was aware of the proceeding under the I&B Code and also regarding the provisions therein, that required the IDCO (Opposite Party No.1) to lodge the claims. Referring to the events dated 07.11.2017, 22.11.2017, 04.12.2017, 09.01.2018, 21.02.2018, 26.09.2018, 29.09.2018, 26.12.2018 and 22.11.2019/23.11.2019, she submitted that IDCO (Opposite Party No.1) at all these stages was given the opportunity to lodge its claim and was duty bound to do so if it wanted the past debt to be recovered. She then submitted that as per the Codal provisions, the present transaction in favour of the Petitioner-Company (SMCPGL) was not a transfer of liabilities and the Petitioner-Company (SMCPGL) did not step into the shoes of the erstwhile CS & PL but as per section 64 of the Code, all liquidation of the assets of the Corporate Debtor (CS & PL), the Corporate Debtor (CS & PL) stood dissolved and that liquidation has resulted in the legal death of the entity after sale of all its assets and, therefore, there is no transfer of liabilities. But, only discharge of the liabilities out of the sale proceeds are to be carried out. She thus submitted that in view of the provision contained in sections 33 to 54 of the I&B Code, the only way by which that the IDCO (Opposite Party No.1) can recover its dues is by approaching the Liquidator (Opposite Party No.2) resorting to the provisions of law, if so permitted.

In order to buttress her submission, she relied upon the decisions of the Hon'ble Apex Court in case of ***Essar Steel India Limited, Committee of Creditors Vrs. Satish Kumar Gupta & Others (2020) 8 SCC 531; Ghanashyam Mishra and Sons Private Limited through the Authorized Signatories Vrs. Edelweiss Asset Reconstruction Company Limited & Others, through the Directors and Others, (2021) 9 SCC 657*** and a decision of this Court in case of ***M/s. Sree Metaliks Ltd. & Another Vrs. State of Odisha and Others in W.P.(C) No.8259 of 2019*** disposed of an 21.06.2021.

7. Mr. P.K. Mohanty, learned Senior Counsel for the IDCO (Opposite Party No.1) submitted that the IDCO (Opposite Party No.1) is a Public Authority, Government of Odisha Undertaking and also Statutory Authority under the Odisha Industrial Infrastructure Development Corporation Act, 1980. It owes the responsibility to protect the public money. He further submitted that it may be under bona fide mistake and also impression that the dues as aforesaid under Annexure 23 series (Rs.1,92,24,618/-) and Annexure-25 (Rs.11,62,00,322/-) should be recovered from the subsequent purchaser from the earlier allottee (which in the present case is the Petitioner-Company-SMCPGL); somehow did not submit its claim before the RP pursuant to the public notice or thereafter. He submitted that under the circumstance, this Court, being a Court of equity, if holds that the Petitioner-Company-SMCPGL is not liable to pay the dues, in that event the legal right of the IDCO (Opposite Party No.1) be kept alive and liberty may be given to move the Liquidator under section 39 read with section 40 of the I&B

Code with a petition for condonation of delay in laying the claim for determination of the claim dues so as to be received as payment from out of the sale proceeds already obtained through the auction of the property and the period of pendency of the writ petition be not counted towards the delay in submitting the claim and/or to take recourse such other remedy as available under the I&B Code to protect the dues of the IDCO (Opposite Party No.1). In support of said submission, he relied on the decision of the Apex Court in ***Greater Noida Industrial Development Authority Vrs. Prabhjit Singh Soni & Another (2024) 2 SCR 258*** and contended that even at a belated stage, the claim of an Public Authority can be entertained.

8. We have meticulously gone through the written notes of submission filed by the Petitioner-Company (SMCPGL) and the IDCO (Opposite Party No.1).

Analysis and Finding:-

9. The I & B Code is a complete Code in itself which deals with situations on a holistic perspective concerning a Company and all stake holders, irrespective of whether the provisions pertains to the Resolution Plan or the Liquidation Process. It is self sufficient Code and provides a complete mechanism in respect of Corporate Insolvency Resolution (CIR) and liquidation.

The I&B Code is divided in to two halves. Firstly, sections 1 to 32 are concerned with reconstruction of the Company by Resolution Process. Secondly, Section 33 of onwards deals with the Liquidation if resolution plan/s is/are not received or rejected and thus resolution is not possible.

10. The central issue being the alleged outstanding owed by the Petitioner-Company (SMCPGL) to the IDCO (Opposite Party No.1); it is not disputed by the IDCO (Opposite Party No.1) that the aforementioned demand pertains to the period prior to the initiation of the Corporate Insolvency Resolution Process (CIRP) against the CS & PL which was admitted by NCLT by order dated 07.11.2017. The scenario that on the basis of afore-stated recapitulation of facts, would indicate that when IRP on 22.11.2017 made a public announcement with regard to the initiation of the CIRP through widely circulated Newspaper (Annexure-8) as per the provision of section 13 of the I&B Code, the IDCO (Opposite Party No.1) had not lodged its claim upon the initiation of the CIRP. When it failed and it was resolved by the CoC to liquidate the Company and after such order of the NCLT for liquidation of the Company (CS & PL), appointing the RP as the Liquidator (Opposite Party No.2), the Liquidator (Opposite Party No.2) once again called for lodging of claims by way of public announcement under Liquidation Process Regulations and then also no claim was lodged by IDCO (Opposite Party No.1) in accordance with Regulation 31-A of the Liquidation Process Regulations.

11. The relevant Regulations, i.e., Regulations 6, 7, 10, 12 and 13 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (for short, the Insolvency Resolution Process Regulations) governing and regulating the Insolvency Resolution Process (IRP) for Corporate Persons read as under:

6. Public announcement.—

(1) An insolvency professional shall make a public announcement immediately on his appointment as an interim resolution professional.

Explanation: 'Immediately' means not later than three days from the date of his appointment.

(2) The public announcement in sub-regulation (1) shall: (a) be in Form A of the Schedule; (b) be published-- (i) in one English and one regional language newspaper with wide circulation at the location of the registered office and principal office, if any, of the corporate debtor and any other location where in the opinion of the interim resolution professional, the corporate debtor conducts material business operations; (ii) on the website, if any, of the corporate debtor; and (iii) on the website, if any, designated by the Board for the purpose, (ba) state where claim forms can be downloaded or obtained from, as the case may be; (bb) offer choice of three insolvency professionals identified under Regulation 4-A to act as the authorised representative of creditors in each class; and (c) provide the last date for submission of proofs of claim, which shall be fourteen days from the date of appointment of the interim resolution professional.

(3) The applicant shall bear the expenses of the public announcement which may be reimbursed by the committee to the extent it ratifies them.

7. Claims by operational creditors.-

(1) A person claiming to be an operational creditor, other than workman or employee of the corporate debtor, shall submit claim with proof to the interim resolution professional in person, by post or by electronic means in Form B of the Schedule:

Provided that such person may submit supplementary documents or clarifications in support of the claim before the constitution of the Committee.

(2) The existence of debt due to the operational creditor under this regulation may be proved on the basis of-

(a) the records available with an information utility, if any; or

(b) other relevant documents, including-- (i) a contract for the supply of goods and services with corporate debtor; (ii) an invoice demanding payment for the goods and services supplied to the corporate debtor; (iii) an order of a court or tribunal that has adjudicated upon the non-payment of a debt, if any; (iv) financial accounts. (v) copies of relevant extracts of Form GSTR-1 and Form GSTR-3B filed under the provisions of the relevant laws relating to Goods and Services Tax and the copy of e-way bill wherever applicable: Provided that provisions of this sub-clause shall not apply to those creditors who do not require registration and to those goods and services which are not covered under any law relating to Goods and Services Tax.

10. Substantiation of claims.-

The interim resolution professional or the resolution professional, as the case may be, may call for such other evidence or clarification as he deems fit from a creditor for substantiating the whole or part of its claim.

xxx xxx xxx xxx

12. Submission of proof of claims.-

(1) Subject to sub- regulation (2), a creditor shall submit claim with proof on or before the last date mentioned in the public announcement.

(2) A creditor, who fails to submit claim with proof within the time stipulated in the public announcement, may submit the claim with proof to the interim resolution professional or the resolution professional, as the case may be, on or before the ninetieth day of the insolvency commencement date.

(3) Where the creditor in sub-regulation (2) is a financial creditor under Regulation 8, it shall be included in the committee from the date of admission of such claim: Provided that such inclusion shall not affect the validity of any decision taken by the committee prior to such inclusion.

12-A. Updation of claim.-A creditor shall update its claim as and when the claim is satisfied, partly or fully, from any source in any manner, after the insolvency commencement date.

13. Verification of claims.-

(1) The interim resolution professional or the resolution professional, as the case may be, shall verify every claim, as on the insolvency commencement date, within seven days from the last date of the receipt of the claims, and thereupon maintain a list of creditors containing names of creditors along with the amount claimed by them, the amount of their claims admitted and the security interest, if any, in respect of such claims, and update it.

(2) The list of creditors shall be- (a) available for inspection by the persons who submitted proofs of claim; (b) available for inspection by members, partners, directors and guarantors of the corporate debtor or their authorised representatives; (c) displayed on the website, if any, of the corporate debtor; (ca) filed on the electronic platform of the Board for dissemination on its website: Provided that this clause shall apply to every corporate insolvency resolution process ongoing and commencing on or after the date of commencement of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Fifth Amendment) Regulations, 2020; (d) filed with the Adjudicating Authority; and (e) presented at the first meeting of the committee."

12. When the Resolution Process does not yield any success or no application is received and in certain other situations, the Corporate Debtor enters into the liquidation phase, section 33 of the I&B Code comes into play, which is extracted herein below:-

Section 33 - Initiation of liquidation

(1) Where the Adjudicating Authority, --

(a) before the expiry of the insolvency resolution process period or the maximum period permitted for completion of the corporate insolvency resolution process under section 12 or the fast track corporate insolvency resolution process under section 56, as the case may be, does not receive a resolution plan under sub-section (6) of section 30; or

(b) rejects the resolution plan under section 31 for the non-compliance of the requirements specified therein, it shall-

(i) pass an order requiring the corporate debtor to be liquidated in the manner as laid down in this Chapter;

(ii) issue a public announcement stating that the corporate debtor is in liquidation; and

(iii) require such order to be sent to the authority with which the corporate debtor is registered.

(2) Where the resolution professional, at any time during the corporate insolvency resolution process but before confirmation of resolution plan, intimates the Adjudicating Authority of the decision of the committee of creditors 2[approved by not less than sixty-six per cent. of the voting share] to liquidate the corporate debtor, the Adjudicating Authority shall pass a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).

Explanation- For the purposes of this sub-section, it is hereby declared that the committee of creditors may take the decision to liquidate the corporate debtor, any time after its constitution under sub-section (1) of section 21 and before the confirmation of the resolution plan, including at any time before the preparation of the information memorandum.

(3) Where the resolution plan approved by the Adjudicating Authority 4[under section 31 or under sub-section (1) of section 54L] is contravened by the concerned corporate debtor, any person other than the corporate debtor, whose interests are prejudicially affected by such contravention, may make an application to the Adjudicating Authority for a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).

(4) On receipt of an application under sub-section (3), if the Adjudicating Authority determines that the corporate debtor has contravened the provisions of the resolution plan, it shall pass a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).

(5) Subject to section 52, when a liquidation order has been passed, no suit or other legal proceeding shall be instituted by or against the corporate debtor:

Provided that a suit or other legal proceeding may be instituted by the liquidator, on behalf of the corporate debtor, with the prior approval of the Adjudicating Authority.

(6) The provisions of sub-section (5) shall not apply to legal proceedings in relation to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

(7) The order for liquidation under this section shall be deemed to be a notice of discharge to the officers, employees and workmen of the corporate debtor, except when the business of the corporate debtor is continued during the liquidation process by the liquidator."

13. Upon initiation of liquidation, a liquidator has to be appointed, to carry out the liquidation process and manage other affairs of the corporate debtor. The RP, appointed to conduct the resolution process, is ordinarily appointed as liquidator. The powers and duties of liquidator are prescribed by Section 35 of the I&B Code. It includes verification of claims of creditors, evaluation of assets of the corporate debtor, carrying on the business of the corporate debtor, taking into consideration the assets of the corporate debtor, etc. The liquidator has to issue a public announcement within 5 days from appointment in a prescribed format; the purpose of public announcement is to call upon creditors and others persons to submit their claims in relation to the corporate debtor. The creditors of the corporate debtor have to send their claims within 30 days from the initiation of the liquidation process. After the receipt of the claims, the liquidator has to verify the claims submitted by the creditors (Section 39). The liquidator may also ask the creditors to submit any evidence in relation to their claims for the purpose of verification.

14. The Liquidator is empowered to either admit or reject the claims on the basis of due verification. If the liquidator rejects or admits a claim of a creditor, the same has to be communicated to the creditor as well as the corporate debtor within 7 days from such decision (Section 40). The liquidator has to concurrently determine what constitutes the "liquidation estate". Section 36 (3) lists out the various assets and claims, etc. which form the liquidation estate.22 After the admission of claims, the liquidator has to determine the value of the claims, for the purpose of distribution of assets of the Corporate Debtor. **(Emphasized)**

15. In terms of Regulation 47 of the Liquidation Regulations, liquidation proceedings should be completed within 1 year from the date of its initiation.

This contrasts with the extendable time limit of 330 days, for the resolution process under I & B Code.

16. During the insolvency resolution process, a secured creditor is not permitted to realize its dues by initiating any proceeding. This is by virtue of Section 14 (1) (c) which enables the imposition of a moratorium period, during which a secured creditor is precluded from bringing any action to foreclose, recover or enforce any security interest. Secured creditors' rights are restored only in the event of failure of the insolvency resolution process, at the stage of liquidation.

17. Regulations 16, 17, 31, 31A, 32, 32-A and 33 of the Liquidation Process Regulations, read as under:

"16. Submission of claim.

(1) A person, who claims to be a stakeholder, shall submit its claim, or update its claim submitted during the corporate insolvency resolution process, including interest, if any, on or before the last date mentioned in the public announcement.

(2) A person shall prove its claim for debt or dues to him, including interest, if any, as on the liquidation commencement date.

17. Claims by operational creditors.

(1) A person claiming to be an operational creditor of the corporate debtor, other than a workman or employee, shall submit proof of claim to the liquidator in person, by post or by electronic means in Form C of Schedule II.

(2) The existence of debt due to an operational creditor under this Regulation may be proved on the basis of-

(a) the records available with an information utility, if any; or

(b) other relevant documents which adequately establish the debt, including any or all of the following –

(i) a contract for the supply of goods and services with corporate debtor;

(ii) an invoice demanding payment for the goods and services supplied to the corporate debtor;

(iii) an order of a court or tribunal that has adjudicated upon the non- payment of a debt, if any; and

(iv) financial accounts.

31. List of stakeholders.

(1) The liquidator shall prepare a list of stakeholders, category-wise, on the basis of proofs of claims submitted and accepted under these Regulations, with-
(a) the amounts of claim admitted, if applicable,
(b) the extent to which the debts or dues are secured or unsecured, if applicable,
(c) the details of the stakeholders, and
(d) the proofs admitted or rejected in part, and the proofs wholly rejected.

(2) The liquidator shall file the list of stakeholders with the Adjudicating Authority within forty-five days from the last date for receipt of claims, and the filing of the list shall be announced to the public in the manner specified in Regulation 12(3).

(3) The liquidator may apply to the Adjudicating Authority to modify an entry in the list of stakeholders filed with the Adjudicating Authority, when he comes across additional information warranting such modification, and shall modify the entry in the manner directed by the Adjudicating Authority.

(4) The liquidator shall modify an entry in the list of stakeholders filed with the Adjudicating Authority, in the manner directed by the Adjudicating Authority while disposing off an appeal preferred under section 42.

(5) The list of stakeholders, as modified from time shall be-

(a) available for inspection by the persons who submitted proofs of claim;
(b) available for inspection by members, partners, directors and guarantors of the corporate debtor;
(c) displayed on the website, if any, of the corporate debtor.

31A. Stakeholders' Consultation Committee.

(1) The liquidator shall constitute a consultation committee within sixty days from the liquidation commencement date, based on the list of stakeholders prepared under regulation 31, to advise him on the matters relating to sale under regulation 32.

(2) The composition of the consultation committee under sub-regulation (1) shall be as shown in the Table below:

Class of Stakeholders	Description	Number of Representatives
(1)	(2)	(3)
Secured financial creditors, who have relinquished under section 52	Where claims of such creditors admitted during the liquidation process is less than 50% of liquidation value	Number of creditors in the category, subject to a maximum of 2
Unsecured financial creditors	Where claims of such creditors admitted during the liquidation process is less than 25% of liquidation value	Number of creditors in the category, subject to a maximum of 1

Where claims of such creditors admitted during the liquidation process is at least 50% of liquidation value	Number of creditors in the category, subject to a maximum of 4

Where claims of such creditors admitted during the liquidation process is at least 25% of liquidation value	Number of creditors in the category, subject to a maximum of 2

Workmen and employees	1	1
Government	1	1

Operational creditors other than Workmen, employees and Governments	Where claims of such creditors admitted during the liquidation process is less than 25 % of liquidation value	Number of creditors in the category, subject to a maximum of 1

Where claims of such creditors admitted during the liquidation process is at least 25% of liquidation value	Number of creditors in the category, subject to a maximum of 2

Shareholders or partners, if any		1

(3) The liquidator may facilitate the stakeholders of each class to nominate their representatives for inclusion in the consultation committee.

(4) If the stakeholders of any class fail to nominate their representatives, the required number of stakeholders with the highest claim amount in that class shall be included in the consultation committee.

(5) Subject to the provisions of the Code and these regulations, representatives in the consultation committee shall have access to all relevant records and information as may be required to provide advice to the liquidator under sub-regulation (1).

(6) The liquidator shall convene a meeting of the consultation committee when he considers it necessary and shall convene a meeting of the consultation committee when a request is received from at least fifty-one percent of representatives in the consultation committee.

(7) The liquidator shall chair the meetings of consultation committee and record deliberations of the meeting.

(8) The liquidator shall place the recommendation of committee of creditors made under sub-regulation (1) of regulation 39C of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, before the consultation committee for its information.

(9) The consultation committee shall advise the liquidator, by a vote of not less than sixty-six percent of the representatives of the consultation committee, present and voting.

(10) The advice of the consultation committee shall not be binding on the liquidator:

Provided that where the liquidator takes a decision different from the advice given by the consultation committee, he shall record the reasons for the same in writing.

32. Sale of Assets, etc.- The liquidator may sell-

(a) an asset on a standalone basis;
(b) the assets in a slump basis;
(c) a set of assets collectively;
(d) the assets in parcels;
(e) the corporate debtor as a going concern; or
(f) the business (s) of the corporate debtor as a going concern:

Provided that where an asset is subject to security interest, it shall not be sold under any of the clauses (a) to (f) unless the security interest therein has been relinquished to the liquidation estate.

32-A. Sale as a going concern.

(1) Where the committee of creditors has recommended sale under clause (e) or (f) of regulation 32 or where the liquidator is of the opinion that sale under clause (e) or (f) of regulation 32 shall maximise the value of the corporate debtor, he shall endeavour to first sell under the said clauses.

(2) For the purpose of sale under sub-regulation (1), the group of assets and liabilities of the corporate debtor, as identified by the committee of creditors under sub-regulation (2) of regulation 39C of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 shall be sold as a going concern.

(3) Where the committee of creditors has not identified the assets and liabilities under sub-regulation (2) of regulation 39C of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the liquidator shall identify and group the assets and liabilities to be sold as a going concern, in consultation with the consultation committee.

(4) If the liquidator is unable to sell the corporate debtor or its business under clause (e) or (f) of regulation 32 within ninety days from the liquidation commencement date, he shall proceed to sell the assets of the corporate debtor under clauses (a) to (d) of regulation 32.

33. Mode of sale.

(1) The liquidator shall ordinarily sell the assets of the corporate debtor through an auction in the manner specified in Schedule I.

(2) The liquidator may sell the assets of the corporate debtor by means of private sale in the manner specified in Schedule I when-

(a) the asset is perishable;
(b) the asset is likely to deteriorate in value significantly if not sold immediately;
(c) the asset is sold at a price higher than the reserve price of a failed auction; or
(d) the prior permission of the Adjudicating Authority has been obtained for such sale:
Provided that the liquidator shall not sell the assets, without prior permission of the Adjudicating Authority, by way of private sale to-

(a) a related party of the corporate debtor;
(b) his related party; or
(c) any professional appointed by him.

(3) The liquidator shall not proceed with the sale of an asset if he has reason to believe that there is any collusion between the buyers, or the corporate debtor's related parties and buyers, or the creditors and the buyer, and shall submit a report to the Adjudicating Authority in this regard, seeking appropriate orders against the colluding parties."

18. At this juncture, we need to take into account the provisions contained in sections 7, 29, 31, 33, 52 and 53 of the I&B Code, which read as under:-

"**7**. Appointment of professionals.

(1) A liquidator may appoint professionals to assist him in the discharge of his duties, obligations and functions for a reasonable remuneration and such remuneration shall form part of the liquidation cost.

(2) The liquidator shall not appoint a professional under sub-regulation (1) who is his relative, is a related party of the corporate debtor or has served as an auditor to the corporate debtor in the five years preceding the liquidation commencement date.

(3) A professional appointed or proposed to be appointed under sub-regulation (1) shall disclose the existence of any pecuniary or personal relationship with any of the stakeholders, or the concerned corporate debtor as soon as he becomes aware of it, to the liquidator.

29. Mutual credits and set-off.

Where there are mutual dealings between the corporate debtor and another party, the sums due from one party shall be set off against the sums due from the other to arrive at the net amount payable to the corporate debtor or to the other party. Illustration: X owes Rs. 100 to the corporate debtor. The corporate debtor owes Rs. 70 to X. After set off, Rs. 30 is payable by X to the corporate debtor.

31. List of stakeholders.

(1) The liquidator shall prepare a list of stakeholders, category-wise, on the basis of proofs of claims submitted and accepted under these Regulations, with- (a) the amounts of claim admitted, if applicable, (b) the extent to which the debts or dues are secured or unsecured, if applicable, (c) the details of the stakeholders, and (d) the proofs admitted or rejected in part, and the proofs wholly rejected.

(2) The liquidator shall file the list of stakeholders with the Adjudicating Authority within forty-five days from the last date for receipt of claims, and the filing of the list shall be announced to the public in the manner specified in Regulation 12(3).

(3) The liquidator may apply to the Adjudicating Authority to modify an entry in the list of stakeholders filed with the Adjudicating Authority, when he comes across additional information warranting such modification, and shall modify the entry in the manner directed by the Adjudicating Authority.

(4) The liquidator shall modify an entry in the list of stakeholders filed with the Adjudicating Authority, in the manner directed by the Adjudicating Authority while disposing off an appeal preferred under section 42. (5) The list of stakeholders, as modified from time to time, shall be-

(a) available for inspection by the persons who submitted proofs of claim;
(b) available for inspection by members, partners, directors and guarantors of the corporate debtor;

(c) displayed on the website, if any, of the corporate debtor.

33. Mode of sale.

(1) The liquidator shall ordinarily sell the assets of the corporate debtor through an auction in the manner specified in Schedule I.

(2) The liquidator may sell the assets of the corporate debtor by means of private sale in the manner specified in Schedule I when- (a) the asset is perishable; (b) the asset is likely to deteriorate in value significantly if not sold immediately; (c) the asset is sold at a price higher than the reserve price of a failed auction; or (d) the prior permission of the Adjudicating Authority has been obtained for such sale: Provided that the liquidator shall not sell the assets, without prior permission of the Adjudicating Authority, by way of private sale to (a) a related party of the corporate debtor; (b) (b) his related party; or (c) any professional appointed by him.

(3) The liquidator shall not proceed with the sale of an asset if he has reason to believe that there is any collusion between the buyers, or the corporate debtor's related parties and buyers, or the creditors and the buyer, and shall submit a report to the Adjudicating Authority in this regard, seeking appropriate orders against the colluding parties.

52. A secured creditor in the liquidation proceedings may-

(1) A secured creditor in the liquidation proceedings may-

(a) relinquish its security interest to the liquidation estate and receive proceeds from the sale of assets by the liquidator in the manner specified in section 53; or
(b) realise its security interest in the manner specified in this section.

(2) Where the secured creditor realises security interest under clause (b) of sub-section (1), he shall inform the liquidator of such security interest and identify the asset subject to such security interest to be realised.

(3) Before any security interest is realised by the secured creditor under this section, the liquidator shall verify such security interest and permit the secured creditor to realise only such security interest, the existence of which may be proved either-

(a) by the records of such security interest maintained by an information utility; or
(b) by such other means as may be specified by the Board.

(4) A secured creditor may enforce, realise, settle, compromise or deal with the secured assets in accordance with such law as applicable to the security interest being realised and to the secured creditor and apply the proceeds to recover the debts due to it.

(5) If in the course of realising a secured asset, any secured creditor faces resistance from the corporate debtor or any person connected therewith in taking possession of, selling or otherwise disposing off the security, the secured creditor may make an application to the Adjudicating Authority to facilitate the secured creditor to realise such security interest in accordance with law for the time being in force.

(6) The Adjudicating Authority, on the receipt of an application from a secured creditor under sub- section (5) may pass such order as may be necessary to permit a secured creditor to realise security interest in accordance with law for the time being in force.

(7) Where the enforcement of the security interest under sub-section (4) yields an amount by way of proceeds which is in excess of the debts due to the secured creditor, the secured creditor shall—

(a) account to the liquidator for such surplus; and
(b) tender to the liquidator any surplus funds received from the enforcement of such secured assets.

(8) The amount of insolvency resolution process costs, due from secured creditors who realise their security interests in the manner provided in this section, shall be deducted from the proceeds of any realisation by such secured creditors, and they shall transfer such amounts to the liquidator to be included in the liquidation estate.

(9) Where the proceeds of the realisation of the secured assets are not adequate to repay debts owed to the secured creditor, the unpaid debts of such secured creditor shall be paid by the liquidator in the manner specified in clause (e) of sub-section (1) of section 53."

53-Distribution of assets.

(1) Notwithstanding anything to the contrary contained in any law enacted by the Parliament or any State Legislature for the time being in force, the proceeds from the sale of the liquidation assets shall be distributed in the following order of priority and within such period and in such manner as may be specified, namely :-

(a) the insolvency resolution process costs and the liquidation costs paid in full;

(b) the following debts which shall rank equally between and among the following :--

(i) workmen's dues for the period of twenty-four months preceding the liquidation commencement date; and

(ii) debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in section 52;

(c) wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date;

(d) financial debts owed to unsecured creditors;

(e) the following dues shall rank equally between and among the following:-

(i) any amount due to the Central Government and the State Government including the amount to be received on account of the Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date;

(ii) debts owed to a secured creditor for any amount unpaid following the enforcement of security interest;

(f) any remaining debts and dues;

(g) preference shareholders, if any; and

(h) equity shareholders or partners, as the case may be.

(2) Any contractual arrangements between recipients under sub-section (1) with equal ranking, if disrupting the order of priority under that sub-section shall be disregarded by the liquidator.

(3) The fees payable to the liquidator shall be deducted proportionately from the proceeds payable to each class of recipients under sub-section (1), and the proceeds to the relevant recipient shall be distributed after such deduction. Explanation.--For the purpose of this section-

(i) it is hereby clarified that at each stage of the distribution of proceeds in respect of a class of recipients that rank equally, each of the debts will either be paid in full, or will be paid in equal proportion within the same class of recipients, if the proceeds are insufficient to meet the debts in full; and

(ii) the term "workmen's dues" shall have the same meaning as assigned to it in section 326 of the Companies Act, 2013."

19. Reliance was placed on the decision of the Hon'ble Apex Court in case of ***Ghanashyam Mishra and Sons Private Limited (supra)***.

The Supreme Court in the aforesaid case after an extensive review of the I&B Code and various decisions rendered thereunder, observed that once the resolution plan is approved, it becomes binding on the stakeholders including creditors. Relevant paragraphs of the judgement read as under:

> *"65. Bare reading of Section 31 of the I&B Code would also make it abundantly clear, that once the resolution plan is approved by the Adjudicating Authority, after it is satisfied, that the resolution plan as approved by CoC meets the requirements as referred to in subsection (2) of Section 30, it shall be binding on the Corporate Debtor and its employees, members, creditors, guarantors and other stakeholders. Such a provision is necessitated since one of the dominant purposes of the I&B Code is, revival of the Corporate Debtor and to make it a running concern.*
>
> *66. The resolution plan submitted by successful resolution applicant is required to contain various provisions, viz., provision for payment of insolvency resolution process costs, provision for payment of debts of operational creditors, which shall not be less than the amount to be paid to such creditors in the event of liquidation of the Corporate Debtor under section 53; or the amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in subsection (1) of section 53, whichever is higher. The resolution plan is also required to provide for the payment of debts of financial creditors, who do not vote in favour of 62 the resolution plan, which also shall not be less than the amount to be paid to such creditors in accordance with subsection (1) of section 53 in the event of a liquidation of the Corporate Debtor. Explanation 1 to clause (b) of subsection (2) of Section 30 of the I&B Code clarifies for the removal of doubts, that a distribution in accordance with the provisions of the said clause shall be fair and equitable to such creditors. The resolution plan is also required to provide for the management of the affairs of the Corporate Debtor after approval of the resolution plan and also the implementation and supervision of the resolution plan. Clause (e) of subsection (2) of Section 30 of I&B Code also casts a duty on RP to examine, that the resolution plan does not contravene any of the provisions of the law for the time being in force.*
>
> *67. Perusal of Section 29 of the I&B Code read with Regulation 36 of the Regulations would reveal, that it requires RP to prepare an information memorandum containing various details of the Corporate Debtor so that the resolution applicant submitting a plan is aware of assets and liabilities of the Corporate Debtor, including the details about the creditors and the amounts claimed by them. It is also required to contain the details of guarantees that have been given in relation to the debts of the corporate debtor by other persons. The details with regard to all material litigation and an ongoing investigation or proceeding initiated by Government and statutory authorities are also required to be contained in the information memorandum. So also the details regarding the number of workers and employees and liabilities of the Corporate Debtor towards them are required to be contained in the information memorandum.*
>
> *68. All these details are required to be contained in the information memorandum so that the resolution applicant is aware, as to what are the liabilities, that he may have to face and provide for a plan, which apart from satisfying a part of such liabilities would also ensure, that the Corporate Debtor is revived and made a running establishment.*

The legislative intent of making the resolution plan binding on all the stakeholders after it gets the seal of approval from the Adjudicating Authority upon its satisfaction, that the resolution plan approved by CoC meets the requirement as referred to in subsection (2) of Section 30 is, that after the approval of the resolution plan, no surprise claims should be flung on the successful resolution applicant. The dominant purpose is, that he should start with fresh slate on the basis of the resolution plan approved.

69. This aspect has been aptly explained by this Court in the case of Committee of Creditors of Essar Steel India Limited through Authorised Signatory (supra).

"107. For the same reason, the impugned NCLAT judgment [Standard Chartered Bank v. Satish Kumar Gupta, 2019 SCC OnLine NCLAT 388] in holding that claims that may exist apart from those decided on merits by the resolution professional and by the Adjudicating Authority/Appellate Tribunal can now be decided by an appropriate forum in terms of Section 60(6) of the Code, also militates against the rationale of Section 31 of the Code. A successful resolution applicant cannot suddenly be faced with "undecided" claims after the resolution plan submitted by him has been accepted as 65 this would amount to a hydra head popping up which would throw into uncertainty amounts payable by a prospective resolution applicant who would successfully take over the business of the corporate debtor. All claims must be submitted to and decided by the resolution professional so that a prospective resolution applicant knows exactly what has to be paid in order that it may then take over and run the business of the corporate debtor. This the successful resolution applicant does on a fresh slate, as has been pointed out by us hereinabove. For these reasons, NCLAT judgment must also be set aside on this count."

70. In view of this legal position, we could have very well stopped here and held, that, the observation made by NCLAT in the appeal filed by EARC to the effect, that EARC was entitled to take recourse to such remedies as are available to it in law, is impermissible in law.

71. As held by this Court in the case of Pr. Commissioner of Income Tax vs. Monnet Ispat and Energy Ltd.10, in view of provisions of Section 238 of I&B Code, the provisions thereof will have an overriding effect, if there is any inconsistency with any of the provisions of the law for the time being in force or any instrument having effect by virtue of any such law. As such, the observations made by NCLAT to the aforesaid effect, if permitted to remain, would frustrate the very purpose for which the I&B Code is enacted.

72. However, in Civil Appeal arising out of Special Leave Petition (Civil) No.11232 of 2020, Writ Petition (Civil) No.1177 of 2020 and Civil Appeals arising out of Special Leave Petition (Civil) Nos. 71477150 of 2020, the issue with regard to the statutory claims of the State Government and the Central Government in respect of the period prior to the approval of resolution plan by NCLT, will have to be considered.

73. Vide Section 7 of Act No.26 of 2019 (vide S.O. 2953(E), dated 16.8.2019 w.e.f. 16.8.2019), the following words have been inserted in Section 31 of the I&B Code. "including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed"

74. As such, with respect to the proceedings, which arise after 16.8.2019, there will be no difficulty. After the 67 amendment, any debt in respect of the payment of dues arising under any law for the time being in force including the ones owed to the Central Government, any State Government or any local authority, which does not form a part of the approved resolution plan, shall stand extinguished....

79. In the Rajya Sabha debates, on 29.7.2019, when the Bill for amending I&B Code came up for discussion, there were certain issues raised by certain Members. While replying to the issues raised by certain Members, the Hon'ble Finance Minister stated thus:

"IBC has actually an overriding effect. For instance, you asked whether IBC will override SEBI. Section 238 provides that IBC will prevail in case of inconsistency between two laws. Actually, Indian courts will have to decide, in specific cases, depending upon the material before them, but largely, yes, it is IBC.

There is also this question about indemnity for successful resolution applicant. The amendment now is clearly making it binding on the Government. It is one of the ways in which we are providing that. The Government will not raise any further claim. The Government will not make any further claim after resolution plan is approved. So, that is going to be a major, major sense of assurance for the people who are using the resolution plan. Criminal matters alone would be proceeded against individuals and not company. There will be no criminal proceedings against successful resolution applicant. There will be no criminal proceedings against successful resolution applicant for fraud by previous promoters. So, I hope that is absolutely clear. I would want all the hon. Members to recognize this message and communicate further that this Code, therefore, gives that comfort to all new bidders. So now, they need not be scared that the taxman will come after them for the faults of the earlier promoters. No. Once the resolution plan is accepted, the earlier promoters will be dealt with as individuals for their criminality but not the new bidder who is trying to restore the company. So, that is very clear. (emphasis supplied)"

80. It could thus be seen, that in the speech the Hon'ble Finance Minister has categorically stated, that Section 238 provides that I&B Code will prevail in case of inconsistency between two laws. She also stated, that there was question about indemnity for successful resolution applicant and that the amendment was clearly making it binding on the Government. She stated, that the Government will not make any further claim after resolution plan is approved. So, that is going to be a major sense of assurance for the people who are using the resolution plan. She has categorically stated, that she would want all the Hon'ble Members to recognize this message and 73 communicate further that I&B Code gives that comfort to all new bidders. They need not be scared that the taxman will come after them for the faults of the earlier promoters. She further states, that once the resolution plan is accepted, the earlier promoters will be dealt with as individuals for their criminality but not the new bidder who is trying to restore the company.

84. It is clear, that the mischief, which was noticed prior to amendment of Section 31 of I&B Code was, that though the legislative intent was to extinguish all such debts owed to the Central Government, any State Government or any local authority, including the tax authorities once an approval was Granted to the resolution plan by NCLT; on account of there being some ambiguity, the State/Central Government authorities continued with the proceedings in respect of the debts owed to them. In order to remedy the said mischief, the legislature thought it appropriate to clarify the position, that once such a resolution plan was approved by the Adjudicating Authority, all such claims/dues owed to the State/Central Government or any local authority including tax authorities, which were not part of the resolution plan shall stand extinguished.

93. As discussed hereinabove, one of the principal objects of I&B Code is, providing for revival of the Corporate Debtor and to make it a going concern. I&B Code is a complete Code in itself. Upon admission of petition under Section 7, there are various important

duties and functions entrusted to RP and CoC. RP is required to issue a publication inviting claims from all the stakeholders. He is required to collate the said information and submit necessary details in the information memorandum. The resolution applicants submit their plans on the basis of the details provided in the information memorandum. The resolution plans undergo deep scrutiny by RP as well as CoC. In the negotiations that may be held between CoC and the resolution applicant, various modifications may be made so as to ensure, that while paying part of the dues of financial creditors as well as operational creditors and other stakeholders, the Corporate Debtor is revived and is made an on- going concern. After CoC approves the plan, the Adjudicating Authority is required to arrive at a subjective satisfaction, that the plan conforms to the requirements as are provided in subsection (2) of Section 30 of the I&B Code. Only thereafter, the Adjudicating Authority can Grant its approval to the plan. It is at this stage, that the plan becomes binding on Corporate Debtor, its employees, members, creditors, guarantors and other stakeholders involved in the resolution Plan. The legislative intent behind this is, to freeze all the claims so that the resolution applicant starts on a clean slate and is not flung with any surprise claims. If that is permitted, the very calculations on the basis of which the resolution applicant submits its plans, would go haywire and the plan would be unworkable.

94. We have no hesitation to say, that the word "other stakeholders" would squarely cover the Central Government, any State Government or any local authorities. The legislature, noticing that on account of obvious omission, certain tax authorities were not abiding by the mandate of I&B Code and continuing with the proceedings, has brought out amendment so as to cure the said mischief. We therefore hold, that the 2019 amendment is declaratory and clarificatory in nature and therefore retrospective in operation.

102. In the result, we answer the questions framed by us as under:

102.1 That once a resolution plan is duly approved by the Adjudicating Authority under subsection (1) of Section 31, the claims as provided in the resolution plan shall stand frozen and will be binding on the Corporate Debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority, guarantors and other stakeholders. On the date of approval of resolution plan by the Adjudicating Authority, all such claims, which are not a part of resolution plan, shall stand extinguished and no person will be entitled to initiate or continue any proceedings in respect to a claim, which is not part of the resolution plan;

102.2 The 2019 amendment to Section 31 of the I&B Code is clarificatory and declaratory in nature and therefore will be effective from the date on which I&B Code has come into effect;

102.3 Consequently all the dues including the statutory dues owed to the Central Government, any State Government or any local authority, if not part of the resolution plan, shall stand extinguished and no proceedings in respect of such dues for the period prior to the date on which the Adjudicating Authority Grants its approval under Section 31 could be continued."

20. Admittedly, in the present case, when the CIRP was undertaken, claims were invited; the IDCO (Opposite Party No.1) did not lodge any such claim and that having not been done, the IDCO (Opposite Party No.1) had also no occasion to update the claim during Liquidation Process. Thereafter, at the stage of liquidation also IDCO (Opposite Party No.1) did not come forward to lodge any such claim.

The Hon'ble Supreme Court in case of ***Ghanashyam Mishra & Sons (supra)*** considered all other earlier decisions including the ***Essar Steel India Limited, Committee of Creditors (Supra)*** and ***Maharasthra Seamless Ltd., Vrs. Padmanavan Venketesh & Others (2020) 11 SCC 467*** and ***Innovative Industries Vrs. ICICI Bank, (2018) 1 SCC 407***. The Hon'ble Supreme Court also referred to its earlier decision in ***K. Sashidhar Vrs. Indian Overseas Bank*** (2019) 12 SCC 150. After discussing all the above judgments, the Hon'ble Supreme Court in ***Ghanashyam Mishra & Sons Private Ltd. (supra)*** has held as under:-

> *"57. It could thus be seen, that the legislature has given paramount importance to the commercial wisdom of CoC and the scope of judicial review by Adjudicating Authority is limited to the extent provided under Section 31 of I&B Code and of the Appellate Authority is limited to the extent provided under subsection (3) of Section 61 of the I&B Code, is no more res integra.*
>
> *58. Bare reading of Section 31 of the I&B Code would also make it abundantly clear, that once the resolution plan is approved by the Adjudicating Authority, after it is satisfied, that the resolution plan as approved by CoC meets the requirements as referred to in subsection (2) of Section 30, it shall be binding on the Corporate Debtor and its employees, members, creditors, guarantors and other stakeholders. Such a provision is necessitated since one of the dominant purposes of the I&B Code is, revival of the Corporate Debtor and to make it a running concern.*
>
> *59. The resolution plan submitted by successful resolution applicant is required to contain various provisions, viz., provision for payment of insolvency resolution process costs, provision for payment of debts of operational creditors, which shall not be less than the amount to be paid to such creditors in the event of liquidation of the Corporate Debtor under section 53; or the amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in subsection (1) of section 53, whichever is higher. The resolution plan is also required to provide for the payment of debts of financial creditors, who do not vote in favour of the resolution plan, which also shall not be less than the amount to be paid to such creditors in accordance with sub section (1) of section 53 in the event of a liquidation of the Corporate Debtor. Explanation 1 to clause (b) of sub section (2) of Section 30 of the I&B Code clarifies for the removal of doubts, that a distribution in accordance with the provisions of the said clause shall be fair and equitable to such creditors. The resolution plan is also required to provide for the management of the affairs of the Corporate Debtor after approval of the resolution plan and also the implementation and supervision of the resolution plan. Clause (e) of subsection (2) of Section 30 of I&B Code also casts a duty on RP to examine, that the resolution plan does not contravene any of the provisions of the law for the time being in force.*
>
> *60. Perusal of Section 29 of the I&B Code read with Regulation 36 of the Regulations would reveal, that it requires RP to prepare an information memorandum containing various details of the Corporate Debtor so that the resolution applicant submitting a plan is aware of the assets and liabilities of the Corporate Debtor, including the details about the creditors and the amounts claimed by them. It is also required to contain the details of guarantees that have been given in relation to the debts of the corporate debtor by other persons. The details with regard to all material litigation and an ongoing investigation or proceeding initiated by Government and statutory authorities are also required to be contained in the information memorandum. So also the details*

regarding the number of workers and employees and liabilities of the Corporate Debtor towards them are required to be contained in the information memorandum. All these details are required to be contained in the information memorandum so that the resolution applicant is aware, as to what are the liabilities that he may have to face and provide for a plan, which apart from satisfying a part of such liabilities would also ensure, that the Corporate Debtor is revived and made a running establishment. The legislative intent of making the resolution plan binding on all the stakeholders after it gets the seal of approval from the Adjudicating Authority upon its satisfaction, that the resolution plan approved by CoC meets the requirement as referred to in subsection (2) of Section 30 is, that after the approval of the resolution plan, no surprise claims should be flung on the successful resolution applicant. The dominant purpose is, that he should start with fresh slate on the basis of the resolution plan approved."

21. As pointed out in ***Ghanashyam Mishra & Sons Private Ltd.*** (supra); after the approval of the Resolution Plan, no surprise claim should be flung on the successful resolution of the applicant. **(Emphasized)**

Further the resolution Applicant "should start with fresh slate on the basis of the resolution plan approved".

22. The liquidation as envisaged in the I&B Code is not a mere isolated off shoot of Insolvency Resolution Proceeding but is one of the logical conclusion of the Resolution Proceeding. The procedure as contemplated in the I&B Code is an integrated continuum.

23. Now to examine the scheme of liquidation under the I&B Code in such context, section 51 (18) of the I&B Code has to be considered.

The said sub-section provides that the Liquidator means an Insolvency Professional appointed as Liquidator in accordance with the provisions of Chapter-III, Chapter-V of Part-2 as the case may be. Section 5(20) of the I&B Code stipulates that "Operational Creditor" means a person to whom an Operational Debt is owed and includes any person to whom such debt has been legally assigned or transferred. Section 5(21), on the other hand, defines "Operational Debt" as a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority.

Section 33, I&B Code provides for initiation of liquidation. It is clear from a plain reading of Section 33 that liquidation begins where a Corporate Insolvency Resolution fails.

23.1. Section 35 stipulates the powers and duties of the liquidator. Clauses (a) to(d), (f) and (j) of Section 35, sub-section (1) are relevant in the context. Clause (a) empowers the liquidator to verify claims of all the creditors, Clause (b) to take into custody or control all the assets, property, effects and actionable claims of the corporate debtor, Clause (c) to evaluate the assets and property of the corporate debtor in the manner as may be specified by the Board and prepare a report and Clause (d) to take such measures to protect and preserve the assets and properties of the corporate debtor as he considers necessary. Clause (f) confers power on the Liquidator, subject to Section 52, to sell the immovable and movable property and actionable claims of the corporate debtor in

liquidation by public auction or private contract, with power to transfer such property to any person or body corporate or to sell the same in parcels in such manner as may be specified.

The proviso thereto says that the liquidator shall not sell immovable and movable property or actionable claims of the corporate debtor in liquidation to any person who is not eligible to be a resolution applicant.

Clause (j) empowers the liquidator to invite and settle claims of the creditor and claimants and distribute proceeds in accordance with the provisions of the Code.

Section 38 of the IBC provides for consolidation of claims by the liquidator, Section 39 the verification of claims and Section 40 deals with the admission or rejection of claims by the liquidator.

Hence, the powers of the liquidator are on a similar footing as those of a Resolution Professional in a resolution proceeding with the distinction that where the actions carried out by Resolution Professionals (RP) when are more or less administrative in nature, the Liquidator discharges qausi judicial function while admitting and rejecting the claim independently assessing the merit based on documents which orders are appealable under section 41 and 42 of the I&B Code.

In this context, when it can be said that the IRP/RP assists in the process of continuation of Corporate Debtor; the liquidator assists upon to prepare the liquidation estate to institute eventual dissolution of the Corporate Debtor.

Unlike CIRP, post completion of liquidation of Corporate-Debtor; creditors do not have any recourse to claim settlement. It is also noteworthy that Section 5 (18) of the IBC stipulates that a Liquidator has to be a Resolution Professional in the first place.

23.2. Section 53 provides for distribution of assets in liquidation and sets out the order of priority of distribution of proceeds from the sale of the liquidation assets.

The sixth category in such pecking order is Section 53(1)(f), "any remaining debts and dues". Clause (f) is the only provision in Section 53 which confers rights on the operational creditors to recover their dues.

As such, Section 53 is the culmination of the entire endeavour of the Liquidator and the order of priority given therein cannot be overridden by any of the operational creditors of the corporate debtor by jumping the queue in contravention of the priorities enumerated in Section 53.

23.3. What is next relevant is Regulation 32 of the Liquidation Process.

The different types of sale of asset have been enumerated therein. Up to Clause (d) of Regulation 32, sale of assets is dealt with. Clause(e) provides for sale of the corporate debtor as a going concern. Again, Clause(f) contemplates the business of the Corporate Debtor being sold as a going concern.

Regulation 32-A of the said Regulations provides for sale as a going concern. Sub-regulation(2) of Regulation 32-A stipulates that for the purpose of sale under Sub-regulation (1), the group of assets and liabilities of the Corporate Debtor, as identified by the Committee of Creditors under sub-regulation(2) of Regulation 39-C of the Insolvency

and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, shall be sold as a going concern.

23.4. On the other hand, Regulation 32-A (3) provides that where the Committee of Creditors has not identified the assets and liabilities under sub- regulation (2) of Regulation 39-C of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the liquidator shall identify and group the assets and liabilities to be sold as a going concern, in consultation with the consultation committee.

24. It is evident from the schematic arrangement of the I&B Code, in respect of Liquidation, is that the pecking order as stipulated in Section 53 of the I&B Code cannot be superseded by any of the categories as provided therein. The said provision is set out below for convenience of ready reference.

> "53. ***Distribution of Assets.*** - (1) Notwithstanding anything to the contrary contained in any law enacted by the Parliament or any State Legislature for the time being in force, the proceeds from the sale of the liquidation assets shall be distributed in the following order of priority and within such period and in such manner as may be specified, namely:-
>
> (a) the insolvency resolution process costs and the liquidation costs paid in full;
> (b) the following debts which shall rank equally between and among the following:-
>
> (i) workmen's dues for the period of twenty-four months preceding the liquidation commencement date; and
>
> (ii) debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in section 52;
>
> (c) wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date;
> (d) financial debts owed to unsecured creditors;
> (e) the following dues shall rank equally between and among the following:-
>
> (i) any amount due to the Central Government and the State Government including the amount to be received on account of the Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date;
> (ii) debts owed to a secured creditor for any amount unpaid following the enforcement of security interest;
> (f) any remaining debts and dues;
> (g) preference shareholders, if any; and
> (h) equity shareholders or partners, as the case may be.
> (2) Any contractual arrangements between recipients under sub-section (1) with equal ranking, if disrupting the order of priority under that sub-section shall be disregarded by the liquidator.
> (3) The fees payable to the liquidator shall be deducted proportionately from the proceeds payable to each class of recipients under sub-section (1), and the proceeds to the relevant recipient shall be distributed after such deduction.
>
> Explanation.- For the purpose of this section--
>
> (i) it is hereby clarified that at each stage of the distribution of proceeds in respect of a class of recipients that rank equally, each of the debts will either be paid in full, or will

be paid in equal proportion within the same class of recipients, if the proceeds are insufficient to meet the debts in full; and class of recipients, if the proceeds are insufficient to meet the debts in full; and class off recipients, if the proceeds are insufficient to meet the debts in full; and

(ii) the term "workmen's dues" shall have the same meaning as assigned to it in section 326 of the Companies Act, 2013."

Thus, the operational creditors, who fall within category (f), that is, "any remaining debts and dues", cannot claim any priority over the preceding categories in having their debts paid off.

25. However, it is worth considering what precisely will happen if the demand of the IDCO (Opposite Party No.1) is accepted in the context of expression "sale of going concern", as used in the I&B Code and connected Regulations in respect of liquidation, to construe and include transfer of pre-CIRP liabilities of the Corporate Debtor.

Regulation 32-A of the Liquidation Process Regulations clearly specifies that "liabilities" for the purpose of going concern sales in liquidation are only those liabilities which have been identified and earmarked for the going concern sale by the Committee of Creditors, if not, by the liquidator.

Section 53 of the I&B Code which, again, is preceded by a non obstante clause, can be attributed to the expression "going concern sale", as contemplated in Rule 32 of the Liquidation Process Regulations.

These dues which are presently demanded by the IDCO (Opposite Party No.1) to be paid by the Auction Purchaser (Petitioner-Company-SMCPGL), of the Corporate Debtor in the Liquidation Process do not operate a charge on the assets of the Corporate Debtor.

Hence, the sale of the Corporate Debtor and the business(es) of the Corporate Debtor as a going concern, as envisaged in Regulation 32, Clauses (e) and (f) respectively, do not contemplate automatic transfer of all Pre-CIRP liabilities of the Corporate Debtor to the Auction Purchaser.

26. Taking a pause here, we feel it apposite at this stage also refer to the recent judgment in case of ***Moser Baer Karmachari Union Vrs. Union of India*** (2023) 9 SCC 499, which has been duly taken note of in the decision of the Hon'ble Supreme Court in case of ***Paschimanchal Vidyut Vitaran Nigam Ltd., Vrs. Raman Ispat Pvt. Ltd.,*** (2023) 10 SCC 60, which we feel is necessary to be borne in mind while dealing the matters like the one in our hand. It has been held therein:-

"49. The Code is based on the organic evolution of law and is a product of an extensive consultative process to meet the requirements of the Code governing liquidation. It introduced a comprehensive and time-bound framework to maximise the value of assets of all persons and balance the interest of the stakeholders. The guiding principle for the Code in setting the priority of payments in liquidation was to bring the practices in India in line with global practices. In the waterfall mechanism, after the costs of the insolvency resolution process and liquidation, secured creditors share the highest priority along with a defined period of dues of the workmen. The unpaid dues of the workmen are adequately and significantly protected in line with the objectives sought to

be achieved by the Code and in terms of the waterfall mechanism prescribed by Section 53 of the Code. In either case of relinquishment or non-relinquishment of the security by the secured creditor, the interests of workmen are protected under the Code. In fact, the secured creditors are taking significant hair-cut and workmen are being compensated on an equitable basis in a just and proper manner as per Section 53 of the Code. The Code balances the rights of the secured creditors, who are financial institutions in which the general public has invested money, and also ensures that the economic activity and revival of a viable company is not hindered because it has suffered or fallen into a financial crisis. The Code focuses on bringing additional gains to both the economy and the exchequer through efficiency enhancement and consequent greater value capture.

50. In economic matters, a wider latitude is given to the law- maker and the Court allows for experimentation in such legislations based on practical experiences and other problems seen by the law-makers. In a challenge to such legislation, the Court does not adopt a doctrinaire approach. Some sacrifices have to be always made for the greater good, and unless such sacrifices are prima facie apparent and ex facie harsh and unequitable as to classify as manifestly arbitrary, these would be interfered with by the court." ***: (2023) 9 SCC 19) (supra).***

27. It has been further said in case of ***Paschimanchal Vidyut Vitaran Nigam Ltd., (supra)***:-

41. It is hence clear that the provisions of IBC are carefully thought out and give options to secured creditors, and balance their interests with those of other creditors in a liquidation proceeding.

28. In another recent ruling of the Supreme Court in case of ***K.C.Ninan Vrs. Kerala SEB*** (2023) 14 SCC 431 examining the circumstances' in which such a charge could be constituted in law, it has been held thus:-

"Consequently, in general law, a transferee of the premises cannot be made liable for the outstanding dues of the previous owner since electricity arrears do not automatically become a charge over the premises. Such an action is permissible only where the statutory conditions of supply authorise the recovery of outstanding electricity dues from a subsequent purchaser claiming fresh connection of electricity, or if there is an express provision of law providing for creation of a statutory charge upon the transferee."

29. At this juncture, it is pertinent to refer to Clause 'H' of the deed of sale in question between the Corporate Debtor (in liquidation) acting through its Liquidator (Opposite Party No.2) referred to as the Owner and the Petitioner-Company (SMCPGL) dated 15.02.2020. The said Clause 'H' reads as under:-

"H. The E-action was conducted on December, 23, 2019 and the purchaser was declared as the highest bidder at the price of INR 288,55,00,000 (Indian Rupees Two Hundred Eighty-Eight Crores and Fifty-Five Lacs only), inclusive of the Escrow amount (hereinafter defined) (Sale Consideration) plus taxes as applicable for the assets listed in Schedule I and Schedule II hereto (collectively the Scheduled assets), pursuant to which a letter of intent was issued by the Liquidator in favour of the purchaser on January, 06, 2020 and was executed by Purchaser on January 06, 2020."

The parties thereto in consideration of the mutual covenants, terms and conditions and understandings set forth in the deed, legally bound themselves that the Schedules to the Deed would form part of the deed. It has been further clarified that the

right, tilted and interest which the owner has on the Schedule Assets as on the date of the deed has been transferred to the Purchaser on "*As is Where is*", "*As is What is*" and "*whatever there is*" basis. Thus, the transfer of right, title and interest which the Corporate Debtor represented by the liquidator had stood transferred on "As is where is" "As is what is" and "Whatever there is". This is quite distinct then what those generally postulates that the purchaser would be acquiring the assets with all its existing rights, obligations and liabilities; that when a property is sold on an 'as is where is basis'; the encumbrances on the property stand transferred to the purchaser upon the sale. All these, appear to have been so provided in the deed keeping in view the contrary intention if expressed would run/stand to counter the intention behind the legislation and the final objective sought to be achieved by the I&B Code.

30. Subsequently upon execution of the deed, the Owner through the Liquidator has delivered to the Purchaser the physical possession of all the assets specified at Part-A of Schedule-I of the deed, at their then current locations. The detail history and description of lease hold land very much finds place in Schedule-II of the said deed.

31. Thus we find no such stipulation thereunder that the Purchaser, i.e., the Petitioner-Company (SMCPGL) will be liable to pay the prior statutory dues and the damage charge as now being levied upon the Petitioner-Company (SMCPGL) by the IDCO (Opp.Party No.1) running from the time before the initiation of the Corporate Insolvency Process. In that connection, it would also be profitable to refer to the letter of the Liquidator (Opp.Party No.2) dated 23rd March, 2020. The Liquidator (Opposite Party No.2) has confirmed that the sale to the Petitioner-Company (SMCPGL) was only of the assets (Asset Lot No.4), the unit of the Corporate Debtor at Jharsuguda, Odisha and that no past liabilities pertaining to the assets or in the running of the unit was transferred to the Petitioner-Company (SMCPGL) nor that the Petitioner-Company (SMCPGL) had thereby assumed any liability towards discharge of the same. It has been further clarified that the Purchaser (Petitioner-Company-SMCPGL) had not assumed any liability of any nature, whatsoever in relation to Jharsuguda Unit-Lot No.4, the cause of action in relation to which had arisen before the date of the sale deed and that such liability would be dealt by the Liquidator (Opp.Party No.2) in accordance with section 53 of the I & B Code. Therefore, even an argument that the asset was sold on a condition of "*As is Where is*", "*As is What is*" and "*whatever there is*" basis, the demand of the IDCO (Opp.Party No.1) of the dues to be paid by the Petitioner-Company (SMCPGL), which is the subject matter of the present proceeding is untenable. This too is, in our opinion, a clause that relieves the Petitioner-Company (SMCPGL) of the liabilities to pay the statutory dues and the demand fees raised by the IDCO (Opp.Party No.1).

32. Even otherwise as per the section 100 of the Transfer of Property Act, 1862, a charge cannot be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of such charge as the bona fide transferee for value as that carves out with-save as otherwise expressly provided by any law for the time being in force which can be enforced against any property in the hands of a person to whom property has been transferred for consideration and without notice of the charge.

33. In AI ***Champdany Industries Ltd. v. Official Liquidator***; (2009) 4 SCC 486; the Apex Court held that such a provision of law should not merely create a charge, but it must expressly provide for the enforcement of a charge against the property in the hands of a transferee for value without notice of the charge.

34. In ***Haji Abadulgafur Haji Husseinbhai***, (1971) 1 SCC 757; the Hon'ble Supreme Court considered the doctrine of constructive notice as provided under Section 100. In that case, the Municipal Corporation had a charge on the property of a person who was in arrears of property tax. An auction purchaser, who became the owner of the property, resisted the attempt of the Municipal Corporation to recover the arrears of pending taxes in exercise of its charge on the ground that they were not aware of the past municipal tax arrears. The Corporation argued that the transferee was imputed with constructive knowledge of the charge created against the property due to Section 141 of the Bombay Provincial Municipal Corporations Act 1949. The Court held against the Municipal Corporation on the ground that in the facts of the case, the plaintiff did not have constructive notice of the arrears of municipality.

35. While explaining the purport of Section 100 of the T.P. Act, 1862, the Hon'ble Supreme Court held that the second half of Section 100 enacts a general prohibition and no charge can be enforced against property in the hands of a transferee for consideration without notice of the charge. In terms of Section 100, an exception to this rule must be expressly provided by law. The Court held that whether a transferee has actual or constructive notice which satisfies the requirement of notice in the proviso to Section 100, must be determined in the facts and circumstances of each case. It has been observed:

> "4. This section in unambiguous language lays down that no charge is enforceable against any property in the hands of a transferee for consideration without notice of the charge except where it is otherwise expressly provided by any law for the time being in force. The saving provision of law must expressly provide for enforcement of a charge against the property in the hands of a transferee for value without notice of the charge and not merely create a charge. The real core of the saving provision of law must be not mere enforceability of the charge against the property charged but enforceability of the charge against the said property in the hands of a transferee for consideration without notice of the charge. Section 141 of the Bombay Municipal Act is clearly not such a provision. The second contention fails and is repelled."

36. As regards the contention of learned Senior Counsel for the IDCO (Opposite Party No.1) that the IDCO (Opposite Party No.1) be granted liberty to move the Liquidator (Opposite Party No.2) under section 39 read with section 40 of the I & B Code seeking condonation of delay in laying the claim for determination and payment of the statutory dues and damage charges from out of the sale proceeds already obtained through the auction by not counting the period spent after the present proceeding before this Court towards delay; we may first state here that the decision in case of ***Greater Noida Industrial Development Authority (supra)*** relied upon in support of the same does not come to the aid of the IDCO (Opposite Party No.1) as the factual settings of the said case were completely different.

In the said case, the Greater Noida Industrial Development Authority pursuant to the public notice upon initiation of the CIRP and its admission by the NCLT had submitted the claim towards the unpaid installments payable towards premium for the lease of the land to the Corporate Debtor asserting to be the Financial Creditor of the Corporate Debtor. The RP treated the said Authority as an Operational Creditor and asked the said Authority to submit its claim in Form-B as an Operational Creditor of the Corporate Debtor. The said Authority did not, however, act upon the request by submitting the claim afresh as an Operational Creditor. In the meantime the CoC approved a plan which being presented to the Adjudicating Authority (NCLT) received the approval. It was only thereafter that the Authority having received a letter about the finalization and approval of the plan moved the Adjudicating Authority (NCLT) by filing an application questioning the Approved Resolution Plan, the decision of the RP to treat the Authority as an Operational Creditor and all actions in pursuance thereof. The Adjudicating Authority (NCLT) rejected the move.

Appeal being preferred, the NCLAT also dismissed the same. So, the orders of Adjudicating Authority (NCLT) and Appellate Authority (NCLAT) were assailed by the Authority under section 62 of the I&B Code carrying an Appeal.

The Hon'ble Supreme Court by its decision allowed the Appeal finding fault with the NCLT and NCLAT of having not taken note of several basic facts touching upon the consideration of the status of the said Authority as the Claimant and the claim, also finding fault with the Resolution Plan being based on factual errors as to the claim of the said Authority. In the given case, the IDCO (Opposites Party No.1) as already stated, at no point of time during the resolution process or even when the Corporate Debtor went for liquidation pursuant to the public announcement from time to time had lodged its claims which are now demanded from the Petitioner-Company (SMCPGL). Therefore, the said decision relied upon does not provide any help for acceptance of the submission as above advanced.

Although there appears no provision for consideration of claims beyond the prescribed period by the Liquidator and for condonation of delay in filing the claim; we, however, feel it apposite only to observe that if the distribution from the sale proceeds is yet to be completed in the case and no prejudice would be caused if the claim of the IDCO (Opposite Party No.1) is considered on merit; the IDCO (Opposite Party No.1) may seek the permission before the Appropriate Forum as provided in law for consideration of its belated claim.

37. In that view of the matter, the impugned demand of Rs.1,92,24,618/- made by the IDCO (Opposite Party No.1) from the Petitioner-Company (SMCPGL) towards outstanding statutory dues of SPSS & PL and CS & PL for processing its application as well as the demand raised by the IDCO (Opposite Party No.1) under Annexure-25 directing the Petitioner-Company(SMCPGL)to pay a sum of Rs.13,52,00,332/- towards penalty (damage charge) and GST are hereby set aside.

Consequently, the Petitioner-Company (SMCPGL) having earlier paid Rs.1,92,24,618/- under Annexure-23 series to the IDCO (Opposite Party No.1) and also having paid a sum of Rs.13,52,00,332/- and GST during pendency of the proceeding as

per the order dated 16.12.2021 of this Court without prejudice to its rights and contentions vis-à-vis the IDCO (Opposite Party No.1); we hereby direct that the same be refunded to the Petitioner-Company (SMCPGL) within a period of 6 (six) weeks hence, along with interest @ 9% (nine percent) per annum in terms of this Court's earlier order dated 16.12.2021.

38. The writ petition is disposed of in the above terms, and in the circumstances without costs.

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2024 (II) ILR-CUT-858

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

W.P.(C) NOS. 27935 & 19843 OF 2023

RABINDRA MOHAPATRA & ORS. ……Petitioners

-V-

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

AND

W.P.(C) NO.19843 OF 2023

BHAGIRATHI MAHAPATRA & ORS. -V- STATE OF ORISSA & ORS.

ORISSA HINDU RELIGIOUS ENDOWMENTS ACT, 1951 – Section 27 – Whether the appointment of Non-Hereditary Trustee can be made without determination of nature of Religious Institution and non-existence of Hereditary Trustees? – Held, No.

Case Laws Relied on and Referred to :-

1. AIR 1976 SC 1059 : Hindu Religious Endowments & Ors. Vrs. B.Samitra.
2. 1992 (II) OLR 330 : Khetramohan Rout & Ors. Vrs. Sri Sri Nageswar Mahadev & Ors.
3. 1999(I) OLR 608 : Jasobanti Thakurani & Ors Vrs. Comm. of Endowments Orissa & Ors.
4. 2014 (Supp.-I) OLR-552 :) Shyamasundar Sahoo & Ors Vrs. State of Orissa & Ors.
5. 1989(II) OLR 69 : Mitrabhanu Naik vs. Jaleswar Panigrahi.
6. AIR 1936 PC 253 : Nazir Ahmad vs. King Emperor.
7. 81(1996) C.L.T. 477 (FB) : Dhadi Parida (& after him) Sundari Parida & Ors. vs. Commissioner of Consolidation, Orissa & Ors.

For Petitioners : Mr. M.K.Dash, Mr. S. Mishra.
For Opp.Parties : Mr. A.K. Nath, Mr. S. Mishra.
Mr. A.P. Bose (For Intervener)

ORDER Date of Hearing : 13.02.2024 : Date of Order : 13.05.2024

G. SATAPATHY, J.

1. The relief claimed in both the writ petitions is contingent upon the effective resolution of dispute concerning recommendation for constitution of Non-Hereditary Trust Board (NHTB) and Managing Trustee for the Religious Institution namely Gandharbanath Mahadev Bije at Chitreswara, Daulatabad, Choudwar, Cuttack (In short, the Religious Institution) and both the writ petitions are accordingly disposed of by this common order with the consent of learned counsel for the parties.

2. The petitioners in W.P.(C) No.27935 of 2023 claiming themselves to be Marfatdars and Hereditary Trustees of the Religious Institution by filing the writ petition have invoked the jurisdiction of this Court under Article 226 & 227 of the Constitution of India seeking to quash/set-aside the orders dated 15.07.2023 and 10.08.2023 at Annexure-10 & Annexure-11 respectively passed by the learned Additional Assistant Commissioner of Endowments, Cuttack appointing OPNos.5 to 13 as Non-Hereditary Trustees(NHT) with OPNo.5 as Managing Trustee of the Religious Institution.

On the other hand, OPNos.5 to 8 and 10 & 11 along with four others have filed the writ petition i.e. W.P.(C) No.19843 of 2023 against the State by impleading the Commissioner, Additional Assistant Commissioner and Collector, Cuttack as OPs praying therein to issue direction to the State to grant approval to the recommendation of Additional Assistant Commissioner of Endowments, Cuttack for formation of NHTB and NHT for the Religious Institution.

3. The factual matrix as unraveled are, the petitioners in W.P.(C) No.27935 of 2023 claim that they along with OPNo.5 are the Hereditary Trustees and Sebaks of the public deity of the Religious Institution and the petitioners and their ancestors are the recorded Marfatdars of said Religious Institution as per the ROR of Khata No.626 & 627 and the petitioners are in possession of Gharabari land including Debasthali of Khata No. 627, but Bhagirathi Mohapatra, who being the son of late recorded Marfatdar Ganeswar Mohapatra and staying at Bhubaneswar forcibly constructed a temple of Lord Ram in the said Gharabari land and put a lock in the said temple as his private temple and said Bhagirathi Mohapatra also constructed a room by putting RCC structure near the said Ram temple as if the land is his private property and when the petitioners objected to the said construction, the dispute between them surfaced leading to institutions of proceeding under Section 144(2) of the Cr.P.C. and, thereafter, Bhagirathi Mohapatra with his political and financial influence indexed the Religious Institution and thereafter, OPNo.4 by enclosing a false report in letter No.12 dated 25.01.2023 addressed to OPNo.3 recommended the names of OPNos.5 to 13 to be appointed as members of NHTB and in such letter, he has apprised OPNo.3 that due publication has been made in terms of Section 27 of Hindu Religious Endowments Act, 1951 (In short the “Act”) and Mr. Dibakar Nayak, the drummer has intimated the general public of locality by beat of drum inviting suggestions and objections regarding appointment of OPNos.5 to 13 as NHT. The petitioners, however, allege in the writ petition that none of the general public was intimated by way of beat of drum and said Dibakar Nayak has sworn an affidavit to state that he has not intimated the public by way of beat of drum and at the instance of private OPs, the local MLA, Choudwar without any authority has written letter to the Law Minister requesting for formation of NHTB for the Religious Institution. According to the petitioners, they are in the management of the institution since the time of its foundation by doing Seva Puja for generation, but for the unauthorized and illegal occupation of some of the lands of Religious Institution

by one Dhirendra Beura, some of the Marfatdars including petitioner No.6 has filed OA No.13 of 2021 before OPNo.2 U/S. 25 of the Act for recovery of possession of lands of the Religious Institution. It is claimed by the writ petitioners that in terms of Section 27 of the Act, where there is no Hereditary Trustee, the Assistant Commissioner of Endowments shall appoint NHT for the Religious Institution, but in the present case, OPNo.3 has relied on the report of OPNo.4 while recommending the names of OPs as NHT by his letter dated 15.02.2023 to the State Government for approval, but since the procedure provided under Section 27 of the Act has not been followed by OPNo.3 with regard to publication of notice in notice board and intimating the general public by beat of drum, the petitioners had no scope to file their objection within the stipulated period of thirty days. After knowing such illegal act of OPNos.3 and 4, the recorded Marfatdars along with the villagers of Chitreswar and Daulatabad, Cuttack, however, have filed objection to the formation of NHTB on 08.06.2023 before OPNo.3, but without considering their objections and without complying the provisions of Section 27 of the Act, the State Government has approved the proposal for formation of NHTB by order No.988 dated 15.07.2023 with appointment of OPNos.5 to 13 as NHT (Annexure-10) and thereafter, OPNo.3 by his order No.1215 dated 10.08.2023(Annexure-11) has approved the appointment of OPNo.6 as Managing Trustee of the Religious Institution, but OPNo.6 Ramakanta Behera for land in Plot No.789, OPNo.8 Parikshita Sahoo for land in Plot No.789, OPNo.9 Narendra Behera for land in Plot No.423 and OPNo.11 Ashok Kumar Muduli for land in Plot No.433, are in unauthorized and forcible possession of the land in respective plots of Khata No.627. On these averments, the petitioners claiming Annexures-10 and 11 to be illegal and arbitrary have filed W.P.(C) No.27935 of 2023 praying to quash these two orders.

4. In response to the notice in W.P.(C) No.27935 of 2023, only OPNos.5 to 13 by entering appearance through their counsel have filed a joint counter affidavit denying allegations made against them and *inter alia* averring that the petitioners are not the Hereditary Trustee or Sebaks of the Religious Institution, but when there was renovation of the Religious Institution by erstwhile Zamindar, the villagers engaged some members of Mohapatra and Panda family of the village including the respective fathers and grand fathers of the petitioners to look after the Seva Puja of the deity and taking advantage of such situation, the petitioners have got their names entered in the ROR in the settlement as Marfatdars of the deity and although such appointment was made with sole objective of proper management of the Religious Institution to safeguard its vast landed property, but the said persons named as Marfatdars in the ROR caused great mismanagement in the affairs of the deity and went on illegally alienating vast extent of landed property of the Religious Institution to outsiders including to M/s. Titlagarh Paper Mill in the year 1960 in gross violation of the Act and after providing an opportunity to such Marfatdars by issue of notice to explain the alienation, which they did not respond, the then

Commissioner of Endowments by order No.39/574-C(M), dated 04.05.1962 suspended the persons (Marfatdars) from the management of the Religious Institution and appointed Inspector of Endowments, Kendrapara as a interim trustee and thereafter, such suspended Marfatdars continued to do Seva Puja in haphazard and irregular manner, and the villagers and the devotees, thereafter, looked after the affairs of the Religious Institution by raising funds. It is claimed in the counter affidavit that after being apprised by the local public and the devotees about the illegal and unauthorized alienation made by the persons recorded in the ROR as Marfatdars and for gross management in the deity's affair, OPNo.3 took steps by formation of NHTB after causing publication of notice in adherence to the procedure prescribed under Section 27 of the Act. Although, the ROR indicates about recording of seventeen (17) families as Marfatdars, but the present writ petition has been filed by only eight(08) of such families and many of the Marfatdars including the members of Mohapatra and Panda family are supporting the formation of NHTB for proper management and restoration of property of the Religious Institution. In support of their claim for unauthorized alienation by some of the Marfatdars, OPNos.5 to 13 have indicated about such alienation by Marfatdars in their counter affidavit by claiming the Lord Ram temple to have been constructed in the year 2010 by the villagers including Marfatdars upon raising funds through public collection and substantial contribution by Bhagirathi Mohapatra for completion of the temple. It is also claimed by OPNos. 5 to 13 that the additional room constructed as an annexed to the temple of Lord Ram is only meant to facilitate preparation of Prasad, but during November, 2022 when some of the petitioners demanded money from villagers, who refused to satisfy such demand, the petitioners obstructed the construction work of annexed room and the said annexed room is now lying half constructed. Supporting the constitution of NHTB and recommendation for appointment of NHT including Managing Trustee by OPNo.3 under Annexures-10 and 11, the OPs have prayed in their counter to dismiss the writ petition.

5. It is, however, clarified that in W.P.(C) No.19843 of 2023, only learned AGA has entered appearance for the State and Mr. A.K. Nath, learned counsel has entered appearance for Commissioner of Endowments, but none has filed any counter affidavit.

6. In the course of hearing of both the writ petitions, Mr. M.K. Dash, learned counsel for the petitioners in W.P.(C) No.27935 of 2023 submitted that the learned Additional Assistant Commissioner neither conducted any enquiry nor recorded any satisfaction regarding existence or non-existence of Hereditary Trustee of the Religious Institution prior to issuance of public notice for the purpose of appointment of Trust Board or Trustees and the action taken by learned Additional Assistant Commissioner is contrary to the provisions of Section 27 of the Act and as is evident from the letter dated 15.02.2023, the learned Additional Assistant Commissioner proceeded on the basis of Inspector's report which is directly in gross violation of Section 27 of the Act and therefore, the orders impugned in the writ petition suffer

from fundamental error and thereby, such orders cannot sustain in the eye of law. It was also submitted by him that the statutory objection as raised by the petitioners, which was forwarded by learned Additional Assistant Commissioner, was never considered by the State Government before according approval for such proposal for formation of NHTB and appointment of NHT of the Religious Institution. Further, Mr.Dash has submitted that in addition to such illegality, it is also quite evident from the document that the general public has not been intimated by way of beat of drum as mandatorily required under Section 27 of the Act and fake drummer receipt was appended to show compliance of Section 27 of the Act which is quite evident from the affidavit voluntarily sworn in by the drummer as produced by the petitioners in the writ petition and therefore, the order passed by the authority without complying the statutory and mandatory provisions of law do not have sanctity of law and thereby, the petitioners have filed a proceeding before the learned Additional Assistant Commissioner in OA No.3 of 2024 under Section 41 of the Act to get a declaration as Hereditary Trustee, but such proceeding is now pending for adjudication. It is further submitted that Hereditary Trustee is a Trustee of the Religious Institution, succession to whose office devolves by a hereditary right and the petitioners being the Hereditary Trustee, the order for formation of NHTB with appointment of NHT for the Religious Institution is manifestly illegal, arbitrary and unsustainable. Mr. Dash has further submitted that due to internal dispute amongst the Marfatdars, OPNo.6 in connivance with Marfatdar Bhagirathi Mohapatra by influencing the Inspector of Endowments got the impugned orders passed for constitution of NHTB with NHT, but said Marfatdar Bhagirathi Mohapatra was in conflict with other Marfatdars for constructing a room inside the temple premises for his own occupation and he being the real mischief monger, the illegal orders under Annexures-10 and 11 have been passed at his influence and the claim of the OPs that due to mismanagement and unauthorized alienation of the deity property, some of the Marfatdars were suspended was not only untrue, but also the private OPs have miserably failed to establish such facts and they have utterly failed to reveal as to who was in the management of the temple from 1960 onwards till date and it is quite clear and evident that pursuant to the notice issued on 30.08.1960 under Section 13 of the Act (Annexure-J/5) to the counter affidavit and another letter dated 04.05.1962, the learned Commissioner of Endowments on enquiry subsequently found that the alienation was required for renovation of the temple which was completely washed out in high flood in the river Mahanadi and therefore, no further proceeding was initiated under Section 28 of the Act against the deceased Marfatdar of the temple for dismissal of the trustees. In summing up his argument, Mr. Dash in order to buttress his submission has relied upon the decisions in (i***) Hindu Religious Endowments and others Vrs. B.Samitra; AIR 1976 SC 1059***, (ii***) Khetramohan Rout and others Vrs. Sri Sri Nageswar Mahadev and others; 1992*** (II) OLR 330, (iii) ***Jasobanti Thakurani and others Vrs. Commissioner of Endowments Orissa and others; 1999(I) OLR 608 and*** (iv) ***Shyamasundar Sahoo and others Vrs. State of Orissa and others; 2014 (Supp.-I) OLR-552***.

7. Mr. A.K. Nath, learned counsel appearing for OPNo.2 in both the writ petitions supporting the impugned orders vide Annexures-10 and 11 submitted that since the learned Additional Assistant Commissioner has complied the provision of Section 27 of the Act, Annexures-10 and 11 cannot held to be illegal and contrary to the law and since the claim of the petitioners being a disputed question of fact cannot be adjudicated upon in writ petitions.

8. Mr. S. Mishra, learned counsel appearing for O.P.Nos.5 to 13 in W.P.(C) No.27935 of 2023 and for the petitioners in W.P.(C) No.19843 of 2023 submitted that the petitioners by their representation to learned Additional Assistant Commissioner of Endowments under Annexure-8 have never raised objection to the formation of Trust Board, but their claim therein was that it should not be formed to satisfy few greedy people who have an eye to grab the immovable property of the Religious Institution and it is on that score, the claim of the petitioners is untenable to hold that public notice was not issued and on the contrary, many of the affidavits sworn in by the very family members of recorded Marfatdars have acknowledged about publication of public notice on 22.12.2022 by beat of drum and therefore, the claim of the petitioners that no public notice was issued nor the general public of the locality were intimated by beat of drum is untenable and therefore, the writ petition by the petitioners merits no consideration. It was further submitted that mere reflection of name of persons of Mohapatra and Panda family in the ROR under Annexures-1 and 2 which has been published in the year 1973 does not indicate that such persons were the Hereditary Trustees of the Religious Institution and in order to establish the claim of Hereditary Trustees, one has to satisfy that he has succeeded to the office by way of hereditary right, but the same having not been done in this case by the petitioners producing any material or document, their claim to the office of the Religious Institution as Hereditary Trustees cannot sustain in the eye of law. It was also submitted that Annexures-A/5 and J/5 to the counter affidavit clearly indicate that some of the Marfatdars had been suspended from the management of Religious Institution on 04.05.1962 by the then Commissioner of Endowments in exercise of power under Section 7 of the Act and the Inspector of Endowments, Kendrapara was appointed as a interim trustee which can go a long way to say that the petitioners are not the Hereditary Trustees. It was also advanced by Mr.S.Mishra that neither there is any pleadings nor any document is being produced by the petitioners to show any account of income or expenditure of Religious Institution to suggest that they are the Hereditary Trustees of the Religious Institution. It was further submitted by Mr. Mishra that unless it was proved that the hereditary right is devolved continuously and uninterruptedly from the time of the founder of the Religious Institution, the trustee cannot be considered to be a Hereditary Trustee and in this regard, he has relied upon the decision in the case of ***Mitrabhanu Naik vs. Jaleswar Panigrahi; 1989(II) OLR 69***. It was also submitted by Mr.Mishra that the petitioners are unable to establish that they are the Hereditary Trustees of the Religious Institution and therefore, the constitution of NHTB and appointment of

NHT to such Religious Institution cannot be said to be arbitrary or illegal and the Additional Assistant Commissioner of Endowments, Cuttack has followed due procedure of law to constitute NHTB and to appoint NHT for the Religious Institution vide Annexures-10 and 11, which should not be interfered with by exercise of writ jurisdiction and many of the Marfatdars including some of the present writ petitioners by taking undue advantage of their names as Marfatdars in the settlement ROR, have acted in a manner highly unbecoming of a Marfatdar and they have made unauthorized alienation of vast extent of landed properties of the Religious Institution in favour of the outsiders for their personal gain and therefore, the writ petitioners are not at all entitled to be considered as Hereditary-Trustees. In summing up his argument, Mr. Mishra has prayed to reject the claim of the writ petitioners by dismissing the writ in W.P.(C) No.27935 of 2023.

9. Mr. A.P. Bose, learned counsel appearing for the Intervener-petitioners in I.A. No.16985 of 2023 arising out of W.P.(C) No.27935 of 2023 submitted that the writ petitioners are neither Hereditary Trustees nor were holding any posts to deal with the affairs of the Religious Institution nor have they maintained/submitted any account of income and expenditure of the Religious Institution to the Endowment Authorities and the money collected by them out of the sale proceeds from the land of the Religious Institution has not been shown in any account by the writ petitioners, but the Interveners are the villagers and the devotees of the deity and they are concerned with the development of the deity. It is further submitted by him that the learned Additional Assistant Commissioner of Endowments, Cuttack has properly followed the procedure before formation of the Trust Board for the smooth management of the Religious Institution and there being no illegality committed in appointing the NHT with O.P. No.6 as Managing Trustee of the Religious Institution, the writ petitioners deserves no relief and accordingly, the writ petitions may kindly be dismissed.

10. Undeniably, whether the writ petitioners in W.P.(C) No.27935 of 2023 are the Hereditary Trustees or not, which is advanced by the rival parties in the writ is a disputed question of fact, which can be gone into in an appropriate proceeding, but following the rival submissions upon meticulous and careful perusal of materials produced on record by the parties, the poignant question emerges for consideration to the dispute between the parties in this case is whether the constitution of NHTB together with the appointment of O.P. Nos.5 to 13 as the members of NHTB and O.P. No.6 as the Managing Trustee of the Religious Institution by the Additional Assistant Commissioner of Endowments, Cuttack is unsustainable in the eye of law for not following the mandatory procedure prescribed U/s. 27 of the Act for such purpose?

11. For just and correct decision in the matter to answer the question as formulated above, it is, however, considered necessary to refer some relevant provisions of Sec.27 of the Act which has been provided in Chapter-III of the Act which reads as under:-

CHAPTER-III

Religious Institutions other than Maths and specific endowments attached thereto

Sec.27. Non-Hereditary Trustees, their numbers and appointment*-(1) The Assistant Commissioner shall, in cases where there is no Hereditary Trustee, with the prior approval of the State Government appoint non-hereditary trustee in respect of each religious institution other than Maths and specific endowments attached thereto and in making such appointments, the Asst. Commissioner shall have due regard to the claims of persons belonging to the religious denomination for whose benefit the said institution is chiefly maintained.*

Provided that the Asst. Commissioner shall, before sending any proposal to the State Government for such prior approval, publish a notice in the Notice Board of the concerned religious institution and intimate the general public of the locality by beat of drum, inviting suggestions and objections on the proposal from all persons affected, to be made within a period of thirty days from the date of such publication, and forward to the State Government the suggestions and objections, if any, received along with such proposal.

Sec.27*(1-a);-On receipt of a proposal made under Sub-section (1) for the appointment of a Non-hereditary Trustee, the State Government may either accord the required approval or reject or modify the proposal of the Assistant Commissioner as it may deem fit in the interest of the persons belonging to the religious denomination for whose benefit, the concerned Religious Institution is chiefly maintained."*

xx xx xx xx xx

12. A plain reading of the aforesaid provisions of Section 27 of the Act makes it ample clear that the Additional Assistant Commissioner of Endowments, Cuttack can appoint Hereditary Trustee U/S 27 of the Act on fulfillment of two mandatory conditions which are, firstly; the Religious Institution is a public institution and secondly; there is no Hereditary Trustee of the institution. Section 3(xiii) of the Act defines Religious Institution as, a math, a temple and endowments attached thereto or a specific endowment and includes an institution under direct management of the State Government, but Section 27(1) of the Act stipulates Religious Institution as other than maths and specific endowments attached thereto. Hence, it is very clear that for exercise of the power by the Additional Assistant Commissioner of Endowments under this Section, it is just absolutely necessary and mandatory that either there should be no dispute about the public nature of the institution and the non-existence of Hereditary Trustees or in case, there is a dispute in any of these matters, a prior determination of such dispute is highly imperative, but without determination of such preliminary issue about the nature of Religious Institution and non-existence of Hereditary Trustees of such Religious Institution, if an appointment of a Non-Hereditary-Trustee is made, the same has to be considered as a violative of Section 27 of the Act and such appointment cannot confer any legal status to the Non-Hereditary-Trustees so appointed. Since when a statute, while conferring power, prescribes the mode of exercise of that power, the power has to be exercised in that manner or not at all, which is the fundamental principle of law as settled long way ago in the case of ***Nazir Ahmad vs. King Emperor; AIR 1936 PC 253***. It is accordingly, quite clear that for appointment of Non-Hereditary-Trustees U/S. 27 of the Act, the authority concerned has to make a prior determination as to the questions that the institution is a public one and has no Hereditary Trustee. In

this case, a casual reference to Annxures-10 & 11 would go to disclose about the appointment of O.P. Nos.5 to 13 as Non-Hereditary-Trustees and O.P. No.6 as Managing Trustee in accordance to Section 27 of the Act, but it does not disclose as to the procedure followed by the Additional Assistant Commissioner of Endowments, Cuttack, but Annexure-4 to the writ petition, which is the information obtained under RTI Act by the petitioners discloses that the Additional Assistant Commissioner of Endowments, Cuttack has written a letter to the Deputy Secretary to Government of Odisha in Law Department, Bhubaneswar for formation of NHTB in respect of Religious Institution on the basis of report of the Inspector of Endowments, Cuttack. The letter under Annexure-4 series further discloses that the Additional Assistant Commissioner of Endowments, Cuttack has recommended the names of O.P. Nos.5 to 13 suggested by the Inspector of Endowments, Cuttack to be appointed as the members of NHTB U/S. 27 of the Act as there is no Hereditary Trustee of the above institution. Therefore, the statutory requirement of conducting a preliminary enquiry/pre-determination U/S. 27 of the Act as to the nature of Religious Institution and the non-existence of Hereditary Trustees for the Religious Institution has not been made, which is contrary to the provision of the Act.

13. It is, however, seriously contended and challenged by O.P. Nos.5 to 13 that the writ petitioners by way of Annexure-8 to the writ petition, which is the representation of the petitioners, raised no objection to the formation of NHTB, but are aggrieved to the manner of formation to satisfy few greedy people, those who have an eye to grab the immovable property of the Religious Institution. It is, however, considered that such contention of O.P. Nos.5 to 13 would no manner establish the primary requirement of Section 27 of the Act. Even otherwise, O.P. Nos. 5 to 13 do not constitute the entire villagers, since Section 27 requires intimation to the general public of the locality by beat of drums in inviting suggestions and objections on the proposal from all persons affected, to be made within a period of thirty days from the date of such publication. A careful consideration of rival contentions makes it very clear that there is dispute relating to determination of Hereditary Trustees of the Religious Institution, since the writ petitioners claim themselves to be the Hereditary Trustees, whereas O.P. No.5 to 13 refuse to acknowledge such claim by asserting that the writ petitioners are not the Hereditary Trustees. What is most important is that the status of the Religious Institution is a public Religious Institution which is not at all in dispute, but whether the petitioners are the Hereditary Trustees or not is a factual question, which this Court does not wish to appreciate or go into detail and considered the same to be within the domain of appropriate authority under the Act.

14. One thing is clear that the claim of the writ petitioners have been subterfuged by O.P. Nos.5 to 13 and there appears allegation and counter allegation by each group against each other and therefore, before appointing the Hereditary Trustee for the Religious Institution, the Competent Authority under the Act was supposed to decide the dispute as to the existence or non-existence of Hereditary Trustee as a condition precedent to proceed further U/s. 27 of the Act within the scope and ambit of the same, but the same has not been done by the authority. However, the rival parties albeit have produced documents in support of their respective pleadings with regard to claim of

existence and non-existence of Hereditary Trustees for the Religious Institution, but this Court does not wish to consider such pleadings or documents purely on the principle of law that this Court is neither sitting in an appeal against determination of Hereditary Trustees of Religious Institution nor is it required to decide as to who is/are the Hereditary Trustee in the present writ petitions and this Court, therefore, refrains from making any comment upon such pleadings and documents.

15. In support of their claim about the status of the petitioners to be not the Hereditary Trustees, O.P. Nos. 5 to 13 by drawing attention of the Court to the facts has relied upon the decision in ***Mitrabhanu Naik & 6 others vs. Jaleswar Panigrahi & 7 others (supra)***. But the same is not applicable to the present case inasmuch as the decision relied on is in the matter of determination of Hereditary Trustee in an appeal against the decision of Commissioner of Endowments reversing the decision of Additional Assistant Commissioner of Endowment, Cuttack, whereas in the given case, this Court is called upon to see the legality of Annexures-10 &11 which pertains to appointment of Non-Hereditary-Trustees. On the other hand, the decision as relied on by the writ petitioners in ***Hindu Religious Endowments (supra)*** is applicable to the present case, since the appointment of Non-Hereditary-Trustees in statutory violation of Section 27 of the Act was issue therein and the same has been answered by the Apex Court in paragraph-26 and 32 as under:

> *"26. It is important to note that the Assistant Commissioner can appoint non-hereditary trustees under Section 27 of the Act only where two conditions are satisfied viz. (1) that the Religious Institution is not an excepted one and (2) that there is no hereditary trustee of the institution. For the exercise of the power by the Assistant Commissioner under this section, it is, therefore, absolutely necessary that either there should be no dispute about the public nature of the institution and the non-existence of hereditary trustees or in case, there is a dispute about any of these matters, a prior determination of such dispute under Section 41 of the Act has been made. Without such preliminary determination if an appointment of a non-hereditary trustee is made under Section 27 of the Act and a direction is given regarding delivery of possession of the institution etc. under Section 68 of the Act, it would be manifestly illegal and without jurisdiction. A careful scrutiny of the provisions of the Act makes this position amply clear. As pointed out by the High Court, Section 27 does not in terms provide that Assistant Commissioner should make an enquiry as to whether the institution is public or private and whether there are hereditary trustees of the institution or not. These questions have to be gone into under Section 41 of the Act which specifically deals with the investigation and decision of disputes in respect thereof. Consequently, a prior determination under Section 41 that the institution is public and has no hereditary trustee is a sine qua non for appointment of trustees under Section 27 of the Act.*
>
> *32. For the foregoing reasons, we are satisfied that the High Court was right in holding that it was only after completion of the enquiry under Section 41 of the Act and determination of the questions that the Religious Institution was not public and there were no hereditary trustees thereof that the Assistant Commissioner could appoint non-hereditary trustees and pass orders regarding delivery of possession to them of the institution."*

16. Further, a Full Bench decision in the case of ***Khetramohan Rout and Others vs. Sri Sri Nageswar Mahadev and Others; 1992 (II) OLR 330 (FB)*** is considered a

relevant to guide this Court in the matter and this Court in paragraph-20 of the aforesaid decision has held as follows:-

> *"20. Xx xx xxx The absence of a hereditary trustee being a condition precedent for exercise of the power under Sec. 27 of the Act, the Assistant Commissioner shall have to record, while exercising this power, as to why he is of the opinion that there is no hereditary trustee of the Religious Institution. This satisfaction may be arrived at on the basis of materials placed before the Assistant Commissioner, for which purpose, he may go in for a summary inquiry only, as Indicated in paragraph 27 of Bantala's case by the Supreme Court. This may be because of the fact that while exercising power under Sec. 27 of the Act, the Assistant Commissioner does not perform a quasi-judicial function; his action under this section may, strictly speaking, be regarded as an administrative act, as opined in* ***Rajkishore v. Commissioner of Endowments, AIR 1979 Orissa, 169."***

Moreover, what has been laid down by the Full Bench of this Court in paragraph-20 of the decision in ***Khetramohan Rout (supra)*** has been subsequently followed by another Full Bench of this Court in the case of ***Dhadi Parida (and after him) Sundari Parida and Others vs. Commissioner of Consolidation, Orissa and Others; 81(1996) C.L.T. 477 (FB)***, wherein a Full Bench of this Court at paragraph-10 has held as under:-

> *"10. We have perused the judgment of the Full Bench in the case of Khetramohan Rout (supra) and carefully considered the rival contentions raised by learned counsel for the parties. As noted earlier, the area of dispute is very limited. It relates to the nature of inquiry to be held by the Assistant Commissioner for appointing non-hereditary trustee under Section 27 off the Act. There is no dispute that the inquiry contemplated is of summary nature since the appointment of a non-hereditary trustee for a temporary period subject to the final determination to be made after detailed enquiry in the proceeding under Section 41 of the Act."*

17. In view of the discussion made hereinabove and on a conspectus of material placed on record, this Court being cognizant of the failure of the Additional Assistant Commissioner of Endowment, Cuttack to follow the provision of Section 27 of the Act while forming NHTB and appointing NHT, is of the considered opinion that Annexures-10 & 11 cannot sustain in the eye of law and are liable to be quashed and thus, Annexures-10 & 11 are accordingly quashed. Hence, the matter is remitted to the concerned Authority for proceeding in accordance with law. Since Annexures-10 & 11 are quashed by this Court, the relief as claimed by the writ petitioners in W.P.(C) No.19843 of 2023 does no more survive for consideration.

Both the writ petitions i.e. W.P.(C) No.19843 of 2023 & W.P.(C) No. 27935 of 2023 are accordingly disposed of on contest, but no order as to costs. The learned Additional Assistant Commissioner of Endowments, Cuttack would now proceed with the matter in accordance with law on production of the copy of this order or its communication whichever is earlier.

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2024 (II) ILR-CUT-869

D. DASH, J.

R.S.A NO. 41 OF 2022

SATYA JENA ……Appellant

-V-

BASISTHA JENA ……Respondent

(A) TRANSFER OF PROPERTY ACT, 1882 – Section 123 r/w Section 68 of Evidence Act – The registered deed of gift has been admitted in evidence and marked as Ext.1 & the same has been signed by appellant as well as by respondent – The appellant is not an illiterate person, he has signed on the registered deed of gift in odia putting the date – Whether the appellant can challenge the deed on the ground of a manufacturing document when he is a witness to the document? – Held, No – The appellant is estopped from questioning the execution of the deed of gift which has been registered carring the legal presumption. (Paras 17-19)

(B) WORDS & PHRASES – Difference between "attestation and execution" – Explained. (Para 18)

Case Laws Relied on and Referred to :-

1. (1969) 1 SCC 573 : M.L. Abdul Jabbar Sahib Vrs. M.V. Venkata Sastri & sons & Ors.
2. (2015) 4 SCC 601: Om Prakash (Dead) through LRs. Vrs. Shanti Devi & Ors.
3. (2000) 7 SCC 189 : Rosammal Issetheenammal Fernandez (Dead) By LRs & Anr. Vrs. Jossa Mariyan Fernandez & Ors.
4. 2008(I) LLR (SC)-197 : Boodireaddy Chandraiah & Ors. Vs. Arigela Laxmi & Anr.
5. 1990(I) OLR-157 : Brundaban Nayak & Ors. Vs. Gobardhan Biswal & Ors.
6. MANU/OR/0017/1971 : Musi Dei Vs. Labanya Bewa & Ors.
7. MANU/SC/1071/2003 : K. Balakrisnhan & Ors. Vs. K. Kamalam & Ors.

For Appellant : Mr. Gautam Misra, Sr. Adv.

For Respondent : Mr. Trilochan Nanda

JUDGMENT Date of Hearing : 10.04.2024 : 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 preliminary decree passed by the learned District Judge, Bolangir in RFA No.9 of 2016. The Respondent as the Plaintiff had filed T.S. No.42 of 1998 in the Court of the learned Civil Judge (Junior Division), Loisingha.

The suit is for declaration of his right, title, interest and confirmation of possession over the suit land described in schedule 'A' of the plaint and for permanent injunction in the alternative for partition of land in schedule 'B' of the plaint. The Appellant was the sole Defendant in the said suit. The Trial Court decreed the suit preliminarily by declaring the Plaintiff to be entitled half share each

over schedule 'A' and 'B' properties. This Appellant (Defendant) being the aggrieved by the said judgment and preliminary decree passed the Trial Court had carried the Appeal under section 96 of the Code, which has also been dismissed. Hence, the Second Appeal is at the instance of the Appellant who as the Defendant has suffered from the judgment and preliminary decrees passed by the First Appellate Court in confirming the judgment and preliminary decree passed by the Trial 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. Plaintiff's case is that the suit land originally belonged to one Netra Jena who died issueless. After his death, his widow Tulasa succeeded to the said property of Netra Jena and she became the absolute owner in possession of the suit land. The Plaintiff and the Defendant are two brothers being the sons of one Gautam Jena. Netra Jena was their elder father. These two brothers were taking care of Tulasa and looking after her till her death. Being satisfied with the services of Plaintiff and Defendant, said Tulasa had executed registered deed of gift on 03.07.1982 gifting away the said properties to the Plaintiff and the Defendant. The Plaintiff and the Defendant accepted the deed gift of the land so made by Tulasa during her lifetime. It is stated that in order to avoid future litigation, the Plaintiff and Defendant amicably partitioned the suit land. During that partition schedule 'A' land came to be allotted to the Plaintiff. However, after the death of Tulasa on 08.07.1997, the Defendant forcibly occupied the suit house. So, the Plaintiff convened a meeting in the village to convince the Defendant that he should not do so. That move, however, proved futile. Therefore, the Plaintiff served a notice upon the Defendant through his Counsel claiming half share over the suit land. That having not been responded to by the Defendant, the Plaintiff filed the suit.

4. The Defendant coming forward to contest the suit in his written statement while not disputing the relationship and the fact that the property originally belonged to Netra Jena stated that the suit land was never partitioned at any point of time between the himself and the Plaintiff. It is also stated that Tulasa had never gifted the suit land to the Plaintiff and the Defendant. The Defendant asserted that said deed of gift is a forged one. It is the specific case of the Defendant that Netra Jena, the owner of the suit land had bequeathed the said property in his favour by executing an unregistered will on 18.03.1979. In view of that, the Defendant claims to be in possession of the suit land as the owner of the same from the time of death of Netra Jena and thus to have the exclusive right, title, interest and possession over the same.

5. At this stage it would be pertinent to mention that in the suit when the Plaintiff has claimed to have got right, title, interest and possession over schedule 'A' land as to have got the same on partition between himself and the Defendant

after having received the same by way of gift from Tulasa, the Defendant while questioning the genuineness of the deed of gift although claimed the right, title and interest not only over schedule 'A' land but also the rest part of the land as shown in schedule 'B'; the Defendant, however, had not lodged any counter claim for declaration of his exclusive right, title and interest over schedule 'A' and 'B' land on the strength of the unregistered Will said to have been executed by Netra.

Thus, it is seen that the Defendant has taken the defence of having the exclusive right, title and interest of schedule 'A' and "B; on the strength of that unregistered will said to have been executed by Netra, the original owner in order to thwart the suit of the Plaintiff in declining to be granted with the reliefs as prayed for by him.

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

> (I) Whether the Plaintiff has got right, title, interest and possession over the suit land, i.e., schedule 'A' land?
>
> (II) Whether there is any cause of action for the Plaintiff to being the suit against the Defendant?
>
> (III) Whether the Plaintiff is entitled to the relief of permanent injunction?
>
> (IV) To what relief?

7. Sitting over to answer the issue No.1, upon examination of evidence and their evaluation, the Trial Court although accepted the deed of gift executed by Tulasa in favour of Plaintiff and Defendant admitted in evidence and marked Ext.1, however has ruled against the factum of partition as claimed by the Plaintiff and allotment of schedule 'A' land in the said partition in favour of the Plaintiff. Having rendered this answer, the Trial Court in terms of the said gift, decreed the suit preliminarily allotting half share over the suit land in schedule 'A' and 'B' to the Plaintiff and Defendant each and in doing so, order has been passed for division of the property taking into consideration and giving due regard to the possession of the parties and their convenience in the field as far as possible and practicable.

8. The Defendant being aggrieved by the said judgment and decree although had filed the First Appeal, the said move has not yielded any fruitful result for the Defendant.

9. The present Appeal has been admitted to answer the following substantial questions of law:-

> (i) Whether on the basis of the evidence on record, the Courts below are right in holding the gift projected by the Respondent (Plaintiff) to be a valid one by saying that the gift in question has otherwise being proved for its acceptance?
>
> (ii) Whether non-framing of specific issue on the validity of the Will prejudiced to the defendant from adducing evidence on the same, resulting its ultimate effect on the decision of the suit?

10. Mr. G. Mishra, learned Senior Counsel for the Appellant (Defendant) submitted that the Courts below have gone completely wrong by holding the registered

deed of gift (Ext.1), which is under challenge and in dispute as to have been duly proved by the Plaintiff. He submitted that the said deed of gift (Ext.1) dated 03.07.1082 said to have been executed by Tulasa has not at all been proved in accordance with law. Referring to the evidence of the attesting witnesses, P.W.4 and 5, he submitted that although the Plaintiff has examined them to prove the attestation, their evidence as laid do not fulfil the requirement as to the attestation as known to law. He, therefore, submitted that when the registered deed of gift under dispute has not been proved in accordance with and as required under law that could not have been taken into account and held to be pressed into service by the Plaintiff, more particularly, when the Defendant has taken the plea that Tulasa was an illiterate lady and the said deed of gift is a forged one. He, therefore, submitted that on this ground alone the suit of the Plaintiff as laid ought to have been dismissed. In support of his submission, he placed reliance on the decisions in cases of *M.L. Abdul Jabbar Sahib Vrs. M.V. Venkata Sastri and sons and others*; (1969) 1 SCC 573*; Om Prakash (Dead) through Legal Representatives Vrs. Shanti Devi and others*; (2015) 4 SCC 601; and *Rosammal Issetheenammal Fernandez (Dead) By LRs and Another Vrs. Jossa Mariyan Fernandez and others*; (2000) 7 SCC 189.

He next submitted that the Defendant from the beginning in his written statement has clearly stated to have the right, title, interest and possession over the entire suit land in schedule 'A' and 'B' as that has been bequeathed in his favour by the original owner, Netra Jena under unregistered Will dated 18.03.1979 and, therefore, it was imperative on the part of the Trial Court to frame an issue on that score and since that issue was not specifically framed, the Defendant has been misled and has not proved the document, unregistered Will dated 18.03.1979 and admitted the same in evidence. According to him, the answer on that issue, which should have gone in favour of the Defendant in that event and the suit was also bound to fail on proper adjudication of that issue.

11. Mr. T. Nanda, learned counsel for the Respondent (Plaintiff) submitted that the deed of gift (Ext.1) dated 03.07.1082 executed by Tulasa is not only in favour of the Plaintiff but also in favour of the Defendant and both are the equal beneficiaries under the said deed of gift being the recipients of equal share over the suit property in schedule 'A' and 'B'. He submitted that when much is said and scathing attack is made as to non-proving of that deed of gift (Ext.1) in accordance with and as required under law, more particularly the attestation part, which impacts the execution, though the Defendant has stated that Tulasa was an illiterate lady and the deed to be a forged one, there is absolutely no explanation from the side of the Defendant as to how he appeared to be one of the signatories to the said registered deed of gift in accepting the same. He, therefore, submitted that when the Defendant is not explaining that particular fact and thus does not show in clear terms to have not accepted the gift; even in the absence of any evidence as to the attestation of the said deed of gift, the Defendant cannot wriggle out of the same and he is estopped from questioning the execution of the said deed of gift and followed by attestation

and registration in questioning the validity of the said deed of gift. He next submitted that the Trial Court as well as the First Appellate Court although have not dealt the above facet; they have very much dealt the attestation part and have concurrently found the deed of gift to be valid and genuine so as to be pressed into service having the full force in the eye of law. According to him, since no perversity is seen with the said finding, this Court in seisin of the Second Appeal is not permitted to tinker with the same.

(A) He next submitted that the Defendant no doubt has pleaded about the unregistered Will dated 18.03.1979 said to have been executed by Netra Jena in his favour bequeathing all the suit properties in his favour upon him but during trial has not even bothered to prove that document, i.e., the unregistered Will except giving the bald statement during his examination.

(B) He further submitted that the Defendant then having carried the First Appeal has also not taken any step, whatsoever, to prove that unregistered Will and get it admitted as additional evidence which even till now in the Second Appeal is not taken and, therefore, just to say that the Trial Court having not framed any specific issue in that regard, the Defendant has been misled although sounds attractive, it is nothing but totally baseless and not legally tenable at this stage.

(C) He further submitted that even though for a moment it is accepted that the Defendant was misled, the Defendant having carried the First Appeal and then Second Appeal where particularly that question was raised, he having remained without any action in that regard, the said submission has absolutely no base to stand upon. He further submitted that in the present suit the plea of the Defendant banking upon that unregistered Will as taken in the written statement was to thwart the suit and see that it is dismissed but not to get his right flowing under the said Will, if any, established, which he has not done from the time of death of Netra Jena till the present suit and, therefore, it was not necessary for the Trial Court even to frame an issue on that score as the decision on that issue even if framed would have stood on the way of the suit to be decreed. He submitted that the Defendant in the written statement has not noted that document as to have been relied upon as required under order Rule of the Code and when he has deposed about the Will has not filed it anywhere and thus under these circumstances to say that he has been misled and was not able to prove that unregistered Will has no legal basis.

He placed reliance upon the following decisions:-

(a) Boodireaddy Chandraiah & Others Vs. Arigela Laxmi & Another, 2008(I) LLR (SC)-197;
(b) Brundaban Nayak & Others Vs. Gobardhan Biswal & Others, 1990(I) OLR-157;
(c) Vaikuntam Mamikyamma Vs. Puppala, MANU/OR/0017/1971;
(d) Musi Dei Vs. Labanya Bewa & Ors., MANU/OR/0083/1986 and
(e) K. Balakrisnhan & Ors. Vs. K. Kamalam & Ors., MANU/SC/1071/2003.

12. Keeping in view the submission made, I have carefully read the judgments passed by the Courts below. I have travelled through the averments taken by the Plaintiff in the plaint and have gone through the evidence, both oral and documentary tendered by the Plaintiff. I have also perused the written statement and the evidence let in by the Defendant.

13. Admitted case of the parties is that the property in question was the property of Netra Jena. The landed property which is the subject matter of the suit was owned and possessed by Netra Jena. Netra Jena had no issue and he was survived by his widow Tulasa.

14. The Plaintiff claims his interest over the property in suit by virtue of a registered deed of gift dated 03.07.1982. The said deed of gift as per the case of the Plaintiff had been executed by Tulasa gifting away the property to which she succeeded upon the death of her husband in favour of the Plaintiff as well as the Defendant as the two donees clothing them with equal interest over the said property.

The Defendant in his written statement while traversing the averments made in the plaint has stated that during the lifetime of Netra Jena, he was treating him (Defendant) as his son and being pleased with him, he out of love and affection had bequeathed the entire suit property in his favour by executing a Will on 18.03.1979 in presence of witnesses.

Thus when the Plaintiff claims half interest over the entire property in schedule 'A' and 'B'; on the basis of the registered deed of gift dated 03.07.1982 as one of the two donees in pleading that the rest half interest under that very registered deed of gift has gone to the hands of the Defendant; the Defendant counters it by saying that he is the owner of the entire property of Netra who had bequeathed the same in his favour under an unregistered Will during his lifetime on 18.03.1979.

15. It be stated at this stage that the Plaintiff in paragraph-4 of his plaint has pleaded about that gift to have been made by Tulasa. In response to the same, the Defendant in the written statement at paragraph-3 has gone to say that it is incorrect to state that Tulasa had gifted away the suit property in favour of the Plaintiff and Defendant by that registered gift deed. It is next stated, which for our purpose is important:- that Tulasa who was an illiterate and paradanasini lady and she had never executed the registered gift deed on 03.07.1982 and even if any such document to that effect is forthcoming, the same is a manufactured document created by impersonation without the knowledge and understanding about the contents of the said document and it was without any independent advice.

It is, therefore, said that said document, if any, is not even worth the paper written on and the transaction is merely a paper transaction and on the strength of that document, the Plaintiff had not acquired any right, title and interest over the suit land.

At this juncture, simultaneously, let us have a glance over the evidence of the Plaintiff himself. He has stated that Netra Jena died leaving behind his widow Tulasa and Tulasa died on 08.09.1997. He has stated that he himself as well as the Defendant were looking after Tulasa and both were possessing the properties of Tulasa which she succeeded from Netra. It is also stated that Tulasa gifted the suit property to the Plaintiff as well as the Defendant and it was executed by her in

presence of witnesses as well as in presence of the Plaintiff and the Defendant. He further states that he as well as the Defendant had put their signatures over the said document which has been admitted in evidence and marked Ext.1 and they knew everything about the contents of the document which was also known to Tulasa and that the scribe, Ghasiram Panda had read over and explained the contents of the gift deed to Tulasa as well as the Plaintiff, Defendant and other witnesses.

The Defendant has questioned the execution of the document by Tulasa. It is vehemently submitted that when the Plaintiff claims the right, title, interest and possession to the extent of half over schedule 'A' and 'B' properties; on the face of the challenges from the side of the Defendant, the Plaintiff has not at all proved the attestation of the said gift deed which is an integral process involved in execution of the deed of gift as required in law in order to ensure due execution. It is essential to prove the attestation through satisfactory evidence, which ensures due execution so as to base a claim upon that gift under challenge. In this connection, attention was invited to the evidence of the witnesses examined from the side of the Plaintiff and placed as to how for the same run towards attestation.

16. The deed of gift is one which is required by law to be attested. As provided in section 123 of the Transfer of Property Act, 1882 for the purpose of making a gift of immovable property, the transfer must be effected by registered instrument signed by donor or someone on behalf of the donor and attested by at least two witnesses.

17. The provisions contained in section 68 of the Evidence Act, 1862 is to the effect that such document requiring attestation as per law cannot be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive and subject to the process of the court and capable of giving the evidence. However, the proviso to section 68 of the Evidence Act reads that it shall not be necessary to call an attesting witness in proof of execution of any document, not being a Will, which has been registered in accordance with the provisions of Indian Registration Act, 1908 unless its execution by the person by whom it purports to have been executed is specifically denied (Emphasis supplied). Therefore, if any document other than a Will even though law mandates that attestation is required therein, yet when it is registered; the Court if its execution by the person by whom it purports to have been executed is not specifically denied; cannot refuse to admit that document in evidence so as to be looked into for the purpose and given the force as per law even for not calling anyone of the attesting witnesses if alive and tendering his evidence as to his attestation after execution of the deed by the executant. In the present case, the execution of the gift deed has been denied in the manner as noted in the forgoing para. Since the execution of the deed of gift has been called in question, the burden of proof lies upon the party, who asserts his case/claim over that very registered deed of gift which in the given case, the Plaintiff to satisfactorily prove said execution by proving the attestation.

18. It is the settled law that attestation and execution are two different acts, one following the other in the order stated. The attestation of a person to a document is to ensure that there is no fraud or other vitiating circumstances in the execution of the document. It is also meant to ensure that the executant was a free agent, and not under pressure, nor subjected to fraud, while executing the same. The reason behind the legislative imperative, set out in section 68, Evidence Act, to call at least one attesting witness for proof of an attestable document appears to be loud and clear that he is a witness best suited to tell the Court about the circumstances under which the document was executed inasmuch as he was a witness appointed or agreed upon by the parties to speak of the circumstances of its execution before any controversy had arisen between them. Therefore, what is more vital for the Court to determine is whether the document, requiring attestation, had been executed in an upright manner. The attesting witnesses can help the Court best in formulating its opinion about the execution of the document. Further, it will be noticed, attestation is insisted upon by the provisions of the Transfer of Property Act. However, the document relied upon by a party has to be proved in accordance with the provisions of the Evidence Act, and if the requirements of the evidence infer that the document is forged or fictitious merely from the circumstances that it has another set of marginal witnesses.

19. However, adverting to the case at hand, it is noticed that the registered deed of gift which has been admitted in evidence and marked Ext.1 has come into being in presence of the Plaintiff as well as the Defendant who are also the signatories to the said registered deed of gift. That being the situation, the Defendant in the entire written statement when has challenge the exception in the manner as stated above, has not breathed a word giving any explanation, whatsoever, as to how his signature could appear in the said registered deed of gift executed by Tulasa and under what circumstance he signed or was to made to sign. The evidence of the Defendant being recorded during trial, the same state of affair is found therein that he has simply said that Tulasa had never executed the deed of gift. The Defendant here is not an illiterate person. He has very much signed on the registered deed of gift (Ext.1) in Odia putting the date. In the absence of any explanation, whatsoever, coming from the side of the Defendant, the Defendant is thus estopped from questioning the execution of the deed of gift, which has been registered carrying legal presumption. The Defendant is also one of the two donees with the Plaintiff, who too has signed thereon. In the given situation, in the absence of the specific explanation mere allegation would not amount to specific denial so as to deny the Plaintiff to take the aid of the proviso contained in section 68 of the Evidence Act as here we are concerned with a 'gift' and not a 'Will'. Therefore, in the obtained facts and circumstances, the deed of gift (Ext.1) is available to be used as evidence as such in having its force as per law. The Defendant in such state of affair without explaining his own act of signing on the deed of gift, when as per his case, he was already the owner of the subject matter can very well be placed in the pedestal of an attesting

witness as the "animus attestandi" can very well be attributed to him. Therefore, he is estopped to deny the attestation and call in question the attestation and execution of the deed of gift (Ext.1) by Tulasa and its acceptance by him and the Plaintiff as donees; that such document of gift had not been executed by Tulasa and had not come into being as per law and it was by impersonation, a manufactured document etc. The reason being that the Defendant here is not a simple identifying witness in the document but a witness, as per his case, having full proprietary interest over the property in question as he pleads to have had got it under the Will executed by Netra much before that which assigns him the status as an attesting witness.

This again bears great significance and leads to say that the projected case of the Defendant having a Will from Netra is an afterthought. Had it been the fact, the Defendant would not have remained as a witness to the said registered gift deed executed by Tulasa in respect of the suit property by which the Defendant stood deprived of half of the property of Netra which was going to the hands of the Plaintiff by that gift. Therefore, the submission from the side of the Appellant (Defendant) that the Plaintiff's case is to fail for want of evidence as regards attestation and execution although at the first blush having due regard to the ratio of the cited decisions (supra) appears to be attractive, yet in view of the discussion as made above is found to be having no force in the eye of law. This provides the answer to the first substantial question of law against the Defendant.

20. Now the other question that stands for being addressed is as regards nonframing of issue. It be stated that in view of the answer to the first substantial question of law; this second substantial question of law does no more survive for answer so as to come to the aid of the Defendant.

Be that as it may, it be taken note at the beginning that although the Defendant has very much pleaded about the Will in the said written statement, yet as required under Order-8, Rule-1 A of the Code, it has not been so mentioned in the written statement that he relies upon that unregistered deed of Will for the purpose of his defence nor the list was filed at that time or later seeking leave of the Court. One more striking feature pops up that the suit having been filed in the year 1998, it came to be disposed by the Trial Court on 29.02.2016. The suit remaining in the Trial Court for about eighteen years, the Defendant having led evidence by examining himself and other witnesses has not even bothered to prove the said so-called unregistered Will as per law. The Defendant has also not lodged any counter claim seeking a decree in respect of the entire property as he is the right, title and interest holder and in possession of the same by virtue of that unregistered Will said to have been executed by Netra. In that situation, when the Will was projected by the Defendant in order to nullify the effect of the deed of gift basing on which the Plaintiff claims the title over half of the property being the co-donee in respect of that half along with the Defendant as the co-donee in respect of the rest half, it was not imperative upon the Trial Court to frame an issue with regard to the Will as the stand of the Defendant is to simply to thwart the move of the Plaintiff in filing the

suit for its dismissal. Furthermore, when the Defendant has not been serious in proving his document even to prevent the move of the Plaintiff in getting any decree, now at this highly belated stage to say that there being no issue, he was misled in the obtained facts and circumstances as narrated above, has to be said to be a contention, which is wholly untenable in the eye of law when it is further seen that the Defendant having carried the First Appeal, there also he has taken no step to get that unregistered Will admitted as additional evidence and not even raising the contention on that score, which for the first time has been raised in the Second Appeal with regard to the nonframing of issue.

21. In the wake of all the aforesaid; this Court records the answer to the second substantial question of law in the negative in holding that nonframing of specific issue on the validity of the Will has not caused any prejudice to the Defendant from being not able to adduce evidence on that score resulting its ultimate effect upon the decision of the Suit and First Appeal.

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

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2024 (II) ILR-CUT-878

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

DSREF NO. 01 OF 2022
(WITH CRLA NOS. 120 & 121 OF 2023)

STATE OF ODISHA ....Appellant

-V-

Sk. ASIF ALLI @ Md.ASIF IQBAL & ANR. ....Respondent

INDIAN PENAL CODE, 1860 – Offence U/s. 302 of IPC – Death sentence – Relevant factors Court should consider before passing the death sentence – Discussed with reference to case laws. (Para-23)

Case Laws Relied on and Referred to :-

1. (2003) 3 Supreme Court Cases 21 : Bhagwan Singh & Ors. -Vrs.- State of M.P.
2. (2013) 55 OCR (SC) 623 : Shankar Kisanrao Khade -Vrs.- State of Maharashtra.
3. (1998) 7 Supreme Court Cases 177 : Panchhi & Ors. -Vrs.- State of U.P.
4. (2011) 4 Supreme Court Cases 786 : State of Madhya Pradesh -Vrs.- Ramesh & Anr.
5. (2023) 5 Supreme Court Cases 534 : Ram Gopal -Vrs.- State of Madhya Pradesh.
6. (2020) 7 Supreme Court Cases 722 : Somasundaram @ Somu -Vrs.- State.
7. (1975) 1 Supreme Court Cases 797 : Shri Phool Kumar -Vrs.- Delhi Administration.
8. A.I.R. 2011 S.C. 200 : Paramjit Singh -Vrs.- State of Uttarakhand.
9. (2015) 1 Supreme Court Cases 496 : Nar Singh -Vrs.- State of Haryana.
10. (2019) 9 Supreme Court Cases 622 : Ravi -Vrs.- State of Maharashtra.
11. (2019) 7 Supreme Court Cases 716 : Manoharan -Vrs.- State.
12. (1994) 3 Supreme Court Cases 381 : Laxman Naik -Vrs.- State of Orissa.
13. (1994) 2 Supreme Court Cases 220 : Dhananjoy Chatterjee -Vrs.- State.
14. A.I.R. 1984 S.C. 1622 : Sharad Birdhichand Sarada -Vrs.- State of Maharashtra.

15. A.I.R. 1982 S.C. 1157 : Gambhir -Vrs.- State of Maharashtra.
16. (1991) 4 Orissa Criminal Reports (SC) 278 : Jaharlal Das -Vrs.- State of Orissa.
17. (2019) 20 Supreme Court Cases 593 : P. Ramesh -Vrs.- State.
18. (2017) 14 SCC 359 : Anjan Kumar Sarma & Ors -Vrs.- State of Assam.
19. 2023 LiveLaw (SC) 217 : Sundar @ Sundarrajan -Vrs.- State by Inspector of Police.
20. (2009) 6 SCC 498 : Santosh Ku.Satishbhushan Bariyar -Vrs.- State of Maharashtra.

For Appellant : Mr. Bibhu Prasad Tripathy, AGA.
For Respondent : Sk. Zafarulla.

JUDGMENT Date of Hearing : 14.05.2024 : Date of Judgment : 20.06.2024

S.K. SAHOO, J.

The reference under section 366 of the Code of Criminal Procedure, 1973 has been submitted to this Court by the learned Adhoc Addl. Sessions Judge, F.T.S.C., POCSO, Jagatsinghpur (hereinafter 'the trial Court') in Special G.R. Case No.30 of 2014 for confirmation of death sentence imposed on Sk. Asif Alli @ Md. Asif Iqbal and Sk.Akil Alli (hereinafter 'the appellants') vide judgment and order dated 29.11.2022 and accordingly, DSREF No.01 of 2022 has been instituted. CRLA No.120 of 2023 has been filed by appellant Sk. Asif Alli @ Md. Asif Iqbal and CRLA No.121 of 2023 has been filed by appellant Sk.Akil Alli challenging the self-same judgment and order of conviction passed by the learned trial Court.

The appellants along with Sk. Abid Alli faced trial in the trial Court for commission of offences punishable under sections 302/376-A/376-D read with section 120-B of the Indian Penal Code (hereinafter 'the I.P.C.') and section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter 'POCSO Act') on the accusation that on 21.08.2014 in between 2.00 p.m. to 11.00 p.m. in the house of Sk. Khairuddin at village Manu Mohalla under Tirtol police station in Jagatsinghpur district, they made criminal conspiracy and committed gang rape and aggravated penetrative sexual assault on the minor victim girl (hereinafter 'the deceased') and inflicted injuries which caused death of the deceased.

The learned trial Court vide impugned judgment and order dated 29.11.2022 found the appellants guilty for the offences punishable under sections 302/376-A/376-D of the I.P.C. and section 6 of the POCSO Act and awarded them death sentence for the offence under section 302 of the I.P.C. so also sentenced each of them to undergo imprisonment for life for the offence under section 376-A of the I.P.C., which shall mean imprisonment for the remainder of natural life, R.I. for a period of twenty years and to pay a fine of Rs.50,000/- (rupees fifty thousand), in default, to undergo R.I. for a further period of one year for the offence under section 376-D 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 substantive sentences awarded to the appellants were directed to run concurrently.

The accused Sk. Abid Alli, who faced trial along with the appellants, was found not guilty for the offences punishable under sections 302/376-A/376-D/120-B of the I.P.C. and section 6 of the POCSO Act and accordingly, he was acquitted of all the charges.

Since both the DSREF and the criminal appeals 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.3) lodged by P.W.7 Tara Bibi, is that on 21.08.2014 at about 2.00 p.m., the deceased along with her cousin brother Sk. Farhan Alli (P.W.17) had been to a nearby shop of their house to purchase chocolates. As there was delay of the deceased in returning home, at about 3.00 p.m., P.W.7 and others searched for the deceased but failed to trace her out. Some co-villagers found the deceased on the Taza of one Sk. Khairuddin in an unconscious state and immediately they shifted her to Tendakuda Primary Health Centre, but the doctor advised them to take the deceased to S.C.B. Medical College and Hospital, Cuttack (hereafter 'S.C.B.M.C.H, Cuttack'). On being asked, the doctor told them that somebody had throttled her neck after committing rape on her. While being shifted to S.C.B.M.C.H, Cuttack, on the way the deceased died and therefore, P.W.7 and others returned back to the village carrying the dead body of the deceased. On enquiry, P.W.17 informed that the appellants gagged the mouth of the deceased and took her away by lifting her in arms while they were returning home after purchasing chocolates. P.W.7 suspected that both the appellants after committing rape on the deceased had strangulated her to death.

On receipt of the written report from P.W.7 which was scribed by P.W.9 Siraj Ul Haque, Sri S.K. Panda, A.S.I. of Krushnanandapur outpost made Station Diary Entry No.300 dated 21.08.14 and sent the report to the Inspector in-charge of Tirtol police station for registration and accordingly, the Inspector in-charge of Tirtol police station, namely, Dayanidhi Nayak (P.W.27) registered Tirtol P.S. Case No.183 dated 21.08.2014 under sections 376-A/376(2)(f)(g) of the I.P.C. and section 6 of the POCSO Act against the appellants at 11.45 p.m. and he himself took up the investigation of the case.

During the course of investigation, the I.O. (P.W.27) visited the spot during the intervening night of 21.08.2014 and 22.08.2014, examined the witnesses and recorded their statements, sent requisition to the S.P., Jagatsinghpur for deputation of scientific team to the spot to assist him during investigation and for collection of material evidence. The local people apprehended the appellant Sk. Akil Alli and on the same night at about 3.30 a.m., the I.O. seized the wearing apparels of the appellant Sk. Akil Alli in presence of the witnesses as per seizure list Ext.6 and at about 3.45 a.m., he arrested the appellant Sk. Akil Alli and sent him to Medical Officer (P.W.28), C.H.C., Manijang for medical examination through escort party.

On 22.08.2014 in the morning at about 6.50 a.m., the I.O. visited the place of occurrence and prepared the spot map vide Ext.20 and during spot visit, he found a quilt, inner garments, towel, plastic chappal, cigarette pups, glass bottles and Aska 40 liquor bottles, thumps up plastic bottles, a pair of golden ear rings at the spot. On the same day at about 7.20 a.m., he conducted inquest over the dead body of the deceased in presence of her family members and other witnesses and prepared inquest report (Ext.1). At about 8.20 a.m., he sent the dead body of the deceased to C.D.M.O., D.H.H., Jagatsinghpur

through escort party for post mortem examination and opinion. On 22.08.2014 at about 1.30 p.m., the scientific team of S.F.S.L., Rasulgarh and staff of D.F.S.L., Jagatsinghpur arrived at the spot and inspected the spot. The I.O. examined the seizure witnesses and Sri Chunuram Murmu, S.O., S.F.S.L., Rasulgarh, Bhubaneswar and recorded their statements. During inspection of the spot by the Scientific Officer, three chance finger prints were detected from the bottles (Aska 40 bottles). The chance finger prints were developed with white powder and marked as Ext.A, B and Ext.B/1. At about 5.30 p.m., the I.O. (P.W.27) seized two sealed vials containing the sample pubic hair and sample semen of the appellant Sk. Akil Alli on production of escorting constable B.B. Singh collected during the medical examination of the appellant in presence of the witnesses as per seizure list (Ext.7). On the same day at about 7.30 p.m., the I.O. forwarded the appellant Sk. Akil Alli to the Court.

On 23.08.2014, the I.O. made prayer before the Court for recording the statement of the informant (P.W.7) under section 164 of Cr.P.C. and on 25.08.2014, as per the direction of S.P., Jagatsinghpur, a special team was formed to apprehend the accused persons and raid was conducted at different places. On 04.09.2014, the I.O. received the post mortem report from the A.D.M.O., D.H.H., Jagatsinghpur.

On 05.09.2014 at about 3.00 p.m., the I.O. apprehended the accused Sk. Abid Alli and appellant Sk. Asif Alli at Bhubaneswar and seized one Nokia mobile phone during the personal search of appellant Sk. Asif Alli in presence of the witnesses. On the same day, the I.O. also seized one Honda Activa scooty bearing regd. no. OD 21 B 0693 and one Samsung Mobile handset during the personal search of accused Sk. Abid Alli and then, the I.O. brought both the accused Sk. Abid Alli and the appellant Sk. Asif Alli to Tirtol police station and seized the wearing apparels of the appellant Sk. Asif Alli in presence of the witnesses and prepared the seizure list marked as Ext.9 and sent the accused Sk. Abid Alli and appellant Sk. Asif Alli to M.O., C.H.C., Manijanga for medical examination and opinion. The I.O. received the spot visit report along with the photographs of the spot from the Scientific Officer, S.F.S.L. through post. On 06.09.2014, the I.O. received the medical examination report of the accused Sk. Abid Alli and appellant Sk. Asif Alli and at about 11.45 a.m., he arrested both of them and seized the biological exhibits on production of the escort officer, S.I. Govinda Majhi in presence of witnesses and prepared the seizure list Ext.11. On the same day at about 6.00 p.m., he forwarded the accused Sk. Abid Alli and the appellant Sk. Asif Alli to the Court.

On 09.09.2014, the I.O. seized the school admission register of Kalinga Public School, Tala Barei, Krishnanandapur on production by P.W.14 Kalpana Beura, the Principal of the School in presence of witnesses and prepared the seizure list (Ext.13), in which the date of birth of the deceased was mentioned as 16.03.2008 and left the same in zima of P.W.14 by executing zimanama (Ext.14). On the same day at about 2.00 p.m., the I.O. seized the original birth certificate of the deceased on production by uncle of the deceased, namely, Ayub Ali @ Tuku and prepared the seizure list (Ext.10) and left the same in his zima executing zimanama (Ext.21). On 20.09.2014, the I.O. made prayer before the Court to send the seized exhibits to S.F.S.L., Rasulgarh for chemical examination and opinion vide Ext.24. On 25.09.2014, he also made prayer to the Court

for passing necessary order for collection of finger print of the appellant Sk. Akil Alli from Sub-Jail, Jagatsinghpur and on the very day, as per the direction of the Court, the finger print was collected. The Scientific Officer, D.F.S.L. finger print and team also collected finger prints of the appellant Sk. Asif Alli and accused Sk. Abid Alli from the Sub-Jail, Jagatsinghpur after obtaining the order of the Court. The I.O. made requisition to the S.P., Jagatsinghpur to send the chance finger prints collected from Aska 40 bottles, which were transferred to a C.D. along with specimen ten digit finger print slips of the accused Sk. Abid Alli and the appellants to the Director, State Finger Print Bureau, Rasulgarh, Bhubaneswar for necessary comparison and opinion. On 1.20 p.m., the I.O. seized the O.P.D. ticket of the deceased on production by P.W.21 in presence of the witnesses and prepared the seizure list Ext.17.

On completion of investigation, P.W.27 submitted charge sheet dated 21.10.2014 under sections 376-A/376-D/120-B of the I.P.C. and section 6 of the POCSO Act against the accused Sk. Abid Alli, Sk. Asif Alli @ Md. Asif Iqbal (appellant in CRLA No.120 of 2023) and Sk. Akil Alli (appellant in CRLA No.121 of 2023) and one Sk. Abdul Karim Ali showing him as absconder before the learned S.D.J.M., Jagatsinghpur, which was forwarded to the learned Sessions Judge -cum- Special Judge, Jagatsinghpur on 22.08.2014 and the learned Special Judge, Jagatsinghpur took cognizance of offences under sections 376-A/376-D/120-B 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 appellants so also the accused Sk. Abid Alli on 17.11.2014 and since all of them refuted the charges, pleaded not guilty and claimed to be tried, the sessions trial procedure was resorted to prosecute them and establish their guilt.

Prosecution Witnesses, Exhibits & Material Objects:

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

P.W.1 Sk. Wamik Alli stated that on the fateful day when he along with others was present in the field of Akhandalmani, at about 6 p.m. he found the appellant Sk. Asif Alli and accused Sk. Abid Alli and Sk. Abdul Karim Alli going towards village Kolta in a red colour Activa scooty. He further stated to have learnt about the missing of the deceased for which he along with others started for searching the deceased. Upon hearing a hulla, he came to the house of one Sk. Khairuddin, where P.W.2 Sk. Sikandar Basa rescued the deceased in a naked condition with injury on the neck and near the ear drum, after which the deceased was brought to her house and then shifted to the medical.

P.W.2 Sk. Sikandar Basa stated that on the date of occurrence, he heard an announcement from the Masjid about the missing of the deceased and accordingly, started searching for her along with others. He further stated that during such search, P.W.3 Sk. Mustakin Alli found the deceased lying on the Taza of the house of one Sk. Khairuddin, who called others in a loud voice to the spot. Upon reaching there, he found the deceased was lying naked in an unconscious state. He also stated to have noticed nail

marks on the belly, back and knee and blood patches on the thigh of the deceased. He further stated that he brought the deceased from that place and handed her over to P.W.1 who took the child to her house. He also stated that he along with others enquired from P.W.17, the brother of the deceased, who stated that while he and the deceased were returning after purchasing chocolates, the appellant Sk. Akil Alli gagged the mouth of the deceased and appellant Sk. Asif Alli lifted and took her.

P.W.3 Sk.Mustakim Alli stated that after coming to know that the deceased was found missing, he enquired from P.W.17 about the deceased, who disclosed that when he and the deceased were returning after purchasing chocolates, the appellant Sk. Akil Alli gagged the mouth of the deceased and Sk. Asif Alli lifted and took her away. He further stated that upon seeing the deceased on the Taza of the underground house of Sk. Khairuddin, he alarmed after which P.W.2 rescued the deceased from the Taza in a naked condition and then the deceased was first shifted to her house and then to Tendakuda Hospital.

P.W.4 Md.Mustakim Naimee stated that while he was playing in Akhandalmani field, he came to know about the missing of the deceased after which he along with P.Ws.1, 2 and 3 searched for her. After a while they found the deceased lying on the Taza of the house of one Sk. Khairuddin. He further stated that after rescuing the deceased, they took her to her house and subsequently, he along with P.W.2 shifted the deceased to Tendakuda medical. He is also a witness to the inquest over the dead body of the deceased.

P.W.5 Musaraf Alli stated that on the date of occurrence, when he was returning from Masjid after reading Namaz at about 02.00 to 02.30 p.m., he saw the appellants Sk. Akil Alli and Sk. Asif Alli were standing near the house of Sk. Khairuddin and they were trembling, worried and looking nervous.

P.W.6 Sk.Mashkur Alli stated that while he was returning to his village on the date of occurrence, he saw the appellants, accused Sk. Abid Alli and Sk. Abdul Karim Alli were taking liquor on the verandah of one Manu Mian at about 12.30 p.m. and talking with each other. He further stated that the police came and seized certain items from the spot and prepared the seizure list vide Ext.2. He identified the material objects (M.Os.) in the Court.

P.W.7 Tara Bibi is the informant of the case and she was the aunt of the deceased. She supported the prosecution case and stated that the deceased had been to purchase chocolate with P.W.17 but did not return home. She further stated about the search to trace the deceased and the body of deceased was found from the Taza of the house of Khairuddin in naked condition with injuries on different parts of her body. She further stated that P.W.17 disclosed before them about the appellants taking away the deceased by lifting her while they were returning from the shop after purchasing chocolates. She is a witness to the preparation of the inquest report vide Ext.1. She is also a witness to the seizure of the wearing apparels of the deceased by the police vide Ext.4. She identified the garments of the deceased which were marked as M.Os. V, X and XIII in the Court.

P.W.8 Diptiranjan Ray was working as a constable in Tirtol police station and he is a witness to the seizure of the wearing apparels of the appellant Sk. Akil Alli as per

seizure list Ext.6. He is also a witness to the seizure of the biological exhibits of the appellant Sk. Akil Alli and the deceased as per seizure lists Exts.7 and 8 respectively. He is also a witness to the seizure of the wearing apparels of the appellants Sk. Asif Alli and Sk. Abid Alli as per seizure lists Exts.9 and 10 respectively.

P.W.9 Siraj Ul Haque is the scribe of the F.I.R. He is also a witness to the seizure of the blood-stained wearing apparels of the deceased and school certificate of the deceased vide seizure lists Exts.4 and 10 respectively.

P.W.10 Sk. Kalim Ulla is a witness to the seizure of the blood-stained wearing apparels of the deceased and school certificate of the deceased as per seizure lists Exts.4 and 10 respectively. He is also a witness to the preparation of inquest report vide Ext.1.

P.W.11 Govinda Majhi was the Sub-Inspector of Police, Tirtol Police Station, who is a witness to the seizure of the wearing apparels of the appellant Sk. Akil Alli as per seizure list Ext.6. He is also a witness to the seizure of the biological exhibits of the appellant Sk. Akil Alli as per seizure list Ext.7 and also a witness to the seizure of sealed vials containing the biological exhibits of all the appellants as per seizure list Ext.11.

P.W.12 Lachaman Sethi was posted as the S.I. of Police, Tirtol police station. He is a witness to the seizure of two parcel sealed packets as per seizure list Ext.8. He is also a witness to the seizure of Honda Activa scooty as well as one Samsung mobile phone on production by accused Sk. Abid Alli as per seizure list Ext.12. He is also a witness to the seizure of Nokia mobile phone on production by appellant Sk. Asif Alli.

P.W.13 Pabitra Kumar Dalai was working as the Asst. Teacher at Kalinga Public School, Krishnanandapur and he is a witness to the seizure of school admission register of the deceased as per seizure list Ext.13.

P.W.14 Kalpana Beura was working as the Principal of Kalinga Public School, Krishnanandapur. She produced the school admission register (Ext.15) of the deceased before the police which was seized as per seizure list Ext.13. After verification of the register, the police left the same in her zima as per zimanama Ext.14.

P.W.15 Johra Bibi stated that the deceased was her niece. She further stated that when she enquired from P.W.17 the whereabouts of the deceased, he stated that while he and the deceased were returning after purchasing chocolates, the appellant Sk. Akil Alli gagged the mouth of the deceased and the appellant Sk. Asif Alli took her away towards the house of one Sk. Khairuddin. She is also a witness to the preparation of the inquest report vide Ext.1.

P.W.16 Bibhuti Bhusan Singh was the police constable who is a witness to the seizure of one Nokia mobile phone from the possession of appellant Sk. Asif Alli as per the seizure list vide Ext.13. He is also a witness to the seizure of one Activa scooty from the possession of appellant Sk. Abid Alli as per seizure list Ext.12.

P.W.17 Sk. Farhan Alli is the cousin brother of the deceased, who stated that on the date of occurrence while he and his deceased sister were returning after purchasing chocolates, the appellant Sk. Akil Alli gagged the mouth of the deceased and the appellant Sk. Asif Alli lifted her and went away. He stated that the accused Sk. Abid Alli and Sk. Abdul Karim Alli were with them. He further stated to have disclosed the aforesaid fact to his tuition Miss (P.W.26), P.W.7, P.W.15 and to the police.

P.W.18 Prasanna Kumar Sahoo was working as a police constable who is a witness to the seizure of the sealed vials containing the biological exhibits of the appellants Sk. Akil Alli and Sk. Asif Alli as per seizure list Ext.11.

P.W.19 Sk. Seraj Alli is a shopkeeper, who is also a co-villager of the deceased. He stated that on the date of occurrence, the deceased and P.W.17 came to his shop to purchase chocolates at about 02.00 to 02.30 p.m. and after taking chocolates, they went away. He further stated that on that evening, he came to know that the deceased had been raped and killed.

P.W.20 Sricharan Rout was working as the Assistant Sub-Inspector of Police in Paradeep Lock police station. He is a witness to the seizure of the wearing apparels of the appellant Sk. Asif Alli and accused Sk. Abid Alli as per seizure lists Exts.9 and 10 respectively.

P.W.21 Dr. Amrit Kumar Behera was working as the Medical Officer, P.H.C., New Tendakura. He stated that on the date of occurrence, the deceased was brought by some people to the P.H.C. and she was in a senseless condition. He stated to have found some nail marks on the neck of the deceased and some marks on the back of the deceased. He also found redness with blood stain in the pubic area of the private part of the deceased. He referred her to the S.C.B.M.C.H., Cuttack for further treatment.

P.W.22 Kishore Chandra Mohanty was working as the attendant in the P.H.C., New Tendakura. He is a witness to the seizure of the O.P.D. ticket vide seizure list Ext.17.

P.W.23 Sk. Wahid Alli is the uncle of the deceased. He stated to have seen the appellants along with other accused persons sitting on the verandah of one Manu Mian and taking liquor while talking with each other. When he learnt about the missing of the deceased, he along with others made announcement from the Masjid. He further stated that when the deceased was rescued, she was found lying naked with injuries on her person.

P.W.24 Mir Zaural Haque is a witness to the seizure of one plastic jari containing glass, burnt cigarette and some other articles as per seizure list Ext.2.

P.W.25 Dr. Soumya Ranjan Nayak was the Assistant Professor, F.M.T., S.C.B.M.H, Cuttack who along with Dr. Gopabandhu Patra, conducted post mortem examination over the dead body of the deceased on police requisition. He proved his report vide Ext.19.

P.W.26 Alakananda Sethy was the tuition Miss of the deceased, who stated that on the fateful day, though she had gone to give tuition, the deceased did not turn up for the same for which she sent another child to call the deceased but the said child could not find her. She further mentioned that P.W.17, the brother of the deceased came for the tuition that day. She was declared hostile by the prosecution.

P.W.27 Dayanidhi Naik was working as the I.I.C. of Tirtol police station who is the Investigating Officer of this case.

P.W.28 Dr. Nigamananda Tripathy was posted as Medical Officer, Manijanga C.H.C., who on police requisition, medically examined the appellant Sk. Akil Alli and found him capable of having sexual intercourse. He proved his report vide Ext.27.

P.W.29 Dr. Debasis Mahali was working as the Medical Officer, Manijanga C.H.C., who on police requisition, medically examined the appellant Sk. Asif Alli and found him capable of having sexual intercourse. He proved his report vide Ext.28.

The prosecution exhibited twenty nine documents. Ext.1 is the inquest report, Ext.2 is the seizure list in respect of one quilt, one panty, one napkin, dress of the deceased, one glass, one thumbs up bottle and other articles, Ext.3 is the F.I.R., Ext.4 is the seizure list in respect of wearing apparels of the deceased, Ext.5 is the 164 Cr.P.C. statement of the informant (P.W.7), Ext.6 is the seizure list in respect of wearing apparels of the appellant Sk. Akil Alli, Ext.7 is the seizure list in respect of biological exhibits of the appellant Sk. Akil Alli, Ext.8 is the seizure list in respect of the nail clippings and pubic hair and biological exhibits of the deceased along with the command certificate of the escort constable, Ext.9 is the seizure list in respect of wearing apparels of the appellant Sk. Asif Alli, Ext.10 is the seizure list in respect of wearing apparels of the accused Sk. Abid Alli, Ext.11 is the seizure list in respect of biological exhibits of the accused Sk. Abid Alli and the appellants in sealed vials, Ext.12 is the seizure list in respect of one maroon colour Honda Active bearing regd. no.OD 21B 0693 and one Samsung mobile phone on production by the accused Sk. Abid Alli, Ext.13 is the seizure list in respect of the school admission register, Ext.14 is the zimanama, Ext.15 is the school admission register, Ext.17 is the seizure list in respect of the outdoor ticket bearing OPD No.4643-D dated 21.08.2014, Ext.18 is the O.P.D. ticket, Ext.19 is the P.M. report, Ext.20 is the spot map, Ext.21 is the zimanama, Ext.22 is the original birth certificate, Ext.23 is the payer made by P.W.27 to send the seized exhibits to S.F.S.L., Bhubaneswar, Ext.24 is the forwarding report, Ext.25 is the C.E. report, Ext.26 is the opinion report of the Director of Finger Print, Bhubaneswar, Ext.27 is the Medical Report of P.W.28 and Ext.28 and Ext.29 are the medical reports of P.W.29.

The prosecution also proved sixteen material objects. M.O.I is the napkin, M.O.II is the lungi, M.O.III is the quilt, M.O.IV is the panty, M.O.V is the semiz, M.O.VI is the full pant, M.O.VII is the blue colour jean pant, M.O.VIII is the jean pant, M.O.IX is the Chadi, M.O.X is the inner garment of the victim, M.O.Xl is the inner banian (Ganji), M.O.XII is another banian (Ganji), M.O.XIII is the pink colour panty of the victim, M.O.XIV is the T-shirt and maroon colour full shirt, M.O.XV is the sealed vial containing sample of semen, pubic hair, both loose and plucked and nail clipping and scrapping and M.O.XVI is the vial containing sample semen, pubic hair, nail clipping and scrapping of accused Sk. Abid Alli.

Defence Plea:

5. The defence plea of the appellants is one of denial of occurrence and of false implication. No witness was examined on behalf of the defence nor any document was exhibited.

Findings of the Trial Court:

6. The learned trial Court taking into account the evidence of P.Ws.1, 2, 7, 15, 21 & 25 coupled with the inquest report (Ext.1) and post mortem examination report (Ext.19) finding came to hold that the prosecution has established that the death of the deceased was a homicidal one. It was further held that there are no eye witnesses to the

occurrence and the case is based on circumstantial evidence. The learned trial Court jotted down the following six circumstances emerging from the records, which are as follows:-

> **(i)** The deceased was last seen with the appellants;
>
> **(ii)** The appellants were seen taking liquor in the verandah of the house of one Manu Mian and gossiping among themselves on 21.08.2014 at about 12.00 p.m. to 12.30 p.m.;
>
> **(iii)** The appellants were found trembling, worried and nervous near the house of Sk. Khairuddin;
>
> **(iv)** Leaving the village Manu Mahala the appellant Sk. Asif Alli, accused Sk. Abid Alli and Sk. Abdul Karim Alli in a Hero Honda Activa scooty at about 6.00 p.m. on 21.08.2014;
>
> **(v)** Detection of finger print of right index finger of appellant Sk. Asif Alli by State Finger Print Bureau from the Aska 40 bottle recovered from the spot;
>
> **(vi)** Conduct of the appellant Sk.Asif Alli and Sk.Abid Alli in absconding from the village.

So far as the circumstance no.(i) is concerned, the learned trial Court taking into account the evidence of P.W.17, held that there is nothing to disbelieve in his evidence that appellant Sk. Akil Alli gagged the mouth of the deceased and appellant Sk. Asif Alli lifted her and they took her. It was further held that after the appellants took the deceased as per the evidence of P.W.17, nobody had seen the deceased till she was recovered from the Taza of the abandoned house of Sk. Khairuddin in a senseless and seriously injured condition and she succumbed to her injuries prior to 8 p.m. and in absence of any explanation from the appellants, it can safely be concluded that they were the authors of the crime.

So far as the circumstance no.(ii) is concerned, the learned trial Court came to hold that the evidence of P.W.6 and P.W.23 that they had seen the accused persons taking liquor in the varandah of the house of Manu Mian at about 12 p.m. or 12.30 p.m. might be a circumstance against the accused persons, but it cannot be safely concluded that all the accused persons were the authors of the crime and it is not sufficient to connect accused Sk. Abid Alli that he was also involved in the crime as possibility cannot be ruled out that he might have left the company of appellants Sk. Asif Alli and Sk. Akil Alli after taking liquor in the varandah of the house of Manu Mian.

So far as the circumstance no.(iii) is concerned, the learned trial Court held that the evidence of P.W.5 that he had seen the appellants standing near the house of Sk. Khairuddin is a circumstance to connect the appellants with the crime. Since they were planning to lift the victim on the way of her return, they might be worried and nervous.

So far as the circumstance no.(iv) is concerned, the learned trial Court held that mere evidence of P.W.1 that the accused Sk. Abid Alli was seen going towards village Kolta in a Hero Honda Activa scooty along with appellant Sk. Asif Alli and Sk.Karim Alli is not sufficient to hold that accused Sk. Abid Alli is also responsible for the crime along with the appellants and it cannot be safely concluded that the accused Sk.Abid Alli is also involved in the crime.

So far as the circumstance no.(v) is concerned, the learned trial Court held that detection of right index finger print of appellant Sk. Asif Alli on Aska 40 liquor bottle recovered from the spot clearly proved his presence at the spot i.e. in the house of Sk. Khairuddin and his involvement in the alleged crime against the victim.

So far as the circumstance no.(vi) is concerned, the learned trial Court held that absconding of appellant Sk. Asif Alli from 21.08.2014 to 05.09.2014 is a strong circumstance against him which completes the chain against him to hold that he is one of the authors of crime along with appellant Sk. Akil Alli. However, it was held that the absconding of Sk. Abid Alli from 21.08.2014 to 05.09.2014 cannot be regarded as a strong circumstance against him in the absence of any other substantial circumstance to complete the chain of circumstances to hold that he was one of the authors of the crime.

The learned trial Court held that the prosecution has successfully established the circumstances against the appellants and the chain of evidence is so complete as not to leave any reasonable ground for the conclusion consistent with their innocence and the facts so established against them are consistent only with hypothesis of the guilt of the appellants and in all human probability, they had committed the ghastly act and responsible for the crime against the deceased. However, it was held that the prosecution has failed to prove the chain of circumstances against the accused Sk. Abid Alli to hold him as one of the authors of the crime. Taking into account the evidence of the doctor (P.W.25) and the post mortem report (Ext.19) findings so also the chemical examination report (Ext.25) and the ocular evidence of the witnesses (P.Ws.1, 2, 3, 4, 7 & 15) and also the evidence of the doctor (P.W.21) who examined the deceased first in a senseless condition, the learned trial Court held that all the circumstances taken together made it clear that the appellants had committed rape on the deceased who was under twelve years of age and that the deceased was subjected to gang rape. Accordingly, while acquitting the accused Sk. Abid Alli of all the charges, found the appellants guilty under sections 302/376-A/376-D of the I.P.C. and section 6 of POCSO Act.

The learned trial Court after holding the appellants guilty under various offences, on the very day also heard on the question of sentence and came to hold that the appellants ravished the deceased who was a minor girl aged about six years and the offences are serious and heinous in nature and against the norms of a healthy society and it revealed a dirty and perverted mind of human beings who had no control over their carnal desires. The number of injuries found on the deceased showed that she was mercilessly ravished and killed to satisfy their carnal desire. Taking into account the criminal antecedents of the appellant Sk. Asif Alli, it was held that after being released on bail on 20.08.2014 in a case under section 307 of I.P.C., he committed the offences in the present case on 21.08.2014 and thus there is no chance of his reformation. It was further held that the appellants had taken away the deceased, who was a minor girl aged about six years, with deliberate intention in order to commit rape and murder and therefore, it comes within the category of rarest of rare case warranting capital punishment to meet the ends of justice.

Submission of parties:

7. Sk.Zafarulla, learned counsel for the appellants argued that out of six circumstances jotted down by the learned trial Court, circumstances nos. (iv), (v) and (vi) are not applicable for the appellant Sk. Akil Alli and circumstances nos. (ii) & (iii) are not so clinching against the said appellant and therefore, basing only on circumstance no. (i) i.e. the last seen evidence as adduced by P.W.17, it would be too risky to convict the appellant Sk. Akil Alli under any of the offences charged. According to him, the sole

witness P.W.17 who deposed about the last seen being a child witness, cannot be relied upon as he has exaggerated his version by naming two accused persons for the first time in Court which shows that he had been tutored to speak such names. Though P.W.17 stated that he had disclosed about the appellants taking away the deceased before his mother but the prosecution did not choose to examine the mother of P.W.17. Similarly P.W.17 stated that he had disclosed also before his tuition Miss (P.W.26) but she has also not supported the prosecution case, for which she has been declared hostile. He placed reliance in the case of ***Bhagwan Singh & others -Vrs.- State of M.P. reported in (2003) 3 Supreme Court Cases 21*** wherein it is held that evidence of child is required to be evaluated carefully because he is an easy prey to tutoring.

The learned counsel further argued that the second circumstance that the appellants were seen taking liquor on the verandah of the house of one Manu Mian and gossiping among themselves on the date of occurrence at about 12 p.m. to 12.30 p.m. along with accused Sk. Abid Alli (acquitted) and Sk. Abdul Karim Alli (absconder) which was two hours before the time of occurrence as deposed to by P.W.6 and P.W.23 cannot be itself a clinching evidence, particularly when as per the evidence of P.W.6, the accused persons used to take liquor in the verandah of Manu Mian regularly.

The learned counsel further argued that so far as the third circumstance regarding the appellants were found trembling, worried and nervous near the house of Sk. Khairuddin is concerned, the finding of the learned trial Court that both the appellants were planning to lift the deceased on the way of her return for which they might be looking worried and nervous is totally a hypothetical finding, which cannot be construed as a conclusive circumstance.

It is argued that so far as the fourth circumstance is concerned, the evidence of P.W.1 that he along with 40-50 persons were in the field of Akhandalmani when he found the appellant Sk. Asif Alli, accused Sk. Abid Alli (acquitted) and Sk. Abdul Karim Alli (absconding) to be going towards village Kolta in a red colour Activa is not supported by any other witnesses. The evidence of P.W.1 indicates that after seeing the accused persons going towards village Kolta, he came to know about the missing of the deceased and also came to the house of Sk. Khairuddin where the body of the deceased was detected lying in a naked condition with injuries and since he was the relative brother of the father of the deceased so also the husband of the informant, it was expected of him to disclose about what he had seen before them at least after P.W.17 stated about the appellants lifted away the deceased while she was returning purchasing chocolates and therefore, it is very difficult to accept the evidence of P.W.1 and utilise this circumstance against the appellant Sk. Asif Alli.

The learned counsel argued that so far as the fifth circumstance i.e. the detection of finger print of right index finger of the appellant Sk. Asif Alli from Aska 40 bottle recovered from the spot is concerned, the two seizure witnesses i.e., P.W.6 & P.W.24 have not specifically stated regarding the seizure of Aska 40 bottle. Similarly, though the evidence of the I.O. (P.W.27) is that there was collection of chance finger prints from Aska 40 bottles by the Scientific Officer which were developed with white powder and marked as Exts.A, B & B-1, but the concerned Scientific Officer was not examined during trial. It is argued that the finger print expert who prepared the report has not been

examined but the report has been simply marked as Ext.26 by the I.O. (P.W.27). Even the Aska 40 bottles in which three chance finger prints were detected and it was developed, were not produced in Court during trial to be marked as M.O. It is further argued that as per the finger print examination report marked as Ext.26, the chance prints marked as 'A & B-1' said to have been detected on different Aska 40 bottles were found to be partial, faint, smudged and devoid of required number of clear ridge details for comparison and opinion and for such reason, no definite opinion could be furnished in respect of chance prints marked as 'A & B-1', however only chance print marked as 'B' said to have been detected on Aska 40 liquor bottle tallied with specimen print marked 'X' said to be the right index finger print of appellant Sk. Asif Alli @ Md. Asif Iqbal. Learned counsel argued that the finding as per Ext.26 was not put to the appellant Sk. Asif Alli in his accused statement to afford him an opportunity to explain the same and therefore, it must be completely excluded from consideration and cannot be utilised against him as one of the circumstances.

The learned counsel further argued that the sixth circumstance i.e. the absconding of the appellant Sk. Asif Alli from the village cannot be said to be such a strong circumstance which without the aid of other clinching circumstantial evidence can form a chain so complete to arrive at the conclusion that he is guilty of the offences charged and therefore, it is a fit case where benefit of doubt should be extended in favour of the appellants. He further argued relying on the decision of the Hon'ble Supreme Court in the case of ***Shankar Kisanrao Khade -Vrs.- State of Maharashtra reported in (2013) 55 Orissa Criminal Reports (SC) 623*** that in the event the appellants are found guilty, in view of their age, family background and the reports received from different authorities as per the orders of this Court, the death sentence should be commuted to life imprisonment.

8. Mr. Bibhu Prasad Tripathy, learned Additional Government Advocate, on the other hand supported the impugned judgment and argued that the evidence of last seen as deposed to by P.W.17 is very natural and convincing and even though he is a child witness, but the learned trial Court after putting some questions found that he was able to answer the questions rationally and therefore, declared him to be a competent witness. The evidence of P.W.17 having not been shaken in the cross-examination and being corroborated by the evidence of P.Ws.2, 3, 7 & 15 before whom he made disclosure about the occurrence, the learned trial Court has rightly placed reliance on such evidence. Reliance was placed on the decisions of the Hon'ble Supreme Court in case of ***Panchhi & others -Vrs.- State of U.P. reported in (1998) 7 Supreme Court Cases 177*** and ***State of Madhya Pradesh -Vrs.- Ramesh & another reported in (2011) 4 Supreme Court Cases 786***. According to Mr. Tripathy, the last seen evidence adduced by P.W.17 in the factual scenario is very relevant as the place of lifting of the deceased by the appellants was very close to the place from where her body was recovered in a naked condition having injuries and the appellants have failed to explain what they did with the deceased after taking her while she was coming with P.W.17 and when they parted with the company of the deceased. He placed reliance in the case of ***Ram Gopal -Vrs.- State of Madhya Pradesh reported in (2023) 5 Supreme Court Cases 534***. Reliance was also

placed in the decision of the Hon'ble Supreme Court in the case of ***Somasundaram @ Somu -Vrs.- State reported in (2020) 7 Supreme Court Cases 722***.

The learned counsel for the State further argued that the evidence of the witnesses relating to taking of liquor by the appellants and the other accused persons on the verandah of Manu Mian prior to the occurrence and the trembling, worried and nervous condition of the appellants near the spot house are very clinching and such evidence has not been shattered in the cross-examination. He submitted that the detection of finger print of Sk. Asif Alli from Aska 40 bottle which was seized from the spot has been rightly utilised by the learned trial Court against the said appellant and non-examination of finger print expert and non-production of Aska 40 bottles for marking as M.Os. cannot be a ground to discard such evidence. Reliance was placed on the decision of the Hon'ble Supreme Court in case of ***Shri Phool Kumar -Vrs.- Delhi Administration reported in (1975) 1 Supreme Court Cases 797***. It is argued that even if no direct questions have been put to the appellant Sk. Asif Alli with regard to matching of one chance finger print from Aska 40 bottle recovered at spot marked as 'B' with his specimen finger print marked as 'X', the same cannot be a ground not to utilise it as an incriminating circumstance. Reliance was placed on the decisions of the Hon'ble Supreme Court in the case of ***Paramjit Singh -Vrs.- State of Uttarakhand reported in A.I.R. 2011 S.C. 200 and Nar Singh -Vrs.- State of Haryana reported in (2015) 1 Supreme Court Cases 496.***

It is argued that the learned trial Court has rightly held the chain of circumstances to be complete pointing towards the guilt of the appellants and therefore, the criminal appeals preferred by the appellants being devoid of merits should be dismissed. He further argued that in view of the age of the deceased, the manner in which she was lifted while coming with her cousin brother (P.W.17) after purchasing chocolates in the broad day light and subsequently found in a naked condition and what had been done with her in a devilish manner as would be evident from the post mortem report finding, the learned trial Court was quite justified in imposing death sentence on the appellants. He placed reliance in the cases of ***Ravi -Vrs.- State of Maharashtra reported in (2019) 9 Supreme Court Cases 622, Manoharan -Vrs.- State reported in (2019) 7 Supreme Court Cases 716, Laxman Naik -Vrs.- State of Orissa reported in (1994) 3 Supreme Court Cases 381*** *and* ***Dhananjoy Chatterjee -Vrs.- State reported in (1994) 2 Supreme Court Cases 220.***

Principle for appreciating the case based on circumstantial evidence:

9. There is no dispute that there is no direct evidence as to who committed the rape and murder of the deceased and how. The prosecution case hinges on circumstantial evidence. It is well established rule of criminal justice that fouler the crime, the higher should be the degree of proof. A moral opinion howsoever strong or genuine cannot be a substitute for legal proof. When a case is based on circumstantial evidence, a very careful, cautious and meticulous scrutinisation of the evidence is necessary.

In the case of ***Sharad Birdhichand Sarada -Vrs.- State of Maharashtra reported in A.I.R. 1984 S.C. 1622***, it is held that the circumstances from which the conclusion of guilt is to be drawn against an accused should be fully established. The

facts so established should be consistent with the hypothesis of the guilt of the accused and they should not be explainable on any other hypothesis except that the accused is guilty. The circumstances should be of conclusive nature and tendency. They should exclude a brief possible hypothesis except the one to be proved. 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 in all human probabilities that the act must have been done by the accused. These five golden principles for appreciation of a case based on circumstantial evidence have been named as 'Panchsheel'. In the case of ***Gambhir -Vrs.- State of Maharashtra reported in A.I.R. 1982 S.C. 1157***, the Hon'ble Supreme Court held that the circumstantial evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence. In the case of ***Jaharlal Das -Vrs.- State of Orissa reported in (1991) 4 Orissa Criminal Reports (SC) 278***, the Hon'ble Supreme Court held that it is to be borne in mind as a caution that in cases depending largely upon circumstantial evidence, there is always a danger that the conjecture or suspicion may take the place of legal proof and such suspicion howsoever strong cannot be allowed to take the place of proof. The Court has to be watchful and ensure that conjectures and suspicions do not take the place of legal proof. The Court must satisfy itself that the various circumstances in the chain of evidence should be established clearly and that the completed chain must be such as to rule out a reasonable likelihood of the innocence of the child.

In the light of legal position about the circumstantial evidence, it is to be examined whether the circumstantial evidence in the instant case satisfies the requirements of law.

The first three circumstances relied upon by the trial Court is common to both the appellants to be discussed first, which are as follows:-

(i) 'Last seen' theory i.e. the appellants and the deceased were last seen together;

(ii) Conduct of the appellants i.e. the appellants were seen taking liquor in the verandah of the house of one Manu Mian and gossiping among themselves on 21.08.2014 at about 12.00 p.m. to 12.30 p.m.;

(iii) The appellants were found trembling, worried and nervous near the house of Sk. Khairuddin;

First Circumstance : 'Last seen' theory i.e. the appellants and the deceased were last seen together:

10. On this circumstance, the relevant witness is P.W.17, the cousin brother of the deceased. He was aged about seven years when he deposed in Court on 04.02.2016. He stated that the informant (P.W.7) was his aunt and the deceased was his sister and on the date of occurrence, when he along with the deceased was returning after purchasing some chocolates, on the way appellant Sk. Asif Alli asked the deceased as to whose daughter she was, to which the deceased replied that she was the daughter of Taz and then Sk. Akil Alli gagged the mouth of the deceased and the appellant Sk. Asif Alli lifted the deceased and took her away. He further stated that the accused Abid (Sk. Abid Alli) and Karim (Sk. Abdul Karim Alli) were along with the appellants. He stated to have disclosed the fact to his mother, tuition Miss (P.W.26) so also to the informant (P.W.7) and to the police.

Admittedly, the mother of P.W.17 has not been examined and the tuition Miss (P.W.26) has not supported the prosecution case.

Though P.W.17 implicated accused persons Abid and Karim, but it has been confronted to him and proved through the I.O. (P.W.27) that he has not stated in his statement recorded under section 161 of Cr.P.C. that the accused persons Abid and Karim were present when the appellants lifted away the deceased. He further stated to have been to the shop to purchase chocolates with the deceased at about 2.00 p.m. and that they were returning home at about 3.00 p.m. He stated not to have met any known person when they had been to purchase chocolates and were returning home. Thus the implication of accused Abid (Sk. Abid Alli) and Karim (Sk. Abdul Karim Alli) was made by P.W.17 for the first time in Court, which was more than a year and five months after the occurrence.

P.W.7 has stated that when they enquired from P.W.17, he disclosed that while he along with the deceased was returning from the shop after purchasing chocolates, appellant Sk. Akil Alli called the deceased and gagged her mouth and appellant Sk. Asif Alli lifted her and took her. Thus P.W.17 has not implicated accused Abid and Karim to be in the company of the appellants before P.W.7 and that is how in the first information report (Ext.3) lodged by P.W.7, the names of accused Abid and Karim did not find place. In the F.I.R., P.W.7 has mentioned that when she asked P.W.17, he disclosed that while returning home, the appellants lifted away the deceased gagging her mouth.

P.W.2 has also stated that P.W.17 disclosed before them that the appellant Sk. Akil Alli gagged the mouth of the deceased and appellant Sk. Asif Alli lifted her away and thus, P.W.17 has not implicated accused persons Abid and Karim before P.W.2.

Thus, it is apparent that P.W.17 has neither disclosed before P.W.2 and P.W.7 about any role played by the accused persons Abid and Karim nor he has stated before the I.O. in his previous statement about their presence at the spot when the deceased was lifted and taken away by the appellants and for the first time, such a statement has been made by him during trial.

Whether P.W.17 was a competent witness to testify?

10.1. P.W.17 is a child witness and aged about seven years. Thus, in view of section 118 of the Evidence Act, it is to be seen whether he was a competent witness to testify.

In the case of ***P. Ramesh -Vrs.- State reported in (2019) 20 Supreme Court Cases 593***, the Hon'ble Supreme Court held that the trial Judge was required to determine as to whether the child witness was in a fit and competent state of mind to depose and was able to understand the purpose for being present on the occasion. Prior to the recording of evidence of a child witness, the trial Court must undertake the exercise of posing relevant questions to determine the capacity of the child witness to provide rational answers. This exercise would allow the Court to determine whether the child has the intellectual and cognitive skills to recollect and narrate the incidents of the crime. Section 118 of the Evidence Act, 1872 deals with the competence of a person to testify before the Court. Section 4 of the Oaths Act, 1969 requires all witnesses to take oath or affirmation, with an exception for child witnesses under the age of twelve years. Therefore, if the Court is satisfied that the child witness below the age of twelve years is

a competent witness, such a witness can be examined without oath or affirmation. It is further held that 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.

Before recording the evidence of P.W.17, the learned trial Judge put some formal questions to him like his name, father's name, name of the school, what was the place where he had come and the purpose in coming to the Court. Since P.W.17 answered all the questions correctly, the learned trial Judge noted down that the witness is able to answer the questions rationally and therefore, he is a competent witness. However, oath was not administered to him as he was seven years of age.

No challenge has been made by the learned counsel for the appellants regarding the competency of P.W.17 to depose.

The admissibility of evidence or acceptability of evidence of a child witness is not solely dependent on his competency. It is well settled that a child witness is prone to tutoring and there is every possibility that under influence, such witness might have been posed to give out a version by persons who may have influence on him. Thus, the testimony of a child witness should be evaluated more carefully and only be accepted after greatest caution and circumspection.

In the cross-examination, suggestion has been given to P.W.17 that he was deposing falsehood being tutored by P.W.7 and P.W.15 to which he denied. In the case of **Ramesh** (*supra*), it is held by the Hon'ble Supreme Court that deposition of a child witness may require corroboration but in case his deposition inspires the confidence of the Court and there is no embellishment or improvement therein, the Court may rely upon his evidence. The evidence of a child witness must be evaluated more carefully with greater circumspection because he is susceptible to tutoring. Only in case there is evidence on record to show that the child has been tutored, the Court can reject his statement partly or fully. However, an inference as to whether child has been tutored or not, can be drawn from the contents of his deposition. In the case of **Panchhi** (*supra*), the Hon'ble Supreme Court held that it is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others telling and thus a child witness is an easy to prey to tutoring. Courts have laid down that evidence of a child witness must find

adequate corroboration before it is relied on. It is more of a rule of practical wisdom than law.

The main plank of argument by the learned counsel for the appellants is that there is every possibility of tutoring to him and that is the reason why he implicated two accused persons for the first time in Court i.e. accused Abid and Karim even though he has not implicated them before police so also while making disclosure about the occurrence before P.W.2 and the informant (P.W.7). The question that now crops up for consideration as to whether the evidence of P.W.17 is to be totally rejected as he has implicated two accused persons i.e. Abid and Karim for the first time during trial. The *maxim falsus in uno falsus in omnibus* i.e. false in one thing false in all is not a sound rule to apply in the condition in our country. It means that if any witness makes a statement which may be incorrect to some extent, it does not inevitably follow that the other portion of his statement, which is correct, has also to be disbelieved. It is very difficult to find a witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishments. The Courts should make efforts to disengage the truth from falsehood, and to shift the grain from the chaff and where the truth and falsehood are so intermingled so as to make it impossible to separate them, the evidence has to be rejected in entirety. It is a misconception that a witness has to be believed in toto or disbelieved in toto. The Court must appraise the evidence to see as to what extent it is worthy of acceptance and merely because in one respect, the Court considers it insufficient to rely the testimony of a witness, it does not necessarily follow as a matter of fact that it must be discarded in all respect as well. Therefore, implication of two accused persons namely, Abid and Karim for the first time in Court during trial by P.W.17 itself cannot be a ground to disbelieve his evidence rather his evidence is required to be carefully assessed and to see if there is any corroboration to his evidence or not. The possibility of coming to his knowledge regarding the involvement of accused persons namely, Abid and Karim afterwards from other sources cannot be ruled out and therefore, he might have been tempted to speak against them in the witness-box. Bereft of implication of two accused Abid and Karim, nothing has been brought out in the cross-examination to discard his evidence, rather his evidence is very natural, clear, cogent and trustworthy. P.W.7 has stated that the deceased had gone to the shop to purchase chocolate along with P.W.17. P.W.19 has stated that on the date of occurrence at about 2 p.m. to 2.30 p.m. the deceased and P.W.17 had come to his stationery shop for chocolate and took chocolate and went away. The evidence of these two witnesses i.e. P.W.7 and P.W.19 lend corroboration to the evidence of P.W.17 that the latter was with the deceased at the time of occurrence. Thus the presence of P.W.17 with the deceased, his conduct in disclosing before others what happened with the deceased is relevant and admissible as res gestae under section 6 of Evidence Act.

In the case of ***Anjan Kumar Sarma and others -Vrs.- State of Assam reported in (2017) 14 Supreme Court Cases 359***, it is held that the circumstance of last seen together cannot by itself form the basis of holding the accused guilty of the offence. In a case where other links have been satisfactorily made out and the circumstance pointed to the guilt of the accused, the circumstance of last seen together and absence of explanation would provide an additional link which completes the chain and in the

absence of proof of other circumstances, the only circumstance of last seen together and absence of satisfactory explanation cannot be made the basis of conviction.

In the case of **Ram Gopal** (*supra*), it is held that once the theory of 'last seen together' was established by the prosecution, the accused was expected to offer some explanation as to when and under what circumstances he had parted the company of the deceased. It is true that the burden to prove the guilt of the accused is always on the prosecution, however, in view of section 106 of the Evidence Act, when any fact is within the knowledge of any person, the burden on of proving that fact is upon whom. Of course, section 106 of the Evidence Act is certainly not intended to relieve the prosecution of its duty to prove the guilt of the accused, nonetheless, it is also equally settled legal position that if the accused does not throw any light upon the facts which are proved to be within the special knowledge, in view of section 106 of the Evidence Act, such failure on the part of the accused may be used against the accused as it may provide an additional link in the chain of circumstances required to be proved against him. In the case based on circumstantial evidence, furnishing or non-furnishing of the explanation by the accused would be a crucial fact, when the theory of last seen together as propounded by the prosecution was proved against him. Though the last seen theory as propounded by the prosecution in a case based on circumstantial evidence may be a weak kind of evidence by itself to base conviction solely on such theory, when the said theory is proved coupled with other circumstances such as the time when the deceased was last seen with the accused and the recovery of the corpse being in very close proximity of time, the accused does owe an explanation under section 106 of the Evidence Act with regard with the circumstances under which death might have taken place. If the accused offers no explanation or furnishes a wrong explanation, absconds, motive is established and some other corroborative evidence in the form of recovery of weapon etc. forming a chain of circumstance is established, the conviction could be based on such evidence.

In the case of ***Somasundaram @ Somu*** *(supra)*, where specific charges under sections 347/365/364 of the I.P.C. were framed, it is held by the Hon'ble Supreme Court that the abduction followed by murder in appropriate cases can enable a Court to presume that the abductor is the murderer. The principle is that after abduction, the abductor would be in a position to explain what happened to his victim and if he failed to do so, it is only natural and logical that an irresistible inference may be drawn that he has done away with the hapless victim. Section 106 of the Evidence Act would come to the assistance of the prosecution.

In the case in hand, however, there is neither any charge of abduction nor any charge of illegal confinement. In the accused statement, the learned trial Court has put specific questions to the appellants on the evidence of P.W.17 but except stating that the same was false, nothing further has been stated by the appellants.

Therefore, I am of the humble view that the learned trial Court has rightly placed reliance on the evidence of P.W.17 and held that the last seen theory has been established by the prosecution. The evidence of P.W.17 that the appellants and the deceased were last seen together when both of them lifted away the deceased while she

was returning with him after purchasing chocolates from the village shop can be used as one of the incriminating circumstance against the appellants as has been rightly done by the learned trial Court, but in my humble view, such circumstance of last seen in itself cannot be held sufficient to record the finding of guilt of the appellants.

Thus the first circumstance i.e. last seen theory even though proved by the prosecution has to be taken into account along with the other circumstances to see whether the chain of evidence has been established clearly and that it forms a completed chain.

Second Circumstance: Conduct of the appellants in taking liquor in the verandah of the house of one Manu Mian:

11. The second circumstance relied upon by the prosecution is that on 21.08.2014 at about 12.00 p.m. to 12.30 p.m., the appellants were seen taking liquor in the verandah of the house of one Manu Mian and gossiping among them which is being deposed to by P.W.6 and P.W.23.

P.W.6 has stated that on the occurrence day, while he was coming to his village Krushnanandapur, he saw the appellants and the accused persons namely, Sk. Abid and Sk. Karim were taking liquor at about 12.30 noon on the varandah of the house of Manu Mian and they were talking with each other. In the cross-examination, he has stated that the accused persons used to take liquor in the varandah of Manu Mian regularly. P.W.23 has also stated to have seen the appellants and the accused persons namely, Sk. Abid Alli and Sk. Karim Alli taking liquor in the varandah of Manu Mian and gossiping among them on the date of occurrence at about 12 noon.

The time when the appellants and the two other accused persons were seen taking liquor was much before the time when P.W.17 with the deceased came to purchase chocolates and after purchasing were returning home. P.W.17 has stated that he had been to the shop with the deceased to purchase chocolate at about 2 p.m. and was returning at about 3 p.m. Similarly P.W.19 has stated that on the date of occurrence at about 2 p.m. to 2.30 p.m., the deceased and P.W.17 had come to his stationery shop for purchasing chocolate. As deposed to by P.W.6, the appellants and the accused persons namely, Sk. Abid and Sk. Karim used to take liquor in the varandah of Manu Mian regularly. Learned trial Court has held that from this circumstance, it cannot be safely concluded that all the accused persons were the authors of the crime. It was further held that the possibility of accused Sk. Abid Alli leaving the company of the appellants after taking liquor from the varandah of the house of Manu Mian cannot be ruled out.

Thus, the second circumstance i.e. the appellants were seen taking liquor in the verandah of the house of one Manu Mian and gossiping among themselves and the other two accused persons were also with them, as proved by the prosecution is not by itself sufficient to connect the appellants with the crime. It is to be considered along with the other proved circumstances to see whether the chain of evidence is so complete as to unerringly point towards the guilt of the appellants.

Third Circumstance : Appellants were found trembling, worried and nervous near the house of Sk. Khairuddin:

12. The third circumstance i.e the appellants were found trembling, worried and nervous near the house of Sk. Khairuddin is concerned, P.W.5 is the sole witness on this circumstance.

P.W.5 has stated that on the date of occurrence at about 2 p.m. to 2.30 p.m. while he was returning from Masjid after Namaz, he found the appellants near the house of Sk. Khairuddin and they were found trembling, looking worried and nervous and then he went to his house.

The learned trial Court held that since the appellants were planning to lift the victim on the way of her return, they might be worried and nervous. It is nothing but a hypothetical conclusion. There is nothing on record that the deceased and P.W.17 had passed by that way by that time to purchase chocolates from the stationery shop of P.W.19 and that the appellants had seen them. According to P.W.17, he had been to the shop with the deceased to purchase chocolate at about 2 p.m. and was returning at about 3 p.m.

The conclusion arrived at should be sensible and reasonable. It must be based on reasons rather than imaginations and emotions. P.W.5 stated that he was a close relative of the deceased and the deceased belonged to her family. It is true that related witness is not necessarily a false witness, but when P.W.5 was just passing by that way near the house of Sk. Khairuddin after Namaj in Masjid and there is no evidence how much time he observed both the appellants and found them trembling, looking worried and nervous, even if the evidence of P.W.5 is accepted, it cannot be said with certainty that it was before the lifting of the deceased as held by the learned trial Court. Trembling, looking worried and nervousness can be for a variety of reasons and it cannot be said with certainty that it was only for the reasons assigned by the trial Court. The body of the deceased was located on the Taza of the house of Sk. Khairuddin at about 5.30 p.m. as stated by the informant (P.W.7) and the appellants were found near the house of Sk. Khairuddin at about 2 p.m. to 2.30 p.m. as stated by P.W.5.

Thus, the third circumstance as proved by the prosecution, i.e the appellants were found trembling, worried and nervous near the house of Sk. Khairuddin, in my humble view is not so clinching by itself to arrive at the conclusion as reached by the trial Court or sufficient to connect the appellants with the crime and it is to be considered along with the other proved circumstances.

Summed up : Circumstances against the appellant Sk. Akil Alli:-

13. The three circumstances which are appearing against appellant Sk. Akil Alli as discussed above, I am of the humble view that though through the evidence of P.W.17, the prosecution has successfully proved that on the date of occurrence in the afternoon, both the appellants lifted away the deceased while she was returning after purchasing chocolates and thus the appellants and the deceased were last seen together, but such circumstance of last seen coupled with the circumstance that the appellant Sk. Akil Alli was seen taking liquor in the verandah of the house of Manu Mian with appellant Sk. Asif Alli and the other two accused i.e. Sk. Abid Alli and Sk. Abdul Karim Alli so also the circumstance that he along with the appellant Sk. Asif Alli was found trembling, worried and nervous near the house of Sk. Khairuddin in the afternoon on the date of

occurrence do not form a complete chain to record the finding that it is consistent only with the hypothesis of guilt of the appellant Sk. Akil Alli and totally inconsistent with his innocence and prove the charges against him beyond all reasonable doubt. The circumstances proved raised an amount of suspicion, but suspicion, howsoever strong, cannot be a substitute for proof of the guilt of the appellant beyond reasonable doubt.

There is no evidence against appellant Sk. Akil Alli that he tried to flee or abscond from his village. He was apprehended by local people and handed over to the I.O. (P.W.27) on the night of occurrence. The appellant was examined by the doctor (P.W.28) at C.H.C., Manijanga on police requisition and he was found capable of committing sexual intercourse and his pubic hair and sample semen were collected by the doctor and kept in sealed vials and handed over to the escorting constable, which in turn were seized by the I.O. (P.W.27), who also seized the wearing apparels of the appellant i.e. blue colour check lungi and one half vest on being produced by him as per seizure list Ext.6. The forwarding report for chemical examination, which was marked as Ext.24, would indicate that the check lungi of the appellant Sk. Akil Alli was marked as Ext.'P', his half vest was marked as Ext.'P-1', pubic hair of the appellant was marked as Ext.'Q' and sample semen of the appellant collected in a sealed bottle was marked as Ext.'Q-1'. The nature of examination sought for so far as these four exhibits, which relate to the appellant Sk. Akil Alli were **(i)** whether Exts.'P' & 'P-1' contained any blood stain and if so, whether it tallied with Exts.'B', 'E' & 'L' i.e. the wearing apparels of the deceased; **(ii)** whether Exts.'P' and 'P-1' contained any vaginal swab and if so, whether it tallied with Ext.'M-1' (vaginal swab); **(iii)** whether any blood stain/seminal stain detected in Ext.'A' i.e. the kantha seized from the spot and did it tally with Ext.'Q-1', **(iv)** whether the stains detected in Exts.'B' & 'L' i.e. the wearing apparels of the deceased tallied with Ext.'Q-1' and **(v)** whether Ext.'Q' tallied with any hair detected from Ext.'A'. The chemical examination report (Ext.25) indicates that in Exts.'P' & 'P-1', no blood, no semen and no vaginal secretion stain were noticed and similarly in Ext.'Q', no blood and no semen were noticed. So far as Ext.'Q-1' is concerned, it was found to be deteriorated due to preservation in liquid state. Admittedly, no finger print of the appellant Sk. Akil Alli was found to be tallying with the chance finger prints detected on Aska 40 liquor bottles found at the spot.

Therefore, from the three proved circumstances, it is difficult to sustain the conviction of the appellant Sk. Akil Alli under sections 302/376-A/376-D of the I.P.C. and section 6 of the POCSO Act and accordingly, the same is hereby set aside and the appellant is acquitted of all the charges.

14. Before proceeding further to discuss about the remaining three circumstances, which are against Sk. Asif Alli @ Md. Asif Iqbal, it would be apt to discuss whether prosecution has proved that the deceased was subjected to rape and she met with a homicidal death.

Whether the deceased was subjected to rape and she met with a homicidal death:

14.1. The deceased was first detected on the Taza of the house of Sk. Khairuddin by P.W.3 who found her in a naked condition. P.W.2 stated to have noticed nail marks on the belly and backside and knee of the victim and he also found blood patches on the

thigh. P.W.15 has stated that the victim was recovered in a senseless and naked condition and she had sustained bleeding injuries on her person including her genital. P.W.7 has stated that she found the victim naked and senseless when she was rescued from Taza of the house of Sk. Khairuddin. She also found injuries on the chest, shoulder, below the ear, back and knee of the deceased and she had sustained bleeding injuries on her private part and there was dried blood in her private part and that they covered the body of the deceased with bed sheet and shifted her to Tendakunda Hospital. P.W.21 Dr. Amrit Kumar Behera who was the Medical Officer in New Tendakuda C.H.C. examined the deceased and he stated that when some persons brought the deceased to him on 21.08.2014 at about 6.30 p.m., he found the deceased was in a senseless condition having some nail marks on her neck and some marks on the back. He also found redness with blood stain in her private part (in pubic area) for which he referred her to S.C.B.M.C.H., Cuttack for further treatment. He proved the OPD ticket vide Ext.18, which was seized by the I.O. as per seizure list Ext.17. While the deceased was being shifted to the hospital at Cuttack, on the way near Kandarpur, she died for which P.W.7 and others who were carrying her returned back to the village. The inquest report marked as Ext.1 also indicates that the deceased had sustained injuries on different parts of her body including bleeding injuries on her vagina.

P.W.25 Dr. Saumya Ranjan Naik, Assistant Professor, F.M.T., S.C.B.M.C.H., Cuttack conducted post mortem examination over the dead body of the deceased on 22.08.2014 and noticed the following injuries :-

External injuries:

(i) Genital area found swollen and edematous and fluid blood found coming out from the vaginal opening. Labia Majora and labia minora found contused, posterior commissure found contused and lacerated. Vaginal opening found stretched and the margins were seen contused and lacerated. There was wide gaping of vaginal cutlet and vaginal canal. Hymen found completely lacerated, mostly on the posterior aspect;
(ii) Abrasion looking red (3 cm x 1 cm) present on right breast;
(iii) Abrasion looking red (4 cm x 0.5 cm) present on right side front of abdomen vertically 1 cm lateral to umbilicus;
(iv) Scratch abrasion (2 cm x 0.1 cm) present on right side zygomatic area;
(v) Abrasion (0.7 cm x 0.2 cm) present on middle of left pinna;
(vi) Abrasion (1 cm x 1 cm) on front of left knee;
(vii) Abrasion (2 cm x 2 cm) on lateral aspect of left knee;
(viii) Multiple scratch abrasions of length varying from 1 cm to 5 cm present on left side back of chest 6 cm below scapula;
(ix) Multiple small abraded contusions over an area of abdomen at the level of LI (6 cm x 4 cm) present on mid line;
(x) Multiple small abrasions (3 cm x 1 cm) present on sacral area;
(xi) Multiple small abrasions present on left scapula shoulder;
(xii) Multiple small abrasions present on right scapula;
(xiii) Multiple small abrasions present on front and right side of neck.

On dissection:

Left side lateral wall of vaginal canal found torn and lacerated and the margins were found contused. About 200 fluid blood found within pelvic cavity. Structures of the neck were found intact without any extravasations of blood. Stomach contained 300 grams partially digested food particles without emitting any characteristic odour, mucosa is healthy. All other organs were intact and pale.

The doctor (P.W.25) has stated in his evidence that external injuries nos.(ii) to (xiii) found on the dead body were ante mortem in nature and might have been caused by hard and blunt trauma or contact with hard and rough surface. He has further opined that external injury no.(i) along with corresponding internal injuries were ante mortem in nature and consistent with forceful thrusting and could have been caused due to penetration of male organ. As per his opinion, death of the deceased was due to shock and hemorrhage as a result of injuries to genital track which were fatal in ordinary course of nature. According to him, age of injuries were of fresh duration at the time of death, time since death was within 12 to 24 hours prior to autopsy and the death was within 12 to 24 hours prior to autopsy and the death was homicidal in nature. During cross-examination, P.W.25 has clearly denied the suggestion put to him by the learned defence counsel by saying that the injuries on the vagina were not possible by fall on hard surface or by inserting a wooden substance in the vagina.

In view of the oral as well as medical evidence, I am of the humble view that the deceased was subjected to rape and on account of rape, external injuries were caused on different parts of her body including injuries to genital track which were fatal in ordinary course of nature and it also caused shock and hemorrhage which resulted in her death and her death was homicidal in nature. The learned counsel for the appellants has not challenged this aspect though it is his contention that there is insufficient evidence on record to hold the appellants liable for such offences.

Remaining three circumstances:

15. The remaining three circumstances which are against the appellant Sk. Asif Alli @ Md. Asif Iqbal are to be discussed now.

Fourth Circumstance : Appellant Sk. Asif Alli was found leaving village Manu Mahala on the date of occurrence:

16. The fourth circumstance i.e. the appellant Sk. Asif Alli was found leaving village Manu Mahala in a Hero Honda Activa scooty on the date of occurrence i.e. on 21.08.2014 at about 6 p.m. with the accused Sk. Abid Alli and Sk. Abdul Karim Alli, has been deposed to by P.W.1 Sk. Wamik Alli who is the sole witness on this circumstance. He has stated that on the date of occurrence in the afternoon, while he along with others were in the field of Akhandalmani, they found the appellant Sk. Asif Alli along with accused Sk. Abid Alli (acquitted) and Sk. Karim Alli (absconding) were going towards village Kolta in a red colour Activa. In the cross-examination, P.W.1 has stated that he went to Akhandalmani field at about 4 p.m. and returned to his house at about 5.20 p.m. He further stated that by the time of his arrival at Akhandalmani field, around forty to fifty persons were there. He further stated that he was examined by the police in front of the house of the deceased on the night of occurrence.

It is the contention of the learned counsel for the appellants that even though there are many others present at Akhandalmani field, only P.W.1 was examined to prove this circumstance. Learned counsel for the State submitted that in the matter of appreciation of evidence of witnesses, it is not the number of witnesses but quality of evidence that is important.

Adverting to the contentions raised, law is well settled that section 134 of the Evidence Act does not provide for any particular number of witnesses and it would be permissible for the Court to record a finding regarding any particular aspect of the prosecution case on the evidence of a solitary witness if his evidence is found to be credible, reliable, in tune with the case of the prosecution and inspires implicit confidence. It is not the quantity but quality of evidence adduced by the witness that matters for determining the guilt or innocence of the accused. The testimony of a sole witness must be confidence-inspiring and beyond suspicion, thus, leaving no doubt in the mind of the Court.

The evidence of P.W.1 who is related to the father of the deceased as brother cannot be doubted on the ground of relationship as related witnesses are not necessarily false witnesses. Unless their evidence suffers from serious infirmity or raises considerable doubt in the mind of the Court, it would not be proper to discard their evidence straight away. Evidence of P.W.1 has not been shattered or discredited by the defence in spite of searching cross-examination. He disclosed before police what he had seen when he was examined on the night of occurrence The leaving of village Manu Mahala by the appellant Sk. Asif Alli along with the other two might not have been noticed by others present in Akhandalmani field as they just passed through that way. P.W.4 was present in Akhandalmani field and he was playing football when he came to know about the missing of the deceased but he has not stated about this circumstance. Non-examination of other witnesses to prove the same circumstance is immaterial.

After carefully assessing the evidence of P.W.1, I find him to be a reliable witness and through his evidence, the prosecution has successfully proved the fourth circumstance.

Fifth Circumstance : Detection of finger print of appellant Sk. Asif Alli by State Finger Print Bureau from the Aska 40 bottle found at the spot:

17. The fifth circumstance relied upon by the prosecution is that the right index finger print of the appellant Sk. Asif Alli was detected by the State Finger Print Bureau from the Aska 40 bottle recovered from the spot.

P.W.27, the I.O. has stated that the scientific team of S.F.S.L., Rasulgarh and staff of D.F.S.L., Jagatsinghpur arrived at the spot on 22.08.2014 at 1.30 pm. and inspected the spot and as per seizure list Ext.2, three nos. of Aska 40 bottles along with other articles were seized in presence of witnesses at 3.30 p.m. The seizure list Ext.2 though does not specifically indicate seizure of Aska 40 bottles, but it indicates about seizure of three nos. of glass bottles marked as Exts.'J','J/1' and 'J/2'. The I.O. (P.W.27) has further stated that during inspection of spot by the Scientific Officer Chunuram Murmu, State F.S.L., Rasulgarh, Bhubaneswar, three chance finger prints were detected from the bottles (Aska 40 bottles) by the Finger Print Sub-Inspector, Jagatsinghpur and the chance finger prints were developed with white powder and marked as Exts.'A', 'B' & 'B-1'. Ext.2 also indicates in column no.2 regarding production of different articles by Scientific Officer Chunuram Murmu, State S.F.S.L., Rasulgarh, Bhubaneswar before the I.O. and the I.O. has also stated that on 22.08.2014 at about 3.30 p.m. he seized the articles after those were handed over to him by the S.F.S.L. Officer.

P.Ws.6 & 24 are the witnesses to the seizure list Ext.2. P.W.6 while proving his signature in seizure list Ext.2, has stated about seizure of different articles as per the said seizure list. P.W.24 has also stated about the seizure of articles by the I.O. as per seizure list Ext.2 and he has also proved his signature thereon. Learned counsel for the appellants contended that neither P.W.6 nor P.W.24 has specifically stated about the seizure of three nos. of Aska 40 bottles under seizure list Ext.2. Such a contention cannot be attached with any importance since their evidence as seizure witnesses has not been shattered or discredited by the defence rather it is getting corroboration from the evidence of the I.O.

It is argued by the learned counsel for the appellants that during trial, the prosecution has not examined the Scientific Officer Chunuram Murmu or any other officer who assisted him during the spot inspection and detected and developed three chance finger prints from the Aska 40 bottles. The liquor bottles were not produced in Court during trial and the photo images of chance prints marked as A, B and B-1 in a CD along with their photo enlargements on the basis of which Finger Print Examination Report (Ext.26) was prepared were also not produced during trial and therefore, no importance is to be attached to the findings recorded by the Director, State Finger Print Bureau, Rasulgarh, Bhubaneswar in Ext.26. Learned counsel for the State on the other hand argued that since spot inspection by the scientific officials is not in dispute which is otherwise proved by oral as well as documentary evidence, non-examination of such officials is immaterial.

The evidence of the I.O. (P.W.27) indicates that on 05.09.2014, after he apprehended the appellant Sk. Asif Alli at Bhubaneswar along with accused Sk. Abid Ali (acquitted), they were sent to Medical Officer, C.H.C., Manijanga for necessary medical examination and opinion. The escort party produced the medical examination reports, biological exhibits collected from the appellants in sealed vials which were seized and then the appellant Sk. Asif Alli and accused Sk. Abid Ali were arrested on 06.09.2014 and forwarded to Court on that very day, which would be evident from the order sheet dated 06.09.2014. The evidence of the I.O. and the case records further indicate that the specimen finger prints of Sk.Asif Alli and other accused persons were collected and the I.O. made requisition to S.P., Jagatsingpur through FPSI, DFSL, Jagatsinghpur to send the chance finger prints collected from Aska 40 bottles which were transferred to a CD along with specimen ten digit finger print slips of the suspects including the appellant Sk. Asif Alli to the Director, State Finger Print Bureau, Rasulgarh, Bhubaneswar for necessary examination and opinion and accordingly, the same were dispatched through FPSI, Jagatsinghpur and the report (Ext.26) goes against the appellant Sk. Asif Alli. Non-examination of Scientific Officer who detected and developed chance finger prints and non-production of Aska 40 bottles in Court during trial cannot be a ground to discard the evidenciary value of Ext.26. No suggestion has been given by the defence to the I.O. that there was no seizure of Aska 40 bottles from the spot. Photo images of chance prints along with their photo enlargements including CD and specimen finger prints are very much available on record and those are part and parcel of Ext.26, which indicates that the chance print marked as Ext.'B' said to have been detected on Aska 40 liquor bottle tallied with specimen print marked Ext.'X' said to be the right index finger print of the appellant Sk.Asif Alli.

In the case of **Phool Kumar** (*supra*) on which reliance was placed by the learned counsel for the State, it is held that the clinching evidence against the appellant was his thumb impression on the kunda of the cash box. It was conclusively proved to be his on the opinion of the expert. The report of the expert was used as evidence by the prosecution without examining him in Court. Neither the Court thought it fit nor the prosecution or the accused filed any application to summon and examine the expert as to the subject matter of his report. The Court was bound to summon the expert if the accused would have filed any such application for his examination. That not having been done, the grievance of the appellant apropos the report of the expert being used without his examination in Court had no substance.

The examination of expert is crucial especially if reliance is placed on the finger print report to suspect the guilt of the accused. The I.O. has stated that the Scientific Officer, DFSL finger print and team collected the finger prints of three accused persons from the Sub-Jail, Jagatsinghpur after obtaining the order of the Court. Specific questions have been put to the appellant Sk. Asif Alli in the accused statement relating to detection of Aska 40 liquor bottles during spot visit, visit of scientific team of SFSL, Rasulgarh and staff of DFSL, Jagatsinghpur to the spot and seizure of three numbers of Aska 40 bottles as per seizure list, but the appellant simply answered that he could not say. Ext.26 has been marked on admission. No application was filed from the side of accused persons to summon the Scientific Officer or expert for his examination. Therefore, non-examination of the Scientific Officer or the expert who prepared the report cannot be a ground not to give importance to Ext.26. It is correct that inadvertently no direct question has been put to the appellant Sk. Asif Alli on the finding of Ext.26 in the accused statement, but it has been held by the Hon'ble Supreme Court in the case of **Paramjeet Singh** (*supra*) that the provisions of section 313 of Cr.P.C. make it obligatory for the Court to question the accused on the evidence and circumstances against him so as to offer him an opportunity to explain the same, but, it would not be enough for the accused to show that he has not been questioned or examined on a particular circumstance, instead he must show that such non-examination has actually and materially prejudiced him and has resulted in the failure of justice. In other words, in the event of an inadvertent omission on the part of the Court to question the accused on any incriminating circumstance cannot ipso facto vitiate the trial unless it is shown that some material prejudice was caused to the accused by the omission of the Court.

In the case of **Nar Singh** (*supra*), contention was raised from the side of the appellant that since Ballistic Expert opinion was not put to the appellant in his statement recorded under section 313 of Cr.P.C, it must be completely excluded from consideration. The Hon'ble Court held that when the trial Court is required to act in accordance with the mandatory provisions of section 313 of Cr.P.C, failure on the part of the trial Court to comply with the mandate of the law, cannot automatically enure to the benefit of the accused. Any omission on the part of the Court to question the accused on any incriminating circumstance would not ipso facto vitiate the trial, unless some material prejudice is shown to have been caused to the accused. It was further held that in so far as non-compliance of mandatory provisions of section 313 of Cr.P.C, it is an error essentially committed by the learned Sessions Judge. Since justice suffers in the

hands of the Court, the same has to be corrected or rectified in the appeal. The question whether a trial is vitiated or not depends upon the degree of the error and the accused must show that non-compliance of section 313 of Cr.P.C. has materially prejudiced him or is likely to cause prejudice to him. Merely because of defective questioning under section 313 of Cr.P.C, it cannot be inferred that any prejudice had been caused to the accused, even assuming that some incriminating circumstances in the prosecution case had been left out. When prejudice to the accused is alleged, it has to be shown that accused has suffered some disability or detriment in relation to the safeguard given to him under section 313 of Cr.P.C. Such prejudice should also demonstrate that it has occasioned failure of justice to the accused. The burden is upon the accused to prove that prejudice has been caused to him or in the facts and circumstances of the case, such prejudice may be implicit and the Court may draw an inference of such prejudice. Facts of each case have to be examined to determine whether actually any prejudice has been caused to the appellant due to omission of some incriminating circumstances being put to the accused. Whenever a plea of non-compliance of section 313 of Cr.P.C. is raised, it is within the powers of the appellate Court to examine and further examine the convict or the counsel appearing for the accused and the said answers shall be taken into consideration for deciding the matter. If the accused is unable to offer the appellate Court any reasonable explanation of such circumstance, the Court may assume that the accused has no acceptable explanation to offer. In the facts and circumstances of the case, if the appellate Court comes to the conclusion that no prejudice was caused or no failure of justice was occasioned, the appellate Court will hear and decide the matter upon merits.

It is pertinent to note that live link was provided to the jail where the appellants were lodged and they were provided opportunity to see the entire hearing proceeding. One learned State Counsel from the District Court also remained present with them throughout the proceeding as per our direction to explain them the argument advanced and interactions between the Bench and the learned counsel for the respective parties. During course of hearing, when we expressed our willingness to provide an opportunity to the appellant Sk. Asif Alli to explain the finding of Ext.26 against him by way of recording additional accused statement under section 313 of Cr.P.C., if he so desires, the learned counsel for the appellants after taking instruction was reluctant to avail such opportunity.

In the case in hand, the defence has not disputed the visit of scientific team to the spot, the seizure of Aska 40 liquor bottles from the spot on being produced by the Scientific Officer, the detection and development of chance finger prints from such bottles, the collection of specimen ten digit finger prints of the appellant Sk. Asif Alli from jail and its dispatch to State Finger Print Bureau, Bhubaneswar for examination. In fact, the same has been proved through oral as well as documentary evidence. The learned counsel for the appellant has failed to show as to what material prejudice was caused to the appellant by the omission of the Court to put direct question on Ext.26.

In view of the foregoing discussions, when chance finger prints were detected and developed from the three Aska 40 liquor bottles found at the spot and one chance print marked ‘B’ tallied with specimen right index finger print of the appellant Sk. Asif

Alli and there is no suspicious feature in it, the prosecution can be said to have proved the fifth circumstance against the appellant Sk. Asif Alli beyond all reasonable doubt. It cannot be lost sight of the fact the Aska 40 liquor bottles were found at the spot which was inside the bunker of the house of Sk. Khairuddin where the wearing apparels of the deceased which were identified by the informant (P.W.7) so also the dead body of the deceased was found in a naked condition on the Taza of the underground room which is a very clinching evidence against the appellant Sk. Asif Alli.

Sixth Circumstance : Conduct of the appellant Sk. Asif Alli in absconding from the village after occurrence:

18. The occurrence in question took place on 21.08.2014 in the afternoon and as already discussed under the heading of fourth circumstance that the appellant Sk. Asif Alli was found leaving the village Manu Mohalla in a Hero Honda Activa Scooty with two co-accused persons on the same day at about 6.00 p.m. The Investigating Officer (P.W.27) has stated that on 22.08.2014, only appellant Sk. Akil Alli was apprehended by the local people and was arrested by him in the occurrence night, but when he searched for the other accused persons inside the village, they were found absent. The I.O. has further stated that as per the direction of the S.P., Jagatsinghpur, a special team was formed to apprehend the accused persons and raid was conducted at different places. On 05.09.2014 at about 3.00 p.m., the appellant Sk. Asif Alli so also the co-accused Sk. Abid Alli (acquitted) were apprehended at Bhubaneswar by the I.O. and they were brought to Tirtol police station. Specific question has been put to the appellant regarding his apprehension at Bhubaneswar in the accused statement but he simply answered he did not know.

The evidence has come on record through the I.O. that the appellant Sk. Asif Alli was an accused in a case of murder in connection with Tirtol P.S. Case No.197 of 2011. Another case under section 307 of the I.P.C. was instituted against him in connection with Tirtol P.S. Case No.89 of 2014 in which he was forwarded to Court and released on bail on 20.08.2014 i.e. the previous day of the occurrence.

The conduct of the appellant Sk. Asif Alli in absconding away from his village on the date of occurrence till he was apprehended by the I.O. was a circumstance duly proved by the prosecution against him. No explanation has been rendered by the appellant in regard to his absence from his village and he was not available to the police in spite of their best efforts to trace him. Thus, the sixth circumstance relating to the conduct of the appellant in absconding from his village has been duly proved by the prosecution and this absconding of the appellant along with other incriminating circumstances as proved by the prosecution goes a great way to point his culpability.

Summed up : Circumstances against appellant Sk. Asif Alli @ Md. Asif Iqbal:

19. All the sixth circumstances which are appearing against the appellant Sk. Asif Alli as discussed above, are of a conclusive nature and have been fully established by the prosecution. The facts established are consistent with the hypothesis of guilt of the appellant and it is not explainable under any of the hypothesis except that the appellant is guilty. The chain of evidence is so complete that it does not leave any reasonable ground for the conclusion consistent with innocence of the appellant rather when the

circumstances are collectively considered, the same lead only to the irresistible conclusion that the appellant is the perpetrator of the crime in question.

Charges proved against appellant Sk. Asif Alli @ Md. Asif Iqbal:

20. In my humble view, the prosecution has established the charge under section 302 of the I.P.C. against the appellant Sk. Asif Alli particularly in view of the oral evidence adduced by the witnesses relating to the manner in which the body of the deceased was found in the Taza of the house of Sk. Khairuddin, the inquest report so also the post mortem report findings.

The prosecution has also proved through the evidence of the doctor (P.W.25) who conducted post mortem examination and the oral evidence of the witnesses regarding the manner in which the body of the deceased was found in a naked condition with multiple injuries on different parts of the body including genital area that the appellant has not only committed an offence of rape on the deceased but in course of such commission, he inflicted the injuries which resulted in the death of the deceased and therefore, the learned trial Court has rightly found the appellant guilty under section 376-A of the I.P.C.

So far as the charge under section 376-D of the I.P.C. which relates to commission of gang rape is concerned, since one of the accused, who faced trial, namely, Sk. Abid Alli has been acquitted by the learned trial Court and appellant Sk. Akil Alli has been acquitted by virtue of this judgment, it would not be proper to convict the appellant under section 376-D of the I.P.C.

Coming to the charge under section 6 of the POCSO Act which deals with punishment for aggravated penetrative sexual assault defined under section 5 of the said Act, the ingredients of the offence can be satisfied if someone, inter alia, commits penetrative sexual assault on a child below twelve years. ‘Penetrative sexual assault’ has been defined under section 3 of the said Act and in view of the evidence of the doctor (P.W.25), I am of the view that the necessary ingredients are satisfied. So far as the age of the deceased is concerned, the evidence of P.W.14, the Principal of Kalinga Public School, Krishnanandapur where the deceased was prosecuting her studies as a student of L.K.G. indicates that her date of birth was 16.03.2008 as per the school admission register which was seized by the police during investigation and left in the zima of P.W.14. The original birth certificate of the deceased was seized by the I.O. as per seizure list Ext.10 on 09.09.2014 on being produced by the uncle of the deceased and it also reflects the date of birth of the deceased to be 16.03.2008. Since the occurrence in question took place on 21.08.2014, the prosecution has proved that the deceased was a child below twelve years. The learned counsel for the appellant has not challenged the evidence relating to the age of the deceased. Therefore, the prosecution has successfully established the charge under section 6 of the POCSO Act against the appellant Sk. Asif Alli.

21. In view of the foregoing discussion, I am of the view that the prosecution has failed to establish the charge under section 376-D of the I.P.C. against the appellant Sk. Asif Alli and accordingly, he is acquitted of such charge, however he is found guilty under sections 302/376-A of the I.P.C. and section 6 of the POCSO Act.

Sentence:

22. The learned trial Court has awarded life imprisonment for the offence under section 376-A of the I.P.C., which shall mean imprisonment for the remainder of his natural life. This section gives a discretion to the Court to impose punishment with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean for imprisonment for the remainder of that person's natural life, and with fine or with death. In view of the age of the deceased at the time of occurrence and the manner in which rape has been committed which ultimately caused the death of the deceased, I am of the view that the sentence awarded by the learned trial Court for such offence is perfectly justified and no interference is called for with the same.

The learned trial Court has rightly not imposed any sentence for the conviction of the appellant Sk. Asif Alli for the charge under section 6 of the POCSO Act in view of section 42 of the said Act.

23. So far as the the offence under section 302 of the I.P.C. is concerned, the learned trial Court has awarded death sentence to the appellant Sk. Asif Alli and ordered that he be hanged by neck till he is dead.

The only question that now remains to be decided is whether this case falls in the category of rarest of rare case, justifying capital punishment. The learned Hon'ble Supreme Court in several judgments has awarded capital punishment, where rape and murder have been committed on a minor girl, after striking a balance between the aggravating and mitigating circumstances. Several other factors like the young age of the accused, the possibility of reformation, lack of intention to murder consequent to rape etc. have also gone into judicial mind.

It seems that on the date of pronouncement of order of conviction i.e. on 29.11.2022, hearing on the question of sentence was made and death sentence was awarded. The learned trial Court after noting down the principles rendered by the Hon'ble Supreme Court in different cases relating to awarding of death sentence, has been pleased to hold that the deceased was a minor victim aged about six years and the offences are serious and heinous in nature and against the norms of a healthy society. The act reveals a dirty and perverted mind of human being who has no control over his carnal desires. The number of injuries found on the deceased show that she was mercilessly ravished and killed to satisfy the carnal desires. The learned trial Court also took into account the criminal background of the appellant as he was involved previously not only in a case under section 302 of the I.P.C. but also in another case under section 307 of the I.P.C. and was released on bail on 20.08.2014 and committed the offence in the present case on the very next day. The learned trial Court held that there was no chance of reformation of the appellant in the near future. The deceased was well known to the appellant as he was a co-villager and the deceased was taken away with deliberate intention in an ill mind in order to commit rape and murder, which comes within the category of rarest of rare case warranting capital punishment to meet the ends of justice. The learned trial Court further held that imposition of capital punishment on the appellant would be an example for other wrongdoers of similar nature

in the society, which is necessitated in order to protect and safeguard the female children's interest in the country and accordingly, imposed death sentence on the appellant.

During course of argument, on 30.04.2024 learned counsel for the appellants argued that passing of death sentence on the date of conviction by the learned trial Court was not justified. The learned counsel for the State brought to the notice of the Court the decision of the Hon'ble Supreme Court rendered in the case of ***Sundar @ Sundarrajan -Vrs.- State by Inspector of Police reported in 2023 LiveLaw (SC) 217***. After going through the ratio laid down in the said decision, we deemed it proper to call for a report to the Superintendent of Circle Jail, Choudwar, Cuttack regarding (i) conduct of the appellants in jail; (ii) information on appellants' involvement in any other case; (iii) details of the appellants acquiring education in jail and (iv) details of appellants' medical records. On 02.05.2024, after considering the submission of the learned counsel for the appellants so also the learned counsel for the State, this Court took suo motu cognizance of the fact regarding the procedure followed by the trial Court at the time of hearing on sentence. Taking into account various decisions of the Hon'ble Supreme Court on the point, we were of the view that there was no proper and meaningful hearing on the question of sentence which was necessary in order to do complete justice. We also held that no opportunity was afforded to the appellants to submit any material in support of mitigating circumstances during course of hearing on the question of sentence. After observing that hearing on the question of sentence has to be real and effective and not a mere formality and that if a meaningful hearing was not taken up by a Court while considering the sentence imposed and inflicted upon the convict, it would cause serious prejudice to him, we afforded an opportunity to the appellants inviting from them such data to be furnished in the shape of affidavits and also directed the Jail Authority to do the needful in that regard. We directed the Senior Superintendent, Circle Jail, Cuttack at Choudwar to collect all the information on the past life of the convicts, psychological conditions and their conduct post- conviction obtaining reports accordingly by taking service and necessary assistance from the Probation Officer and such other officers including a Psychologist or Jail Doctor or any Medical Officer attending the prison.

In pursuance of such order, the mother of the appellant filed an affidavit dated 09.05.2024 indicating therein that at the time of occurrence, his son was working in an auto garage as a colour mistri and the entire family depended on the income of the appellant, who was a young boy aged about twenty five years at the time of occurrence and though he has got previous criminal antecedents but he has no previous conviction. It is further stated in the affidavit that during incarceration, her son had reformed and he should be rehabilitated to the extent that he could live in the society.

As per the order dated 02.05.2024, the learned Additional Government Advocate also produced the social reports of both the appellants submitted by the Regional Probation Officer, Cuttack, Psychological condition reports of both the appellants submitted by Psychiatrist, Circle Jail, Cuttack at Choudwar and present conduct and behaviour inside the Circle Jail, Cuttack at Choudwar from Senior Superintendent, Circle Jail, Cuttack at Choudwar. The Regional Probation Officer in his report dated 08.05.2024 has stated that he met the mother of the appellant Sk. Asif Alli,

who was aged about sixty three years and ascertained from her that the appellant was the eldest son of the family and was working as a labourer in a private shop (radium work), Mumbai for his livelihood to maintain the family. The family of the appellant has got no landed property and the mother of the appellant was suffering from eye sight problem and psychological imbalance after the death of her husband. The two sisters of the appellant are unmarried and stated that their marriage proposal could not be settled due to non-acceptance of their family in the society. It is observed that the family have no means to face the situation in the village and the family is struggling for the livelihood as there is no earning member in the family and they are remaining in fear psychosis and the mother of the appellant is behaving irrationally with unsettled mind. So far as education background of the appellant is concerned, he passed matriculation in third division in the year 2010 and the school leaving certificate reflects good in character/conduct during his school days and he had no adverse report as per the school report. The appellant was a good cricket and football player and after matriculation, he discontinued his higher studies due to financial problems as reported by his family members. So far as social life and past life of the appellant is concerned, it appears that prior to the offence in question, the appellant was involved in seven cases, out of which in three cases, he has been acquitted. The villagers and village committee members expressed their displeasure against the appellant for his criminal act and they were very disgusted, aggravated and grudged towards the appellant and therefore, the life of the appellant is in danger in his village. The villagers are not providing any support to the family of the appellant for which the family members are suffering a lot. The Senior Superintendent, Circle Jail, Cuttack at Choudwar has submitted a report wherein it is mentioned that the conduct and behaviour of the appellant inside prison at present is normal, his behaviour and attitude towards other co-prisoners as well as the staff is cordial. He is maintaining every discipline of jail administration and there is no adverse report against him during his entire period of confinement in prison. No prison offence was committed by the appellant inside the jail during the period of his imprisonment. The Psychiatrist, Circle Jail, Cuttack at Choudwar has given a report relating to the psychological condition of the appellant wherein it is mentioned that the appellant is doing his daily routine activities properly, offering prayer to God many times in a day and coping with the co-inmates well and regarding the sentence, the appellant is ready to accept his punishment as he has surrendered before the God. On mental status examination, mild degree of anxiety was noticed and no other mental abnormality was detected and on surrendering before the God, the appellant was able to keep the mental state in balance. The Senior Superintendent, Circle Jail, Cuttack at Choudwar has also reported that the conduct of the appellant inside the jail is normal and he has not acquired any further education in jail after his admission to jail.

The learned counsel for the appellants placed reliance in the case of **Shankar Kisanrao Khade** (*supra*), wherein Hon'ble Justice K.S. Radhakrishnan (as His Lordship then was) held as follows:

> *"28……In my considered view that the tests that we have to apply, while awarding death sentence, are "crime test", "criminal test" and the R-R Test and not "balancing test". To award death sentence, the "crime test" has to be fully satisfied, that is 100% and "criminal test" 0%, that is no mitigating circumstance favouring the accused. If there is any*

circumstance favouring the accused, like lack of intention to commit the crime, possibility of reformation, young age of the accused, not a menace to the society no previous track record etc., the "criminal test" may favour the accused to avoid the capital punishment. Even, if both the tests are satisfied that is the aggravating circumstances to the fullest extent and no mitigating circumstances favouring the accused, still we have to apply finally the Rarest of Rare Case test (R-R lest). R-R Test depends upon the perception of the society that is "society centric" and not "Judge centric" that is, whether the society will approve the awarding of death sentence to certain types of crimes or not. While applying that test, the Court has to look into variety of factors like society's abhorrence, extreme indignation and antipathy to certain types of crimes like sexual assault and murder of minor girls intellectually challenged, suffering from physical disability, old and infirm women with those disabilities etc. Examples are only illustrative and not exhaustive. Courts award death sentence since situation demands so, due to constitutional compulsion, reflected by the will of the people and not the will of the Judges.

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38. Therefore, the mere pendency of few criminal cases as such is not an aggravating circumstance to be taken note of while awarding death sentence unless the accused is found guilty and convicted in those cases. High Court was, therefore, in error in holding that those are relevant factors to be considered in awarding appropriate sentence."

In the said case, even though the victim was a minor girl aged about 11 years, intellectually challenged and the accused repeatedly raped the girl for few days, ultimately strangulated her to death and the Hon'ble Justice K.S. Radhakrishnan held that both 'crime test' and 'criminal test' are independently satisfied against the accused, but considering the entire facts and circumstances of the case, the death sentence awarded to the accused was converted to rigorous imprisonment for life. Hon'ble Justice Madan B. Lokur (as His Lordship then was) also agreed with such view.

Now the decisions cited by the learned counsel for the State on death penalty are to be discussed. In the case of **Ravi** (supra), Hon'ble Justice Surya Kant speaking for himself and for Justice R.F. Nariman (as His Lordship then was) held as follows:-

*"62. In the light of above discussion, we are of the considered opinion that sentencing in this case has to be judged keeping in view the parameters originating from **Bachan Singh** and **Machhi Singh** cases and which have since been strengthened, explained, distinguished or followed in a catena of subsequent decisions, some of which have been cited above. Having said that, it may be seen that the victim was barely a two-year old baby whom the appellant kidnapped and apparently kept on assaulting over 4-5 hours till she breathed her last. The appellant who had no control over his carnal desires surpassed all natural, social and legal limits just to satiate his sexual hunger. He ruthlessly finished a life which was yet to bloom. The appellant instead of showing fatherly love, affection and protection to the child against the evils of the society, rather made her the victim of lust. It is a case where trust has been betrayed and social values are impaired. The unnatural sex with a two-year old toddler exhibits a dirty and perverted mind, showcasing a horrifying tale of brutality. The appellant meticulously executed his nefarious design by locking one door of his house from the outside and bolting the other one from the inside so as to deceive people into believing that nobody was inside. The appellant was thus in his full senses while he indulged in this senseless act. The appellant has not shown any remorse or repentance for the gory crime, rather he opted to remain silent in his 313 Cr.P.C. statement. His deliberate, well-designed silence with a standard defence of 'false' accusation reveals his lack of kindness or compassion and leads to believe that he can never be reformed. That being so, this Court cannot write of the capital punishment so long as it is inscribed in the statute book."*

Hon'ble Justice R. Subhash Reddy (as His Lordship then was) dissented on the question of sentence and held as follows:-

"76. In this case, learned counsel for the appellant has contended that the trial Court as well as the High Court, fell in error in confining nature and brutality of crime alone, to award the sentence of death. It is submitted that nature of crime alone is not sufficient to impose the sentence of death, unless State proves by leading cogent evidence that the convict is beyond reform and rehabilitation. It is submitted that the socio-economic conditions of the convict and the circumstances under which crime is committed are equally relevant for the purpose of considering whether a death penalty is to be imposed or not. It is submitted that as the case on hand, rests on circumstantial evidence, same is also the ground not to impose capital punishment, of death.

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98. I am clear in my mind that in this case on hand, the mitigating circumstances of the appellant, dominate over the aggravating circumstances, to modify the death sentence to that of life imprisonment. Even as per the case of prosecution, the appellant was under influence of liquor at the time of committing the offence, and there is no evidence on record from the side of prosecution, to show that there is no possibility of reformation and rehabilitation of the Appellant. Further, age of the appellant was 25 years at the relevant time and conviction is solely based on circumstantial evidence. Taking all such aspects into consideration, the death penalty imposed on the appellant is to be modified to that of life imprisonment, for the offence under section 302 Indian Penal Code."

In the case of **Manoharan** (*supra*), Hon'ble Justice R.F. Nariman (as His Lordship then was) speaking for himself and for Justice Surya Kant held as follows:-

"*34. In the circumstances, we have no doubt that the trial Court and High Court have correctly applied and balanced aggravating circumstances with mitigating circumstances to find that the crime committed was cold-blooded and involves the rape of a minor girl and murder of two children in the most heinous fashion possible. No remorse has been shown by the appellant at all and given the nature of the crime as stated in paragraph 84 of the High Court's judgment it is unlikely that the appellant, if set free, would not be capable of committing such a crime yet again. The fact that the appellant made a confessional statement would not, on the facts of this case, mean that he showed remorse for committing such a heinous crime. He did not stand by this confessional statement, but falsely retracted only those parts of the statement which implicated him of both the rape of the young girl and the murder of both her and her little brother. Consequently, we confirm the death sentence and dismiss the appeals."*

Hon'ble Justice Sanjiv Khanna dissented on the question of sentence and held as follows:-

"44. The expression 'rarest of rare' literally means rarest even in the rare, i.e. a rarest case of an extreme nature. The expression and the choice of words, means that punishment by death is an extremely narrow and confined rare exception. The normal, if not an unexceptional rule, is punishment for life, which rule can be trimmed and upended only when the award of sentence for life is unquestionably foreclosed. Thus, capital punishment is awarded and invoked only if the facts and material produced by the prosecution disdainfully and fully establish that the option of imprisonment for life will not suffice and is wholly disproportionate and therefore the case belongs to the 'rarest of rare' category.

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55. When we come to the facts of the present case, one has to but agree that the offence or the crime was brutal, ruthless and cruel as two innocent children aged 7 to 10 lost their lives, and there is substantial medical and other evidence to show that the young girl was

mercilessly sexually abused and raped by the Appellant and Mohanakrishnan (since deceased). Thereafter the children were administered poison and thrown into a canal to die. The pain and trauma suffered by the small children who were not at fault and the agony of the parents and grandmother are immense, incalculable and would remain forever. The punishment must be severe. Yet to award death penalty we must examine and answer the second question, i.e. balance out the aggravating circumstances by giving weightage to the mitigating circumstances and decide whether punishment of life imprisonment is foreclosed. Then and then alone the case would fall under the 'rarest of rare' category. While doing so, we should account for the majority dictum in ***V. Sriharan*** *(supra) that where life imprisonment is considered to be disproportionate or inadequate, then the Court may direct sentence for life imprisonment, without any right to remission i.e. imprisonment for the entire course of life with no recourse to remission, subject to the power that may be exercised under Articles 72 and 161 of the Constitution.*

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73. The appellant's partial retraction has been rightly disbelieved for good reasons, including the statement of the appellant under Section 313 Cr.P.C. in the Court accepting and admitting that his confession was recorded by the Magistrate. The retraction by itself, I would observe, should not be treated as absence of remorse or repentance, albeit an afterthought or on advice propelled by fear that the appellant in view of his admission may face the gallows, and that the earlier confession made seeking forgiveness would be the cause of his death. A thought of doubt and attempt to retract had surfaced on account of belief that the sense of remorse, repentance and forgiveness would not be appreciated and given due regard, cannot be ruled out. Benefit in this regard must go to the Appellant.

74. The other mitigating factors in favour of the appellant are his young age, he was 23 years of age at the time of occurrence and he belongs to a poor family. He has aged parents and is a first-time offender as recorded in the judgment/order of the trial court. Further, the appellant Manoharan was not initially involved in the abduction and kidnapping of the children. He was not the mastermind. Mohanakrishnan (since deceased) had thought, conceived and had single-handedly executed the plan to abduct the children. The appellant did join him thereafter and was with Mohanakrishnan (since deceased). Subsequently the devil in Mohanakrishnan (since deceased) took over and he sexually assaulted and raped the small girl, while the appellant kept quiet. Later the appellant too sexually assaulted and committed rape. Thereupon, poison was administered to the children before throwing them into the canal. The offence committed was heinous and deplorable.

75…….In view of the aforesaid discussion and on balancing aggravating and mitigating circumstances, in my opinion, the present case does not fall under the category of 'rarest of rare' case i.e. there is no alternative but to impose death sentence. It would fall within the special category of cases, where the appellant should be directed to suffer sentence for life i.e. till his natural death, without remission/commutation under sections 432 and 433 Code of Criminal Procedure. To this extent, I would allow the appeal."

In the case of **Laxman Naik** (*supra*), the Hon'ble Supreme Court held that the extreme penalty can be inflicted only in gravest cases of the extreme culpability and in making choice of the sentence, in addition to the circumstances of the offender also. Having regard to these principles with regard to the imposition of the extreme penalty, it may be noticed that there are absolutely no mitigating circumstances in the case. The appellant seems to have acted in a beastly manner as after satisfying his lust, he thought that the victim might expose him for the commission of the offence of forcible rape on her to the family members and other, the appellant with a view to screen the evidence of his crime also put an end to the life of innocent girl who had seen only seven summers. The evidence on record is indicative of the fact as to how diabolically the appellant had

conceived of his plan and brutally executed it and such a calculated, cold blooded and brutal murder of a girl of a very tender age after committing rape on her would undoubtedly fall in the category of rarest of the rare case attracting no punishment other than the capital punishment.

In the case of **Dhananjoy Chatterjee** (*supra*), the Hon'ble Supreme Court held that the object of sentencing should be to see that the crime does not go unpunished and the victim of crime as also the society has the satisfaction that justice has been done to it. In imposing sentences, in the absence of specific legislation, Judges must consider variety of factors and after considering all those factors and taking an overall view of the situation, impose sentence which they consider to be an appropriate one. Aggravating factors cannot be ignored and similarly mitigating circumstances have also to be taken into consideration. It is further held that the measure of punishment in a given case must depend upon the atrocity of the crime; the conduct of the criminal and the defenceless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that courts should impose punishment fitting to the crime so that the courts reflect public abhorrence of the crime. The courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment.

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.

Keeping in view the ratio laid down in the decisions discussed above, it is borne out of record that the offence was committed against a girl child aged about six years in a most horrendous, devilish and barbaric manner, but the case is based on circumstantial evidence and there is no material on record that the crime was committed in a pre-planned manner. It seems that both the appellants noticed the deceased in the company of his cousin brother (P.W.17) while they were returning after purchasing chocolates and then the deceased was lifted away and she was subjected to rape during course of which she sustained injuries on different parts of her body and her death was due to shock and haemorrhage as a result of injuries to genital track which were fatal in ordinary course of nature. No harm has been caused to P.W.17 while lifting away the deceased even though the appellants must have been aware that P.W.17 is likely to disclose about their misdeeds before the family members and others. The post mortem report (Ext.19) does not indicate any specific method was applied by the culprit for committing the death of the deceased. Though the appellant has got criminal antecedents but he has not been found guilty in those cases rather he has been acquitted in three cases as would be evident from the social report submitted by Regional Probation Officer, Cuttack. Therefore, the mere pendency of criminal cases cannot be considered as relevant factors for awarding death sentence in view of the ratio laid down by the Hon'ble Supreme Court in the case of **Shankar Kisanrao Khade** (*supra*). The date of birth of the appellant as per the report submitted by Regional Probation Officer, Cuttack is 13.03.1989 and therefore, he was aged about 26 years as on the date of occurrence. He is

a family man and having old mother aged about 63 years and two unmarried sisters and he was the sole bread earner of his family and working as a colour mistri in Mumbai and the financial condition of the family is not good. His character and conduct was good in school and he has passed matriculation in the year 2010. He could not continue his higher studies due to financial problems in the family. He was a good cricket and football player during his teen age. Even though he is in judicial custody for about ten years, but the reports submitted by Jail Superintendent and the Psychiatrist indicate that his conduct and behaviour inside prison is normal, his behaviour towards co-prisoners as well as staff is cordial and he is maintaining every discipline of the jail administration. Neither there is any adverse report against him during the entire period of confinement nor he has committed any prison offence. He is offering prayer to God many times in a day and he is ready to accept the punishment as he has surrendered before God.

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. There is no cogent evidence that the appellant is beyond reform and rehabilitation. Considering the entire facts and circumstances, the aggravating circumstances and mitigating circumstances, it cannot be said that capital punishment is the only option for the appellant and that the option of imprisonment for life will not suffice and is wholly disproportionate.

In view of the foregoing discussions, I am inclined to commute the death sentence awarded to the appellant for the offence under section 302 of the I.P.C. to life imprisonment, which shall mean the remainder of his natural death, without remission/commutation under sections 432 and 433 Code of Criminal Procedure.

Victim Compensation:

24. The learned trial Court has awarded compensation of Rs.1,50,000/- (rupees one lakh fifty thousand) to be paid to the parents of the deceased. The State Government of Odisha in exercise of powers conferred by the provisions of section 357-A of Cr.P.C. has formulated the Odisha Victim Compensation Scheme, 2017. Schedule-II of the scheme deals with compensation scheme for woman victims or survivors of sexual assault or other crimes. In case of death (loss of life), the minimum limit of compensation is Rs. 5 Lakh and the upper limit of compensation is Rs.10 Lakh. In the factual scenario and particularly taking into account the age of the deceased, the maximum compensation amount i.e. Rs. 10,000,00/- (rupees ten lakh) as provided under Schedule-II is awarded which is to be paid to the father and mother of the deceased. If any compensation amount has already been disbursed to the parents of the deceased as per the order of the learned trial Court, the same shall be adjusted and District Legal Services Authority, Jagatsinghpur shall take immediate steps to pay the balance amount of compensation within four weeks from today.

Conclusion:

25. In view of the discussions, CRLA No.121 of 2023 filed by the appellant Sk. Akil Alli is allowed. The conviction of the appellant Sk. Akil Alli under sections 302/376-A/376-D of the I.P.C. and section 6 of the POCSO Act is hereby set aside and

the appellant is acquitted of all the charges. He shall be set at liberty forthwith if his detention is not required in any other case.

CRLA No.120 of 2023 filed by appellant Sk. Asif Alli @Md. Asif Iqbal is allowed in part. The conviction of the appellant Sk. Asif Alli @Md. Asif Iqbal under section 376-D of the I.P.C. is hereby set aside, however his conviction under sections 302/376-A of the I.P.C. and section 6 of the POCSO Act is upheld. The sentence of life imprisonment awarded by the learned trial Court to the appellant Sk. Asif Alli @Md. Asif Iqbal for the offence under section 376-A of the I.P.C., which shall mean imprisonment for the remainder of his natural life, stands confirmed. No separate sentence is awarded to the appellant Sk. Asif Alli @Md. Asif Iqbal for his conviction under section 6 of the POCSO Act. The death sentence awarded to the appellant Sk. Asif Alli @Md. Asif Iqbal for the offence under section 302 of the I.P.C. is commuted to life imprisonment, which shall mean till his natural death, without remission/ commutation under sections 432 and 433 Code of Criminal Procedure.

Accordingly, Death Sentence Reference is answered in negative.

Before parting with the case, I would like to put on record my deep appreciation to Sk. Zafarulla, learned counsel for the appellants 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. Bibhu Prasad Tripathy, learned Addl. Govt. Advocate.

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2024 (II) ILR-CUT-916

S.K. SAHOO, J & CHITTARANJAN DASH, J.

JCRLA NO.12 OF 2014

SUNITA MUNDARI ……Appellant

-V-

STATE OF ODISHA ……Respondent

INDIAN EVIDENCE ACT, 1872 – Section 27 – Necessary conditions for bringing the Section into operation – Discussed with reference to case laws.

Case Laws Relied on and Referred to :-

1. A.I.R. 1984 SC 1622 : Sharad Biridhichand Sarda -Vrs.- State of Maharashtra.
2. (2019) 19 SCC 447 : Devi Lal -Vrs.- State of Rajasthan.
3. (2013) 12 SCC 765 : Shanmugam -Vrs.- State.
4. (2004) 10 SCC 657 : Anter Singh -Vrs.- State of Rajasthan.
5. (1999) 4 SCC 370 : State of H.P. -Vrs.- Jeet Singh.

For Appellant : Mr. Biswajit Nayak.

For Respondent : Mr. Rajesh Tripathy, ASC

JUDGMENT Date of Hearing : 26.06.2024 :: Date of Judgment : 04.07.2024

S.K. SAHOO, J.

The appellant Sunita Mundari faced trial in the Court of learned Additional Sessions Judge, Rourkela in Sessions Trial No.132 of 2011 for commission of offence punishable under section 302 of the Indian Penal Code (hereinafter 'I.P.C.') on the accusation that on 27/28.06.2011 in village Jhirpani, she committed murder by intentionally causing the death of her husband Mangal Mundari (hereinafter, 'the deceased').

The learned trial Court vide impugned judgment and order dated 20.12.2012 has been pleased to hold the appellant guilty of the offence charged and sentenced him to undergo imprisonment for life.

<u>Prosecution Case:</u>

2. The prosecution case, as per the first information report (hereinafter 'F.I.R.') (Ext.3) presented by Laxmi Badaik (P.W.15), the second wife of the deceased before the Inspector in-charge of Jhirpani police station on 29.06.2011, is that she was married to the deceased since last twenty years. The deceased used to reside with his first wife (appellant) and their children in village Jhirpani. The appellant used to quarrel with the deceased for which the deceased had built a separate house at Tungritola, Jagda where P.W.15 used to reside. At times, P.W.15 used to visit the deceased and his children at Jhirpani. On 27.06.2011, P.W.15 came to the house situated at Jhirpani at about 8.00 p.m. and after having the dinner, she went to sleep with the deceased in the inner room. The son of the deceased, namely, Siki (P.W.7) slept in the front/passage room adjacent to the spot room while the appellant along with her daughter Binika slept on the outer verandah. Around the midnight, when P.W.15 woke up to urinate, she found the appellant in the front/passage room where P.W.7 was sleeping. Finding the appellant in that room, P.W.15 enquired from her as to why she was standing there but the appellant did not give any reply. While she was returning after passing urine, she heard the shout of the deceased and rushed inside the house and found the appellant coming out of the inner room with severe burnt injuries in a naked condition. In the meantime, P.W.7 woke up and helped the deceased to lie on the ground. P.W.15 along with P.W.7 tried to extinguish the fire from the body of the deceased. P.W.15 then enquired from the deceased as to how he caught fire on his body to which the latter replied that the appellant poured kerosene on his body and set him on fire. P.W.7 called an auto-rickshaw in which he along with P.W.15 took the deceased to Sahu clinic and then to C.W.S. Hospital, however, the doctor referred the deceased to Ispat General Hospital, Rourkela and accordingly, the deceased was admitted in I.G.H., but during the course of the treatment, on 28.06.2011, the deceased succumbed to his injuries. P.W.15 stated in the F.I.R. that the appellant poured kerosene and set the deceased on fire for which he sustained severe burn injuries which led to his death.

On receipt of the written report of P.W.15, the Inspector in-charge of Jhirpani police station, namely, Anil Kumar Pradhan (P.W.14) registered Jhirpani

P.S. Case No.44 dated 29.06.2011 under section 302 of the I.P.C. and he himself took up investigation of the case.

During the course of investigation, P.W.14 examined the informant (P.W.15) and other witnesses and requisitioned the District Scientific Officer for appraisal of crime scene. He visited the spot, seized the half burnt clothes and on 30.06.2011, he arrested the appellant and recorded her statement under section 27 of the Indian Evidence Act and recovered a green colour plastic jerrican containing 300 ml. of kerosene near a brick heap from the backside of the spot house at the instance of the appellant and seized it as per seizure list Ext.5. He held inquest over the dead body of the deceased in presence of the witnesses and prepared the inquest report marked as Ext.1 and sent the dead body for post mortem examination and forwarded the appellant to Court. On 10.07.2011, he received the post mortem examination report marked as Ext.11. On 29.07.2011, he seized the bed head ticket of the deceased from the I.G.H., Rourkela as per seizure list marked as Ext.6 and on 26.08.2011, P.W.14 handed over the charge of investigation to the S.I. of Police Anima Sahu (P.W.12). On 01.09.2011, P.W.12 seized the sample packets and the exhibits were sent to R.F.S.L., Sambalpur for chemical examination and received the chemical examination report marked as Ext.10 and on completion of investigation, submitted the charge sheet under section 302 of the I.P.C. against the appellant on 25.10.2011.

Framing of Charges:

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

Prosecution Witnesses, Exhibits and Material Objects:

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

P.W.1 Chhotray Mundari is a neighbour of the appellant who stated that there used to be hot exchange of words among the appellant, the deceased and P.W.15. He further stated to have come to know that the deceased had received severe burn injuries for which he came to the hospital to meet him. Subsequent to the death of the deceased, the police conducted inquest over the dead body of the deceased and he is a witness to the preparation of inquest report vide Ext.1.

P.W.2 Dharam Mundari stated that P.W.15 used to visit the house of the appellant. He also stated that in the evening hours of 28.06.2011, he heard that the deceased received serious burn injuries. He is a witness to the conduct of inquest over the dead body of the deceased.

P.W.3 Saul Lugun is an auto-rickshaw driver, who stated that at about 1.15 a.m. of 27/28.06.2011, P.W.7 came to him and informed that the deceased had received burn injuries and sought for his help. He further stated that he took the deceased being accompanied by P.W.7, P.W.15 and daughter of the appellant Binita to Sahu Clinic at Jhirpani and then to C.W.S. Hospital at Jagda and as advised by the doctor, they took him to I.G. Hospital. He also said that the deceased was semi-conscious at that time. Furthermore, he stated to have learnt from P.W.7 that the appellant had set the deceased on fire. He is a witness to the seizure of half-burnt blanket and mattress as per seizure list Ext.2.

P.W.4 Prakash Chandra Mundari is the scribe of the F.I.R., who stated that the deceased and the appellant used to stay at village Jhirpani and the P.W.15 used to visit their house. He further stated that there used to be frequent quarrel between the appellant and P.W.15 and also between the appellant and the deceased at times. In the morning of 28.06.2011, he came to know that the deceased had received burn injuries and he had been taken to the hospital.

P.W.5 Karan Mundari is a neighbour of the deceased and the appellant. He stated that in the morning hours of 30.06.2011 at Jhirpani police station, the appellant confessed her guilt and she also revealed that the kerosene was kept inside a jerrycan which she concealed by the side of a brick heap near her house. He also stated that the appellant led him and the police party to the place and gave recovery of the jerrycan.

P.W.6 Archana Mundari is the niece of the deceased. She stated that on being informed about the incident, she went to the house of the deceased where she saw the deceased being shrouded with some clothes and pleading for his life.

P.W.7 is the son the appellant and the deceased. He stated that the deceased used to stay mostly with P.W.15 and occasionally, visited the Jhirpani house. He further stated that on the date of occurrence, the deceased along with P.W.15 came to the house of the appellant and stayed there in the night. During midnight at about 1.00 a.m., he woke up hearing commotion and found the deceased severely burnt and was in a naked condition and then he arranged auto-rickshaw and shifted the deceased to the hospital and got him admitted in I.G.H., Rourkela.

P.W.8 Taramani Mundari is the sister-in-law of the deceased. She stated that in the midnight of the occurrence, P.W.15 came to her house and informed that the appellant had set the deceased on fire. She went to the house of the deceased and found him badly burnt. She further stated that he was pleading for his life but he could not state anything else.

P.W.9 Pahana Oram is a neighbour of the appellant and he did not support the prosecution case for which he was declared hostile.

P.W.10 Giri Gouda expressed his ignorance about the facts which led to the death of the deceased. He is a witness to the preparation of the inquest report vide Ext.1.

P.W.11 Kiran Kumar Nayak was working as the Assistant Sub-Inspector of Police at Jhirpani police station. He is a witness to the seizure of bed-head ticket of the deceased from the I.G. Hospital. He is also a witness to the seizure of samples made by the scientific team as per seizure list Ext.8.

P.W.12 Anima Sahu was working as the Sub-Inspector of Police at Jhirpani police station. She is the second investigating officer in this case and she took over the charge of investigation from P.W.14. Upon completion of investigation, she submitted charge sheet against the appellant on 25.10.2011.

P.W.13 Dr. Sandipana Satpathy was posted as the Medical Officer, S.D. Hospital, Panposh. On police requisition, she conducted post mortem examination over the dead body of the deceased and proved her report vide Ext.11.

P.W.14 Anil Kumar Pradhan was working as the I.I.C. of Jhirpani police station and he is the initial investigating officer of the case. Upon his transfer, he handed over the charge of investigation to P.W.12.

P.W.15 Laxmi Badaik is the second wife of the deceased and also the informant in this case. She was residing at Jagda and she stated that the deceased used to live either with the appellant or with her. She also stated that she and the appellant were in visiting terms with each other. She stated about the dying declaration made by the deceased implicating the appellant. She is also a witness to the preparation of the inquest report vide Ext.1.

The prosecution exhibited twelve documents. Ext.1 is the inquest report, Ext.2 is the seizure list in respect of half burnt blanket, half burnt mattress and half burnt pati, Ext.3 is the F.I.R., Ext.4 is the statement of the appellant, Ext.5 is the seizure list in respect of jerrycan, Ext.6 is the seizure list in respect of the bed head ticket of the deceased from the I.G.H. Rourkela, Ext.7 is the bed head ticket, Ext.8 is the seizure list in respect of one sealed packet containing the portion of burnt wearing apparel and a match box having match stick and one sealed packet containing portion of burnt blanket, Ext.9 is the forwarding letter to R.F.S.L., Sambalpur, Ext.10 is the spot visit report of Scientific Officer containing rough diagram of the spot house, Ext.11 is the post mortem report and Ext.12 is the examination report of Scientific Officer.

The prosecution also proved three material objects. M.O.I is the half burnt blanket, M.O.II is the packet containing a match box and half burnt portion of wearing apparels and M.O. III is the green coloured jerrycan.

Defence Plea:

5. The defence plea of the appellant is one of denial. Defence has neither examined any witness nor exhibited any document.

Findings of the Trial Court:

6. The learned trial Court after assessing the oral as well as documentary evidence on record, held that the motive of the appellant was clear as she was

jealous of P.W.15 for having diverted her husband's affection from her and had nursed grudge for over a decade and thus, the motive for the crime has been established by the prosecution. It was further held that there is no material on record that the appellant had at any point of time attended her dying husband. It was further held that though the occurrence took place in the intervening night of 27/28.06.2011 and the F.I.R. was lodged on 29.06.2011 but since the informant was concerned with the treatment and recovery of the deceased husband and after his demise, it would have taken some time to regain her composure and after spending a night in grief and bereavement, she thought of reporting the matter to the police, it can be said that delay has been properly and satisfactorily explained by the prosecution and it did not affect the prosecution case. Without discussing the evidence on record as to how far the prosecution has proved each of the circumstances as jotted down in paragraph 9 of the impugned judgment to drag in the appellant in the commission of the crime, the learned trial Court jumped to the conclusion that the appellant is guilty of the offence punishable under section 302 of the I.P.C.

Contentions of the Parties:

7. Mr. Biswajit Nayak, learned counsel appearing for the appellant submitted that the case is based on circumstantial evidence and the main circumstance appearing against the appellant is the dying declaration stated to have been made by the deceased before P.W.15 implicating the appellant to have poured kerosene on him and set him on fire by striking a match stick, but the evidence of P.W.15 is full of contradictions and there are many suspicious feature in her evidence and there was also motive on the part of P.W.15 to implicate the appellant falsely in the crime and therefore, P.W.15 cannot be said to be an absolutely reliable witness. He further argued that P.W.15 stated to have noticed the appellant in the inner room (where she along with the deceased was sleeping) when she woke up at 12.00 midnight and went out to urinate and returned back and heard the dying declaration from the deceased who was in a burnt condition, but the evidence of P.W.7, the son of the deceased as well as the appellant who was sleeping in the adjacent front/passage room to the spot room at the time of occurrence and also woke up after hearing commotion and called others to the spot, is totally silent regarding any such dying declaration being made by the deceased as deposed to by P.W.15. Learned counsel further argued that the appellant was sleeping outside on the veranda of the house and P.W.7 has stated that hearing the shout, the appellant came from outside and poured water on the deceased and she was also weeping sitting outside the house and this conduct of the appellant proves her non-involvement in the crime in question, which has not been given any importance by the learned trial Court. Learned counsel further argued that even though P.W.8 has stated that P.W.15 came and told her that the appellant set fire to the deceased for which she went to the house of the deceased, but the same is not corroborated by P.W.15 rather P.W.7 has stated that he rushed to the house of P.W.8 and gave the information. Learned counsel further argued that even though P.W.3 has stated that P.W.7 told him in the

hospital that the appellant had set fire to the deceased but the same can be stated to be a hearsay evidence inasmuch as neither P.W.7 has stated to have disclosed any such thing before P.W.3 nor P.W.7 has himself stated to have got any knowledge that the appellant had set fire to the deceased rather he stated that he had no knowledge as to how his father (deceased) received burn injuries. Learned counsel further argued that the jerrican which is stated to have been seized at the instance of the appellant from the backside of the spot house near a heap of bricks is a doubtful feature inasmuch as though P.W.5, a witness to the seizure of such jerrican has stated that it contained 20 to 30 ml. of kerosene, whereas the I.O. (P.W.14) has stated in his evidence that the jerrican was containing 300 mls. of kerosene. It is submitted that since the kerosene jerrican was lying in an open space and not in a concealed condition out of visibility of others in normal circumstances, it cannot be said to be within the exclusive knowledge of the appellant and therefore, it cannot be utilized under section 27 of the Evidence Act against the appellant. It is argued that in view of the suspicious feature available on record and the nature of circumstances proved by the prosecution, it cannot be said that the circumstances taken together form a complete chain so as to irresistibly come to the conclusion that it is the appellant, who is the author of the crime and therefore, it is a fit case where benefit of doubt should be extended in favour of the appellant.

Mr. Rajesh Tripathy, learned Additional Standing Counsel appearing for the State of Odisha, on the other hand, supported the impugned judgment and submitted that since the deceased was spending most of the time with P.W.15, who was the second wife, the appellant being the first wife might have nursed grudge against P.W.15 and she must have also grievance against her husband (deceased), which can be said to be the motive behind the commission of crime. Learned counsel further argued that the evidence of P.W.15 not only establishes the presence of the appellant inside the spot room but also the evidence relating to dying declaration, which is deposed to by her is very clinching and the same finds place in the first information report lodged by P.W.15. Learned counsel further argued that since the appellant did not take any steps to save the life of the deceased and she did not even accompany the deceased to the hospital, this conduct is also very relevant which points towards the guilt of the appellant. Learned counsel further argued that taking advantage of the absence of P.W.15 from the spot room for a short period when P.W.15 had gone to pass urine during the midnight, the appellant committed the crime and poured kerosene on the deceased, who was sleeping and set him on fire and left that place and she was found to be having a satisfying smile as deposed to by P.W.15, which are also very clinching evidence against the appellant. It is further argued that the wearing apparels of the deceased so also the blanket, which was found in a burnt condition and the jerrycan were seized by the police during course of investigation and those were sent for chemical examination and the report (Ext.12) indicates that kerosene was detected in all the exhibits which supports the prosecution case that kerosene was used for setting fire to the deceased. Learned counsel further argued

that the plastic jerrican was seized at the instance of the appellant from near the brick heap by the police from the backside of the spot house and it was within the knowledge of the appellant as there was every possibility on her part to throw the same after committing the crime. Learned counsel further argued that there are clinching circumstances available on record and the conduct of the appellant and the dying declaration evidence form a complete chain and it points out towards the guilt of the appellant and therefore, the learned trial Court has rightly found the appellant guilty of the offence charged and the appeal should be dismissed.

Principles for appreciation of circumstantial evidence:

8. Adverting to the contentions raised by the learned counsel for the respective parties, there is no dispute that there is no direct evidence relating to the commission of murder of the deceased and the case is based on circumstantial evidence. It is the settled principle of law as held in the case of **Sharad Biridhichand Sarda -Vrs.- State of Maharashtra reported in A.I.R. 1984 Supreme Court 1622** that the circumstances from which the conclusion of guilt is to be drawn against the accused should be fully established. The facts so established should be consistent only with the hypothesis of the guilt of the accused and they should not be explainable on any other hypothesis except that the accused is guilty. The circumstances should be a conclusive nature and tendency and they should exclude every possible hypothesis except the one to be proved. 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 a case based on circumstantial evidence, there is always a danger that conjecture or suspicion may take the place of legal proof. The Court has to be watchful and ensure that suspicion howsoever strong should not be allowed to take the place of proof. A moral opinion howsoever strong or genuine and suspicion, howsoever grave, cannot substitute a legal proof. A very careful, cautious and meticulous appreciation of evidence is necessary when the case is based on circumstantial evidence. The prosecution must elevate its case from the realm of 'may be true' to the plane of 'must be true'.

The core principles which need to be adhered to by the Court, while examining and appreciating circumstantial evidence, have been strenuously discussed by the Hon'ble Apex Court in the case of **Devi Lal -Vrs.- State of Rajasthan reported in (2019) 19 Supreme Court Cases 447** in the following words:

> "17…It has been propounded that while scrutinising the circumstantial evidence, a Court has to evaluate it to ensure the chain of events is established clearly and completely to rule out any reasonable likelihood of innocence of the accused. The underlying principle is whether the chain is complete or not, indeed it would depend on the facts of each case emanating from the evidence and there cannot be a straitjacket formula which can be laid down for the purpose. But the circumstances adduced when considered collectively,

> it must lead only to the conclusion that there cannot be a person other than the accused who alone is the perpetrator of the crime alleged and the circumstances must establish the conclusive nature consistent only with the hypothesis of the guilt of the accused."

Whether the testimony of the prosecution witnesses implicate the appellant in commission of the crime?:

9. The main attack has been made by the learned counsel for the appellant on the evidence of P.W.15 Laxmi Badaik, who is the informant in the case. She was the second wife of the deceased and the appellant was the first wife. P.W.15 has stated that the appellant used to live at village Jhirpani and on 27.06.2011, she had come to village Jhirpani to the house of her husband on being called by him and after dinner, she along with the deceased slept. She further stated that the house of her husband was having two rooms and in the entrance room, the son of the deceased and the appellant, namely, Siki Mundari (P.W.7) was sleeping and she along with the deceased were sleeping in the inner room. She further stated that the appellant slept on the front veranda. At about 12 midnight, she woke up and found the appellant in the inner room where she (P.W.15) along with the deceased were sleeping and when she went to urinate outside, she heard screaming of the deceased for which she rushed in and found the deceased with severe burn injuries and he was standing naked at the door and shouting for help. The appellant had come out of the inner house and she was having a satisfying smile. P.W.15 further stated that her deceased husband told her that the appellant poured kerosene on him and set him on fire by striking a match stick. She further stated that the room where they were sleeping was complete dark. Then she wrapped a chadar around the deceased and took him to Sahu clinic at Jhirpani but since the doctor denied to entertain him, she took the deceased to the C.W.S. Hospital at Jhirpani in auto-rickshaw but he was not treated there and then he was taken to the I.G.H., Rourkela where he was treated but during course of treatment, he expired in the afternoon of 28.06.2011 and accordingly, she lodged the report, which was scribed by P.W.4 at Jhirpani police station.

Whether evidence relating to dying declaration as deposed to by P.W.15 can be acted upon?

9-A. P.W.7 was sleeping in the adjacent room where the occurrence in question took place, but his evidence is that when hearing hullah and commotion, he woke up at about 1.00 a.m., he found his father (deceased) to be badly burnt and he had no clothes on his body and P.W.15 was near him but he again did not find the appellant anywhere near. P.W.7 stated that he covered the deceased by means of a blanket and in desperation, rushed to the house of P.W.8 and then he came to P.W.3 and took the deceased in an auto-rickshaw to Sahu clinic and then to C.W.S. Hospital and then to I.G.H where the deceased was admitted. The evidence of P.W.7 is totally silent regarding any dying declaration being made by the deceased either at the spot or at any place till he breathed his last.

The spot map so also diagram of spot house prepared by Scientific Officer (Ext.10) indicates that if a person intended to come to the inner room where the deceased and P.W.15 were sleeping, then he has to first enter into the front/passage room where P.W.7 was sleeping from the outer verandah and then there is a single door through which he could enter into the spot room. It is the case of P.W.15 so also P.W.7 that the appellant was sleeping on the outer verandah of the house. P.W.7 has stated that the entrance room, where he was sleeping, was also used as kitchen and that was also a dark room. He further stated that hearing his shout, the appellant came from outside and poured water on the deceased and the appellant was also weeping outside of the house and P.W.7 further stated that he had no knowledge as to how the deceased received the burn injuries.

Learned counsel for the State argued that since P.W.7 was the son of the appellant, he might have refrained himself from implicating his mother (appellant) in the crime. It is very difficult to accept such a contention inasmuch as P.W.7 has not been declared hostile and his evidence cannot be discarded merely because he is related to the appellant as her son, inasmuch as it cannot be lost sight of the fact that the deceased was his father and there is no proposition of law that relatives are to be treated as untruthful witnesses. It is quite unlikely that close relatives of a deceased person would falsely implicate an innocent person for a heinous crime like murder and let the real culprit escape the clutches of law and gallows of confinement. This view has time and again been adopted and reiterated by the Courts across the nation, including the highest Court of the land. In the case of **Shanmugam -Vrs.- State reported in (2013) 12 Supreme Court Cases 765**, while evaluating the evidentiary value of testimony of related witnesses, the Hon'ble Supreme Court held as follows:

> "12. As observed by this Court in **Raju case [(2012) 12 SCC 701 : AIR 2013 SC 983]**, far more important than categorisation of witnesses is the question of appreciation of their evidence. The essence of any such appreciation is to determine whether the deposition of the witness to the incident is truthful hence acceptable. While doing so, the court can assume that a related witness would not ordinarily shield the real offender to falsely implicate an innocent person. In cases where the witness was inimically disposed towards the accused, the courts have no doubt at times noticed a tendency to implicate an innocent person also, but before the court can reject the deposition of such a witness the accused must lay a foundation for the argument that his false implication springs from such enmity. The mere fact that the witness was related to the accused does not provide that foundation. It may on the contrary be a circumstance for the court to believe that the version of the witness is truthful on the simple logic that such a witness would not screen the real culprit to falsely implicate an innocent. Suffice it to say that the process of evaluation of evidence of witnesses whether they are partisan or interested (assuming there is a difference between the two) is to be undertaken in the facts of each case having regard to ordinary human conduct, prejudices and predilections."
>
> **[Emphasis supplied]**

P.W.15 has not stated to have seen the appellant holding any jerrycan in her hand containing kerosene either when she (P.W.15) went to urinate after finding the appellant in the inner room during the midnight or when the appellant was found

with a satisfying smile afterwards. According to the prosecution, the occurrence has happened during a very short time when P.W.15 stated to have gone to urinate and returned back after hearing the scream of her deceased husband.

Law is well settled that dying declaration should be of such a nature which must inspire full confidence of the Court in its truthfulness and correctness. It is for the Court to ascertain from evidence placed on record that the deceased was in a fit state of mind and had ample opportunity to observe and identify the culprit. In the case in hand, the evidence of P.W.15 as well as P.W.7 indicate that not only the bed room (spot room) of the deceased but also the entrance room where P.W.7 was sleeping was dark and the duration of the occurrence being very short, it creates doubt as to whether the deceased had ample opportunity to observe and identify the culprit correctly as to who poured kerosene on him and set him on fire striking a match stick so as to make the declaration before P.W.15. P.W.7 has stated that when he woke up, he found the deceased in the room where he was sleeping. If the deceased screamed and P.W.7 woke up so also P.W.15 came inside hearing such screaming from outside where she had gone to pass urine and then both P.W.7 and P.W.15 covered the body of the deceased, who was in a naked condition, with a blanket and thereafter the dying declaration was made, then P.W.7 would also have stated in that respect, but his evidence is totally silent regarding the dying declaration. Therefore, it creates doubt relating to the dying declaration being made by the deceased before P.W.15.

Motive:

10. Learned counsel for the State submitted that since the deceased gave preference to P.W.15, who was his second wife and allowed her to sleep with him in the inner room and thereby the appellant had to sleep on the outer verandah, she might have grievance against her husband (deceased) for which she committed the crime. Such a contention that on that particular day, merely because the deceased slept with P.W.15, the same triggered the appellant so violently that she committed the ghastly crime of killing her husband by pouring kerosene and striking match stick on his body, is very difficult to be accepted. Needless to say that it is the evidence of P.W.7 that P.W.15 was his 'sana maa', who usually stayed at Tungripali, Jagda and the deceased was staying with P.W.15 most of the times and that he himself along with the appellant was staying in Jhirpani village and occasionally, the deceased visited them. Even P.W.15 has stated that the deceased was living at either of the two places and the appellant and she herself were at visiting terms to each others' houses. Therefore, when the appellant had accepted the second marriage of her husband with P.W.15 which took place twenty years prior to the date of occurrence and they were in visiting terms and merely because on the occurrence night, P.W.15 slept with the deceased in the inner room, it cannot be said to be a strong motive on the part of the appellant to kill her husband (deceased).

Suspicious feature in the prosecution case:

11. The appellant was sleeping on the outer verandah and in the first room her son (P.W.7) was sleeping and in the inner room, her husband (deceased) and P.W.15 were sleeping. It was not known to the appellant as to whether P.W.15 would wake up in the night and go for urination. Therefore, it is quite improbable to even assume that she kept herself well-prepared to avail the opportunity to pour kerosene on the body of the deceased and set him on fire, particularly when in the adjacent room her son (P.W.7) was sleeping. This is a suspicious feature of the case.

Conduct of the appellant:

12. Learned counsel for the State highlighted that the appellant did not accompany her husband (deceased) when he was shifted to the hospital in the occurrence night in the auto-rickshaw. He placed the evidence of P.W.3, the auto-rickshaw driver, who stated that he took the injured (deceased) being accompanied by P.W.7, P.W.15 and the daughter of the deceased, namely, Binita first to a clinic at Jhirpani and then to C.W.S. Hospital at Jagda. In the accused statement, the evidence of P.W.3 and P.W.15 regarding the shifting of the deceased was put to the appellant and she has stated that she did not accompany because there was no space available in the tempo. The explanation is quite acceptable as it was an auto-rickshaw and apart from the auto driver, there were already four persons including the deceased in it.

The conduct of the appellant as deposed to by P.W.7 that she tried to pour water on the deceased and was weeping is another factor, which goes in favour of the appellant.

Implication of the appellant by other witnesses:

13. P.W.3 has stated that after the deceased was admitted in the I.G.H., P.W.7 told him that the appellant set the deceased on fire, but the evidence of P.W.7 is totally silent in that respect. When P.W.7 has himself stated that he had no knowledge as to how the deceased received the burn injuries and he has also not stated to have made any disclosure before P.W.3 implicating the appellant to be the author of the crime, no importance can be attached to the evidence of P.W.3.

Similarly, P.W.8 has stated that P.W.15 told her that the appellant had set the deceased on fire and then she went to the house of the deceased and found the deceased in a burnt condition and pleading for his life, but most peculiarly P.W.15 has not stated to have gone to the house of P.W.8 and informed the latter anything against the appellant, rather it was P.W.7, who has stated that after covering the deceased with a blanket, in desperation he rushed to the house of P.W.8 and then to the house of P.W.3. Therefore, no importance can be attached to the evidence of P.W.8 that any statement has been made by P.W.15 before her implicating the appellant to be the author of the crime.

Whether the recovery statement given by the appellant can be held admissible U/S 27 of the Evidence Act?:

14. The learned counsel for the State highlighted the evidence relating to leading to discovery of a plastic jerrycan containing kerosene, which is stated to have been kept near a brick heap in the backside of the spot house and was seized by the I.O. (P.W.14) on the basis of information supplied by the appellant, who led the police party to the place of recovery and the jerrycan was seized as per the seizure list Ext.5.

The I.O. has stated that he recovered a green colour plastic jerrycan containing 300 ml. of kerosene kept concealed near a brick heap and prepared the seizure list Ext.5. In the cross-examination, the I.O. has stated not to have measured the kerosene available in jerrycan (M.O.III). P.W.5 is a witness to the said seizure list and he has stated that the jerrycan contained about 20 to 30 ml. of kerosene and jerrycans of that type were available in the open market and it is also a common household item. Therefore, there is also a discrepancy relating to the quantity of kerosene oil found in the jerrycan and it cannot be lightly brushed aside because being a villager, P.W.5 was not supposed to give an incorrect statement relating to the quantity of kerosene found in the plastic jerrycan. Above all, the seizure list (Ext.5) indicates that the jerrycan was found from the backside of the said house near the heap of bricks at Mundari basti, Jhirpani. It is not mentioned that the jerrycan containing kerosene was found in a hidden state. When the seizure of the jerrycan was made while it was lying in an open and accessible place and it had not remained out of visibility of others, in normal circumstances, it cannot be said that it was within the exclusive knowledge of the appellant and that such jerrycan could not have been recovered without the assistance of the appellant as it was ordinarily visible to others. Against this backdrop, it is germane to borrow credence from the following observations made by the Hon'ble Supreme Court in the case of **Anter Singh -Vrs.- State of Rajasthan reported in (2004) 10 Supreme Court Cases 657**:

> "14…It will be seen that the first condition necessary for bringing this section (section 27) into operation is the discovery of a fact, albeit a relevant fact, in consequence of the information received from a person accused of an offence. The second is that the discovery of such fact must be deposed to. The third is that at the time of the receipt of the information the accused must be in police custody. The last but the most important condition is that only "so much of the information" as relates distinctly to the fact thereby discovered is admissible. The rest of the information has to be excluded. The word "distinctly" means "directly", "indubitably", "strictly", "unmistakably". The word has been advisedly used to limit and define the scope of the provable information. <u>The phrase "distinctly" relates "to the fact thereby discovered" and is the linchpin of the provision. This phrase refers to that part of the information supplied by the accused which is the direct and immediate cause of the discovery.</u> The reason behind this partial lifting of the ban against confessions and statements made to the police, is that if a fact is actually discovered in consequence of information given by the accused, it affords some guarantee of truth of that part, and that part only, of the information which was the clear, immediate and proximate cause of the discovery."

[Emphasis supplied]

From the aforesaid decision, it is clear that discovery of a fact/ a material object must be preceded by the supply of information by the accused person. In other words, to attract the provision under section 27 of the Evidence Act, it is necessary that the police must have discovered something as per the information provided by the accused person. If something is quite easily discoverable, even without the assistance of the accused, the same can hardly be called as an 'information' admissible under the section. Not only the police but also the scientific team visited the spot on 29.06.2011 and remained there for hours together and in such scenario, the jerrycan lying near the brick heap would not have gone unnoticed.

It is more than important to clarify that merely because an object is openly accessible to public, the same would not vitiate the evidence under section 27. The real test is not to ascertain whether the object/material is 'openly accessible', rather it is to see whether the same was visible to the bare eyes of the common people passing through the said accessible place. In the case of **State of H.P. -Vrs.- Jeet Singh reported in (1999) 4 Supreme Court Cases 370**, the Hon'ble Supreme Court elucidated the legal position in the following words:

> "26. There is nothing in Section 27 of the Evidence Act which renders the statement of the accused inadmissible if recovery of the articles was made from any place which is "open or accessible to others". It is a fallacious notion that when recovery of any incriminating article was made from a place which is open or accessible to others, it would vitiate the evidence under Section 27 of the Evidence Act. Any object can be concealed in places which are open or accessible to others. For example, if the article is buried in the main roadside or if it is concealed beneath dry leaves lying on public places or kept hidden in a public office, the article would remain out of the visibility of others in normal circumstances. Until such article is disinterred, its hidden state would remain unhampered. The person who hid it alone knows where it is until he discloses that fact to any other person. Hence, the crucial question is not whether the place was accessible to others or not but whether it was ordinarily visible to others. If it is not, then it is immaterial that the concealed place is accessible to others."

In the present case, the prosecution case is that the kerosene jerrycan was lying near the brick heap. Neither there is any evidence that the brick heap was inaccessible to public nor there is any indication that it was not within the visibility of the others. Thus, when the jerrycan was simply found near the brick heap in an open space, it cannot be said that it is only and only the recovery statement of the appellant which caused the discovery of the jerrycan. In such circumstances, the so-called recovery statement rendered by the appellant and the consequential recovery of jerrycan cannot be utilized against the appellant as per the contours and mandate of section 27 of the Evidence Act. Moreover, the jerrycan was seized as per seizure list (Ext.5) on 30.06.2011 and it was forwarded to R.F.S.L., Sambalpur through Court on 22.10.2011 vide Ext.9. There is no evidence on record where the jerrycan was kept and in what condition. The prosecution is duty bound to adduce evidence in this respect otherwise the possibility of tampering with it cannot be ruled out which would be also a factor not to place any reliance on the finding of chemical examination report.

Conclusion:

15. In view of the foregoing discussions, I am of the view that there is no clinching evidence against the appellant relating to her involvement in the crime in question. The circumstances which are appearing on record are not clinching and they do not form a complete chain so as to come to a conclusion with certainty that the appellant is the author of the crime. The findings of the learned trial Court against the appellant are not justified and the circumstances which are in favour of the appellant have been ignored and thereby it has resulted in miscarriage of justice.

Accordingly, the impugned judgment and order of conviction of the appellant under section 302 of the I.P.C. is not sustainable in the eye of law and the same is hereby set aside. The appellant is acquitted of the charge. She shall be set at liberty forthwith if her detention is not required in any other case.

In the result, the JCRLA is allowed.

Before parting with the case, I would like to put on record my appreciation to Mr. Biswajit Nayak, learned counsel for the appellant for rendering his valuable help and assistance towards arriving at the decision above mentioned. This Court also appreciates the valuable help and assistance provided by Mr. Rajesh Tripathy, learned Additional Standing Counsel.

The trial Court records with a copy of this judgment be sent down to the learned trial Court forthwith for information.

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2024 (II) ILR-CUT-930

K.R. MOHAPATRA, J.

CMP NO. 384 OF 2024

BIJAY RAM DASH ……Petitioner

-V-

PRAFULLA CHANDRA MOHAPATRA & ORS. ……Opp.Parties

SPECIFIC RELIEF ACT, 1963 – Section 19(b) r/w Order 1, Rule 10(2) of the Civil Procedure Code – The petitioner is a subsequent purchaser of the suit land – No specific performance is sought against the petitioner – The petitioner filed an application U/o. 1, Rule 10(2) to implead him as a party to the final decree – The learned sub-ordinate court rejected the application – Whether the learned trial court committed any error? – Held, No – The petitioner may claim relief against his vendor if law permits, but certainly not against the plaintiff in the suit for specific performance of contract. (Para 4)

Case Laws Relied on and Referred to :-

1. 2016 (II) CLR 978 : Smt. Pinky Pradhan -v- Pratap Kishore Das & Ors.
2. 2005 SCC OnLine Bom 983 : Sujata Sanzgiry -v- Ankush R. Naik & Ors.
3. (2013) 5 SCC 397 : Thomas Press (India) Ltd. -v- Nanak Builders & Investors P.Ltd.& Ors.

For Petitioner : Ms. Deepali Mahapatra.
For Opp.Parties : Mr. Ajit Chandra Mohapatra

JUDGMENT Heard & disposed of on : 08.05.2024

K.R. MOHAPATRA, J.

1. This matter is taken up through hybrid mode.

2. Order dated 6th March, 2024 (Annexure-12) passed in T.S. No.442 of 1994 (F.D) is under challenge in this CMP, whereby learned 2nd Additional Civil Judge (Senior Division), Cuttack rejected an application filed by the Petitioner under Order I Rule 10(2) CPC to be impleaded as a party to the final decree proceeding.

3. Ms. Mahapatra, learned counsel for the Petitioner submits that T.S. No.442 of 1994 was filed by one, Smt. Prafullata Mohapatra, the predecessor of Opposite Party Nos.1 to 4 for specific performance of contract against Sri Soubhagya Ranjan Kanungo, the father of Opposite Party Nos.4 to 8. The suit was dismissed. Assailing the same, Smt. Prafullata Mohapatra filed RFA No.58 of 2003, which was decreed on contest vide judgment dated 19th February, 2004 (Annexure-3). Assailing the same, Sri Soubhagya Ranjan Kanungo filed R.S.A. No.183 of 2004. During pendency of the second appeal, said Soubhagya Ranjan Kanungo sold the suit property to the Petitioner by virtue of a Registered Sale Deed. The Petitioner neither has any knowledge of the previous contract for sale nor pending litigations and the decree passed therein. Thus, with a bona fide belief that the land is free from encumbrance, he purchased the property. On purchase, the Petitioner constructed his residential house therein investing the entire retiral dues and is residing therein with his family members till date. In due course, RSA No.183 of 2004 was dismissed vide judgment dated 16th May, 2007 (Annexure-4).

3.1. After disposal of the second appeal, Smt. Prafullata Mohapatra filed final decree proceeding. During pendency of final decree proceeding, the Petitioner filed an application under Order I Rule 10 CPC, which was allowed vide order dated 22nd September, 2008. Assailing the same Smt. Prafullata Mohapatra preferred W.P.(C) No.15213 of 2008 before this Court, which was allowed vide judgment dated 22nd February, 2016 (Annexure-8) setting aside the order dated 22nd September, 2008 impleading the present Petitioner as party to the final decree proceeding. The Petitioner being aggrieved, filed SLP(C) No.11506 of 2016 before the Hon'ble Supreme Court, which was allowed to be withdrawn vide order dated 29th April, 2016 (Annexure-9).

3.2 Thereafter, the Petitioner filed an application under Order XXI Rule 97 CPC in the final decree proceeding, which was dismissed by learned trial Court. Assailing the same, the Petitioner preferred CMP No.108 of 2018, which was disposed of vide order dated 14th March, 2018 (Annexure-10) granting liberty to the Petitioner to make appropriate application in the Execution Proceeding with an observation that if such an application is filed, it would be decided on its own merit without being influenced by the observation made in the order impugned therein. Accordingly, the

Petitioner filed an application under Order I Rule 10(2) CPC to be impleaded as party to the final decree proceeding, which was rejected vide order under Annexure-12. During pendency of the final decree proceeding, both Smt. Prafullata Mohapatra and Sri Soubhagya Ranjan Kanungo died and their legal heirs have been substituted, as stated above.

4. Ms. Mahapatra, learned counsel for the Petitioner submits that the Petitioner is a *bona fide* purchaser and has a subsisting right over the suit property in view of the Registered Sale Deed executed by the recorded tenant, namely, Sri Soubhagya Ranjan Kanungo in his favour. It is her submission that in view of Section 19 (b) of the Specific Relief Act, 1963 (for brevity 'the Act'), no specific performance of a contract may be enforced against him as he has purchased the property in good faith without notice of the original contract. She, therefore, submits that the final decree proceeding in his absence will be an incomplete one and no effective adjudication can be made in the final decree proceeding in his absence. She also relied upon the decision in the case of ***Smt. Pinky Pradhan –v- Pratap Kishore Das and others***, reported in 2016 (II) CLR 978, wherein this Court emphasizing the right of the *bona fide* purchaser directed to refund the consideration amount in whose favour specific performance was allowed. She also relied upon the case of ***Sujata Sanzgiry –v- Ankush R. Naik and others***, reported in 2005 SCC OnLine Bom 983, wherein at Paragraphs-9 and 10, it is held as under:

> *"**9.** Section 19(b) of the Specific Relief Act, 1963 is in same terms as was section 27(b) of the Specific Relief Act, 1877. The word 'transferee' occurring in section 27(b) of the Act of 1877, came up for consideration before the Division Bench of Patna High Court in the case of Loknath Prosad Singh v. Shah Wahib Hussain, AIR 1930 Patna 181. The Division Bench of Patna High Court held thus:*
>
> *xxx xxx xxx xxx*
>
> ***10.** In the case of Veeramalai Vanniar (died) v. Thadikara Vanniar, AIR 1968 Madras 383, the Division Bench of Madras High Court dealt with the provisions of section 27(b) by observing thus:*
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> *"The only question that remains is whether the defendants are entitled to invoke the provisions of section 27(b) of the Specific Relief Act, as persons who have paid money in good faith and without notice of the original contract. It is simply amusing how, on the admitted facts, the learned Subordinate Judge felt that defendants 3 to 5 are transferees for value who have paid their money in good faith and without notice of the plaintiffs agreement of sale. He has not borne in mind the rudiments and the basic principles of law. The general rule is that no person can convey a better title than what he has, except where the statute provides exceptions to the rule like section 27(b) of the Specific Relief Act. If a person, as the owner of the property, has entered into an agreement to sell the property, he cannot thereafter convey the same property to any other person, as after the prior agreement of sale, he cannot be said to be a free owner of the property he can alienate it only subject to the rights created under the prior agreement of sale. Section 27 of the Specific Relief Act is in these terms:—*
>
> *"**27.** Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against—*

> *(a) either party thereto: (a) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract."*
>
> *The plain language of the sub-section (b) shows that the subsequent transferee can retain the benefit of his transfer by purchase which, prima facie, he had no right to get, only after satisfying the two conditions concurrently; (1) he must have paid the full value for which he purchased the property and (2) he must have paid in good faith and without notice of the prior contract."*

5. Ms. Mahapatra, learned counsel for the Petitioner, therefore, submits that Bombay High Court reiterating the principles laid down in Section 19 of the Act (Section 27 of the Act 1877) stating that no relief can be claimed against a *bona fide* purchaser as a subsequent transferee for value, who has paid the full consideration amount in good faith without notice of the original contract. Thus, in order to protect his possession over the suit property, the Petitioner should be made a party to the final decree proceeding so that he could get an opportunity to establish that he is a *bona fide* purchaser of the property in question having paid the full consideration amount without having knowledge of the previous contract.

6. Mr. Mohapatra, learned counsel for Opposite Party Nos.1 to 3 vehemently objects to the above. It is his submission that similar nature of application was earlier rejected by learned trial Court and the Petitioner had unsuccessfully challenged the same up to Hon'ble Supreme Court. Thus, a subsequent application of such nature would not be maintainable. He further submits that the liberty granted in CMP No.108 of 2018 is in respect of an execution proceeding. No such execution proceeding has yet been initiated. Thus, the liberty so granted cannot be exercised in a final decree proceeding of the present nature. It is further submitted that the Petitioner had sufficient knowledge of the original contract, when the sale deed in his favour was executed by the vendor. Although the decree was passed since 2004, the Opposite Party Nos.1 to 3 are yet to enjoy the fruit of the same. He further submits that Section 19 (b) of the Act does not protect the Petitioner in the instant case. The principles laid down in the case law cited have also no application to the instant case. He, therefore, prays for dismissal of the CMP.

7. Heard learned counsel for the parties and perused the documents as well as the case laws placed before this Court.

8. Apparently a decree of specific performance of contract has been granted in favour of the predecessor of Opposite Party Nos.1 to 3, namely, Smt. Prafullata Mohapatra. Both the vendor and vendee of the original contract have died in the meantime and they have been substituted by their legal heirs as stated hereinabove. It appears from the material available on record so also the impugned order that similar nature of application filed by the Petitioner was allowed by learned trial Court vide order dated 22nd September, 2008. The said order was challenged before this Court in W.P.(C) No.15213 of 2008. This Court vide judgment dated 22nd February, 2016 set aside the order passed by learned trial Court in the Final Decree

Proceedings. The said order was challenged by the Petitioner in SLP(C) No.11506 of 2016 before Hon'ble Supreme Court. However, vide order dated 29th April, 2016, the Petitioner was permitted to withdraw the SLP(C). As such order passed by this Court in W.P.(C) No.15213 of 2008 is still in force. No change circumstance has been shown by the Petitioner to move a subsequent application under Order I Rule 10(2) CPC to be impleaded as a party to the final decree proceeding.

9. Ms. Mohapatra, learned counsel for the Petitioner, however, submits that the Petitioner had filed an application under Order XXI Rule 97 CPC, which was rejected by learned trial Court. Assailing the same, the Petitioner preferred CMP No.108 of 2018, which was disposed of by this Court on 14th March, 2018 granting liberty to the Petitioner to make appropriate application in the execution proceeding with a further direction to decide the same on its own merit without being influenced by the observation made in the order impugned therein in the event such an application is filed. Admittedly, no execution case has yet been filed to execute the decree of specific performance of contract. The suit is at the stage of final decree. Thus, the liberty granted by this Court in CMP No.108 of 2018 has no application to the instant application under Order I Rule 10(2) CPC filed in a final decree proceeding.

10. Section 19 of the Act is subject to other provisions of the said chapter of the Act. It provides that "*except as otherwise provided by this Chapter, specific performance of a contract may be enforced against….*

> *(b) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract……*"

10.1 In the instant case, no specific performance is sought against the Petitioner. However, the Petitioner claiming to be a subsequent purchaser filed an application to be impeaded as a party to the Final Decree proceedings. Application filed by the Petitioner under Order I Rule 10(2) CPC has been annexed to the CMP as Annexure-11. In the said application there is no whisper about lack of knowledge of the original contract by the Petitioner. In the said petition, the Petitioner emphasized that prior to the contract for which specific performance has been granted, he had executed a contract with the Defendant (Vendor). It is also not stated in the Petition under Annexure-11 as to when the Petitioner acquired knowledge of the original contract. Admittedly, the Defendant executed the sale deed on 19th July, 2006 in favour of the Petitioner basing upon which he claims to be impleaded as a party to the Final Decree proceedings. At that point of time SA No. 183 of 2004 filed by the Defendant was pending before this Court. Thus, the Petitioner is a lis pendens purchaser of the suit property.

11. In the case of ***Thomas Press (India) Ltd. –v- Nanak Builders and Investors P. Ltd. and others*** reported in (2013) 5 SCC 397, it is observed as under;

> *"**25**. In Vidur Impex [Vidur Impex and Traders (P) Ltd. v. Tosh Apartments (P) Ltd., (2012) 8 SCC 384 : (2012) 4 SCC (Civ) 1] the Supreme Court again had the opportunity*

to consider all the earlier judgments. The fact of the case was that a suit for specific performance of agreement was filed. The appellants and Bhagwati Developers though total strangers to the agreement, came into picture only when all the respondents entered into a clandestine transaction with the appellants for sale of the property and executed an agreement of sale which was followed by sale deed. Taking note of all the earlier decisions, the Court laid down the broad principles governing the disposal of application for impleadment. Para 41 is worth quoting hereinbelow: (SCC p. 413)

"41. Though there is apparent conflict in the observations made in some of the aforementioned judgments, the broad principles which should govern disposal of an application for impleadment are:

41.1. The court can, at any stage of the proceedings, either on an application made by the parties or otherwise, direct impleadment of any person as party, who ought to have been joined as plaintiff or defendant or whose presence before the court is necessary for effective and complete adjudication of the issues involved in the suit.

41.2. A necessary party is the person who ought to be joined as party to the suit and in whose absence an effective decree cannot be passed by the court.

41.3. A proper party is a person whose presence would enable the court to completely, effectively and properly adjudicate upon all matters and issues, though he may not be a person in favour of or against whom a decree is to be made.

41.4. If a person is not found to be a proper or necessary party, the court does not have the jurisdiction to order his impleadment against the wishes of the plaintiff.

41.5. In a suit for specific performance, the court can order impleadment of a purchaser whose conduct is above board, and who files application for being joined as party within reasonable time of his acquiring knowledge about the pending litigation.

41.6. However, if the applicant is guilty of contumacious conduct or is beneficiary of a clandestine transaction or a transaction made by the owner of the suit property in violation of the restraint order passed by the court or the application is unduly delayed then the court will be fully justified in declining the prayer for impleadment."

(Emphasis supplied)

12. In the instant case the facts narrated above give a clear picture that the conduct of the Petitioner is not above board. Further in absence of any pleading to the effect that the Petitioner had no knowledge of the original contract between the Plaintiff and Defendant, Section 19 of the Act has no application to the instant case. The case law in ***Sujata Sanzgiry*** (supra) is of no assistance to the Petitioner, as it laid down the principles of Section 19 of the Act. But, as aforesaid, the Petitioner has not made out any case in the petition under Annexure-11 that he didn't have knowledge of the original contract. In that view of the matter, the said ratio is not applicable to the instant case. Further in the case of ***Smt. Pinky Pradhan*** (supra), the consideration of the Court was completely different. The consideration in that case was as to whether a relief of refund of money to the Plaintiff in a suit for specific performance of contract can be granted even no relief was sought for in the suit. Thus, the ratio decided therein has no assistance to the Petitioner.

13. Section 28 of the Act deals that rescission in certain circumstances of contracts for the sale or lease of immovable property, the specific performance of which has been decreed. Sub-Section 4 of Section 28 of Act provides that "*no*

separate suit in respect of any relief which may be claimed under this section shall lie at the instance of a vendor, purchaser, lessor or lessee, as the case may be."

14. Ms. Mahapatra, learned counsel submits that the Petitioner cannot maintain a separate suit for protection of his right. Unless the Petitioner is impleaded as a party to the suit, he will be remediless. This Court is not in a position to accept such submission of Ms. Mahapatra, learned counsel for the Petitioner for the reason that the Petitioner has already filed two suits, viz, C.S. No.25 of 2008, which has already been dismissed for default and C.S. No.416 of 2008, which is pending for consideration, as submitted by Mr. Mohapatra, learned counsel for Opposite Party Nos.1 to 3. C.S. No.416 of 2008 has been filed for declaration of right, title, interest and for confirmation of possession over the suit property. Further, the vendor of the Petitioner could not have conveyed a better title than he had on the date of execution of the sale deed in favour of the Petitioner. Admittedly a decree of specific performance was staring at the Defendant on the date of execution of the sale deed in favour of the Petitioner. Thus, the Petitioner being a lis pendens purchaser, is governed under Section 52 of the Transfer of Property Act, 1882. He may claim relief against his vendor if law permits, but certainly not against the Plaintiff in the suit for specific performance of contract. Thus, learned trial Court has committed no error in rejecting the petition (Annexure-11) under Order I Rule 10(2) CPC filed by the Petitioner.

15. In addition to the above, the instant petition filed by the Petitioner under Order I Rule 10(2) CPC is hit by principles of *res judicata*, as similar such application was rejected earlier, as discussed hereinabove. Law is well settled that principles of *res judicaata* is applicable to different stages of the same suit or proceeding.

16. Accordingly, the CMP being devoid of any merit stands dismissed.

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2024 (II) ILR-CUT-936

K.R. MOHAPATRA, J.

CMP NO.1096 OF 2023

KRUSHNA CH. BEHERA PRADHAN & ANR. ……Petitioners

-V-

GOVERNMENT OF ODISHA ……Opp.Party

(A) CODE OF CIVIL PROCEDURE, 1908 – Order IX, Rule 13 – The State Govt. filed an application U/o. IX, Rule 13 against an ex-parte order after lapse of 12 years – No explanation has been offered for condonation of delay – The Court below allow the application on the ground that, the *ex-parte* decree has been passed declaring right, title and interest of the petitioners over a valuable piece of land – Whether the impugned order is sustainable? – Held, No – The State Opp. Party

appears to be very casual in their approach – Hence, the impugned orders are not sustainable.

(B) WORDS & PHRASES – Difference between "Explanation" & "Excuse" – Explained. (Para 7)

Case Laws Relied on and Referred to :-

1. (2020) 10 SCC 654: State of Madhya Pradesh & Ors Vs. Bherulal.
2. (2012) 3 SCC 563 : Office of the Chief Post Master General v. Living Media India Ltd.
3. 2023 SCC OnLine SC 1278 : Sheo Raj Singh (Deceased) through Lrs. & Ors Vs. Union of India & Anr.
4. (1988) 2 SCC 142 : G. Ramegowda Vs. Spl. Land Acquisition Officer.
5. 1987 AIR 1353 : Mst.Katiji Collector, Land Acquisition, Anantnag & Anr. v. Mst.Katiji & Ors.
6. 1996 (10) SCC 634 : Special Tehsildar, Land Acquisition v. K.V. Ayisumma.

For Petitioners : Miss Deepali Mahapatra.
For Opp.Party : Mr. Amiya Kumar Mishra, AGA

JUDGMENT Heard & disposed of on : 26.06.2024

K.R. MOHAPATRA, J.

1. This matter is taken up through hybrid mode.

2. Petitioners in this CMP seek to assail the judgment dated 19th July, 2023 (Annexure-10) passed by Additional District Judge, Bhawanipatna in Civil Revision No.5 of 2019, whereby confirming the order dated 4th September, 2019 (Annexure-9) passed by learned Civil Judge (Junior Division), Bhawanipatna in CMA No.2 of 2018 (CMA No.3 of 2018), learned appellate Court dismissed the appeal and thereby confirmed the order allowing an application filed by the State-Opposite Parties under Order IX Rule 13 CPC.

3. Brief facts relevant for consideration of this Court are that TS No.41/117 of 2002-2005 was filed by the Petitioners against the State-Opposite Party for declaration of their right, title and interest over the suit property by way of adverse possession. Although the State-Opposite Party appeared through learned Government Pleader, but did not file its written statement. Consequently, the Suit was decreed *ex-parte* vide judgment dated 21st September, 2006. An application under Order IX Rule 13 CPC in CMA No.2 of 2018 (Annexure-6) was filed by the State-Defendant for setting aside the *ex-parte* decree along with an application for condonation of delay under Section 5 of the Limitation Act. It is stated in the petition under Annexure-6 that although the State-Opposite Party entered appearance in the suit, but no para-wise comment could be provided. Thus, the written statement could not be filed within the stipulated time. On the basis of the ex parte decree, the Petitioners on 2nd June, 2016, filed an application before the Tahasildar, Kalahandi at Bhawanipatna for mutation of the suit land in their favour. After filing of the mutation case, they came to know about the *ex-parte* decree and applied for the certified copy from which they came to know that no written statement was filed in the suit. It is also stated in the petition that for the negligence of the officials, who were looking after the suit on their behalf, the State should not

suffer. Property involved is a valuable piece of government land (anabadi). Unless the *ex-parte* decree is set aside the State would be highly prejudiced. It was also stated that the suit was not maintainable for non-compliance of provisions of Section 80 CPC. After it came to the knowledge of the officials that an *ex-parte* decree has been passed obtaining necessary documents, the petition under Order IX Rule 13 was filed in the year 2018 along with a petition in CMA No.3 of 2018 under Section 5 of the Limitation Act. Learned trial Court holding that the land involved is a valuable piece of property and in the meantime, several officials have been transferred for which the proceedings of the suit could not be kept track of, allowed the application under Order IX Rule 13 CPC vide order under Annexure-9. Assailing the same, Petitioners preferred Civil Revision No.5 of 2019, which was dismissed vide judgement under Annexure-10. Hence, the CMP has been filed assailing the impugned judgment under Annexures- 9 and 10.

3.1 Miss.Mahapatra, learned counsel for the Petitioners further submits that Government officials should not be rewarded for their negligence. The grounds taken in the petition under Order IX Rule 13 CPC cannot be the cause much less sufficient cause to condone the inordinate delay of more than twelve years in filing such petition and to allow the same. It is her submission that admittedly the *ex-parte* decree came to the knowledge of the Opposite Party in the year 2016, when the mutation case was filed. Even thereafter, there is an unexplained delay of more than two years in filing the petition under Order IX Rule 13 CPC. As such, both the Courts have committed error of both fact and law in allowing the application under Order IX Rule 13 CPC. By allowing such application, a valuable right accrued to the Petitioners by virtue of an *ex-parte* decree is being lightly taken away, which was never the intent and object of the provision under Order IX Rule 13 CPC. She also relied upon the case of ***State of Madhya Pradesh and others Vs. Bherulal***, reported in (2020) 10 SCC 654, wherein relying upon the case of ***Office of the Chief Post Master General v. Living Media India Ltd.***, reported in (2012) 3 SCC 563, Hon'ble Supreme Court dismissed the appeal filed by the State of Madhya Pradesh, refusing to condone the delay of 663 days and imposed a cost of Rs.25,000/, which was directed to be deposited with the Mediation and Conciliation Committee of the State. It is her submission that a pragmatic view should be taken in condoning the delay and entertaining an application under Order IX Rule 13 CPC. But in the instant case, the explanation given by the State-Opposite Party is a mere excuse, which gives a clear picture that government officials were thoroughly negligent in pursuing their right before the Court. She, therefore, submits that learned Courts have committed an error of law in condoning inordinate and un-explained delay of more than twelve years in allowing the application under Order IX Rule 13 CPC.

4. Mr. Mishra, learned AGA vehemently objects to such submission. It is contended that learned Courts, while adjudicating the matter, have taken into consideration different case laws and analyzing the facts and circumstances of the case more particularly the fact that by virtue of an *ex-parte* decree, a valuable piece

of government land is being taken away by the Petitioners, allowed the application under Order IX Rule 13 CPC. The fact-finding Courts having concurrently held that the delay in filing the application should be condoned and the petition under Order IX Rule 13 CPC should be allowed, this Court should not interfere with the same in exercise of extra-ordinary jurisdiction under Article 227 of the Constitution. He also relied upon the case of ***Sheo Raj Singh (Deceased) through Lrs. and others Vs. Union of India and another***, reported in 2023 SCC OnLine SC 1278, wherein the Hon'ble Supreme Court took note of the case laws in the case of ***G. Ramegowda Vs. Spl. Land Acquisition Officer***, reported in (1988) 2 SCC 142, ***Mst. Katiji Collector, Land Acquisition, Anantnag & Anr. v. Mst. Katiji & Ors.***, reported in 1987 AIR 1353 and ***Special Tehsildar, Land Acquisition v. K.V. Ayisumma***, reported in 1996 (10) SCC 634.

5. It is his submission that in litigation to which, the Government is a party, is lost for default, no individual is affected, but what in the ultimate analysis suffer is the public interest. The decisions of the Government are collective and institutional decisions and do not share the characteristics of a decision of a private individual. Observing as above, the Hon'ble Supreme Court has held as under:-

> *"17. State of Nagaland v. Lipok AO & Ors., (2005) 3 SCC 752 arose out of an appeal where this Court condoned the State's delay of 57 days in applying for grant of leave to appeal before the high court against acquittal of certain accused persons. This Court observed that in cases where substantial justice and a technical approach were pitted against each other, a pragmatic approach should be taken with the former being preferred. Further, this Court noted that what counted was indeed the sufficiency of the cause of delay, and not the length, where the shortness of delay would be considered when using extraordinary discretion to condone the same. This Court also went on to record that courts should attempt to decide a case on its merits, unless the same is hopelessly without merit. It was also observed therein that it would be improper to put the State on the same footing as an individual since it was an impersonal machinery operating through its officers.*

It might be somewhat unrealistic to exclude from the consideration that go into the judicial verdict, these factors which are peculiar to and characteristic of the functioning of the Government. Government decisions are provincially slow encumbered, as they are by a considerable degree of procedural red tape in the process of their making. A certain amount of latitude is therefore not impermissible. It is rightly said that those who bear the responsibility of the Government must have a little play at the joints. During recognition of those limitations on Government functioning of course within reasonable limits is necessary in judicial approach is not to be rendered unrealistic. It would perhaps be unfair and unrealistic to prove the Government and private parties on the same footing in all respects in such matters. Implicit in the very nature of the Governmental functioning is procedural delay incidental to the decision- making process. He, therefore, submits that learned Courts have committed no error in providing the Government an opportunity to contest the suit to protect their right in the suit property.

5.1 It is further submitted that the Opposite Party-State has clearly stated the reasons for which no step could be taken to file the written statement as well as to institute a proceeding under Order IX Rule 13 CPC in time. Taking note of the same, learned Courts were of the opinion that the ex-parte decree under Order IX Rule 13 CPC should be set aside. Thus, the impugned orders under Annexures-9 and 10 should not be interfered with.

6. Taking note of the submissions made by learned counsel for the parties, this Court thinks it profitable to quote the relevant portion of the judgment in ***Office of the Chief Post Master General*** (*supra*).

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

In the case of ***Sheo Raj Singh*** (supra), Hon'ble Supreme Court at para-29 observed as under:-

> *29. Considering the aforementioned decisions, there cannot be any quarrel that this Court has stepped in to ensure that substantive rights of private parties and the State are not defeated at the threshold simply due to technical considerations of delay. However, these decisions notwithstanding, we reiterate that condonation of delay being a discretionary power available to courts, exercise of discretion must necessarily depend upon the sufficiency of the cause shown and the degree of acceptability of the explanation, the length of delay being immaterial. Sometimes, due to want of sufficient cause being shown or an acceptable explanation being proffered, delay of the shortest range may not be condoned whereas, in certain other cases, delay of long periods can be condoned if the explanation is satisfactory and acceptable. Of course, the courts must distinguish between an 'explanation' and an 'excuse'. An 'explanation' is designed to give someone all of the facts and lay out the cause for something. It helps clarify the circumstances of a particular event and allows the person to point out that something that has happened is not his fault, if it is really not his fault. Care must however be taken to distinguish an 'explanation' from an 'excuse'. Although people tend to see 'explanation' and 'excuse' as the same thing and struggle to find out the difference between the two, there is a distinction which, though fine, is real. An 'excuse' is often offered by a person to deny responsibility and consequences when under attack. It is sort of a defensive action. Calling something as just an 'excuse' would imply that the explanation proffered is believed not to be true. Thus said, there is no formula that caters to all situations and, therefore, each case for condonation of delay based on existence or absence of sufficient cause has to be decided on its own facts. At this stage,*

> *we cannot but lament that it is only excuses, and not explanations, that are more often accepted for condonation of long delays to safeguard public interest from those hidden forces whose sole agenda is to ensure that a meritorious claim does not reach the higher courts for adjudication."* *(Underlining for emphasis)*

7. From an analysis of the submissions made by learned counsel for the parties and on perusal of the record more particularly the ground taken in the petition under Order IX Rule 13 CPC under Annexure-6, it is crystal clear that those are not the explanations but mere excuses of the State Government. As held in ***Sheo Raj Singh*** (supra), there is a distinction between '*explanation*' and '*excuses*'. It is held therein that condonation of delay being a discretionary power available to Courts, exercise of discretion must necessarily depend upon sufficiency of the cause and degree of acceptability of the explanation, the length of delay being immaterial. Sometimes, due to want of sufficient cause being shown or an acceptable explanation being offered, delay of shortest range may not be condoned whereas in certain other cases delay of long period can be condoned if the explanation is satisfactory and acceptable. Of course, Courts must distinguish between '*explanation*' and '*excuse*'. Explanation is designed to give someone all of the facts and lay out a cause for something. It helps clearly the circumstances of a particular event and allows the person to point out that something that has happened is not his fault. Care must however be taken to distinguish an '*explanation*' from an '*excuse*'. Although common people tend to see 'explanation' and 'excuse' in same parlance and struggled to find out the difference between the two, but the Court of law has the obligation to find out that distinction which though fine, is real. An excuse is often offered by a person to deny responsibility and consequences when under attack. It is sort of a defensive action. Calling something just an '*excuse*' would imply that '*explanation*' offered is believed not to be true. Thus, the Hon'ble Supreme Court has observed that length of delay is not a matter of consideration but the explanation that is offered has a dominant role in considering the case of the parties in taking a decision for condonation of delay. The Hon'ble Supreme Court has also observed that a delay whatsoever minimal may be, should not be condoned on a mere excuse. In the instant case, on a bare perusal of the petition under Order IX Rule 13 CPC, it appears that the Government has admitted its negligence stating that for the negligence of the officials, the State should not suffer. The officials being employees of the State, State Government has a vicarious liability for the loss caused by its officials. Further, no explanation for condonation of delay much less any sufficient cause is offered in the petition under Order IX Rule 13 CPC, only because an *ex-parte* decree has been passed declaring right, title and interest of the Petitioners over a valuable piece of land, the same cannot be a ground to condone the inordinate and un-explained delay of more than 12 years.

7.1 It further appears from the petition under Order IX Rule 13 CPC that the State Government had entered appearance in the suit, but did not file its written statement. In the year 2016, a Mutation case was filed by the Petitioners to record the land in their name on the basis of *ex-parte* decree. It is also stated in the said

petition that from the mutation petition filed by the Petitioners, the State came to know about the *ex-parte* decree, but surprisingly no explanation has been offered for condonation of delay in filing the petition under Order IX Rule 13 CPC in 2018, i.e., after more than two years of filing of the Mutation Case. Further, no details or particulars has been provided either in the petition under Order IX Rule 13 CPC or in the petition for condonation of delay explaining the delay. The State-Opposite Party appears to be very casual in their approach in filing the petition under Order IX Rule 13 CPC. In that view of the matter, this Court is of the considered opinion that learned Courts have committed error of law and fact in arriving at the conclusion.

8. Accordingly, orders passed under Annexures-9 and 10 are not sustainable and are accordingly set aside. However, in the facts and circumstances of the case, there shall be no order as to costs.

9. The CMP is allowed accordingly.

10. Interim order dated 12th October, 2023 passed in IA No.1055 of 2023 stands vacated.

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2024 (II) ILR-CUT-942

B.P. ROUTRAY, J.

W.P.(C) NO. 24945 OF 2023

PRIYABRAT DAS@ DASH ……Petitioner

-V-

SANJAY PARIDA & ANR. ……Opp.Parties

ELECTION MATTER – Recounting of votes – Relevant guidelines ought to be followed while directing the recounting order – Discussed with reference to case laws.

Case Laws Relied on and Referred to :-

1. AIR 1964 SC 1249 : Ram Sewak Yadav vs. Hussain Kamil Kidwai & Ors.
2. (1999) 9 SCC 420 : Mahanta Ram Prakash Dass vs. Ramesh Chandra & Ors.
3. (2006) 6 SCC 255 : Sadhu Singh vs. Darshan Singh & Anr.

For Petitioner : Mr. D.Tripathy.
For Opp.Parties : Mr. P.K. Swain (For O.P.No.1), Mr. S.Ghose, AGA.

JUDGMENT Date of Judgment : 07.05.2024

B.P. ROUTRAY, J.

1. Heard Mr. D. Tripathy, learned counsel for the Petitioner and Mr. P.K. Swain, learned counsel for Opposite Party No.1 as well as Mr. S. Ghose, learned Additional Government Advocate for the State Opposite Party No.2.

2. The Petitioner who is election Petitioner in Election Misc. Case No.2 of 2022 before the learned Civil Judge, Jajpur Road, has challenged order dated 12th July 2023 rejecting his prayer for recounting of the rejected ballots.

3. The Petitioner and Opposite Party No.1 contested the election for the office of Sarpanch of Kankadapal Gram Panchayat. The Petitioner secured 1885 votes and Opposite Party No.1 secured 1887 votes. The Petitioner challenged the election of Opposite Party No.1 in Election Misc. Case No.2 of 2022. After the evidence was closed, a petition dated 23rd June 2022 was filed seeking a direction to the Election Officer for deposit of ballot papers in respect of ward no.2, 13, 14, 15 & 16.

4. Treating the petition dated 23rd June 2023 for recounting, the prayer of the Petitioner was rejected by order dated 12th July 2023, which is the subject of challenge in present writ petition.

5. Prayer of the petition dated 23rd June 2023 reads as follows:

> *"It is therefore most humbly prayed that your honour may kindly be pleased enough to direct the opp.party no.1 to deposit the sealed ballot papers of ward no.2 and 13 to 16 (Booth Nos.2 & 13 to 16) of Kankadapal G.P. along with the result sheet and report regarding rejection of votes in this Hon'ble Court for the ends of natural justice.*
>
> *And for this the aforesaid petitioner as in duty bound will every pray."*

6. A bare perusal of the aforesaid prayer does not show any prayer for recounting of the votes. However, learned Civil Judge has proceeded in the impugned order treating the prayer for recounting of W.P.(C) No.24945 of 2023 ballot papers. Accordingly, this Court without getting to the technicality in the prayer of the petitioner in his petition dated 23rd June, 2023 proceeds to deal with the impugned order treating the prayer for recounting of ballot papers.

7. Law relating to an order for inspection and recount of ballot papers had been well-settled in several decisions of the Hon'ble Apex Court. In ***Ram Sewak Yadav vs. Hussain Kamil Kidwai &Ors., AIR 1964 SC 1249***, the circumstance for an order for inspection of ballot papers has been explained in the following terms.

> *"6. An order for inspection may not be granted as a matter of course: having regard to the insistence upon the secrecy of the ballot papers, the court would be justified in granting an order for inspection provided two conditions are fulfilled:*
>
> *(i) that the petition for setting aside an election contains an adequate statement of the material facts on which the petitioner relies in support of his case; and*
>
> *(ii) the Tribunal is prima facie satisfied that in order to decide the dispute and to do complete justice between the parties inspection of the ballot papers is necessary,*
>
> *But an order for inspection of ballot papers cannot be granted to support vague pleas made in the petition not supported by material facts or to fish out evidence to support such pleas. The case of the petitioner must be set out with precision supported by averments of material facts. To establish a case so pleaded an order for inspection may undoubtedly, if the interests of justice require, be granted. But a mere allegation that the petitioner suspects or believes that there has been an improper reception, refusal or rejection of votes will not be sufficient to support an order for inspection."*

8. In ***Mahanta Ram Prakash Dass vs. Ramesh Chandra and others, (1999) 9 SCC 420***, the Supreme Court has explained as follows:-

> *"13. A candidate or his agent has an opportunity to ask for re-count at two stages: the first, before election result is finally declared, and the second, by way of election petition before the High Court. An application under Rule 63(2) of the Conduct of Elections Rules is to be given immediately after the votes secured by each of the candidates is announced under Rule 63(1), but such an application cannot be given after the candidate is declared elected under Rule 64. If an application is made under Rule 63(2) the Returning Officer shall decide the matter either by allowing the application in whole or in part or may reject it in its entirety, if it appears to him to be frivolous or unreasonable. The decision shall be in writing containing reasons therefor. The application for recount should contain valid precise grounds on which the re-count is asked for. When the rules provide for enough opportunity to a candidate or his agent to watch the counting process before the result is declared and if an objection is raised as to the validity of any ballot paper and if such objection is rejected improperly, it would afford a basis for re-count in an election petition. The secrecy of the vote has to be maintained and demand for re-count should not ordinarily be granted unless the election petitioner makes out a prima facie case with regard to error in counting of such magnitude that the result of the election of the returned candidate may be affected. Smallness of the victory margin by itself may not be a sufficient ground for re-count. However, if a prima facie case is made out as to error in counting, a small margin by which the returned candidate succeeded in the election assumes significance, inviting re-count."*

9. Further, the Supreme Court has propounded the guidelines in ***Sadhu Singh vs. Darshan Singh and another, (2006) 6 SCC 255***, that reads as under:-

> *"7. Concededly the following factors are relevant for directing re-counting of votes:*
>
> *(i) prima facie case must be established;*
> *(ii) material facts must be pleaded stating irregularities in counting of votes;*
> *(iii) a roving and fishing inquiry shall not be directed by way of an order for re-counting of votes;*
> *(iv) an objection to the said effect should be raised; and*
> *(v) secrecy of ballot papers should be maintained;*
>
> *(See Gursewak Singh v. Avtar Singh, (2006) 4 SCC 542; M. Chinnasamy v. K.C. Palanisamy, (2004) 6 SCC 341; Chandrika Prasad Yadav v. State of Bihar, (2004) 6 SCC 331 and Tanaji Ramchandra Nimhan v. Swati Vinayak Nimhan, (2006) 2 SCC 300)"*

10. In the case at hand, the Petitioner lost election to Opposite Party No.1 by two votes. Taking advantage of such low margin of votes, he is trying his best for recounting of the ballot papers. As it is seen from the record, according to the Election Officer, 88 votes in Ward No.2, 58 votes in Ward No.13, 31 votes in Ward No.14 and 15 votes in Ward No.15 and 23 votes in Ward No.16 were rejected. But the Petitioner did not have any detail about the same. Though he has stated that his agent had objected at the time of counting of the ballots before the Election Officer, but no such document could be brought on record. Rule 51(2) of the OGP Election Rules prescribes that, after the declaration under sub Rule 1 has been made, a candidate or, in his absence, his polling agent may apply in writing to the Election

Officer to recount the votes either wholly or in part stating the grounds for such recounting. Not only the Petitioner has failed to produce his written objection for recounting of the votes in respect of such wards, but the polling agent, who has been examined as a witness on behalf of the Petitioner, also failed to say the details of such facts rejected and he also could not able to produce his written note regarding rejection of those ballot. The Petitioner has also failed in his evidence to speak the number of votes secured in his favour in respect of those wards or could he be able to say about the number of illegally rejected votes. The Petitioner does not disclose anything regarding specific illegality alleged to have been done in rejecting such votes or counted in favour of Opposite Party No.1. Without disclosing the reasons to *prima facie* satisfy the Court regarding improper rejection of votes against it or allowing the same in favour of Opposite Party No.1, the prayer for recounting has been made by the Petitioner by merely saying that rejection of those ballot papers for not having the signature of the Presiding Officer is illegal. It needs to be mentioned here that as per Rule 47(h) of OGP Election Rules, the ballot paper is bound to be rejected without the seal and signature of the Presiding Officer. Therefore, mere submission of the Petitioner that ballot papers have been illegally rejected would not entitle a case in his favour for recounting or inspection of those ballot papers. It is true that a low difference or margin of votes with the elected candidate would not per se give any right in favour of the looser for recounting. Thus, unless a *prima facie* case is made out by the Petitioner in his favour warranting recounting of the ballot papers, the same cannot be allowed on the prayer of a party concerned. Not only the averments made in the election petition or in the petition dated 23rd June 2023, but also in his evidence, the Petitioner has failed to bring *prima facie* material fact to justify his allegations of illegal rejection of votes to aver a good ground in his favour that there is any mistake in counting. In such circumstances, the rejection of the prayer of the Petitioner by the learned Civil Judge is found justified.

11. In the result, the impugned order is confirmed and the writ petition is dismissed and all the interim order stands vacated.

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2024 (II) ILR-CUT-945

B.P. ROUTRAY, J.

WP(C) NO.9712 OF 2024

SMT. SMITARANI MOHANTY ....Petitioner

-V-

STATE OF ODISHA (H.& U.D.Deptt) & ORS. ....Opp.Parties

ODISHA MUNICIPAL ACT, 1950 – Section 54 Clause C of sub-Section(2) – No confidence motion against the chairman – Notice were served upon the councilors and not upon the chairman – Whether non service

of notice is amounts to violation of natural justice – Held, Yes – Notice is required to be served on the chairperson before initiating the motion along with other councilors in terms of Clause C of sub-Section(2) of Section 54.

Case Law Relied on and Referred to :-

1. AIR 1982 983 : Joyti Basu and Others v. Debi Ghosal & Ors.

For Petitioner : Mr. S.K.Mishra, Sr. Adv.
For Opp.Parties : Ms. S.Mishra, ASC
Mr. M.Kanungo, Sr. Adv.(for intervener).

JUDGMENT Date of Judgment : 28.06.2024

B.P. ROUTRAY, J.

1. Heard Mr. S.K. Mishra and Mr. M. Kanungo, learned senior counsels for the Petitioner & interveners respectively and Ms. S.Mishra, learned ASC for State – Opposite Parties.

2. Present writ petition has been filed by the Chairperson of Phulbani Municipality. A no confidence motion was proposed against her by 11 Councilors out of 13 Councilors of said municipality. Pursuant to the motion initiated, the Collector and District Magistrate issued notice on 15th April, 2024 under Annexure-1 series to all the Councilors to hold meeting of the Municipal Council on 23rd April, 2024 at 10 am in terms of Section 54 of the Odisha Municipal Act for voting on the motion. Said notice dated 15th April, 2024 of the Collector and District Magistrate is the subject matter of challenge in present writ petition.

3. Mr. Mishra, learned senior counsel for the Petitioner submits that the motion of no confidence and circulation of notice on the Councilors except the Chairman, against whom the motion is proposed, is violative of the principles of natural justice and secondly, also violating the statutory provisions under the Odisha Municipal Act and Rules. According to him, when the rules prescribe for notice of motion by any Councilor through the Chairperson, the notice for no confidence cannot be circulated ignoring the right of notice to the Chairperson. Moreover the principle of natural justice also mandates intimation to the Chairperson.

4. Mr. Kanungo, learned senior counsel appearing for the interveners, who are the Councilors proposing the no confidence motion, submits that the provisions contained in the Act and Rules nowhere prescribe for issuance of notice of such motion on the Chairperson and in absence of any express provision to that effect the service of notice on the Chairperson is not at all required and therefore, the contention of the Petitioner regarding want of notice or intimation on the part of the Chairperson is without any basis. He further submits that, making motion against the Chairperson for no confidence is the statutory right on the part of the Councilors and this being a statutory right, the question of right to hear or principles of natural justice cannot come into play in absence of any prescription in the statutory provisions regarding service of intimation on the person concerned.

5. Similarly Ms. Mishra, learned ASC while supporting the stand of the interveners submits that the Legislation has consciously omitted notice on the Chairperson though for other purposes like removal of Chairperson by the State Government, the statute is prescribing service of notice on the Chairman. Therefore, when it is settled that a thing has to be done in a particular procedure as prescribed in the statute the same should have been done in that procedure. Here in absence of any provision prescribing service of notice on the Chairperson, the Petitioner cannot claim any right of service of notice on her.

6. Before delving into the contentions raised by the parties it would be important to reproduce Section 54 of the Odisha Municipal Act. The same reads as under:-

> "54. Vote of no confidence against Chairperson or Vice-Chairperson
>
> (1)Where a meeting of the Municipality specially convened by the District Magistrate in that behalf a resolution is passed, supported by not less than two-third of the total number of Councillors recording want of confidence in the Chairperson or Vice-Chairperson the resolution along with the records of the proceedings at such meetings shall forthwith be forwarded to the State Government who shall publish the same in the Gazette and with effect from the date of passing of the resolution the person holding the office of Chairperson or Vice-Chairperson, as the case may be, shall be deemed to have vacated such office. In the event of both Chairperson and Vice-Chairperson vacating office the District Magistrate or his nominee shall discharge the responsibilities of the Chairperson till a new Chairperson is elected.
>
> [Provided that no such resolution recording want of confidence in the Chairperson or the Vice-*Chairperson-*
>
> (i) shall be passed within two years from the date of his election or nomination, as the case may be; and
>
> (ii) shall be moved more than once during a calendar year.]
>
> (2) In convening a meeting under Sub-section (1) and in the conduct of business at such meeting the procedure shall be in accordance with the rules, made under this Act, subject however to the following provisions, namely:
>
> (a) no such meeting shall be convened except on a requisition signed by at least one-third of the total number of Councillors along with a copy of the resolution of proposed to be moved at the meeting;
>
> (b) the requisition shall be addressed to the District Magistrate;
>
> (c) the District Magistrate shall, within 10 days of receipt of such requisition, fix the date, hour and place of such meeting and give notice of the same to all the Councillors holding office on the date of such notice along with a copy of the resolution and of the proposed resolution, at least three clear days before the date so fixed;
>
> (d) the District Magistrate or if he is unable to attend, any Gazetted Officer above the rank to which the Executive Officer of the Municipal area belongs who is specially authorized by him in that behalf shall preside over, conduct and regulate the proceedings of the meeting;
>
> (e) the voting at all such meetings shall be made in such manner as may be prescribed;
>
> (f) no such meeting shall stand adjourned to a subsequent date and no item of business other than the resolution for recording want of confidence in the Chairperson or ViceChairperson, as the case may be, shall be taken up for consideration at the meeting;

(g) if the number of Councillors present at the meeting is less than two-thirds of the total number of Councillors the resolution stand annulled;

(h) if the resolution is passed at the meeting supported by the requisite number of Councillors as specified in Subsection

(1) the Presiding Officer shall immediately forward the same in original along with the records of the proceedings to the State Government who shall forthwith publish the resolution in accordance with the provisions of Sub-section (1); and

(i) where any Gazetted Officer presides at the meeting he shall, without prejudice to the provisions of Clause (h) also send a copy of the resolution along with a copy of the proceedings to the District Magistrate for information and such action as may be necessary.]"

7. A bare reading of Section 54(2), which speaks for modalities for convening the meeting, refers to the rules prescribed under the Act in addition to such provisions enumerated in clause (a) to (i). This includes that the District Magistrate on receipt of the requisition shall fix the date, hour and place of meeting and give the notice of the same to all the Councillors along with a copy of the requisition and proposed resolution before three clear days. The words 'give notice to all the Councillors .. ..' does not include the word 'Chairperson' or 'Chairman'. In other words, when clause (c) mandates giving of notice to the Councillors, at the same time it remainssilent in respect of the Chairperson.

8. Law is well settled that if a statute provides for things to be done in a particular manner, then it has to be done in that manner alone and in no other manner (See: *Chandra Kishore Jha v. Mahavir Prasad, (1999) 8 SCC 266, Nazir Ahmad v. King-Emperor, (1936) SCC OnLine PC. 41, Cherukuri Mani v. Chief Secretary, Government of Andhra Pradesh, (2015) 13 SCC 722*)

9. In ***Joyti Basu and Others v. Debi Ghosal and Others, AIR 1982 983***, it is observed at paragraph 8 as follows:-

"8. A right to elect, fundamental though it is to democracy, is, anomalously enough, neither a fundamental right nor a Common Law Right. It is pure and simple, a statutory right. So is the right to be elected. So is the right to dispute an election. Outside of statute, there is no right to elect, no right to be elected and no right to dispute an election. Statutory creations they are, and therefore, subject to statutory limitation. An Election petition is not an action at Common Law, nor in equity. It is a statutory proceeding to which neither the Common Law nor the principles of Equity apply but only those rules which the statute makes and applies. It is a special jurisdiction, and a special jurisdiction has always to be exercised in accordance with the statute creating it. Concepts familiar to Common Law and Equity must remain strangers to Election Law unless statutorily embodied. A Court has no right to resort to them on considerations of alleged policy because policy in such matters, as those, relating to the trial of election disputes, is what the statute lays down. In the trial of election disputes, Court is put in a straight jacket. xxxxxx".

10. In the instant case it is not to be forgotten that prior to 2018 amendment to the Odisha Municipal Act the Chairman of the Municipal Council happens to be one of the Councillors. But after 2018 amendment is effected, the Chairman is required

to be elected directly by public. If in that context Section 54(2) would be read then the notice of no confidence was to be served on the Chairperson also in the capacity of one of the Councillors. Nonetheless, the position has been changed after 2018 and the Legislature while amending the provisions of the Act and Rules consciously left the provisions under Section 54(2) not to include the Chairperson of the Municipality for service of notice. In reference to the rules as mentioned in sub-Section (2) of Section 54, Rule 3 to 11 of the Odisha Municipal Rules appears relevant since no other rules are there regarding the business of meeting. Rule 4 of the Odisha Municipal Rules speaks that a Councillor when desires to move a motion shall give the same in writing to the Chairperson. Undoubtedly, the no confidence motion is intended to remove the Chairperson and therefore the knowledge of the Chairperson about the proposal moved against him to remove from the Chair becomes important in this context. The right of the Chairperson is definitely affected by moving such a motion against him behind his back. The principles of natural justice demand that an opportunity of hearing should be granted to the party affected by the action. When the motion is proposed against the Chairperson to be decided in the proposed meeting the principle of natural justice demands intimation to the Chairperson of such motion initiated against him. For this, absence of statutory provision would not be a hurdle since the action proposed to be taken is affecting his right of unseating him from the Chair. Therefore, in the demand of natural justice, this court is of the opinion that such notice is required to be served on the Chairperson before moving the motion along with other Councillors in terms of clause (c) of sub-Section (2) of Section 54. With such conclusion this court sets aside the impugned notice of the Collector and District Magistrate dated 15th April, 2024 under Annexure-1 series.

11. It is made clear that the authorities concerned are free to fix fresh meeting of the Council on the motion, in accordance with law, with service of notice on the Chairperson.

12. The writ petition is disposed of accordingly.

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2024 (II) ILR-CUT-949

Dr. S.K. PANIGRAHI, J.

W.P.(C) NO.19979 OF 2023
(WITH W.P.(C) NOS. 21206 OF 2022 & 21427 OF 2023)

MANAS KUMAR KAR ……Petitioner

-V-

STATE OF ODISHA & ORS. ……Opp.Parties

(IN W.P.(C) NO. 21206 OF 2022)
SANTOSH BHOI & ORS. -V- STATE OF ODISHA & ORS.

(IN W.P.(C) NO. 21427 OF 2023)
PUSPALATA PARIDA AND ANR.-V- STATE OF ODISHA & ORS.

(A) ODISHA LOKAYUKTA ACT, 2014 – Section 20(2) – Procedure laid down in the Section have not been followed – The competent authority have not given its view – No enquiry report have been submitted – Whether the proceeding against the petitioner is sustainable? – Held, No – When the statute provides for a particular procedure, the authority has to follow otherwise cannot be permitted to act in contravention of the same. (Paras 14-22)

(B) ODISHA LOKAYUKTA ACT, 2014 – Section 20(2) – Whether compliance of Section 20(2) is mandatory? – Held, Yes.

Case Laws Relied on and Referred to :-

1. 2023 SCC Online SC 175 : Lokayukta Odisha v. Dr Pradeep Kumar Panigrahi.
2. [1876] 1 Ch.D. 426 : Taylor v. Taylor.
3. 1936 SCC OnLine PC 41 : Nazir Ahmad v. King Emperor.
4. (2007) 5 SCC 85 : Kunwar Pal Singh v. State of U.P.
5. AIR 1961 SC 751 : State of U.P. v. Babu Ram Upadhya.
6. (1976) 2 SCC 895 : State of Mysore v. V.K. Kangan.
7. (1980) 1 SCC 403 : Sharif-ud-Din v. Abdul Gani Lone.
8. (1999) 8 SCC 266 : Chandra Kishore Jha v. Mahavir Prasad.
9. (2008) 4 SCC 755 : Gujarat Urja Vikas Nigam Ltd. v. Essar Power Ltd.
10. (2015) 13 SCC 722 : Cherukuri Mani v. State of Andhra Pradesh.
11. 2022 SCC OnLine SC 909 : Union of India v. Mahendra Singh.
12. 1955 SCC OnLine SC 26 : Jugalkishore Saraf v. Raw Cotton Co. Ltd.
13. 1981 Supp SCC 87 : S.P. Gupta v. Union of India.

For Petitioner(s): Mr. Sukanta Kumar Dalai, Mr. S.B. Mohanty,
Mr. Manas Ranjan Dhal.

For Opp.Parties : Mr. Ashok Parija, AG,
Mr. Ch. Satyajit Mishra, AGA,
Mr. Niranjan Panda, Mr. Sangram Das.

JUDGMENT Date of Hearing : 15.03.2024 : Date of Judgment : 19.04.2024

Dr. S.K. PANIGRAHI, J.

1. Since common questions of law are involved in these Writ Petitions, the same were heard together and are being disposed of by this common judgment. This Court considers it apposite to deal with W.P.(C) No.19979 of 2023 as the leading case for proper adjudication of all the connected matters.

2. The Petitioners in W.P.(C) No.19979 of 2023 and W.P.(C) No.21427 of 2023 have challenged order dated 18.5.2023 passed by the Lokayukta, Odisha in LY Case No.543/2021 and have further challenged the subsequent initiation of proceedings emanating therefrom on the basis of the Vigilance Inquiry report dated 23.3.2022 of the Inspector, Vigilance, Cuttack Division, Cuttack which is dehors the spirit of Odisha Lokayukta Act, 2014 (hereinafter referred to as "the Lokayukta Act" for brevity).

3. The Petitioners in W.P.(C) No. 21206 of 2022 challenge the order dated 29.4.2022 passed by the Lokayukta, Odisha in LY Case No. 540/2019 and have further challenged the subsequent initiation of proceedings emanating therefrom.

4. While the Complaint Petitions leading to the LY Cases differ, what is curiously similar between the aforementioned three Writ Petitions is the question posed by them, i.e. whether Section 20 of the Lokayukta Act was followed, and if so, whether noncompliance with the procedure laid down therein will strike at the root of the proceedings.

5. Hence, the present Writ Petitions.

I. FACTUAL MATRIX OF THE CASE:

6. The concise factual record of the cases, pertaining to the matters at hand, is presented succinctly as follows:

(i) In W.P.(C) No.19979 of 2023 and W.P.(C) No. 21427 of 2023:

a. A complaint petition was filed before the Lokayukta, Odisha which was registered as LY Case No.543 of 2021.

b. Upon passing the order dated 8.9.2021 of the Lokayukta, the Director, Vigilance, Odisha, Cuttack took up the preliminary enquiry of the matter and subsequently handed over the inquiry to Smt. Annapurna Sahoo, Inspector of Vigilance for inquiry in respect of 36 nos. of projects regarding misappropriation of funds in respect of MGNRGS funds under Kushapangi G.P. of Banki -Dampada Block.

c. In view of the above, the Bench of Lokayukta had issued notice by Registered Post with AD along with a copy of the complaint and a copy of the order to the Competent Authority, i.e., the Principal Secretary, Panchayati Raj and Drinking Water Department, Government of Odisha, asking him to submit his views on the same in line with the requirement prescribed in Section 20(3) of the Lokayukta Act. The competent authority did not respond and without his views, on 28.6.2022, the enquiry officer submitted her report before the I.G., Vigilance, Odisha, Cuttack which has been subsequently submitted before the Lokayukta.

d. On accepting the inquiry report, the Lokayukta, Odisha on 12.10.2022 issued notice to the Petitioners for filing of explanation on the enquiry report. The Petitioners were thereafter called upon to participate in hearing.

e. The Lokayukta recommended to the Director, Vigilance, Odisha vide order dated 18.5.2023 in LY Case No.543 of 2021 for registration of the case and investigation, and further directed the Director, Vigilance to submit the investigation report within six months.

f. The present Petitioners are before this Court challenging the order dated 18.5.2023 inter alia on the ground that the procedure laid down in Section 20(2) of the Lokayukta Act having not been followed, i.e. the Competent Authority not having given its views, no enquiry report ought to have been submitted and the same vitiates the proceedings emanating therefrom while the said action of the enquiry officer also suffers from being unfair, arbitrary and unreasonable.

(ii) In W.P.(C) No. 21206 of 2022:

a. A complaint petition was filed before the Lokayukta, Odisha which was registered as LY Case No.540 of 2019.

b. Upon being directed by order dated 18.2.2020 of the Lokayukta, the Director, Vigilance, Odisha, Cuttack took up the preliminary enquiry of the matter and entrusted the Deputy Superintendent of Police, Vigilance, Dhenkanal to enquire into the matter which pertained to mismanagement in afforestation and plantation in Kandappa Range,

Papsara and Kuajhari apart from allegations of misappropriation of funds and low survival rate of saplings in plantations.

c. The Deputy Superintendent of Police, Vigilance, Dhenkanal vide report dated 30.6.2020 has highlighted that the views of higher Forest Officials (who would be Competent Authority) is required for initiation of action. On the same day, after receiving the report, the Superintendent of Police, Vigilance, Cuttack forwarded the said report to the D.I.G. Police, Vigilance acknowledging that, among other things, the views of higher Forest Officials (who would be Competent Authority) have not been received by the Inquiring Officer due to shortage of time, nevertheless recommended initiation of criminal action against the present Petitioners.

d. Without paying any heed to the aforementioned inaction, the D.I.G. Police, Vigilance forwarded the report and the comments appended thereto to the Lokayukta on the same day of 30.6.2020 stating that all the inactions can be looked into "during" the investigation of the criminal case.

e. On accepting the inquiry report, the Lokayukta, Odisha on 10.9.2020 issued notice to the Petitioners for filing of their explanation on the enquiry report. The Petitioners were thereafter called upon to participate in the hearing.

f. The views of the Competent Authority were received on 3.3.2021 by the Lokayukta vide order dated 4.3.2021 and the Lokayukta recommended LY Case No.540 of 2019 to the Director, Vigilance, Odisha for registration of case and investigation, and further directed the Director, Vigilance to submit the investigation report within six months.

g. The investigation report was submitted to the Lokayukta on 17.2.2022 and thereafter the Lokayukta directed the Director of Prosecution, Office of Lokayukta, Odisha vide order dated 29.4.2022, to file a chargesheet in the case against the present Petitioners.

h. The present Petitioners are before this Court challenging the order dated 29.4.2022 inter alia on the ground that the procedure laid down in Section 20(2) of the Lokayukta Act having not been followed, i.e. the Competent Authority not having given its views, no enquiry report ought to have been submitted and the same vitiates the proceedings emanating therefrom.

II. PETITIONER'S SUBMISSIONS:

7. Learned counsel for the Petitioner(s) earnestly made the following submissions in support of his contentions:

(i) On facts, it is submitted that the inquiry report has failed to establish any misappropriation of Government funds by the Petitioners. In fact, on the perusal of the material available on record and pendency of the case before the Lokayukta Odisha has caused serious prejudice to the Petitioners thereby affecting his service career. Further, there is no suggestive /substantial material or chain of circumstances that would establish any nexus among the officials or any mutual criminal conspiracy between the elected body and the petitioner for causing any loss to state exchequer.

(ii) On law, it is submitted that the inquiry report is defective for not being in compliance with the mandatory provisions of Section 20 of the Lokayukta Act. The views of the Competent Authority not being received on considered by the Inquiry Officer at the time of drawing up of the Inquiry Report, is a violation of the statutory provisions and it is trite in law that when a statute provides for something to be done in a particular manner, it has to be done in that manner only and no way else.

(iii) It was further contended that the Director, Vigilance being tasked by the Lokayukta with conducting the preliminary enquiry essentially acted as a judge in its own case which contravenes the basic legal principle of "*nemo judex sua causa*".

III. STATE'S SUBMISSIONS:

8. *Per contra*, learned AG appearing for the State intently made the following submissions:

(i) In W.P.(C) No.19979 of 2023 and W.P.(C) No. 21427 of 2023 the Lokayukta had issued notice by Registered Post with AD the Competent Authority, i.e., the Principal Secretary, Panchayati Raj and Drinking Water Department, Government of Odisha, asking him to submit his views on the inquiry reports. However, no view was submitted despite several adjournments, requests and reminders. Therefore, intent of Section 20(2) was fulfilled. He also submitted that so far as W.P.(C) No. 21206 of 2022 is concerned then the views of the Competent Authority were received on 3.3.2021 by the Lokayukta and it is only thereafter vide order dated 4.3.2021, that the Lokayukta recommended LY Case No.540 of 2019 to the Director, Vigilance, Odisha for registration of case and investigation.

(ii) It was also contended that Section 20(1) of Lokayukta Act requires that on receipt of a complaint, if the Lokayukta decides to proceed further, it may order for preliminary inquiry against any public servant by its Inquiry wing or by any agency to ascertain whether there exists a prima facie case for proceeding in the matter. The words "any agency" include the Director Vigilance, Odisha and therefore, the order directing the Director Vigilance, Odisha to conduct Preliminary Inquiry, cannot be taken exception of. It was acknowledged that, the Inquiry wing of the Lokayukta could have been directed to conduct preliminary Inquiry into the allegation of corruption but reiterated that the discretion of the Lokayukta cannot be questioned.

IV. COURT'S REASONING AND ANALYSIS:

9. This Court shall first consider whether the Vigilance Department could have conducted the preliminary inquiry. Section 28 authorizes the Lokayukta to conduct any preliminary inquiry or investigation and utilize the services of any officer or organization or investigation agency of the Government. The said facts have been reinforced by the Apex Court in ***Lokayukta Odisha v. Dr Pradeep Kumar Panigrahi*** [1] wherein it was held that:

"30. At the same time, under Section 28, for the purpose of conducting any preliminary inquiry or investigation, it is open for the Lokayukta to utilize the services of any officer or organization or investigation agency of the Government and, in the circumstances, if the appellant in its judicious discretion and on the facts and circumstances of the case, conduct a preliminary inquiry through an agency of the Government of which reference has been made under Section 28 through the Directorate of Vigilance, Cuttack, there appears no legal infirmity being committed by the appellant in the decision making process in conducting a preliminary inquiry which, in our view, was within the scope and ambit of Section 20(1) of the Act, 2014."

1. 2023 SCC Online SC 175

10. Keeping the aforementioned settled position of law in mind, this Court is of the view that the Lokayukta can order to the Vigilance Department for conducting the preliminary inquiry. However, the Section 20(2) of the Act is mandatory in nature. Any preliminary inquiry ordered by the Lokayukta "shall" be in conformity of Section 20(2). The expression "and after" employed in the said provisions makes it abundantly clear that the inquiry report has to be submitted to the Lokayukta only after the comments of the concerned public servant and competent authority are received. In fact, the competent authority is likely to have better knowledge about the propensity, the nature and ramification of the loss caused to the department due to such corrupt practices. This comment shall guide the investigation in proper way.

11. Moving on, the Petitioner relies heavily on Section 20 of the Lokayukta Act, which lays down the procedure in respect of Preliminary Inquiry and investigation of the Lokayukta. Section 20 provides an inbuilt mechanism laying down the procedure to be followed in holding preliminary inquiry and investigation which the Lokayukta, in the facts and circumstances, on receipt of a complaint may decide - either order for conducting preliminary inquiry against the public servant by its inquiry wing or any agency to ascertain whether there exists a prima facie case for proceeding in the matter; or direct to hold an investigation by any agency or authority empowered under any law to investigate, to record its satisfaction whether there exists a prima facie case. The relevant section is reproduced hereinbelow:

> ***"20.(1) The Lokayukta, on receipt of a complaint, if it decides to proceed further, may order-***
> ***(a) preliminary inquiry against any public servant by its Inquiry Wing or any agency <u>to ascertain whether there exists a prima facie case for proceeding in the matter</u>****; or*
>
> *(b) investigation by any agency or authority empowered under any law to investigate, where there exists a prima facie case:*
>
> *Provided that any investigation under this clause shall be ordered only if in the opinion of the Lokayukta there is substantial material relating to the existence of a prima facie case or any earlier statutory investigation or enquiry regarding the same complaint reveals that a prima facie case exists:*
>
> *Provided further that before ordering an investigation under this clause, the Lokayukta shall call for the explanation of the public servant and views of the competent authority, so as to determine whether there exists a prima facie case for investigation:*
>
> *Provided also that a decision to order investigation under this clause shall be taken by a bench constituted by the Chairperson under section 16.*
>
> ***(2) During the preliminary inquiry referred to in sub-section (1), the Inquiry Wing or any agency shall conduct a preliminary inquiry and on the basis of material, information and documents collected, seek the comments on the allegations made in the complaint from the public servant and competent authority <u>and after obtaining the comments of the concerned public servant and competent authority, submit, within sixty days from the date of receipt of the reference, a report to the Lokayukta</u>.***
>
> *(3) A bench consisting of not less than three Members of the Lokayukta shall consider every report received under sub-section (2) from the Inquiry Wing or any agency and after giving an opportunity of being heard to the public servant, decide as to whether*

there exists a prima facie case, and make recommendations to proceed with one or more of the following actions, namely:-

(a) investigation by any agency (including any special investigation agency):
(b) initiation of the departmental proceedings or any other appropriate action against the concerned public servant by the competent authority,
(c) closure of the proceedings against the public servant and take action to proceed against the complainant under section 46.

(4) The promotion and other service benefits of a public servant mentioned in clauses (e) to (h) of sub-section (1) of section 14 shall not be affected until the public servant is put under suspension on recommendation of the Lokayukta under section 32 or charge sheet is filed after completion of investigation under clause (a) of sub-section (3) or a charge memo is issued against the said public servant in a disciplinary proceeding initiated on the recommendation of the Lokayukta under clause (b) of sub-section (3).

(5) Every preliminary inquiry referred to in sub-section (1) shall ordinarily be completed within a period of ninety days and for reasons to be recorded in writing, within a further period of ninety days from the date of receipt of the complaint.

(6) In case the Lokayukta decides to proceed to investigate into the complaint, it shall, by order in writing, direct any investigating agency (including any special agency) to carry out the investigation as expeditiously as possible and complete the investigation within a period of six months from the date of its order.

Provided that the Lokayukta, for the reasons to be recorded in writing, may extend the said period by a further period not exceeding six months at a time and for the maximum period of two years.

(7) Notwithstanding anything contained in section 173 of the Code of Criminal Procedure, 1973, any investigating agency (Including any special agency) shall, in respect of cases referred to it by the Lokayukta, submit the investigation report to the Lokayukta.

(8) A bench consisting of not less than three Members of the Lokayukta shall consider every report received by it under sub-section (7) from any investigating agency (including any special agency) and may, decide as to-

(a) filing of charge-sheet or closure report before the Special Court against the public servant;
(b) initiating the departmental proceedings or any other appropriate action against the concerned public servant by the competent authority.

(9) The Lokayukta may, after taking a decision under sub-section (8) on the filing of the charge sheet, direct its Prosecution Wing to initiate prosecution in a Special Court in respect of cases investigated by any investigating agency (including any special agency).

(10) The Lokayukta may, during the preliminary inquiry or the investigation, as the case may be, pass appropriate orders for the safe custody of the documents relevant to the preliminary inquiry or, as the case may be, investigation, as it deems fit.

(11) The website of the Lokayukta shall, from time to time and in such manner as may be specified by regulations, display to the public, the status of number of complaints pending before it or disposed of by it.

(12) The Lokayukta may retain the original records and evidences. which are likely to be requined in the process of preliminary inquiry or investigation or conduct of a case by it or by the Special Court.

(13) Save as otherwise provided, the manner and procedure of conducting a preliminary inquiry or investigation (including such material and documents to be made available to the public servant) under this Act shall be such as may be specified by regulations."

(emphasis is ours)

12. A perusal of the aforementioned Section makes it clear that Section 20(2) is mandatory in nature. Any preliminary inquiry ordered by the Lokayukta "**shall**" be in conformity of Section 20(2). The "**and after**" utilized in the said provisions makes it abundantly clear that the inquiry report has to be submitted to the Lokayukta only after the comments of the concerned public servant and competent authority are received. The intention of the Legislature to make this a mandatory requirement is understandable as the views of the Competent Authority as contemplated under the Act is solicited to ascertain the stand of the authority about the affairs of the sub-ordinate officer i.e. the public servant. It may be clarified here that the view of the Competent Authority though mandatorily required prior to submission of the Report to the Lokayukta, does not bind the Lokayukta who shall then assess the materials, comments and documents independently to ascertain whether or not a prima facie case is made out against the alleged errant official.

13. Therefore, this Court is unable to accept the contention of the Ld. Senior Counsel for the State that as the comments of the Competent Authority were solicited in W.P.(C) No.19979 of 2023 and W.P.(C) No. 21427 of 2023, but never received, the 'intent' of Section 20(2) was fulfilled. Furthermore, in W.P.(C) No. 21206 of 2022, the comment of the Competent Authority though received, it did not form a part of the enquiry report that was forwarded to the Lokayukta. The comments of the concerned public servant and the Competent Authority being mandatory in nature, the enquiry report submitted without the latter cannot be said to be in accordance with the spirit of the statutory provisions.

14. There is yet an uncontroverted legal principle that when the statute provides for a particular procedure, the authority has to follow the same and cannot be permitted to act in contravention of the same. In other words, where a statute requires to do a certain thing in a certain way, the thing must be done in that way and not contrary to it at all. Other methods or mode of performance are impliedly and necessarily forbidden. The aforesaid settled legal proposition is based on a legal maxim *expressio unius est exclusio alterius*, meaning thereby that if a statute provides for a thing to be done in a particular way, then it has to be done in that manner and in no other manner and following any other course is not permissible.

15. The said proposition of law about limitation of exercise of statutory power has first been identified by Jassel M. R. in the case of ***Taylor v. Taylor***[2] , wherein it was laid down that, where a power is given to do a certain thing in a certain way, that thing must be done in that way, or not at all, and that other methods of performance are necessarily forbidden.

2. [1876] 1 Ch.D. 426

16. In India, this well recognized principle was first seen in ***Nazir Ahmad v. King Emperor***[3] . It is a settled position of law that if the law requires something to be done in a particular manner, then it must be done in that manner, and if it is not done in that manner, then it would have no existence in the eye of the law. Reference can be made in this regard to the Apex Court's judgments in ***Kunwar Pal Singh v. State of U.P.***[4] **,** ***State of U.P. v. Babu Ram Upadhya***[5] **,** ***State of Mysore v. V.K. Kangan***[6] ***and Sharif-ud-Din v. Abdul Gani Lone***[7] , wherein the Supreme Court while referring to certain statutory provisions, consistently held that the statutory provisions of the statutory enactment are mandatory and not directory and that they are required to be rigidly complied with. For ascertaining the real intention of the Legislature the Court may consider, inter alia, the nature and the design of the statute, and the consequences which would follow from construing it the one way or the other, the impact of other provisions whereby the necessity of complying with the provisions in question is avoided, the serious or trivial consequences that flow therefrom, and, above all, whether the object of the legislation will be defeated or furthered.

17. The Supreme Court in the case of ***Chandra Kishore Jha v. Mahavir Prasad***[8] **,** has succinctly held as follows:

> *"17. ...It is a well-settled salutary principle that if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner…"*

Relying on the aforementioned observation, the Apex Court in the case of ***Gujarat Urja Vikas Nigam Ltd. v. Essar Power Ltd.***[9], has also observed that:

> *"9. It is well settled that where a statute provides for a thing to be done in a particular manner, then it has to be done in that manner, and in no other manner…."*

18. The Supreme Court furthermore in the case of ***Cherukuri Mani v. State of Andhra Pradesh***[10], reiterated similar sentiment which is as follows:

> *"14. Where the law prescribes a thing to be done in a particular manner following a particular procedure, it shall be done in the same manner following the provisions of law, without deviating from the prescribed procedure……"*

19. More recently, the Apex Court in the case of ***Union of India v. Mahendra Singh***[11], relying on Cherukuri (*supra*) has observed as follows:

> *"16. The said principle has been followed by this Court in Cherukuri Mani v. Chief Secretary, Government of Andhra Pradesh [(2015) 13 SCC 722] wherein this Court held as under:*
>
> *"14. Where the law prescribes a thing to be done in a particular manner following a particular procedure, it shall be done in the same manner following the provisions of law, without deviating from the prescribed procedure ………."*

3. 1936 SCC OnLine PC 41 **4**. (2007) 5 SCC 85 **5**. AIR 1961 SC 751 **6**. (1976) 2 SCC 895
7 . (1980) 1 SCC 403 **8**. (1999) 8 SCC 266 **9**. (2008) 4 SCC 755 **10**. (2015) 13 SCC 722
11. 2022 SCC OnLine SC 909

20. An Act or a Rule requires to be read as it is. The intention of the legislature has to be considered while reading the said Act or Rule. The interpretation of an Act or Rule is based on the intention of the law maker to promulgate the same. The Supreme Court in the case of ***Jugalkishore Saraf v. Raw Cotton Co. Ltd.***[12], has held as follows:

> *"6. ...The cardinal rule of construction of statutes is to read the statute literally, that is by giving to the words used by the legislature their ordinary, natural and grammatical meaning. If, however, such a reading leads to absurdity and the words are susceptible of another meaning the court may adopt the same. But if no such alternative construction is possible, the court must adopt the ordinary rule of literal interpretation….."*

21. Moreover, the Constitution Bench of the Supreme Court in the case of ***S.P. Gupta v. Union of India***[13], observed as follows:

> *"199. But there is one principle on which there is complete unanimity of all the courts in the world and this is that where the words or the language used in a statute are clear and cloudless, plain, simple and explicit unclouded and unobscured, intelligible and pointed so as to admit of no ambiguity, vagueness, uncertainty or equivocation, there is absolutely no room for deriving support from external aids. In such cases, the statute should be interpreted on the face of the language itself without adding, subtracting or omitting words therefrom.*
>
> *200. It is equally well settled that it is not the duty of the court to import words which have been omitted deliberately or intentionally in order to fill up a gap or supply omissions to fit in with the ideology or concept of the Judge concerned. The words and the language used must be given their natural meaning and interpreted in their ordinary and popular sense."*

22. The intent of inviting comments from the competent authority being assumably to ensure that the Lokayukta will have a complete picture of the effect of the alleged errant officer's conduct or actions on the Department, permitting preliminary inquiry reports to be forwarded to the Lokayukta without the same would defeat the purpose of the legislation which is a quicker redressal of public grievances pertaining to corruption and mal-administration. If a prima facie case is not entirely made out, then proceeding with action under the Lokayukta Act gravely affects the service career of the public servant. There is no ambiguity in the language used in Section 20 of the Lokayukta Act. It clearly stipulates that the Lokayukta upon receiving a complaint, if decides to proceed further, they may order a preliminary inquiry or an investigation to examine whether there exists a prima facie case. The preliminary inquiry so ordered, shall be handed over to the Inquiry Wing of the Lokayukta or any agency. The inquiry shall entail a collection of materials, information and documents on the basis of which the comments on the allegations made in the complaint shall be elicited from the concerned public servant "and" the competent authority. "After" obtaining the comments of the concerned public servant "and" the competent authority will the report be submitted to the Lokayukta.

12. 1955 SCC OnLine SC 26 **13**. 1981 Supp SCC 87

23. Keeping the aforesaid discussion in mind, this Court is inclined to quash the order dated 18.5.2023 passed by the Lokayukta, Odisha in Case No. LY No.543/2021 and order dated 29.4.2022 passed by the Lokayukta, Odisha in LY Case No. 540/2019 and all the proceedings emanating therefrom against the present Petitioners. However, the Lokayukta has the authority to revisit the case complying with the above mentioned formalities and not without such compliances.

24. Ordered accordingly. All the Writ Petitions are accordingly disposed of.

25. Interim orders passed earlier in all the above mentioned Writ Petitions stand vacated.

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2024 (II) ILR-CUT-959

Dr. S.K. PANIGRAHI, J.

W.P.(C) NO.16600 OF 2023

GAUTAM MALHOTRA & ORS. ……Petitioners

-V-

IDBI BANK LTD., BHUBANESHWAR ……Opp.Party

CONSTITUTION OF INDIA, 1950 – Articles 226 & 227 – The Bank declared the petitioners/directors of company as wilful defaulter – Whether the declaration/order is sustainable? – Held, No – For making directors of a company liable for offence committed by the company, there must be specific averments against the directors showing as to how and in what manner the directors were responsible for the conduct of the business of the company without any specific role attributed, they cannot be arrayed as an accused.

Case Laws Relied on and Referred to :-

1. (2019) 6 SCC 787 : State Bank of India Vs. M/s Jah Developers.
2. (2018) 7 SCC 443 : Chintalapati Srinivasa Raju and Ors. v. Securities and Exchange Board of India.
3. (2010) 3 SCC 330 : National Small Industries v. Harmeet Singh Paintal.
4. (2019) 6 SCC 787 : State Bank of India vs. M/s Jah Developers Pvt.Ltd. & Ors.
5. W.P. No. 24289 of 2019 : Gaurav Dalmia vs. Reserve Bank of India.

For Petitioners : Mr. Gopal Jain, Sr. Adv. with Mr. Venugopal Mahapatra, Mr. Karan Batura, Mr. Jayant Chanda, Mr. Aishwarya Ray, Mr. Ayush Khandelwal.

For Opp.Party : Mr. Subir Palit, Sr. Adv. with Ms. Soma Patnaik.

JUDGMENT Date of Hearing : 15.03.2024 : Date of Judgment : 26.04.2024

Dr. S.K. PANIGRAHI, J.

1. The Petitioner through this Writ Petition has challenged the action of the Opposite Party Bank in declaring the Petitioners as “wilful defaulters” under the Reserve Bank of India's Master Circular on Wilful Defaulters dated 01.07.2015.

I. FACTUAL MATRIX OF THE CASE:

2. The concise yet comprehensive factual record of the case, pertaining to the matter at hand, is presented succinctly as follows:

3. The Petitioners have been constrained to approach this Court under Article 226 of the Constitution of India challenging the illegal, arbitrary and wrongful declaration of the Petitioners as Wilful Defaulters vide order dated 28.03.2023 passed by the Review Committee of the Opposite Party Bank which was communicated to the Petitioners vide communication dated 03.05.2023 issued by the Opposite Party Bank.

4. Clause 3 of the RBI Master Circular dated 01.07.2015 ('RBI Master Circular') provides for a three-tier mechanism in order to declare any person as a wilful defaulter. The first stage is issuance of a show cause notice in accordance with law providing the basis on which a person is to be identified as a wilful defaulter along with the supporting documents relied upon by the bank.

5. The second stage is that of the "Committee for Identification of Wilful Defaulter(s)" who shall then pass an order after affording an opportunity of representation and personal hearing to the accused(s) and in the third stage, the order of the Committee is reviewed by a second committee known as the “Review Committee”.

6. This three stage mechanism is provided as a safeguard since the declaration of a person as a wilful defaulter has grave civil and penal consequences. Failure on the part of the Opposite Party Bank to provide relevant documents and raise specific allegations against the Petitioners has resulted in denial of a fair opportunity to the Petitioners to present their case before the Review Committee of the Opposite Party Bank which has caused severe prejudice to the Petitioners. The entire process has been done in utter violation of the principles of natural justice.

7. It is alleged that the impugned action of the Opposite Party Bank declaring the Petitioners as “wilful defaulters” is against the basic tenets of law and in gross violation of the provisions of the Reserve Bank of India's Master Circular on Wilful Defaulters. The Opposite Party Bank has erred in not taking into consideration the representations of the Petitioners and *inter alia* the following:

> (i) Petitioner Nos.1, 2 and 3 were merely working as Non-executive Directors of 'JMT Auto Ltd.' (JAL). During their tenure with the company nor did they participate in the financial decision making of the company.
>
> (ii) Petitioner No.4 was always acting as the Director in the Professional capacity only and was not involved in the financial decision making of the company in any manner.
>
> (iii) The impugned order was only signed by the Chief General Manager, NPA Management Group. Thus, being in contravention of provision 3(c) of the RBI Master Circular on Wilful Defaulters, the e-voting of the Resolution Plan of JAL was concluded on 16.01.2023 and the Resolution Plan submitted by one Ramkrishna Forgings Limited was duly approved by 84.61% voting CoC members. Pursuant to this, the Resolution

Professional of JAL filed an application [IA No. 1067/2023 in CP(IB) No. 1088/ND /2020] before the NCLT in accordance with Section 30 of the IBC for approval of the said Resolution Plan, which is pending approval and the next date of hearing in the said matter is 30.05.2023. It is pertinent to state herein that proposed approval of the Resolution Plan is bound to have a direct bearing on the present case and once the Resolution Plan is approved, the Company as well as the Petitioners will legally be absolved of the liability, if any, and discharging them of the wilful defaulter declaration as well.

(iv) Pursuant to the initiation of CIRP of JAL, all the documents/data/ information relating to the company were in the exclusive custody of the Resolution Professional/ Interim Resolution Professional.

(v) No specific allegations were made against the Petitioners, as required by law. Further, no relevant documents were supplied to the Petitioners by the Opposite Party Bank substantiating the allegations in the SCN.

(vi) The next step of the Opposite Party Bank, post declaring the Petitioners as wilful defaulters, would be to report their names to TransUnion CIBIL; other Credit Information Companies; and publication of their name & photograph in the Newspapers, which shall be highly prejudicial and detrimental to the interest of the Petitioners. Needless to mention that such reporting of the names shall also be illicit in nature; the same being in consequence of an unlawful wilful defaulter declaration.

(vii) Further, in terms of Insolvency & Bankruptcy Code, 2016, the approval of Resolution Plan and the consequent resolution of debts of the Corporate Debtor is a two-step process, viz. (i) approval of the Resolution Plan by the Committee of Creditors of the Corporate Debtor and meet the statutory conditions; and (ii) Once the Adjudicating Authority (i.e. NCLT) is satisfied that the resolution plan as approved by the CoC under Section 30 of the IBC meets the requirements as referred to in sub-Section (2) of Section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan.

(viii) In the present case, the Resolution Plan of JAL already stands approved by the Committee of Creditors with 84.61% voting.

(ix) The second step, i.e. approval of the Resolution Plan by the NCLT has already been initiated. An application [IA No.1067/2023 in CP(IB) No. 1088/ND/2020] was filed before the NCLT in accordance with Section 30 of the IBC for approval of the said Resolution Plan, which is pending and the next date of hearing in the said matter is 30.05.2023. In view of the above, it is anticipated that the Resolution Plan of JAL will be approved by the NCLT soon, thereby resolving the debts due by JAL. Hence, the present Writ Petition has been filed seeking removal of the "wilful defaulter" tag.

II. PETITIONERS' SUBMISSIONS:

8. Learned Senior Counsel for the Petitioner(s) earnestly made the following submissions in support of his contentions:

(i) The impugned order of the Opposite Party Bank is vague, arbitrary, capricious and illegal. The same has been issued without application of mind and without even considering the detailed representations made by the Petitioners orally and in writing.

(ii) The Opposite Party Bank did not even issue a Show Cause Notice to the borrower (i.e. JAL) and proceeded against its erstwhile Directors in a whimsical manner. This shows the prejudiced approach of the Opposite Party Bank towards the Petitioners, who

were merely working in the capacity of Non- executive Directors in the professional capacity and were not at all involved in the day to day functioning or the financial decision making of the company.

(iii) The impugned order stands vitiated at the very threshold as the same is without any jurisdiction. The Opposite Party Bank has failed to take into consideration the procedure for declaration as "Wilful Defaulters" as laid down by the RBI in Clause 3 (c) of its Master Circular. The impugned order has not been passed by the appropriate committee as per the requirement of sub- clause (c) of Clause 3 of the RBI Master Circular and is also in violation of the judgment of the Apex Court in the matter of ***State Bank of India Vs. M/s Jah Developers*** [1].

(iv) Petitioner Nos.1, 2 and 3 were merely working as Non-executive Directors of JMT Auto Ltd. during their tenure with the company and neither were they involved in the day to day functioning of the company nor with the financial decision making aspects of the company.

(v) It is pertinent to mention that no specific allegations are made against the Petitioners in any of the communications and the only basis to proceed against the Petitioners is their erstwhile association with the company. It is trite law that for making a director of a company liable for offences committed by the company, there must be specific averments against the director showing as to how and in what manner the director was responsible for the conduct of the business of the company.

(vi) While dealing with such an issue, the Supreme Court in the matter of ***Chintalapati Srinivasa Raju and Ors. v. Securities and Exchange Board of India*** [2], has held that Non-executive Directors are persons who are not involved in the day to day affairs of the running of the company and are not in charge of and not responsible for the conduct of the business of the company. Hence, the Petitioners cannot be held liable for any omission and commission during the currency of their tenure.

(vii) The Supreme Court in another matter titled ***National Small Industries v. Harmeet Singh Paintal*** [3], has further stated that for making a director of a company liable for offences committed by the company, there must be specific averments against the director showing as to how and in what manner the director was responsible for the conduct of the business of the company. Moreover, if the person responsible to the company for the conduct of the business of the company was not in charge of the conduct of the business of the company, he can be made liable only if the offence was committed with his consent or connivance or as a result of his negligence. However, in the instant case, no specific allegations were made against the petitioners.

III. SUBMISSIONS OF OPPOSITE PARTY BANK:

9. Per *contra*, learned Senior Counsel for the Opposite Party Bank intently made the following submissions:

(i) All such procedural check boxes specified by RBI in its aforesaid Master Circular have been met with. A Wilful Defaulter Committee (WDC) was constituted by the Opposite Party Bank and after examining all such evidence of default available against the present petitioners the Opposite Party Bank sent a letter dated 01.11.2021 to the Petitioners for classification of the Petitioners as "wilful defaulters". Thereafter, on 08.07.2022 a WDC meeting was held (3rd WDC 2022-23) and it approved to issue SCN

1. (2019) 6 SCC 787 **2.** (2018) 7 SCC 443 **3.** (2010) 3 SCC 330

to all 11 numbers of erstwhile Directors of JMT Automobile. Again, on 02.08.2022 Show cause Notices (SCN) (Annexure-12 of the Writ Petition) were issued to the Directors.

(ii) The written representation to the SCNs were received from all the 11 numbers of Directors on various dates during August, 2022 and September, 2022. After receipt of written representation along with request for personal hearing from erstwhile Directors, the Bank on 12.09.2022 issued a letter for appearance for personal hearing on 19.09.2022 with option for personal hearing. On 19.09.2022 a personal hearing was conducted in the 6th meeting 2022-23 of WDC, where all the 4 numbers of Petitioners made their submissions before the WDC. Pursuant to such personal hearing, on 17.10.2022, the 7th meeting 2022-23 of WDC was convened and based on submissions the personal hearing and representation letters, a memorandum was put up for classification of 4 Directors as "Wilful Defaulters".

(iii) Post finalization of minutes of 7th WDC meeting dated 17.10.2022, the Bank issued intimation letter dated 07.11.2022 to the other 7 numbers erstwhile independent Directors informing them that they have been excluded from the purview of "wilful defaulter" process due to absence of substantiating documentary evidence. Further, on 05.01.2023 the WDC order dated 30.11.2022 classifying the Petitioners as "Wilful Defaulters" was communicated along with copy of the order (Annexure-22 Series of the Writ Petition). Also, the Petitioners were also provided with an opportunity to represent against the order and make their submissions before Wilful Defaulters Review Committee (WDRC) within 15 days from the date of intimation letter i.e. 05.01.2023.

(iv) Thereafter, the Petitioners made their representations against the WDC order conveyed vide the above intimation letter dated 05.01.2023. The representations of the Petitioners were duly considered by the Bank, despite delay in submissions of the representation to WDRC by the Petitioners. Based on such reply, on 28.03.2023 a Memorandum was put to the 41st meeting of WDRC held on 28.03.2023. Pursuant to such, on 03.05.2023 (Annexure-1 Series to the Writ Petition) a reasoned order was issued to all 4 erstwhile Directors/promoters declaring them as "Wilful Defaulters" with the seal and signature of the Bank officials authorized by WDRC.

IV. COURT'S REASONING AND ANALYSIS:

10. The Opposite Party's conduct is in defiance of the RBI Master Circular on Wilful Defaulter, the law laid down by the Supreme Court in ***State Bank of India vs. M/s Jah Developers Private Limited and Ors.*** [4] and the principles of natural justice. It is trite law that material relied upon by any Authority in arriving at its decision must be made available to the affected party. There is no justifiable reason that the same should be departed from in the present case. However, in the present case, *inter alia*, the Opposite Party Bank acted unfairly and did not provide the Petitioners with any material/ information/documents relied upon it for the purpose of declaring the Petitioners as "Wilful Defaulters". The Opposite Party Bank had filed a claim before the Committee of Creditors of JAL and such claim was accepted to the extent of Rs.58,12,02,697/-.

11. During the pendency of the captioned Writ Petition, the Resolution Plan of JMT Auto Limited (JAL) (i.e. the borrower company) has been approved by the

4 . (2019) 6 SCC 787

National Company Law Tribunal, New Delhi vide order dated 21.08.2023 in I.A. No.1067/ND/2023 in CP(IB) No.1088/2020.

12. In view of the above, the dues of the Opposite Party have been settled qua JAL and since JAL itself has been absolved (in lieu of the acceptance of Resolution Plan) of its alleged liability, the promoters/Directors of JAL (including the Petitioners herein who were not in the helm of affairs of the company and were merely working as Non-executive/ Professional Directors during the period as stated in the Writ Petition) also cannot remain to be tagged as "wilful defaulters".

13. The liability of the Petitioners could not have exceeded that of the Borrower Company itself. The liability of JAL having been extinguished by virtue of approval of the Resolution Plan, the Petitioners cannot be continued to be tagged as "wilful defaulters".

14. The wilful defaulter proceedings against the Petitioners were only attributable due to their erstwhile association with the borrower company, wherein the company itself has now been exculpated of the alleged default. Once the default itself goes by virtue of a corporate resolution, the "wilful defaulter" tag of the Petitioners in relation to the alleged defaults of such company has to go. Thus, the Petitioners can no more be tagged as "wilful defaulters".

15. In regards to the aforementioned, it is submitted that the High Court of Calcutta in the matter of Gaurav Dalmia vs. Reserve Bank of India bearing W.P. No.24289 of 2019 has held that:

> *"However, as far as the subsequent event is concerned, the petitioners are justified in arguing that since the wilful default tag was attached to the petitioners merely in the capacity of the promoters and directors of the defaulting company, which itself had been absolved of such default, automatically removing its wilful defaulter tag, such tag could not be sustained thereafter. The petitioners were castigated as wilful defaulters only due to the alleged actions taken by them in commission of the default by PMPL. Hence, the term 'wilful default', even in respect of the petitioners, does not pertain to their general conduct as company officials but is restricted to the default committed by the company, of which they were promoters/directors. As such, it is a 'Dog in the Manger' policy to sustain the tag 'wilful defaulter' for the petitioners for a default which had been absolved by the corporate resolution. Whatever might have been the veracity of the allegations against the petitioners, they could not continue being labelled as wilful defaulters for a default which itself had been resolved. Thus, the Review Comunittee adopted a palpably erroneous legal process in taking the view that the petitioners and the company were individually labelled as wilful defaulters. The impact of the sustenance of such tag would be severely detrimental to the petitioners, more so in view of the provisions of Section 29A of the Insolvency and Bankruptcy Code, 2016.*
>
> *In view of the same default, which was marked as wilful default, having been allegedly committed by the company on the one hand and the petitioners, in their capacity as promoters/directors thereof on the other, the declaration of wilful defaulter in respect of the company and that of the directors/promoters could not be segregated, since the root cause is the same default. Once the default itself is resolved through a Corporate Resolution Process and the company is itself absolved from such tag by its merger with*

> *a different company, the default cannot be said to continue in respect of the directors, since it has already been absolved. It was not separate causes of action, which led to the declaration of the petitioners and the PMPL as wilful defaulters, but the same alleged defaults.*
>
> *Once the default itself goes by virtue of a corporate resolution, the 'wilful defaulter' tag of the petitioners, in the capacity of promoters and directors of such company only and not in their individual capacities, had to go. Thus, the Review Committee acted palpably without jurisdiction in refusing to withdraw the wilful defaulter tag attached to the petitioners, on an unjust and unfair basis."*

16. The Opposite Party Bank has failed to make any specific allegation against the Petitioners to show as to how they were responsible/ at the helm of affairs/had the knowledge/involved/were aware of the alleged defaults committed by the Company. It is well settled that Non-Executive Directors is not responsible for the conduct of the business of a company. Also, it is trite law that there must be specific allegations against the persons related to the Company to accuse them of an act committed by the Company. Without any specific role attributed, they cannot be arrayed as accused. Merely, because a person is a Director of a Company, he does not become liable for all the actions of the Company.

17. On one hand JAL has not been addressed in the SCN, and on the other hand, the Directors including independent Directors/Non-Whole Time Directors are proposed to be declared as “wilful defaulters”. It is submitted that the word "and" in para 3(a) and 3(b) of the RBI Master Circular is of paramount importance for declaration of 'Promoters or Whole Time Directors' of a borrower company as wilful defaulters. As per the RBI Master Circular, the Promoters or Whole Time Directors can only be declared as “wilful defaulters”, if the lender finds the default of the borrower company as 'wilful'. Thus, if the lender does not consider the principal borrower's (i.e. the company's) default as 'wilful', then declaration of the Promoter or Whole Time Director as “wilful defaulter” cannot arise.

18. With respect to the aforesaid discussion, this Court is inclined to allow the application of the Petitioners. The Opposite Party Bank is directed to remove the names of the Petitioners as “wilful defaulters” which has been declared on the basis of the Reserve Bank of India's Master Circular on Wilful Defaulters.

19. Accordingly, the Writ Petition is disposed of.

20. Interim order passed earlier stands vacated.

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2024 (II) ILR-CUT-965

Dr. S.K. PANIGRAHI, J.

W.P.(C) NO. 29084 OF 2019

NARAYAN JENA ......Petitioner

-V-

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

ODISHA CIVIL SERVICE (CLASSIFICATION, CONTROL AND APPEAL) RULES, 1962 – Rule 15 – The Collector passed an order of suspension without any authority of law – Whether the impugned order of suspension is sustainable? – Held, No.

Case Laws Relied on and Referred to :-

1. 2008 (11) OLR 530 : Fakir Mohan v. Govt.
2. 2009(1) OLR 1020 : Nabakishore Mishra, v. Collector, Dhenkanal.

For Petitioner : Mr. S.K. Dalai.

For Opp.Parties : Mr. S.S. Pradhan , AGA.

JUDGMENT Date of Hearing : 27.03.2024 : Date of Judgment : 26.04.2024

Dr. S.K. PANIGRAHI, J.

1. The Petitioner, in this Writ Petition, has challenged the order of suspension dated 21.12.2019 issued by the Collector, Khurda, which is not only without authority but also in contrary to the service condition of the petitioner and in gross violation to the principles of natural justice.

I. FACTUAL MATRIX OF THE CASE:

2. The concise yet comprehensive factual record of the case, pertaining to the matter at hand, is presented succinctly as follows:

(i) The petitioner was appointed as Panchayat Secretary and subsequently in the year 2004 appointed as VLW (Village level Workers) and working as such and in view of the amendment of the Orissa Gram Panchayat Act, 1964 and in view of the Sec. 122 of the Orissa Gram Panchayat Act, 1964 he is working as Panchayat Executive Officer, under Kantabada and Malipada Gram Panchayat under Bhubaneswar Block, Dist-Khurda and is working under the control and supervision of the Gram Panchayat in view of the Article 243(g) of the Constitution of India.

(ii) Prior to the present assignment, the petitioner was discharging his duties under the control of Gram Panchayats namely Podadiha Gram Panchayat under the Begunia Block from December 2015 to 30.06.2017. It is also pertinent to mention here that since 04.07.2017 the petitioner has Joined in the present place of posting and working as Panchayat Executive Officer, under Kantabada and Malipada Gram Panchayat under Bhubaneswar Block, Dist-Khurda and is discharging his duties very sincerely and honestly with the utmost satisfaction of the Gram Panchayat.

(iii) The cause of action arose to approach before this Court when the petitioner saw the news items published in the print media and electronics media regarding suspension of the present petitioner regarding financial irregularity in podiha Gram panchyat and accordingly the petitioner ascertained that he has been put under suspension by order dated 21.12.2019.

(iv) As it appears from the order of suspension the collector Khordha in exercise of his power under Rule 15 of the OCS(CCA) Rules, 1962 placed the petitioner under suspension directing his headquarters at Project Director, DRDA Khordha and also accorded sanction under Rule 90 of the OCS(CCA) Rules, 1962, which is absolute without authority and settled principles of Law. Hence, the present Writ Petition.

(v) On the bare perusal of the order of suspension it is very clear that the order has been issued by the Collector, Khordha who is without authority. The law is well settled in

view of the Article 243 (g) of the Constitution of India, the employees of the Gram Panchayat is under the control and supervision of the Gram Panchayat and there exists a master-servant relationship.

(vi) It appears from the language of the order of suspension and amply reflects that while the petitioner was working as Panchayat Executive office i.e. PEO, a disciplinary proceeding was initiated by the Collector which is contrary to the law.

(vii) In the present context, the petitioner is yet to know what are the allegations against him and at any point of time the petitioner has been served with the contents of the allegations or the contents of the inquiry report so also at no point of time the petitioner has been called for rebuttal the allegations at this juncture issuance of order of suspension gives very bad taste in the eye of Law and interference of this court is highly warranted.

II. COURT'S REASONING AND ANALYSIS:

3. The main ground of challenge and point of law involved in the present case is that the entire allegation has been made against the petitioner while he was working as Panchayat Executive officer i.e. PEO under the Gram Panchayat. If the earlier full Bench decision of this Court is relied, it has been held that the Secretary who is working under the Gram Panchayat is not holding a civil post in the Gram Panchayat. The State Government has no authority at all to take any disciplinary action against the Secretary and after amendment Section 122 of the Act, the power of superintendents and supervision was vested with the Collector but subsequently in view of the judgment passed in ***Fakir Mohan v. Govt.***[1] it has been declared as ultravires and subsequently in case of ***Nabakishore Mishra, v. Collector, Dhenkanal*** [2] it has been observed that the Collector cannot have any control over the services of VLWs posted as Panchayat Executive Officers in the Gram Panchayats. It is also clear that if the VLWs are working under Gram Panchayat as Executive Officers their duties and responsibility with respect of to the duties in the Panchayat and their services within the control of Gram Panchayat and the gram Panchayat may deal with any indiscipline or negligence while carrying out the lawful order of the Sarpanch or the Panchayat.

4. In fact, during the aforesaid period, the Collector has no authority to take any disciplinary action against the Executive Officer. Since, in the present case, the petitioner was working as Panchayat Executive officer, framing of charge in such period and initiation of disciplinary proceeding is bad in law.

5. In view of Article 243G of the Constitution of India, it has been directed that the implementation of schemes for economic development and social justice as may be entrusted to them including those in relation to the matters listed in the Eleventh Schedule are purely in the domain of Gram Panchayat. Further, under Article 243(G), power has been given to the Gram Panchayat by the Constitution of India. For the reasons, disciplinary action has been vested to the State Government not to the Officers of the State by curtailing the independence of the Gram Panchayats.

1. 2008 (11) OLR 530 **2.** 2009(1) OLR 1020

But, the aforesaid action of the Officers in interfering with the mandates of the Constitution does warrant an interference by this Court.

6. With respect to the aforesaid discussion, this Court is inclined to quash the order of suspension dated 21.12.2019 issued by the Collector, Khurda.

7. Accordingly, this Writ Petition is allowed.

8. Interim order passed earlier stands vacated.

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2024 (II) ILR-CUT-968

MISS. SAVITRI RATHO, J.

CRLMA NO. 160 OF 2023

INFORMANT ....Petitioner

-V-

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

CODE OF CRIMINAL PROCEDURE, 1973 – Section 439(2) – The Learned Additional District Judge and Session Judge-cum-Special Judge (POCSO) granted bail to the accused/Opp.Party No.2 for commission of offences punishable U/ss. 363, 366, 506, 376(3), 376(2)(n), 34 of IPC r/w Section 6 of POCSO Act without hearing the informant – Whether the order is liable for interference? – Held, Yes – The impugned bail order has been granted to Opp.Party No.2 without issuing notice to the informant or hearing the informant is against the mandate of Section 439(1)(A) of the Cr.P.C – Hence liable for interference & accordingly the bail which was granted is cancelled.

For Petitioner : Mr.P.C.Jena & Mr.P.C.Dash.
For Opp.Parties : Ms.S.Mishra, ASC (for O.P.1).

JUDGMENT Date of Judgment : 23.02.2024

SAVITRI RATHO, J.

This application under section 439(2) of the Code of Criminal Procedure has been filed by the petitioner–informant, for cancellation of bail granted to the opposite party no.2 by order dated 16.02.2023 passed by the learned A.D.J. & Sessions Judge-cum-Special Judge (POCSO), Kendrapara in Talchua Marine P.S. Case No. 45 of 2018 corresponding to G.R. Case No. 67 of 2018 (POCSO) where charge sheet has been filed against the opposite party no.2 - Sudhansu Jana for commission of offences punishable under Sections 363, 366, 506, 376(3), 376(2)(n), 34 of IPC read with Section 6 of POCSO Act.

(For protecting their identity, neither the name of the victim nor the informant have been mentioned in the judgment.)

2. By order dated 31.07.2023, notice had been issued to the opposite party no.2 only. On 10.01.2024 this Court found from the postal tracking report, that the item

had been delivered to the addressee on 21.08.2023 and hence notice was held to be sufficient. As none appeared for the opposite party no.2 when the matter was called, in order to give him one more chance, the matter was adjourned to 31.01.2024 and the Registry was directed to verify if any counsel had appeared for the opposite party no.2 in the meanwhile.

3. Office note dated 30.01.2024 indicates that no Vakalatnama has been filed on behalf of the opposite party no.2. On 31.01.2024, the matter was adjourned to 19.02.2024. No counsel appeared on behalf of the opposite party no.2 on 31.01.2024, on 19.02.2024 or on 22.02.2024. On 22.02.2024 this case had been adjourned to today with a direction to list alongwith ABLAPL No. 1183 of 2019 which had been filed in this Court by opposite party No.2 under Section 438 of Cr.P.C.

4. Today also none appears for the opposite party No.2 when the matter is called. As notice is sufficient on opposite party no.2, the matter is taken up for disposal today. The photostat copy of ABLAPL No.1183 of 2019 has been tagged to this file.

5. Perused the order dated 08.04.2019 passed in ABLAPL No.1183 of 2019. The order is extracted below :

> *"Heard, learned counsel for the petitioner and learned counsel for the State.*
>
> *The petitioner in this case having been implicated in Talachua Marine PS Case No.45 of 2018 corresponding to GR Case No.67 of 2018, pending in court of the learned Additional Sessions Judge, -cum-Special Court, Kendrapara for alleged commission of offence punishable under Sections 341, 363, 506, 376 (2) (i) (n)/34 of IPC and Section 6 of POCSO Act, has filed this petition for his release on pre-arrest bail.*
>
> *Learned counsel for the petitioner during course of argument submits that petitioner does not want to press this petition for pre-arrest bail as the petitioner intends to surrender and move for bail before the court in seisin over the matter. However, he submits to direct the court in seisin over the matter to dispose of the bail application of the petitioner on the same day.*
>
> *Considering the submission made, this ABLAPL stands disposed of with an observation that if the petitioner surrenders before the court of learned Additional Sessions Judge-cum-Special Court, Kendrapara within four weeks hence and makes a motion for bail the learned Additional Sessions Judge-cum-Special Court, Kendrapara shall consider and dispose of the same in accordance with law in course of the day, if there is no other legal impediment.*
>
> *It is made clear that this Court has expressed no opinion on the merit of the case…."*

6. Mr. P.C.Dash, learned counsel for the petitioner submits that the petitioner is the mother of the minor victim and the informant in this case and the opposite party No.2 is the principal accused in Talchua Marine P.S. Case No. 45 of 2018 which had been registered against opposite party No. 2 and opposite party No.3 for commission of offences punishable under Sections 341, 363, 506, 376(2)(i)(n), 34 of IPC read with Section 6 of POCSO Act . After completion of investigation, charge sheet dated 24.08.2021 has been filed against the opposite party no.2 Sudhansu Jana

for commission of offences punishable under Sections 363, 366, 506, 376(3), 376(2)(n), 34 of IPC read with Section 6 of POCSO Act showing him as an absconder. Charge sheet has also been filed against proforma opposite party nos. 3 to 5 Surjendu Jena @ Apu Jena @ Jean, Santanu Giri and Gouranga Mandal @ Goura respectively, for commission of offences punishable under Sections 363, 366-A, 34 of IPC.

7. Mr. P.C.Dash, learned counsel for the petitioner further submits that the opposite party No.2 had surrendered before the learned Court below on 16.02.2023 and althought the learned Court below found that chargesheet has been filed against the opposite party No.2 on 24.08.2021 for commission of offence under Sections 363, 366, 366-A, 376(3), 376(2)(n), 506, 34 of IPC read with Section-6 of the POCSO Act, but without issuing notice to the informant, illegally allowed his prayer for bail on the same day by observing as follows:

> *"Perused the case record and found that the charge sheet against the accused has already been filed on dtd.24.08.21 U/s.363/366/366A/376(3)/376 (2)(n/506/34 IPC r/w Sec.6 POCSO Act. Hence, looking to the changing circumstance and as there is no order against the accused from the Appellate Authority regarding consideration of bail petition, in my view for the interest of justice, the accused be released on bail by furnishing bail bond of Rs.20,000/- (rupees twenty thousand) with one solvent surety for the like amount with condition that:-*
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> *(i) He shall not commit similar type of offence during bail period;*
>
> *(ii) He shall not terrorise the victim or her family members while on bail;*
>
> *(iii) Any deviation of the above condition if reported it will amounts to cancellation of the bail.*

8. The order dated 08.04.2019 was passed in ABLAPL No. 1183 of 2019, by a co-ordinate Bench of this Court, when investigation was in progress and the offences under which the case had been registered had been mentioned in the order. (The Hon'ble Judge has superannuated in the meanwhile). It had also been mentioned in the order that if the petitioner surrenders before the court of the learned Additional Sessions Judge–cum Special Court, Kendrapara within four weeks hence and makes a motion for bail, it would be considered and disposed of in accordance with law on the same day if there is no other legal impediment and that the Court had expressed no opinion on the merit of the case. (emphasis supplied)

9. The opposite party No.2 had not surrendered before the Court within four weeks of the order and there was a legal impediment as in the meanwhile, chargesheet had been filed against the opposite party No.2 for commission of offences punishable under Sections 363, 366, 366-A, 376(3), 376(2)(n), 506, 34 of IPC read with Section - 6 of the POCSO Act, which attracted the provsions under Section – 439(1)(A) of the Cr.P.C. He was arrayed as an absconder in the chargesheet.

10. The provision of Section 439 (1A) Cr.P.C. is extracted below :

> *"Section 439 (1A)- The presence of the informant or any person authorised by him shall be obligatory at the time of hearing of the application for bail to the person under sub-section (3) of section 376 or section 376-AB or section 376-DA or section 376-DB of the Indian Penal Code (45 of 1860)."*

11. Section 439(1)(A) of the Cr.P.C. has come into the statute by way of amendment with effect from 21.04.2018 and makes the presence of the informant or any person authorised by him obligatory at the time of hearing of the application for bail of a person accused under sub-section (3) of section 376 or section 376-AB or section 376-DA or section 376-DB of the Indian Penal Code. The occurrence in this case allegedly took place 26.08.2018 and FIR had been registered on 29.08.20l8.

12. In view of the mandate of Section- 439(1)(A) of the Cr.P.C and as opposite party No.2 had not surrendered in the Court within the time indicated by this Court in the ABLAPL, the learned Court below did not have to dispose of the bail application on the same day, more so without hearing the informant. It was incumbent on the learned A.D.J. & Sessions Judge-cum-Special Judge (POCSO), Kendrapara, to comply with Section 439(1)(A) of the Cr.P.C., as one of offences under which chargesheet had been filed against opposite party No 2 was under Section 376 (3) I.P.C. That apart the allegations against the opposite party No.2 have not been considered by the learned Court below and apart from stating that chargesheet has been filed which is a changing circumstance, the impugned order is bereft of reasons.

13. As bail has been granted to opposite party No.2 without issuing notice to the informant or hearing the informant, the impugned order is against the mandate of Section 439(1)(A) of the Cr.P.C. and is laible for interference and the bail granted to the opposite party no.2 vide the impugned order is liable to be cancelled.

14. Accordingly, it is ordered :-

Order dated 16.02.2023 passed by the learned A.D.J. & Sessions Judge-cum-Special Judge (POCSO), Kendrapara in Talchua Marine P.S. Case No. 45 of 2018 corresponding to G.R. Case No.67 of 2018 (POCSO) is set aside and the bail granted to the opposite party No.2 is cancelled .

15. If the opposite party No.2 does not voluntarily surrender in the Court in seisin over the matter, the said Court shall take steps for his apprehension.

16. After his surrender/apprehension, if the opposite party No.2 files an application for bail, the same shall be considered in accordance with law on its own merit but after hearing the informant as per the mandate of Section 439(1)(A) of the Cr.P.C.

17. The CRLMA is allowed.

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2024 (II) ILR-CUT-972

R.K. PATTANAIK, J.

MACA NO. 625 OF 2020

SADYASMITA MOHAPATRA & ANR. ....Appellants

-V-

SURYASNTA MOHAPATRA & ANR. ....Respondents

MOTOR ACCIDENT CLAIM – Claim of compensation – Death of a pillion rider – Whether the claimant is entitled to get compensation in case of death of a pillion rider? – Held, if the vehicle have a comprehensive/ package policy and the deceased was an occupant as a pillion rider, it would cover the risk, allow payment of compensation.

Case Laws Relied on and Referred to :-

1. 2013(1) T.A.C. 1 (S.C.) : National Insurance Company Ltd. Vrs. Balakrishnan & Anr.
2. AIR 2020 SC 527: AIR Online 2020 SC 14 : Ramkhiladi and another Vrs. United India Insurance Company & Anr.

For Appellants : Mr. P.K.Mishra.

For Respondents : Mr. G.P. Dutta, (for Respondent No.2)

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 'the M.V. Act') is filed by the claimants challenging the impugned judgment dated 19th February, 2020 passed in M.A.C. Case No.66 of 2014 by the Learned 1st Additional District Judge-cum-1st M.A.C.T, Cuttack, whereby, an application under Section 166 of the M.V. Act at their behest was dismissed with a nil award on the grounds inter alia that the same is not tenable in law as compensation was to be directed payable by respondent No.2 being the insurer.

2. As per the appellants, the claim application under Section 166 of the M.V. Act was filed after the death of their mother in a motor accident involving a vehicle bearing registration No. OR 05 AS 7514. According to the claimants, the deceased mother was aged about 57 years and was working as an Assistant Teacher under the District Inspector of Schools, Jagatsinghpur. It is pleaded that the deceased, who was travelling as a pillion rider in the offending vehicle having a comprehensive policy and on account of her death, respondent No.2 is liable to cover the risk, however, learned Tribunal disallowed the same with a nil award for the reason stated.

3. In fact, learned Tribunal on the basis of the pleading on record, framed the following issues, such as: (i) whether the claim application under Section 166 of the M.V. Act is maintainable? (ii) whether the alleged accident dated 30th October, 2012 took place with the death of the deceased due to rash and negligent driving of the rider of the offending vehicle bearing registration No. OR 05 AS 7514? and (iii) whether the claimants are entitled to any such compensation and to what extent and who among the owner and the insurer is liable to pay such compensation? Learned

Tribunal discussed the evidence on record and thereafter, passed the nil award. The claim for compensation by the appellants before the learned Tribunal was challenged by respondent No.2 Insurance Company with a plea that an unknown vehicle caused the accident and as such, no any report was lodged with the local PS and hence, therefore, it is not liable to indemnify the owner.

4. Heard Mr. Mishra, learned counsel for the appellants and Mr. Dutta, learned counsel for respondent No.2 Insurance Company. None represents respondent No.1.

5. It is pleaded that the learned Tribunal committed serious error in dismissing the claim application on the premise that the appellants failed to prove the rashness and negligence of the rider of the motorcycle and on such other grounds.

6. Mr. Mishra, learned counsel for the appellants would submit that the offending vehicle was insured with respondent No.2 with a comprehensive/package policy and hence, learned Tribunal fell into error by dismissing the claim application filed under Section 166 of the M.V. Act and while contending so, he refers to a decision of the Apex Court in the case of ***National Insurance Company Ltd. Vrs. Balakrishnan and Another 2013(1) T.A.C. 1 (S.C.)***. It is further contended that the rashness and negligence of the rider of the vehicle is prima facie established from the evidence of the witnesses examined further corroborated with the report of the local police in U.D. case. As per Mr. Mishra, the rider of the offending vehicle was possessed of a valid D.L. and the said vehicle to be insured with respondent No.2 under a comprehensive/package policy to cover the risk of a pillion rider and hence, the appellants as the LRs of deceased, are entitled to receive compensation.

7. On the contrary, Mr. Dutta, learned counsel for respondent No.2 submits that not only the negligence of the rider of the vehicle has not been proved and established but also the claimants being the children of the deceased as daughters of the rider of the offending vehicle and respondent No.1, the registered owner is also a daughter, in the facts and circumstances of the case, since the owner and insurer of the other vehicle found involved in view of the investigation report marked as Ext. C, the deceased being not a 3rd party, there lies no liability and hence, learned Tribunal committed no wrong in dismissing the claim application of the appellants. While advancing such an argument, Mr. Dutta cited a decision of the Apex Court in the case of ***Ramkhiladi and another Vrs. United India Insurance Company and another AIR 2020 SC 527: AIR Online 2020 SC 14***.

8. Mr. Mishra, learned counsel for the appellants produced the certified copies of the evidence received by the learned Tribunal with other relevant documents for perusal of the Court.

9. It is not being disputed by respondent No.2 with regard to the policy package of the offending vehicle. Any such comprehensive policy in respect of the vehicle has not been challenged by insurer before the learned Tribunal. So, the Court is to proceed on the premise that the offending vehicle bearing registration No. OR

05 AS 7514 (Honda Activa) had a comprehensive/package policy at the relevant point of time and on the date of accident i.e. 30th October, 2012.

10. Considering the rival contentions, the Court is to examine the claim of compensation advanced by the appellants. As per the evidence on record, appellant No.2 was examined as P.W.1 before the learned Tribunal and she deposed that on the date of accident, while her deceased mother was travelling in the offending vehicle, her father as a rider, as a stray dog came in front of him and due to sudden application of brake by him, she fell down and sustained grievous head injury and other injuries as well and while under treatment, died on 31st October, 2012 and in that connection, Mangalabag UD P.S. Case No.1520 of 2012 corresponding to U.D. G.R. No. 1736 of 2012 was registered. P.W.1 was cross-examined by respondent No.2. Nothing has been elicited during cross-examination of P.W.1 vis-à-vis rashness and negligence on the part of the rider of the motor cycle. In other words, the same was not challenged during such examination of P.W.1. It was elicited from P.W.1 that the vehicle in question stands registered in the name of her elder sister, namely, respondent No.1. As per P.W.2, who claimed to be an occurrence witness, the accident was caused due to rash and negligent driving of the husband of the deceased as he applied sudden brake. Again, there has been no cross-examination of P.W.2 with regard to any such negligence by the rider of the vehicle while denying the same. But, learned Tribunal declined to consider the alleged accident as a result of any such negligence by the husband of the deceased. The death of the deceased is no doubt due to a vehicular accident. The said accident has taken place on 30th October, 2012 and the deceased died on 31st October, 2012. A U.D. case was registered at Mangalabag P.S. The intimation with regard to the accident has been received by the P.S. after the death of the deceased and the same is supported by evidence. The death is also shown to be on account of sudden application of brake so revealed before the local P.S. However, a copy of the inquest report on record indicates the cause of accident differently and about the involvement of another motorcycle. If any such accident took place with the involvement of a motorcycle having dashed the vehicle, in which the deceased was travelling, a report should have been lodged at the local P.S. It is rather unusual for not lodging any report with the local police even after an accident having taken place involving another motorcycle, as revealed from the inquest report. The death of the deceased is on account of the ante mortem injuries sustained during the accident. In the considered view of the Court, merely by referring to the inquest report without more, it would not be proper and justified to disbelieve the plea of the appellants, who all along maintained that the accident was on account of the negligence of the rider of the motor cycle and for sudden application of brake, may be for the reason that a dog appeared and came in front of him. No doubt, respondent No.2 adduced evidence by placing the investigation report i.e. Ext.C and as per the findings of such enquiry, another motorcycle dashed the Scooty from back side and fled away from the accident spot. As per the said report, the rider of the unknown motorcycle was

negligent and hence, the accident took place and in that connection, no report was lodged or any case has been registered at Jagatsinghpur P.S. But, the U.D. case was registered since the deceased fell from the Scooty due to sudden brake being applied by her husband. Any such involvement of a motorcycle is not really established by cogent evidence though claimed to have been revealed after an investigation. In fact, respondent No.2 heavily relied on the inquest report to arrive at a finding that an unknown motorcycle was involved in the accident to suggest that the driver of the said vehicle was instead responsible as he was rash and negligent. At the cost of repetition, the Court holds that the involvement of another vehicle cannot be concluded merely on acceptance of the inquest report. No evidence is on record from the side of respondent No.2 to satisfy that the cause of the accident as mentioned in the inquest report was on account of any such disclosure made by the claimants. It is not revealed from the record as to who stated so at the time of inquest held in respect of the deceased claiming involvement of another motorcycle in the accident. In absence of any such clear and satisfactory evidence, the Court is not inclined to arrive at such a conclusion accepting the inquest report and also Ext.C regarding involvement of any other motorcycle in the accident.

11. So far as the liability of respondent No.2 is concerned, Mr. Dutta claims that the deceased was travelling in the Scooty owned by respondent No.1, who is none other than her daughter like the claimants and the rider of the said vehicle to be their father and in view of the decision in **Ramkhiladi** (*supra*), the claimants are not entitled to compensation and as such, respondent No.2 is not liable to cover the risk. In the aforesaid case, the application for compensation under Section 163-A of the M.V. Act was filed after the death of the deceased, who was driving the vehicle having borrowed it from the owner and therein, the Supreme Court held and concluded that though in such a proceeding, there is no need for the claimants to plead or establish negligence or that the death was due to a wrongful act, negligence or for the fault of the owner of the vehicle but since the deceased not being a 3rd party, a claim against the owner/insurer cannot be maintained for the vehicle having been borrowed by him and hence, he steps into the shoes of the owner and the parties hence to be governed by the contract of insurance; the liability of the Insurance Company would be qua a 3rd party only and the deceased cannot be treated as 3rd party with respect to the insured vehicle. In that case, the deceased was not an employee of the owner of the vehicle but was a permissible user or borrower of the motorcycle and hence, therefore, in a proceeding under Section 163-A of the M.V. Act, he was not considered as a 3rd party having stepped into the shoes of the owner and under such circumstances, allowed compensation to the extent as per the contract of insurance payable along with interest. In the instant case, the deceased was a pillion rider and as concluded earlier, such an accident had taken place due to negligence of her husband (not being challenged), who was driving the Scooty by then. Admittedly, respondent No.1, namely, one of the daughters of the deceased is the owner of the Scooty. The question is, whether, as a pillion rider, if the deceased met with the accident and died, respondent No.2 is liable to cover risk and indemnify respondent No.1? Admittedly, the claimants, owner and rider of the Scooty are related to each other. The vehicle had a comprehensive/package policy, the fact which is not under question as no

objection was ever raised in that regard by respondent No.2. In **Ramkhiladi** (*supra*), the rider of the motorcycle died and he had borrowed the vehicle from the owner, hence, he could not have been a 3rd party since stepped into the shoes of the owner. In the case at hand, the pillion rider died and as to the vehicle, it is owned by respondent No.1. In the considered view of the Court, the said decision is not applicable to the present case where the Scooty had a comprehensive policy as on 30th October. So therefore, the Court is of the conclusion that the policy covers the risk to indemnify the loss. It is not a case of Act policy to hold that the pillion rider is not a 3rd party. The deceased is to be considered as an occupant and her death is a risk to be covered by the comprehensive policy. In fact, the Apex Court in **Balakrishnan** (*supra*) remanded the matter back to the Tribunal to scrutinize policy, whether to be an Act policy or a comprehensive one for consideration of compensation in respect of the vehicle registered in the name of a Company but owned by the injured, the Managing Director of the said Company and such was on the premise that if there is a comprehensive/package policy, it would cover the risk and allow payment of compensation as an occupant of the vehicle. Considering the facts of the case at hand and taking note of the decisions referred to above, the Court is of the final conclusion that since the Scooty said to have had a comprehensive/ package policy and the deceased was an occupant as a pillion rider and died on account of the accident which occurred due to negligence of her husband, respondent No.2 is liable to cover the risk and hence, to pay the compensation to the claimants and having held so, for its determination, the matter has to be remitted to the learned Tribunal.

12. Hence, it is ordered.

13. In the result, the appeal stands allowed. As a necessary corollary, the impugned judgment dated 19th February, 2020 passed in M.A.C. Case No.66 of 2014 by the learned 1st Additional District Judge-cum-1st M.A.C.T, Cuttack is set aside thereby restoring the application filed under Section 166 of the M.V. Act to file for a decision on the quantum of compensation payable to the appellants by respondent No.2 covering the risk indemnifying respondent No.1 by providing an opportunity of hearing to all concerned.

14. In the circumstances, however, there is no order as to costs.

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2024 (II) ILR-CUT-976

SASHIKANTA MISHRA, J.

R.S.A. NO. 552 OF 2023

SANJUKTA SWAIN ....… Appellant

-V-

KUSUM MANJARI RANA & ANR. ....…Respondents

SPECIFIC RELIEF ACT, 1963 – Section 34 – Maintainability of suit – The plaintiff has no right, title, interest over the schedule land but only claimed easementary right of way over the same for which she filed the suit challenging the alienation of the land by its lawful owner in favour

of defendant No.1 without any declaration being sought for by her regarding easementary right of way over the scheduled property – Whether the suit is maintainable in view of the provision U/s. 34 of the Act? – Held, No – She being neither a co-owner nor a co-sharer, cannot be allowed to challenge the alienation of the land by its lawful owner.

For Appellant : Mr. Soumya Mishra.
For Respondent s: Mr. Subrat Mishra.

JUDGMENT Date of Judgment : 17.05.2024

SASHIKANTA MISHRA, J.

The Plaintiff is the Appellant against the reversing judgment passed by learned 1st Addl. Sessions Judge, Cuttack on 29.11.2023 followed by decree on 11.12.2023 in R.F.A. No.37/2020 whereby the judgment dated 30.11.2019 followed by decree dated 05.12.2019 passed by learned 4th Addl. Civil Judge (Sr. Division), Cuttack, in C.S. No.553/2017 was set aside and the appeal was allowed.

2. For convenience, the parties are referred to as per their respective status in the trial Court.

3. The Plaintiff filed the suit for declaration that the Sale Deed No.121 dated 05.1.2013 executed by Defendant No.2 in favour of Defendant No.1 is illegal, void, inoperative and not binding on her and that no right had accrued to Defendant No.1 thereby, permanent injunction against Defendant No.1 restraining him from creating any disturbance over 'B' Schedule property and from obstructing the use of the Plaintiff over the same and other reliefs. The case of the Plaintiff as set out in the plaint, briefly stated, is that she is the owner in possession of suit Schedule 'A' land. The property described in Schedule 'B' is a road for ingress and egress of the Plaintiff to her residential house situate over 'A' Schedule property. The Schedule 'A' land comprising an area of Ac.0.70 dec. was recorded in the name of the Plaintiff as per order passed in Mutation Case No.1307/1996 and thereafter on the application of the Appellant under Section 8-A of the O.L.R Act filed before the Tahasildar, Cuttack, the nature (kisam) of the land was converted to homestead (Gharabari). The Plaintiff thereafter constructed her residential house over the suit land and has been residing therein without any dispute. It is her further case that her vendor left the Schedule 'B' property to be used by her as road for ingress and egress to her residential house over Schedule 'A' land. Said road was also used by adjoining neighbours and as such, it has become the common road of the Plaintiff and Defendant No.1 along with other persons of the area. Defendant No.2 being the owner of 'B' schedule property has thus granted the right of easement to the Plaintiff and Defendant No.1. The Plaintiff by filing Title Suit No.160/1994 got an award in her favour on the basis of a village Panchayatnama, which was reduced to writing along with a sketch map appended thereto wherein 'B' schedule property was shown as road over Plot No.426 connecting to the Plaintiff's land over Schedule 'A'. Said

award was made rule of the Court and a decree was passed granting absolute right to the Plaintiff over 'A' Schedule property. Further, a unregistered agreement was also executed between the Plaintiff and Defendant No.1 on 19.3.1994 granting right of easement in respect of 'B' schedule property. Thus, the Defendant No.1 having no manner of right to make any construction over the 'B' schedule land (road) stocked building materials with the intent of making construction. The Plaintiff objected to the same and also initiated proceeding under Section 144 of Cr.P.C. wherein a preliminary order was passed restraining Defendant No.1 from making any obstruction over Schedule 'B' property. In course of such proceeding, it came to light that Defendant No.1 has alienated 'B' schedule property in favour of Defendant No.1 vide R.S.D. No.121 dated 05.1.2013 despite not having any alienable right and ignoring the right of easement granted by him earlier to the plaintiff and other persons. It is also stated that the right, title and interest of Defendant No.1 has been declared in T.S. No.429/1995 in respect of an area of Ac.0.20 decs. under Hal Plot No.426. In the said suit, 'B' schedule property was also described as road meant for the use of Defendant No.1 as well as the Plaintiff. Defendant No.1, by producing the sale deed dated 5.1.2013 has managed to record her name in the R.O.R. Since the sale deed executed by Defendant No.2 in favour of Defendant No.1 seriously affects the right of easement of the Plaintiff and other adjoining land owners is contrary to the findings in T.S. No.160/1994 and T.S. No.429/1995, same is therefore, illegal. Since Defendant No.1 caused obstruction over 'B' schedule property, the drain water and foul water of the Plaintiff was blocked for which she was constrained to file the suit.

4. Defendant No.1 contested the suit by filing written statement. Her case is that she has been possessing an area of Ac.0.027 decs. 6 kadi of land from Plot No.426. She acquired title over the property by way of adverse possession as per decree passed on 18.12.1995 by the Civil Judge (Sr. Division) 1st Court, Cuttack in C.S. No.429/1995 whereby she got an area of Ac.0.20 Decs. Defendant No.2 thereafter, for his legal necessity sold an area of Ac.0.007 decs. 6 kadi to Defendant No.1 vide R.S.D. No.121 dtd.5.1.2013. Thereafter, she mutated the land in her name and also converted the kisam of the land to homestead as per Section 8-A of the OLR Act. It is the further case of Defendant No.1 that the Plaintiff has a separate road i.e., Municipality road adjacent to the western side of her residential plot for ingress and egress which she has been using since long. The Plaintiff has not used Schedule 'B' land as road at any point of time as it is not a road. Further, nothing has been expressly mentioned regarding easementary right of way over Schedule 'B' property in the judgments passed in T.S. No.160/1994 and T.S. No.429/1995.

5. On the rival pleadings, the trial Court framed the following issues for determination;

> "(1) Whether the suit is maintainable?
>
> (2) Whether there is any cause of action on the part of the plaintiff to file the present suit?

(3) Whether the sale deed bearing No.121 dtd.5.1.2013 executed by defendant no.2 in favour of defendant no.1 is illegal, void or inoperative or not?

(4) Whether a decree can be passed restraining the defendant no.1 permanently for causing any disturbance over Schedule B property?

(5) Whether the plaintiffs are entitled to cost of the suit?

(6) Whether the plaintiffs are entitled to any other reliefs?"

6. Both parties adduced oral and documentary evidence in support of their respective cases.

7. The trial court took up Issue Nos. 3,4,5 and 6 together for consideration. In this regard, the endeavour of the trial court was to determine whether Schedule 'B' land is/was a road or not. Reliance was placed on the agreement styled as Pathway Agreement executed by Defendant No.2 with the Plaintiff, which was marked Ext.3. Considering the sketch map attached to Ext.3 it was held that the same showed the existence of a road over 'B' Schedule property. The trial court also relied upon the oral evidence of the parties. Further, relying on a judgment rendered by the Patna High Court reported in ***AIR 1958 Patna 571*** and on consideration of the earlier judgments passed in favour of the Plaintiff, Defendant No.1, Defendant No.2 and two other boundary tenants, the trial court held that the road mentioned in Schedule 'B' land is used by the Plaintiff as easementary right of way for which the sale deed executed by Defendant No.2 in favour of Defendant No.1 is void and illegal and that no right has accrued to Defendant No.1 thereby. Further, the land being used as easementary right of way by the Plaintiff, Defendant No.1 was permanently restrained from making any constriction or obstruction thereon. With the above findings on the main issues, the remaining issues were also decided in favour of the Plaintiff and the suit was decreed accordingly.

8. Defendant No.1 carried the matter in appeal to the District Judge, which was heard and disposed of by learned 1st Addl. District Judge. After considering the grounds raised, the 1st Appellate Court formulated the following points for determination;

"A. Whether learned court below decreed the suit illegally in favour of the plaintiff without considering the evidence on record?

(B) Whether the learned court below committed error by declaring the sale deed executed by defendant no.1 in favour of defendant no.2 relating to suit schedule B property on 5.1.2013 as illegal, void and inoperative and by awarding the relief of permanent injunction in favour of plaintiff?

9. The 1st Appellate Court referred to the judgments passed in the previous suits namely, T.S. No.160/1994, T.S. No.429/1995, T.S. No.14/1995 and C.S. No.491/2002, all of which were decreed on the basis of the awards of the Arbitrator (Panchayat Faisalanama), which formed part of the decrees passed therein. It was found from examination of the award sheets of T.S. Nos.160/1994 and 429/1995 that there is no mention about grant of Schedule 'B' property to the Plaintiff for use of passage. Further, said road was shown as 'Gharoi Rasta'. The agreement vide Ext.3

was also considered and it was held that same having been executed on 19.3.1994 i.e. prior to passing of the decree in T.S. No.160/1994, there was no reason why the same was withheld before the Court. It was therefore, held that the plaintiff's claim of acquiring easementary right of way over 'B' schedule property is not tenable. It was also held that both the Plaintiff and her husband admitted that they have been discharging foul water over the suit property and therefore, it cannot be said that the Plaintiff is using it as her path way. A survey knowing Commissioner was deputed to the property, who submitted a report, which was also considered by the 1st Appellate Court along with the sketch map, marked Ext.C-1. It was found that a Government land adjoins the suit Schedule 'A' property on its western side which was also admitted by the Plaintiff and her husband in their evidence. It was therefore, held that the plaintiff cannot be said to have easementary right of necessity over the 'B' schedule property. The 1st Appellate Court further held that the Plaintiff not having sought for any relief of declaration of her right of easement over the suit schedule 'B' property, the suit is hit by Section 34 of the Specific Relief Act and therefore, not maintainable. On the above findings, the judgment and decree of the trial Court was set aside and the appeal was allowed.

10. Feeling aggrieved, the Plaintiff has filed the present appeal, which was admitted on the following substantial question of law;

> *"Whether on the face of the decree passed in T.S. No.160 of 1994 as also the document which has been admitted in evidence and marked Ext.3 and other evidence on the user in support of the claim of the Plaintiff that he has the right of easement over the property in Schedule 'B', the First Appellate Court is right in reversing the finding of the Trial Court and holding that the Plaintiff has failed to prove his case/claim so as to get the reliefs claimed therein.?*

11. Heard Mr. Soumya Mishra, learned counsel for the Appellant and Mr. Subrat Mishra, learned counsel for the Respondent No.1.

12. Mr. Soumya Mishra would assail the impugned judgment by arguing that the 1st Appellate Court completely misdirected itself in holding that the Plaintiff was claiming easementary right of necessity ignoring the evidence on record to suggest that her claim was based on easement of grant. Mr. Mishra further submits that the finding of the 1st Appellate Court that the date of execution of the Pathway Agreement between Defendant No.2 and the Plaintiff is 19.3.1994, is factually incorrect and hence, vitiated in view of the fact that the document itself mentions the date as 19.3.1997. Therefore, any typographical error that may have been made by the Plaintiff in her plaint cannot override the actual date of the document mentioned therein. Mr. Soumya Mishra further argues that the Plaintiff's claim is based on the agreement marked Ext.3, which was never challenged by the executant, Defendant No.2. As such, there was no necessity for the Plaintiff to seek any declaration of easementary right. With regard to the permissibility of Defendant No.1 of opposing the Plaintiff's claim, Mr. Mishra would argue that once an easement of grant is made by the owner of the property, it cannot be revoked

subsequently in view of the provision under Section 48 of the T.P. Act. On the same analogy, Defendant No.2 could not have executed a sale deed in favour of Defendant No.1 ignoring his own grant of easement to the Plaintiff vide Ext.3. The 1st Appellate Court also, according to Mr. Mishra, did not appreciate the fact that in all the previous suits based on Panchayat Faisalanamas including the suit between the Plaintiff and Defendant No.2, 'B' schedule land was described as Gharoi Rasta, which substantiates the Plaintiff's claim. Finally, Mr. Mishra would argue that the findings of the 1st Appellate Court that the Plaintiff constructed her house over the property after its Kisam was changed into homestead land is perverse.

13. Mr. Subrat Mishra, learned counsel for the Defendant No.1-Respondent would argue that firstly, what the Plaintiff claims is nothing but an easementary right of necessity, which as per settled position of law gets extinguished if alternative passage is available. Further, the Plaintiff not being a co-owner or co-sharer of the 'B' schedule property is a complete stranger to the suit property for which the suit to declare the sale deed as void and illegal is not maintainable at her instance particularly, in the absence of any declaration being sought for regarding easementary right of passage over 'B' schedule property. As regards, the Pahchayat Faisalanamas made rule of the Court, Mr. Subrat Mishra would contend that they reflect existence of a Gharoi Rasta to the eastern side of the Schedule 'A' land and western side is Municipality road. Further, it is also mentioned that in the decree passed in T.S. No.429/1995 the northern portion is disowned as Ananta Sahoo lane, which corresponds to 'B' schedule property, but it is nowhere mentioned in the award that said lane was granted to the Plaintiff for her ingress and egress. The agreement vide Exct.3, according to Mr. Subrat Mishra, cannot be treated as a genuine document for the reason that it does not contain any date below the signatures of Defendant No.2 and the Plaintiff on each page nor in the last page. The attesting witnesses were also not examined. On the contrary, Defendant No.2 being examined as D.W.3 clearly stated that he had not given 'B' schedule land to anybody to use the same as road. Mr. Mishra has also referred to the evidence of the Plaintiff who denied knowledge about the suit land. She also denied knowledge about the Ext.3, which is highly significant in the context of the case. The husband of the plaintiff being examined as P.W.2 admitted that in none of the judgments passed in the previous suits any right of passage had been given to him and also admitted that he was discharging drain water as well as foul water of his house into the 'B' schedule land.

14. From the rival contentions noted above vis-a-vis the substantial question framed by this Court at the time of admission of this appeal, it is evident that the dispute between the parties is limited to the narrow strip of land described as 'B' schedule land to the plaint measuring Ac.0.0076 kadi. Admittedly, 'B' schedule land lies to the adjoining east of Schedule 'A' land belonging to the Plaintiff and the adjoining northern side of land belonging to Defendant No.1. There is no dispute that a Municipality road exists to the adjoining west of Schedule 'A' land. The

plaintiff's claim of easementary right over 'B' schedule land is based on firstly, the description of the passage in the Panchayat Faisalanamas made part of the decrees passed in 4 earlier civil suits and secondly, on the agreement executed by Defendant No.1 with her on 19.3.1997 (19.3.1994 according to the 1st Appellate Court). As it appears, the original Plot No.426 belonging to Defendant No.2-Ajay Kumar Sahoo was the subject matter of 5 different suits, which are as follows;

(1) C.S. No. 491/2002 filed by Judhistir Basa against Ajay Kumar Sahoo;

(2) C.S. No.14/1995 filed by Raghunath Sahoo against Ajay Kumar Sahoo;

(3) C.S. No.94/2003 filed by Bansidhar Sahoo against Ajay Kumar Sahoo.

(4) T.S. No.160/1994 filed by Sanjukta Swain (Plaintiff-Appellant) against Ajay Kumar Sahoo; and

(5) T.S. No.429/1995 filed by Kusum Manjari Rana (Defendant No.1-Responddent) against Ajay Kumar Sahoo.

These suits were decreed on the basis of reports of the Arbitrators (Panchayat Faisalanamas), which were made rule of the Court. The subject matters of the suits were regarding title of the Plaintiffs of the said suits over different portions of land belonging to Ajay Kumar Sahoo. Incidentally, in the description of the suit properties, there is mention of a land described as Gharoi Rasta, which corresponds to suit schedule 'B' property. The certified copies of the judgment passed in the said suits have been admitted into evidence as Ext.1 (T.S. No.160/94), Ext.2 (T.S. No.429/1995), Ext.8 (T.S. No.14/1995) and Ext.9 (C.S. No.491/2002). The sketch map has also been appended to the decrees passed in the said suits. Having perused the said exhibits this Court does not find any right being granted to any person much less the present Plaintiff over the 'B' Schedule land to be used as a passage for ingress and egress. Therefore, mere description of the land as Gharoi Rasta and Ananta Sahoo lane in some awards/decrees cannot *ipso facto* lead to the conclusion that any right of assessment was granted to any person over the same. The 1st Appellate Court therefore, appears to have very rightly taken the above view.

15. Coming to the so-called Pathway Agreement described in Odia as 'Patha Satwa Rajinama' executed between Defendant No.2 and the Plaintiff, marked Ext.3, it is seen that the same is an unregistered document purporting to grant right of passage to the Plaintiff over Schedule 'B' land along with right to have it recorded as common road in future. Surprisingly and as pointed out by Mr. Subrat Mishra, no date has been endorsed under the signatures of the parties in each of the pages of the document. Thus is contrary to what is usually seen in all such documents. That apart, no date is also mentioned under the signature of parties and their witnesses in the last page of the document, which is even more surprising. One Harekrushna Behera of Chauliaganj, Cuttack, has signed obliquely on the bottom left of the document by endorsing the date '19.3.1997'. The identity of said Harekrushna Behera is not forthcoming from the record nor disclosed by the Plaintiff. That apart, 3 other witnesses namely, Santosh Kumar Bhala, Manorama Mohanty and Chandramani

Barik have signed on the document, but none of them was examined to prove execution of the document. Interestingly, the agreement has been written on a non-judicial stamp paper worth Rs.5 said to have been purchased by Ajay Kumar Sahoo, but the stamp vendor has also not mentioned the date of sale, which makes the document all the more doubtful. All these raise considerable doubts as regards authenticity of the document.

16. Much argument has been made as regards the date of the agreement. Relying on the plaint averments, the 1st Appellate Court has treated the date as 19.3.1994 whereas referring to the date mentioned in the document, learned counsel for the Plaintiff has tried to persuade this Court to treat it as 19.3.1997. In view of what has been stated in the preceding paragraph, it is difficult for this Court to place any reliance whatsoever on the document. Therefore, the claim of the plaintiff of easement of grant based on Ext.3 can have no legs to stand.

17. Faced with such a situation, the only way by which the Plaintiff can raise a claim, if at all, of easement is of necessity in view of her specific pleadings that she had been using the passage for ingress and egress to her residential house over the Schedule 'A' land. However, in view of the clear evidence through the report of the Civil Court Commissioner that a municipality road situates to the adjoining west of Schedule 'A' property, which the plaintiff also admits to be using, the right of easement by necessity also falls to the ground in view of the provision of Section 41 of the Easements Act. That apart, the admission in the plaint as well as by P.W.2 that they are discharging drain water and foul water into the Schedule 'B' land militates against their claim of using it as a passage for ingress and egress to their residential house. The 1st Appellate Court has taken note of the above aspects to hold, and rightly so, that the Plaintiff cannot be said to be using the suit Schedule 'B' property as her pathway.

18. On the question of maintainability of the suit in view of the provision under Section 34 of the Specific Relief Act, this Court also holds that admittedly the Plaintiff has no manner of right, title or interest over 'B' Schedule land but only claimed easementary right of way over the same. As such, she being neither a co-owner nor a co-sharer cannot be allowed to challenge the alienation of the land by its lawful owner in favour of Defendant No.1 vide R.S.D. No.121 dated 5.1.2013 without any declaration being sought for by her regarding easementary right of way over 'B' Schedule property. The suit therefore, cannot be held to be maintainable in view of the provision under Section 34 of the Specific Relief Act, which is quoted herein below;

> *"34. Discretion of court as to declaration of status or right.—Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:*

Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so."

19. Once this Court holds that the claim of easement by grant based on the so-called agreement marked Ext.3 falls to the ground and in the absence of any declaration being sought for regarding easementary right of way over 'B' Schedule land, the suit has to be held as not maintainable in law.

20. Thus, from a conspectus of the analysis of the facts, evidence on record vis-à-vis the substantial question of law framed, this Court does not find any infirmity much less illegality in the findings of the 1st Appellate Court so as to be persuaded to interfere therewith.

21. In the result, the appeal fails and is therefore dismissed, but in the circumstances without any cost.

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2024 (II) ILR-CUT-984

SASHIKANTA MISHRA, J.

BLAPL NO. 14644 & 14599 OF 2023

MANOJ KUMAR PATTNAIK ....Petitioner

-V-

STATE OF ODISHA (OPID) ....Opp.Party

IN BLAPL NO. 14599 OF 2023

BASANTA KUMAR PRADHAN -V- STATE OF ODISHA (OPID)

(A) ODISHA PROTECTION OF INTERESTS OF DEPOSITORS (IN FINANCIAL ESTABLISHMENT) ACT, 2011 – Section 6 – Whether dealing in crypto currency can be treated as illegal and attracts the offence U/s. 6 of the Act? – Held, No – Mere dealing in crypto currency cannot be treated as illegal in any manner. (Paras 12-14)

(B) PRIZE CHITS & MONEY CIRCULATION SCHEMES (BANNING) ACT, 1978 – Whether crypto currency is money within the meaning of PCMCS Act? – Held, No – The investment made by the general public in crypto currency cannot partake the nature of deposit within the meaning of OPID Act.

Case Law Relied on and Referred to :-

1. 2020 SCC online SC 275 : Internet Mobile Association of India V. Reserve Bank of India.

For Petitioner : Ms. Deepali Mahapatra.

For Opp.Party : Mr.J.P. Patra, Counsel for OPID.

JUDGMENT Date of Judgment : 17.05.2024

SASHIKANTA MISHRA, J.

These Bail Applications have arisen out of the same case and involve common questions of fact and law. As such, both the applications were heard together and are being disposed of by this common order.

2. The petitioners, in BLAPL No. 14644 of 2023 (Manoj Kumar Pattnaik) and BLAPL No 14599 of 2023 (Basanta Kumar Pradhan), are in custody since 17.11.2023 in connection with EOW CID C.B. Bhubaneswar, Odisha P.S. Case No. 25 of 2023 dated 16.10.2023 corresponding to C.T. case No. 124 of 2023 pending in the Court of learned Presiding Officer, Designated Court (under the OPID Act) at Cuttack for the alleged commission of Offence under Section 420/467/468/471/120-B of IPC read with Section 4,5 and 6 of Prize Chits and Money Circulation Schemes (Banning) Act 1978 (PCMCS) read with Section 6 of OPID Act and Section 66-C of Information Technology Act.

Prosecution Case

3. The Inspector of Police (EOW Bhubaneswar) Rina Behera lodged an FIR on 16.10.2023 before the S.P. EOW on the basis of a complaint received from one Swagat Kumar Nayak against the CEO of Yes World, Sandeep Chowdhury, the present petitioners and other unnamed persons. It is alleged that the Petitioners, by targeting private individuals have been encouraging them to invest in crypto currency, Yes World Token by building a network of members. The investors are asked to recruit further investors on payment of interest or bonus which is expected to increase corresponding to the number of members added by them. The Company aimed to promote Save Earth Mission and Green Energy by increasing investment in its crypto currency, i.e. Yes Token. The complaint further revealed that the complainant came in contact with accused Manoj Kumar Pattnaik at Press Club Bhubaneswar, wherein the accused enticed him to invest in crypto currency in lieu of higher returns upon adding new members to the network. It is further alleged that Manoj Kumar Pattnaik added the informant to the whatsapp group 'Yes World Save Earth' that consisted of both the petitioners along with other members. After joining the group, accused Basant Kumar Pradhan urged him to add new members under his wallet ID. Following this, he created 5 more IDs on behalf of his family members and invested INR 62,000, which is in addition to INR 18,000 that he invested while creating his own Trust wallet ID, taking his total investment to INR 80,000. They convinced local persons through public meetings to join their network. As such, the meetings were presided by the petitioners, who logged into their personal ID during the meeting to demonstrate their incomes and encouraged the attendees to usher in new participants under their network chain for which they shall be earning referral income, staking bonus, and membership bonus proportional to the amount invested by the new participants. The complaint further alleged that all his IDs have been frozen as that of several others along with various other people's and the accused persons have thereby duped people of their hard earned money by operating a Ponzi/ Multi-Level Marketing (MLM) Scheme in the name of a fake crypto currency company and/or Token.

4. Basing on such FIR, the aforementioned P.S. Case was registered and investigation was taken up. In course of investigation the petitioners were taken to

custody on 17.11.2023 and several documents were seized, besides recording of the statements of several persons.

5. Heard Ms. Deepali Mahapatra, learned Counsel appearing for the petitioners and Mr J.P. Patra learned counsel appearing for the State in OPID Matters.

Submissions

6. Ms. Mahapatra, learned Counsel would argue that the entire case of the prosecution is based on misunderstanding and erroneous perception of the investigating agency as regards the use of crypto currency. Moreover, the essential ingredients of the alleged offences are not made out at the least. Further, there is absolutely no evidence to show that the petitioner had induced any person to trade in crypto currency or to make any investment therein. There is also no evidence to show that any amount was paid to him by any investors. In any event, crypto currency is also a legal tender as held by the Supreme Court in the case of ***Internet Mobile Association of India V. Reserve Bank of India.***[1]

Ms. Mahapatra would further argue that the prosecution has been launched against the petitioner on a misconception regarding the crypto currency and its transactions. She also argues that the essential ingredients of the alleged offences are not made out. In this regard Ms. Mahapatra would argue that crypto currency is not 'money' within the meaning of Section 2(b) of PCMCS Act 1978, for which the offences under Section 4, 5 and 6 of said Act are not made out. Similarly, according to Ms. Mahapatra, the allegation of commission of offence under Section 6 of the OPID Act is also misconceived, since the amount invested by the individuals to trade in crypto currency cannot be treated as 'deposit' within the meaning of Section 2-b of the OPID Act. As regards the IPC offences also, Ms. Mahapatra makes similar submissions and contends that there is absolutely no proof to show that the petitioner had acted fraudulently or with the specific intent to cheat any person. She further argues that the petitioners never promised returns to any person which would be evident from the statements of the witnesses examined by the I.O. most of whom have stated that they were induced to invest being attracted by the prospect of getting higher returns. No one has stated that he was directly or indirectly induced by the petitioner to deposit. Explaining the working of the scheme, Ms. Mahapatra submits that the amount credited is on a person to platform basis (P 2 P) and is kept in a Trust Wallet in a secured manner. It is not open to any person, other than the investor, to deal with such amount.

Additionally, Ms. Mahapatra, argues that the Supreme Court in the case of ***Internet and Mobile Association of India (supra)*** has categorically held that as on date, virtual currencies are not banned by the Reserve Bank of India or the Government of India.

7. Mr. J.P. Patra, learned State Counsel appearing in OPID matters would argue that the transactions effected by the petitioners are nothing but part of a Ponzi

1. 2020 SCC online SC 275

Scheme and that they have obtained crores of rupees in the name of crypto currency. The entire modus operandi of the petitioners is to lure ordinary people into making investments on the promise of getting attractive returns in future. The petitioners have cleverly manipulated their operations only to cheat the Investigating Agencies, but investigation has clearly revealed that they were running a Ponzi Scheme. Mr. Patra further contends that unlike other crypto currencies, the investor in Yes World Token does not have full control over his wallet since it is dependent upon addition of members and further that when the members are not added, the wallet would be suspended. Mr. Patra further submits that investigation revealed that the scheme was being operated as a pyramid structure, wherein persons like the petitioners were placed at different levels of the structure depending on the money earned by them through bonus, commission, royalty etc. All the persons investing money in Yes World Token have been assured of higher returns which is not to be found in case of other crypto currencies. In the process, huge amounts were collected from different persons.

Analysis

8. I have heard the rival submissions at length and have perused the materials on record including the case diary produced by learned counsel for OPID carefully. A bare reading of the FIR would suggest that the petitioners have been alleged to have convinced local persons through personal interactions and public meetings to join their network. As such, thousands of people are said to have become active members of Yes World Token. The statements of a few persons have been recorded by the I.O. during investigation. It would be relevant to refer to statements of some such witnesses in order to appreciate the prosecution allegations. One, Debadutta Basantaray, states that being induced by the petitioners, he has become a member by investing Rs. 2 lakh/-. Further, he was explained the scheme by petitioners in the following words:

> *"…He also stated that it is a chain system and if one creates more members under him can get more benefits. They also stated that if one invests 2.5. lakhs in Yes Token, he will get 6 lakhs in one and half year.*
>
> *XXX XXX XXX*
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> *Being asked I am to state that Zoom meeting is held everyday evening (T) online in which Sandip Chowdhury, Country head (CEO) Yashdev Singh and others interacted with the group members and motivated them to add more members under their chain. In this group, in order to motivate people to invest and add more down line members they send narratives about the scheme of investment and future of 'Yes Token' & brochure etc of Yes World."*

9. Similar statements has been given by Akshaya Kumar Dash, Premananda Mohanty, Sangram Kesari Panda, and Ranjan Sahoo. Not a single person so examined has stated to have paid any amount to the petitioners nor about any promise being made of getting higher returns on such investment by him. The only thing that is evident from a reading of the statements is that the several persons were asked to enroll new members which would enhance their earnings.

10. Accepting the prosecution case as such, this Court is unable to appreciate as to how this act can constitute any of the offences alleged. As is evident, the members of the public who participated in trading in crypto currency appear to have done so on their own free will and volition as also on the desire of getting higher returns. There is not a whisper of allegation that the Petitioners had promised them higher returns on their investment as usually happens in case of a Ponzi Scheme. Insofar as the PCMCS Act is concerned, Section 2(b) thereof defines money as follows;-

> *"Money includes a cheque, postal order, demand draft, telegraphic transfer or money order."*

Yes World Token, on the other hand, is a crypto currency which is purchased by the investors indirectly by purchasing USTD or by directly buying it through upline workers in cash and thereafter, kept in their respective Trust Wallets. Therefore, Yes World Token cannot be said to be money within the meaning of the Act. Such being the case, naturally, the offences under Section 4,5 and 6 of the said Act would prima facie not be made out.

11. Coming to the offence under Section 6 of the OPID Act is seen that Section 2(b) of the Act defines 'deposit' as follows;-

> *"'Deposit' means the deposit of money either in one lump sum or by installments made with the Financial Establishment for a fixed period for interest or for return in any kind or for any service:"*

Thus, the essential ingredient required to invoke Section 6 of the OPID Act is that some money must have been deposited either in lump sum or by installments with the financial establishment. In the instant case, as already stated Yes World Token, being a crypto currency, is not deposited in any financial establishment but is kept secure in a Trust Wallet. This appears to have been interpreted as 'deposit' within meaning of section 2(b) of the OPID Act and sought to be projected as a Ponzi Scheme. There is an essential difference between deposits in a Ponzi scheme and trading in crypto currency. In the case of ***Internet and Mobile Association of India (supra)***, the Supreme Court held that the ban imposed by RBI on use of digital currency is unreasonable and therefore, struck it down. It was held that virtual currencies are valid mode of payments in the exchange of goods and services and do not violate the provisions of Payments Settlements and Systems Act, 2007. The following observations made by the Supreme Court are worthy of note;-

> *"6.171. In case the said enactment (2019) had come through, there would have been an official digital currency, for the creation and circulation of which, RBI/central government would have had a monopoly. But that situation had not arisen. The position as on date is that VCs are not banned, but the trading in VCs and the functioning of VC exchanges are sent to comatose by the impugned Circular by disconnecting their lifeline namely, the interface with the regular banking sector. What is worse is that this has been done (i) despite RBI not finding anything wrong about the way in which these exchanges function and (ii) despite the fact that VCs are not banned.*
>
> xxx xxx xxx xxx

> *6.173. It is no doubt true that RBI has very wide powers not only in view of the statutory scheme of the 3 enactments indicated earlier, but also in view of the special place and role that it has in the economy of the country. These powers can be exercised both in the form of preventive as well as curative measures. But the availability of power is different from the manner and extent to which it can be exercised. While we have recognized elsewhere in this order, the power of RBI to take a pre-emptive action, we are testing in this part of the order the proportionality of such measure, for the determination of which RBI needs to show at least some semblance of any damage suffered by its regulated entities. But there is none. When the consistent stand of RBI is that they have not banned VCs and when the Government of India is unable to take a call despite several committees coming up with several proposals including two draft bills, both of which advocated exactly opposite positions, it is not possible for us to hold that the impugned measure is proportionate."*

12. It is clear that mere dealing in crypto currency cannot be treated as illegal in any manner. Thus, the offence under Section 6 of OPID Act is also not made out.

13. As regards the IPC offences, in view of what has been narrated hereinbefore, it is evident that the petitioners can only be said to have attempted to convince members of the public to trade in crypto currency Yes World Token. There is nothing on record to show that they had dishonestly induced any person to deliver any property to them. In other words, there is no evidence whatsoever of any money being transferred from any person to the petitioners. The Petitioners may have earned commission/bonus from the company for convincing the public to invest in crypto currency but that by itself cannot partake the nature of dishonest earning. The methodology adopted being person to platform (P 2 P), it cannot be said that the petitioners had cheated any person particularly in view of the fact that any amount invested by any person remains secure in his or her Trust Wallet. Thus, the offence under Section 420 does not appear, prima facie, to be made out. There is no evidence that any documents, records etc. were forged, manipulated, manufactured etc. so as to attract the offences under Section 467/468/471 of IPC.

Summation

14. From the forgoing narration, it is clear that the petitioners were dealing with crypto currency which, as on date is per se, not illegal. There is no evidence to show that they had convinced members of the general public to invest money in any company (financial establishment) on promise of high returns rather it is borne out from the materials on record that the investors acted on their own volition with the desire of higher returns. There is no evidence to show that any person was defrauded or that his investment was misappropriated by the petitioner. Further, crypto currency is not money within the meaning of PCMCS Act. Finally, the investment made by the general public in crypto currency cannot partake the nature of deposit within the meaning of OPID Act. Thus, there is no evidence of a definite offence having been committed. The maxim *nullum sine crimen lege* meaning there can be no crime without law applies to the case at hand. It is needless to mention that there is an absence of a proximal nexus between the petitioners and the alleged offences.

In the considered view of this Court, therefore, detention of the petitioners in custody, appears to be unjustified.

Conclusion

15. In the result the bail applications are allowed. Let the petitioners be released on bail on such terms and conditions as the Court below may deem and fit proper to impose including the following conditions;-

(i) They shall deposit their passports if any in the Court below at that time of their release.
(ii) They shall not leave the territorial jurisdiction of the Court below without obtaining leave.
(iii) They shall make themselves available as and when required by the IO.
(iv) They shall appear before the Court below on each date of posting of the case without seeking representation through counsel.

16. The BLAPLs are accordingly disposed of.

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2024 (II) ILR-CUT-990

A.K. MOHAPATRA, J.

CRLMC NO. 2260 OF 2024

PRAVASH CHANDRA MISHRA ....Petitioner

-V-

TUSARKANTA PARIDA ....Opp.Party

NEGOTIABLE INSTRUMENT ACT, 1881 – Section 148(2) – Whether the Appellate Court is empowered to exempt/relax the statutory deposit of 20% of the amount that has been awarded while admitting the appeal? – Held, Yes – It is only on an exceptional cases, the condition of depositing 20% is to be exempted by assigning reason and the court has to consider whether the case falls within the exception or not.

Case Law Relied on and Referred to :-

1. Criminal Appeal No.2741 & 2742 of 2023 (dtd. 04.09.2023) : Jamboo Bhandari v. M.P. State Industrial Development Corporation Ltd. & Ors.

For Petitioner : Mr. Deepak Ranjan Parida
For Opp.Party : -

ORDER Date of Order : 01.07.2024

A.K. MOHAPATRA, J.

1. This matter is taken up through Hybrid Arrangement (Virtual / Physical Mode).

2. Heard learned counsel for the Petitioner. Perused the CRLMC application as well the documents annexed thereto.

3. This application under Section 482 of Cr.P.C. has been filed by the Petitioner with a prayer to quash the order dated 04.06.2024 passed by the learned Sessions Judge, Kendrapara in Criminal Appeal No.14 of 2024.

4. On perusal of the impugned order dated 04.06.2024 passed by the learned Sessions Judge, Kendrapara in Criminal Appeal No.14 of 2024, this Court observes that while admitting the appeal of the accused-Appellant, the learned lower appellate court had proceeded on the footing that the deposit of 20% of the compensation amount as provided in Section 148(2) of N.I. Act is a statutory deposit which shall be followed mandatorily in every case. Accordingly, the Appellant has assailed the direction of the trial court for deposit of 20% of the amount that has been awarded, i.e. a sum of Rs.2,40,000/-. While admitting the appeal, the Petitioner has been directed to deposit 20% of the compensation amount, i.e. Rs.2,40,000/-

5. Learned counsel for the Petitioner, at the outset, contended that the order dated 04.06.2024 is not in consonance with law. He further submitted that the position of law has been subsequently analysed by the Hon'ble Supreme Court in the case of ***Jamboo Bhandari v. M.P. State Industrial Development Corporation Ltd. & Ors.*** in Criminal Appeal No.2741 of 2023 and in Criminal Appeal No.2742 of 2023, which were disposed of vide a judgement dated 4th September, 2023.

6. On perusal of the aforesaid judgment of the Hon'ble Supreme Court, this Court observes that while dealing with Section 148 of N.I. Act, the Hon'ble Supreme Court has held that a purposive interpretation is to be given to Section 148 of the N.I. Act and that normally the Appellate Court will be justified in imposing the condition of deposit as provided in Section 148. While saying so, it has also been observed that in a case where the Appellate Court is satisfied that the condition of deposit of 20% will be unjust or imposing such a condition will amount to deprivation of the right of appeal of the appellant, exception can be made for the reasons specifically recorded. The Hon'ble Supreme Court has further observed that it is only an exceptional cases, the condition of depositing 20% is to be exempted by assigning reasons. Further, in para-9 of the judgment, it has been stated by the Hon'ble Supreme Court that when a blanket order is sought by the appellants, the Court has to consider whether the case falls in exception or not. Similarly, in para-10, it has been observed that both the Sessions Courts as well as the jurisdictional High Court have proceeded on the erroneous premise that deposit of minimum 20% amount is an absolute rule which does not accommodate any exception.

7. In such view of the matter, this Court is of the considered view that learned appellate court has failed to apply the principle laid down by the Hon'ble Supreme Court in *Jamboo Bhandari's* case (supra). Accordingly, the order dated 04.06.2024, which has been passed at the stage of admission only after hearing the appellant, is required to be set aside and further opportunity be given to the Petitioner to move a fresh application for grant of exemption. If the appellate court is satisfied, then the procedure as has been prescribed in the above *Jamboo Bhandari's* case (supra) shall

be followed. In the event the Petitioner fails to satisfy that the case falls within the exceptional category, then it will be mandatory on his part to deposit the aforesaid amount as has been prescribed under Section 148 of N.I. Act.

8. Accordingly, the order dated 04.06.2024 is hereby set aside. The Petitioner is directed to approach the learned Sessions Judge, Kendrapara within a period of two weeks from today by filing an application for exemption along with a copy of this order. On such event, the trial court shall do well to pass a fresh order in terms of the procedure prescribed in *Jamboo Bhandari's* case (supra) within a period of four weeks thereafter.

9. Since while admitting the appeal the order was passed by the learned Sessions Judge, Kendrapara in the absence of the private Opposite Party, therefore, this Court is of view that there is no necessity to issue notice to the private Opposite Party in the present case. However, liberty is given to the learned Sessions Judge, Kendrapara to issue a notice to the private Opposite Party before passing any order in the event the same is felt necessary by the learned Sessions Judge, Kendrapara.

10. With the aforesaid observation and direction, the CRLMC stands disposed of.

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2024 (II) ILR-CUT-992

V. NARASINGH, J.

W.P.(C) NO. 4345 OF 2014

SIBANJALI BADHAI .....Petitioner

-V-

COMMANDANT 38-BN, CRPF, SMILEPUR, JAMMU & ORS. .....Opp.Parties

(A) CONSTITUTION OF INDIA, 1950 – Article 226 – Scope of judicial review and interference by the Courts in the matter of disciplinary proceeding – Procedural infraction and test of prejudice – Discussed. (Para 11)

(B) DISCIPLINARY PROCEEDING – Punishment of dismissal from service – Doctrine of proportionality – Discussed with reference to case laws. (Paras 10,15,16,17)

Case Laws Relied on and Referred to :-

1. (2001) 2 SCC 386: Om Kumar & Ors. v. Union of India.
2. (1995) 6 SCC 749 : B.C. Chaturvedi v. Union of India.
3. (1977) 2 SCC 491: State of Haryana & Anr. v. Rattan Singh.
4. (1996) 3 SCC 364 : State Bank of Patiala and Ors. v. S.K. Sharma.
5. (2001) 6 SCC 392 : State of U.P. v. Harendra Arora & Anr.
6. (2018) 13 SCC 161 : Manoj Kumar Vs. State of U.P. & Ors.
7. (2003) 9 SCC 228 : State of U.P. v. Jaikaran Singh.

For Petitioner : Mrs. Prativa Mishra.
For Opp.Parties : Mr. Prabhu Prasanna Behera, CGC

JUDGMENT Date of Hearing : 03.01.2024 : Date of Judgment : 30.05.2024

V. NARASINGH, J.

1. The husband of the petitioner, Salegram Badhai, who was working as a Head Constable in CRPF assailed the finding of the court of enquiry dtd.7.5.2009 declaring him as a deserter, the order of dismissal from service dtd. 20.2.2009 and order dtd. 11.2.2013 rejecting his appeal vide Annexures-7, 14 and 18 respectively in this Writ Petition filed under Article 226 & 227 of the Constitution of India.

2. As ill luck would have it during the pendency of the present Writ Petition the said Salegram Badhai passed away on 19.08.2016 and the prayer of the substitution of the present Petitioner being the wife having been allowed, she pursued the lis.

3. Heard Mrs. P. Mishra, learned counsel for the Petitioner and Mr. P.P. Behera, learned CGC for the Opposite Parties.

4. The facts germane for just adjudication of the present lis are as under:-

(A) The petitioner's husband was recruited as CRPF Constable by the Group Centre, Bhubaneswar in the State of Odisha and he joined as such in CRPF on 22.2.1991.

(B) After completion of training in May 1991, he was transferred to the CRPF Battalion 70 at Durgapur in the State of West Bengal and thereafter as Constable to different places like State of Punjab, Uttarpradesh, Tripura, Jammu & Kashmir from the period 1992 to till 2007.

(C) It is asserted that the deceased-employee after undergoing promotional training at G.C. Bhubaneswar in the year 2003 was promoted to the rank of Head Constable (Havildar) in the year 2006-07.

(D) During the year 2007, he was transferred to Battalion 70 of establishment of Durgapur G.C. from Bhubaneswar G.C. and posted at Jammu.

(E) It is stated that since the husband of the petitioner (deceased-employee) felt unbearable stress and strain both mentally and physically, he had no other option but to opt to stay with his family at Sambalpur and accordingly on 24.11.2008, he prayed for leave but the same was not considered. For which, he was compelled to leave the unit of 38 Battalion without leave, however under intimation in the form of an application handed over to his colleague, requesting him to submit it on his behalf.

(F) Once again on 27.11.2008, he sent another intimation to the Unit Commander, after reaching Sambalpur. Though copy of such leave application could not be placed on record. It is admitted that the Commandant G/38 Battalion CRPF issued a letter on 30.11.2008 directing the deceased-employee to resume his duty.

(G) The deceased-employee responded reiterating the compelling circumstances on account of illness as well as unstable mental and physical condition and requested the authorities to allow him to stay at his home on leave for some more time.

(H) The leave application submitted by the deceased-employee was not considered following which another intimation letter was issued on 12.01.2009 directing the deceased-employee to join duty. And, in response thereof, the deceased-employee submitted

further leave application on 10.02.2009 reiterating his request to stay at his home with family because of his health condition.

(I) Treating the deceased-employee to be willful deserter, pursuant to Office Order dated 27.03.2009 a Court of enquiry was held and on 07.05.2009 (Annexure-7) the deceased-employee was declared as "Deserter" with effect from 24.11.2008 i.e. from the date of his unauthorized absence, which was communicated to the deceased-employee vide C.O. dtd.7.5.2009.

(J) Relying upon the report of Court of enquiry, the Disciplinary Authority decided to hold a departmental enquiry and accordingly as per Annexure-8, the charge sheet in the departmental proceeding was communicated to the deceased-employee. The deceased-employee could not file any reply, as a result of which, on 7.8.2009, an Enquiry Officer (E.O) was appointed. The E.O directed the deceased-employee to attend enquiry on 2.9.2009, whereas owing to illness, the deceased-employee could not attend the enquiry on the date fixed i.e.2.9.2009. It is alleged that after conducting the enquiry in an perfunctory manner, the enquiry report was submitted. And, on basis on the same the authority dismissed the husband of the petitioner on 20.2.2009 vide Annexure-14. Though the punishment order was issued on 20.2.2009 but deceased-employee could not take any appropriate action against such punishment order up to October 2012 for his prolonged illness. However on 20.10.2012, the deceased-employee preferred an Appeal before the IG Police CRPF Kolkata.

Such appeal was forwarded to the appropriate authority i.e. DIGP CRPF, Durgapur on 6.11.2012. But without referring to any of the contentions raised in the Appeal, the DIG Range, CRPF, Durgapur vide his office order dtd.11.2.2013 at Annexure-18 impugned herein, communicated that the DIG Police CRPF Greater Noida, Uttarpradesh, has rejected the Appeal.

(K) As already stated vide Annexures-7, 14 & 18, the order declaring the deceased-employee as deserter, the order of punishment of dismissal and the order rejecting the appeal respectively is the subject matter of challenge in the present W.P.(C).

(L) It is contended that the deceased-employee could not participate in the enquiry proceeding regarding his alleged desertion so also in the disciplinary enquiry. It is submitted that leave of the deceased employee was refused and was directed to join duty despite his prolonged illness and as such, the deceased-employee's absence cannot be labelled as deliberate or willful. As he has already served CRPF actively for a long period of 17 years with the reward of promotion etc., till November 2008, the dismissal from service is harsh in nature patently disproportionate to the alleged charges against him.

(M) Further contention is that his desertion has been treated to be unauthorized absence only because his absence due to medical reasons have not been believed by the Opp. Parties. Since the enquiry was one sided and both the Disciplinary Authority as well as Appellate Authority failed to take note of the same.

5. In reply to the aforesaid averments at the behest of the deceased-employee, the Opp. Parties, DIG Police Odisha Sector CRPF, Bhubaneswar filed counter affidavit on 15.11.2014, in which, some of the material grounds were controverted. And, the same are as under:-

A. The Writ Petition is not maintainable in law as the Union of India have not been impleaded as a party, which is mandatory in view of Order 27 Rule 5 (a) of CPC 1908 read with Article 300 of the Constitution of India.

B. A Court of enquiry was conducted against deceased-employee taking into consideration his long absence and non-response to the direction to resume the duty and in the said Court of enquiry, he was declared as deserter.

C. The finding of the Court of enquiry was the basis for the authority to initiate proceeding against deceased-employee as per Memorandum dtd.21.7.2009.

D. That since the deceased-employee did not respond to the memorandum of charges the enquiry officer was appointed to conduct departmental enquiry and basing upon the report of such Enquiry Officer and after following due procedure, the punishment of dismissal from service was awarded on 20.02.2010, further by treating his unauthorized absence period w.e.f. 24.11.2008 to the date of dismissal as 'DIES NON' he was debarred from getting any pay and allowances or any other service benefit for the above period.

E. It was further urged that the plea of mental stress and strain without availing medical facility readily available at the centre, the conduct of the deceased-employee leaving the unit without prior permission is in itself sufficient to hold a court of enquiry to declare him as deserter and as such challenge to the initiation of departmental proceeding, in the case at hand is untenable.

F. It is also contended by the Opp. Parties that the deceased-employee has simply submitted an application for leave without any supporting Medical Document. No leave was sanctioned in his favour and despite repeated instruction to resume duty and initiation of disciplinary proceeding, the deceased-employee failed to resume his duty.

G. There is no infirmity in conducting Departmental proceeding, while imposing penalty in a departmental proceeding so also while considering the appeal by the Appellate Authority. On the other hand, despite ample opportunity being provided to him to appear before the enquiring officer, deceased-employee neither appeared in person nor sent any communication in connection with departmental enquiry for which the enquiry had to be conducted Ex-parte but, in accordance with Rules.

H. After completion of departmental enquiry by the Enquiring Officer, a report of said departmental enquiry was sent to the deceased-employee at his declared home address on 16.1.2010 inviting representation if any. In response to the same, deceased-employee vide his application dtd.28.01.2010, received by the office on 09.02.2010 had pleaded guilty. He also regretted for such indiscipline activities and requested for discharge and dismissal from service.

I. Annexure-A/1 to the counter is such admission by the deceased-employee.

J. With respect to the discrepancy to the date, the Opp. Parties have admitted some typographical errors and has prayed to ignore such inadvertent typographical errors.

6. The substituted LR, the present petitioner, submitted a rejoinder, reiterating the stand taken by her husband, more particularly, with respect to treatment of his deceased husband for such prolonged illness involving cirrhosis of liver etc. It is further contended that the deceased employee although failed to go to Jammu on 02.09.2009 but thereafter reported at Jammu on 27.9.2009. But the OC refused to give entry in the camp on the ground that enquiry is already over since 24.9.2009, for which, he once again returned from Jammu to Sambalpur. The enquiring officer completed the enquiry on 24.9.2009 whereas the punishment order has been dated 20.2.2009.

7. It is further contended by her that Section 11(1) of CRPF Act prescribes minor punishment but the Authority awarded major punishment like dismissal which is in complete violation of natural justice and grossly disproportionate to the alleged act or omission by the deceased employee. She also made a prayer for sympathetic consideration since after the death of the deceased employee w.e.f. 19.08.2016, she is surviving with two children and suffering from acute financial hardship.

8. The Opp. Parties through additional affidavit have urged that on dtd.15.11.2019 the deceased employee had accepted his indisciplined attitude and failed to substantiate his ailments. He deserves the punishment for dismissal, from service and consequentially his entire financial benefits thus ceased in accordance with Rule 24 of CCS pension Rule 1972.

9. It is further contended by Mr. Prabhu Prasanna Behera, learned CGC that the deceased employee had never reported illness to his authority at any point of time rather he deserted from his service place unauthorizedly and it amounts to serious offence in Para Military Organization for which the punishment of dismissal from service cannot be said to be disproportionate by any stretch of imagination.

10. Regarding power of judicial review and interference by the courts in the matter of disciplinary proceedings, the test of proportionality, principles enunciated by the Apex Court in the following decisions are of relevance:

> i. In the case of **Om Kumar & Others v. Union of India, (2001) 2 SCC 386**; Apex Court, after considering the Wednesbury principles and the doctrine of proportionality, has observed and held that the question of quantum of punishment in disciplinary matters is primarily for the disciplinary authority and the jurisdiction of the High Courts Under Article 226 of the Constitution or of the Administrative Tribunals is limited and is confined to the applicability of one or other of the well-known principles known as 'Wednesbury principles'.
>
> It is apposite to state here that in the **Wednesbury case, MANU/ UKWA/ 0002/1947 : (1948) 1 KB 223**, it was observed that when a statute gave discretion to an administrator to take a decision, the scope of judicial review would remain limited. Lord Greene further said that interference was not permissible unless one or the other of the following conditions was satisfied, namely, the order was contrary to law, or relevant factors were not considered, or irrelevant factors were considered, or the decision was one which no reasonable person could have taken.
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> ii. In the case of **B.C. Chaturvedi v. Union of India, (1995) 6 SCC 749**, the Apex Court observed and held as under:
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> "12. Judicial review is not an appeal from a decision but a review of the manner in which the decision is made. Power of judicial review is meant to ensure that the individual receives fair treatment and not to ensure that the conclusion which the authority reaches is necessarily correct in the eye of the court. When an inquiry is conducted on charges of misconduct by a public servant, the Court/Tribunal is concerned to determine whether the inquiry was held by a competent officer or whether Rules of natural justice are complied with. Whether the findings or conclusions are based on some evidence, the authority entrusted with the power to hold inquiry has

jurisdiction, power and authority to reach a finding of fact or conclusion. But that finding must be based on some evidence. Neither the technical Rules of Evidence Act nor of proof of fact or evidence as defined therein, apply to disciplinary proceeding. When the authority accepts that evidence and conclusion receives support there from, the disciplinary authority is entitled to hold that the delinquent officer is guilty of the charge. The Court/Tribunal in its power of judicial review does not act as appellate authority to re-appreciate the evidence and to arrive at its own independent findings on the evidence. The Court/Tribunal may interfere where the authority held the proceedings against the delinquent officer in a manner inconsistent with the Rules of natural justice or in violation of statutory Rules prescribing the mode of inquiry or where the conclusion or finding reached by the disciplinary authority is based on no evidence. If the conclusion or finding be such as no reasonable person would have ever reached, the Court/Tribunal may interfere with the conclusion or the finding, and mould the relief so as to make it appropriate to the facts of each case."

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XXX XXX XXX

"18. A review of the above legal position would establish that the disciplinary authority, and on appeal the appellate authority, being fact-finding authorities have exclusive power to consider the evidence with a view to maintain discipline. They are invested with the discretion to impose appropriate punishment keeping in view the magnitude or gravity of the misconduct. The High Court/Tribunal, while exercising the power of judicial review, cannot normally substitute its own conclusion on penalty and impose some other penalty. If the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the High Court/Tribunal, it would appropriately mould the relief, either directing the disciplinary/appellate authority to reconsider the penalty imposed, or to shorten the litigation, it may itself, in exceptional and rare cases, impose appropriate punishment with cogent reasons in support thereof."

11. At this juncture keeping in view the limited scope available to this court to interfere with the order of punishment as well as order rejecting appeal it is now required to answer the sufficiency of evidence and alleged procedural infraction causing prejudice to the deceased employee during the continuance of departmental proceeding. And, in this context the following decisions are of relevance :-

i. In the case of **State of Haryana and Anr. v. Rattan Singh reported in (1977) 2 SCC 491**, the Apex Court held that all material that are logically probative to a prudent mind ought to be permissible in disciplinary proceedings keeping in mind the principles of fair play. The relevant paragraph is extracted hereunder:

"4. It is well settled that in a domestic enquiry the strict and sophisticated Rules of evidence under the Indian Evidence Act may not apply. All materials which are logically probative for a prudent mind are permissible. There is no allergy to hearsay evidence provided it has reasonable nexus and credibility. It is true that departmental authorities and administrative tribunals must be careful in evaluating such material and should not glibly swallow what is strictly speaking not relevant under the Indian Evidence Act. For this proposition it is not necessary to cite decisions nor text books, although we have been taken through case law and other authorities by counsel on both sides. The essence of a judicial approach is objectivity, exclusion of extraneous materials or considerations and observance of Rules of natural justice. Of course, fairplay is the basis and if perversity or arbitrariness, bias or surrender of independence of judgment vitiate the conclusions reached, such finding, even though of a domestic tribunal, cannot be held

good. However, the courts below misdirected themselves, perhaps, in insisting that passengers who had come in and gone out should be chased and brought before the tribunal before a valid finding could be recorded. The 'residuum' Rule to which counsel for the Respondent referred, based upon certain passages from American Jurisprudence does not go to that extent nor does the passage from Halsbury insist on such rigid requirement. The simple point is, was there some evidence or was there no evidence - not in the sense of the technical Rules governing regular court proceedings but in a fair commonsense way as men of understanding and worldly wisdom will accept. Viewed in this way, sufficiency of evidence in proof of the finding by a domestic tribunal is beyond scrutiny. Absence of any evidence in support of a finding is certainly available for the court to look into because it amounts to an error of law apparent on the record."

ii. The "test of prejudice" is a canon of law that needs application where any procedural impropriety or violation of Rule of audi alteram partem is alleged.

The Apex Court in **State Bank of Patiala and Ors. v. S.K. Sharma reported in (1996) 3 SCC 364** held that the test is to ascertain whether the violation of such procedure or process resulted in prejudice being caused or affected fair hearing.

"33.(4)(b) In the case of violation of a procedural provision, which is of a mandatory character, it has to be ascertained whether the provision is conceived in the interest of the person proceeded against or in public interest. If it is found to be the former, then it must be seen whether the delinquent officer has waived the said requirement, either expressly or by his conduct. If he is found to have waived it, then the order of punishment cannot be set aside on the ground of the said violation. If, on the other hand, it is found that the delinquent officer/employee has not waived it or that the provision could not be waived by him, then the Court or Tribunal should make appropriate directions (include the setting aside of the order of punishment), keeping in mind the approach adopted by the Constitution Bench in B. Karunakar (1993) 4 SCC 727. The ultimate test is always the same, viz., test of prejudice or the test of fair hearing, as it may be called."

iii. In the case of **State of U.P. v. Harendra Arora and Anr. reported in (2001) 6 SCC 392**, the Apex Court further expanded the applicability of the "Test of Prejudice" to even procedural provisions which are fundamental in nature.

"13. The matter may be examined from another viewpoint. There may be cases where there are infractions of statutory provisions, Rules and Regulations. Can it be said that every such infraction would make the consequent action void and/or invalid? The statute may contain certain substantive provisions, e.g., who is the competent authority to impose a particular punishment on a particular employee. Such provision must be strictly complied with as in these cases the theory of substantial compliance may not be available. For example, where a Rule specifically provides that the delinquent officer shall be given an opportunity to produce evidence in support of his case after the close of the evidence of the other side and if no such opportunity is given, it would not be possible to say that the enquiry was not vitiated. But in respect of many procedural provisions, it would be possible to apply the theory of substantial compliance or the test of prejudice, as the case may be. Even amongst procedural provisions, there may be some provisions of a fundamental nature which have to be complied with and in whose case the theory of substantial compliance may not be available, but the question of prejudice may be material. In respect of procedural provisions other than of a fundamental

> nature, the theory of substantial compliance would be available and in such cases objections on this score have to be judged on the touchstone of prejudice. The test would be, whether the delinquent officer had or did not have a fair hearing."

12. It is already discussed that the deceased employee had remained absent from duty knowing very well that the leave has not been granted in his favour and he left the headquarter and did not return to the Head quarter for a long period which is not at all desirable and acceptable in a disciplined organization where the deceased-employee was serving. He had never examined himself in the hospital in his headquarter nor consulted with the doctor of the Unit. As such the decision of the enquiry committee declaring him as absenter/deserter cannot be treated as a wrong decision.

13. This court on perusal of records of the proceeding also cannot ignore the stand of the Opp. Parties that due procedure were followed in initiating and concluding the disciplinary proceeding against the delinquent and there was no cooperation on the part of husband of the petitioner in such proceeding. Therefore this court is of the view that the grounds canvassed at the behest of the deceased-employee with respect to arbitrary exercise of power causing prejudice to the delinquent is not sustainable.

14. At this stage the only question left to be answered is whether the punishment is proportionate to the alleged delinquency or it is shockingly disproportionate and falling under the category of an exceptional case to mould the punishment of dismissal to any other lesser form of punishment.

15. Before answering the same this court respectfully refers to the decision of Apex court in the matter of **Manoj Kumar Vs. State of U.P. and Ors.** reported in **(2018) 13 SCC 161**. In the said decision paragraph-9 of the earlier judgment of the Apex Court in the case of **State of U.P. v. Jaikaran Singh** reported in **(2003) 9 SCC 228** was quoted with approval. The said paragraph-9 reads as under:-

> 9. In **State of U.P. v. Jaikaran Singh, (2003)9 SCC 228**, it was observed as follows:
>
> ".......Having regard to the facts and circumstances of the present case and also taking into account the fact that the respondent had served the Appellant organisation for about more than 12 years, we think the ends of justice would be met if the order of dismissal is altered to one of compulsory retirement."

16. Further paragraph-10 of the judgment in the case of **Manoj Kumar (supra)** extracted hereunder is also relevant in the factual matrix of the case at hand.

> "10. In the entirety of the materials, considering the suspension on 28.03.2004 and ultimately dismissal from service on 19.08.2004, the fact that he had remained out of service for such a long period of time with all the attendant consequences to him and his family, the Appellant has suffered enough and therefore in the facts and circumstances of the case, the ends of justice shall be met by setting aside the order of dismissal and substituting it by an order for compulsory retirement. With the aforesaid modification of punishment the appeal stands disposed."

17. Applying the aforesaid ratio in the present case it is found that the deceased-employee had 17 years of unblemished service and after his death the substituted petitioner, the widow is now survived with two children. During his service career the concerned employee had also been found suitable for promotion and was promoted.

18. Hence, on a conspectus of materials on record, this Court is of the considered view that the ends of justice shall be subserved by setting aside the order of dismissal and substituting it by an order for compulsory retirement.

However the deceased-employee shall not claim any other benefit for the alleged period of his absence till the date of dismissal to be treated as compulsory retirement. Accordingly the retirement benefits as due and admissible be calculated.

19. Pension as due and admissible be calculated till the death of the deceased employee and thereafter appropriate family pension is to be granted in favour of the substituted petitioner. The entire exercise including releasing of arrear retirement benefits of the deceased-employee be completed within a period of four months from the date of receipt of the judgment failing which, the same will entail interest @ 6% per annum from the date of compulsory retirement till the amount is actually disbursed to the deceased-employee.

20. Accordingly the writ petition is disposed of. No costs.

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2024 (II) ILR-CUT-1000

BIRAJA PRASANNA SATAPATHY, J.

FAO NO. 512 OF 2009

STATE OF ODISHA & ANR. ....Appellants

-V-

DASARATHI SAHOO & ANR. ....Respondents

DOCTRINE OF PRECEDENT – Two conflicting judgment rendered by the Hon'ble Apex Court – Which one should be followed by the High Court as law of precedent – Held, in case of conflicting judgment of equal strength of the Hon'ble Apex Court, it is earlier one which is to be followed by the High Court. (Para 4.5)

Case Laws Relied on and Referred to :-

1. 2001 (2) OLR-508 : Kalidas Mohapatra vs. State of Orissa & Ors.
2. (2011) 3 SCC-436 : State of Orissa & Anr. vs. Mamata Mohanty.
3. (1997) 4 SCC 560 : State of Orissa & Anr. vs. Damodar Nayak & Anr.
4. (2001) 8 SCC 532 : Dr. Bhanu Pr. Panda vs. Chancellor, Samablpur University & Ors.
5. (1998) 3 SCC 613 : State of Odisha & Anr. vs. Aswini Kumar Das & Ors.
6. (2001) 2 SCC -247 : Dr. Vijay Laxmi Sadho vs. Jagdish.
7. (2002) 1 SCC -1 : Pradip Chandra Parija & Ors. vs. Pramod Chandra Patnaik & Ors.
8. (2002) 7 SCC -273 : Union of India & Anr. vs. Hansoli Devi & Ors.
9. (2003) 5 SCC-488 : State of Bihar vs. Kalika Kuet alia Kalika Singh & Ors.

10. (2004) 11 SCC-26 : State of Punjab & Anr. vs. Devans Modern Breweries Ltd., & Anr.
11. (2005) 2 SCC-673 : Central Board of Dawoodi Bohra Community & Anr. vs. State of Maharastra & anr.
12. (2017) 16 SCC-680 : National Insurance Company Limited vs. Pranay Sethi and Ors.
13. Writ Petition (Civil) No.1099 of 2019 : Shah Faesal vs. Union of India.
14. 2023 LiveLaw (SC) 749 : Union Territory of Ladakh & Ors. vs. Jammu & Kashmir National Conference & Anr.

For Appellants : M/s. S.K. Samal, AGA.
For Respondents : M/s. Dr. J.K. Lenka.

JUDGMENT Date of Hearing : 21.03.2024 : Date of Judgment : 21.05.2024

BIRAJA PRASANNA SATAPATHY, J.

1. This is an appeal filed by the State under Section 24-C of the Orissa Education Act challenging the judgment dtd.31.05.2008 so passed by the State Education Tribunal (in short the 'Tribunal') in G.I.A Case No.6 of 2005. Vide the said judgment the Tribunal while allowing the claim of the private Respondent No.1 held him eligible and entitled to get the benefit of UGC Scale of pay w.e.f. 01.01.1986 and the order passed in that regard by Appellant No.1 on 06.08.2005 rejecting such claim was set aside. The Tribunal also held Respondent No.1 entitled to get the benefit of UGC Scale of Pay w.e.f. 01.01.1986.

2. It is the case of the Appellants that private Respondent No.1 was initially appointed as a Lecturer in English by the Governing Body of Mangala Mohavidyalaya, Kakatpur in the district of Puri vide order dtd.20.03.1980. Pursuant to the said order, Respondent No.1 joined as such on 22.03.1980.

2.1. It is contended that at the time of appointment of Respondent No.1, though he was not having the required percentage of mark i.e. 55% in M.A in English, but the deficiency was condoned by the Utkal University vide Memo No.16208 dtd.15.09.1989. Pursuant to such condonation of the qualification by the University the appointment of the Respondent No.1 as against the 1st post of Lecturer in English was approved by the Director Higher Education-Appellant No.2 vide Order No.40056 dated 27.08.1992 allowing grant-in-aid @ 1/3rd w.e.f.01.06.1985, 2/3rd w.e.f. 01.06.1987 and full salary cost w.e.f 01.06.1989 in the scale of pay of Rs.1350/- to 2975/-. However, full grant-in-aid was released in favour of Respondent No.1 only from 01.03.1990.

2.2. It is contended that Respondent No.1 while so, continuing he was transferred to Nayagarh College, Nayagarh in the year 1995. However, State Government in the Department of Higher Education vide Resolution dtd.06.10.1989 decided to implement the scheme for grant of UGC Scale of Pay to Teachers in Colleges, which is applicable to all categories of Full Time Teachers working in affiliated Government Colleges and aided Non-Govt. Colleges either covered or eligible to be covered under the direct payment scheme till 01.04.1989.

2.3. It is contended that Respondent No.1 initially approached this Court in OJC No.6600 of 1993 with a prayer to grant revised UGC scale of pay and arrear salary as due and admissible. The writ petition was disposed of by this Court on 14.01.1998, directing the appellants to release the arrear salary. However, with regard to grant of

UGC Scale of Pay, this Court directed Respondent No.1 to make a separate application and for its consideration. Pursuant to the said order, Respondent No.1 made a representation to Appellant No.2 on 14.08.2002 for grant of UGC Scale of Pay.

2.4. As the claim made by Respondent No.1 to get the benefit of UGC Scale of Pay on 14.08.2002 was kept pending, he approached this Court once again in W.P.(C) No.2774/2002. However, this Court while disposing the Writ Petition vide order dtd.06.05.2004 observed that Respondent No.1 should approach the Tribunal in terms of the provisions contained under Section-24-B of the Act. While making such an application before the Tribunal, Respondent No.1 in support of his claim relied on the decision of this Court in the case of ***Kalidas Mohapatra vs. State of Orissa & Others*** reported in ***2001 (2) OLR-508***. This Court in Para-8 to 10 of the judgment held as follows:-

> ***"8.*** *After hearing the learned counsel for petitioners and the learned Additional Government Advocate, the following questions require to be answered : The petitioners who admittedly did not secure 55 per cent marks at the P. G. level had been appointed as Lecturers. Their under qualifications having been condoned by the University and their appointments having been approved prior to 1-4-1989, whether they are entitled to the revised scales of pay as per Resolution of the Government dated 6-10-1989 (Annexure-7). As per the decision of the State Government in Annexure-6, i.e. a letter from Deputy Secretary to Government in the Department of Education and Youth Services written to the Director, Higher Education dated 27-11-1886, the under qualified teachers appointed in non-Government colleges by the concerned management before the college became aided may be made eligible to receive grant-in-aid notwithstanding their under qualification provided they were appointed on or prior to 31-3-1982 subject to the condition that the posts held by them otherwise qualify for release of grant-in-aid and such under qualification is condoned. All the petitioners were appointed prior to 31-3-1982 and their under qualifications were also condoned in view of the decision taken by the Utkal University in Annexures-5 and 6, Considering the aforesaid fact the appointment of the petitioners were approved from different dates prior to 1-4-1989 and they were brought under the direct payment scheme. The petitioners also satisfy the requirements for condonation of deficency in qualifications as the term 'under qualified teacher' means a teacher securing less than 54 per cent marks in aggregate at the P. G. Examination in the concerned discipline but not less than 48 per cent marks in any case. There is no dispute that all the petitioners have secured more than 48 per cent but less than 54 percent marks. Coming to the Resolution of the Government dated 6th October, 1989 with regard to revision of pay scale of teachers working in colleges it appears that a decision was taken to cover all categories of full time teachers working in all affiliated Government colleges and aided non-Government colleges either covered or eligible to be covered under direct payment scheme till. 1st April, 1989. There is no dispute that the petitioners were working as full time teachers and that the college in which they were working are aided non-Government colleges which had received aid prior to 1st April, 1989. The appointments of the petitioners having been approved prior to 1-4-1989 and they having been covered under the direct payment scheme prior to 1-4-1989 there is no reason as to why the said Resolution of the Government shall not be made applicable to the petitioners. Reliance is placed by the learned Additional Government Advocate on the Resolution of the State Government in the Department of Education & Youth Services dated 6th November,1990.*

It is stated in the said Resolution that a decision was taken to regulate the revision of scales of pay of different categories of teachers serving in aided non-Government colleges of the State and the said instructions were not made applicable to teachers whose qualifications were below the qualification prescribed by U. G. C. even if such lack in prescribed qualification stands condoned by, the University. Relying on the said. Resolution, the learned Additional Government Advocate submits that even if the under qualification of the petitioners have been condoned, they shall not be entitled to the benefits of revised scale of pay as per the Resolution of the Government dated 6th November, 1990. The Resolution of the Government dated 6th October, 1989 only says that the revised pay scale of teachers in colleges shall be applicable to all categories of full time teachers working in aided non-Government colleges, provided such colleges are covered or eligible to be covered under direct payment scheme till 1st of April, 1989, The said Resolution does not say anything about condonation of deficiency in qualification in respect of teachers who had been appointed prior to 1-4-1989 and whose appointments were approved and brought within the fold of direct payment scheme prior to 1-4-1989.

9. This Court in the decision reported in 72(1991) C.L.T. 4. Sk. Harwi v. State of Orissa and Ors., held as follows :

"5. In this connection, our attention has been invited to the dictionary meaning of the, word 'condone', as given in Chambers Twentieth Century Dictionary, which has defined this word to mean to forgive, to pass over without blame, overlook, to excuse...'. We have also noted the meaning of this word as given in the Oxford English Dictionary which is 'to give up, remit, forgive, pardon'. In Websters Third New International Dictionary, the meaning of 'condone' given is "to pardon, forgive (an offence or fault)'.

6. From the meaning of the word 'condone' as given in these dictionaries, it appears that once deficiency is condoned, the same is forgiven and the deficiency attached gets washed away. This apart, in the present case the resolution of the Syndicate has stated that the deficiency has been condoned permanently. Because of these, we are of the view that Shri Kanungo's appointment as Lecturer was valid with effect from 8-8-1967."

In view of the aforesaid decision of this Court, the deficiency in qualification having been condoned the same is forgiven and the deficiency attached gets washed away.

10. This court in the decision in O. J. C. No. 14967 of 1996, disposed of on 12-9-2000, relying on an earlier decision of this Court in O. J. C. No. 6101 of 1995, disposed of on 24-7-96, held that the deficiency in qualification having been condoned and the petitioner therein having been brought under the direct payment scheme prior to 1-4-1989 is entitled to get U.G.C.scale of pay. Therefore, instructions issued on 6th November,1990 prescribing that the Resolution of the State Government dated 6th October,1989 shall not be applicable to teachers whose qualifications have been condoned, cannot be acted upon".

2.5. It is contended that before the Tribunal the appellants filed a detailed counter affidavit disputing the claim of the Respondent No.1 to get the benefit of UGC Scale of Pay on the ground that Original Governing Body Resolution relating to selection and appointment of Respondent No.1 and details of the academic qualification have not been furnished by the Governing Body.

2.6. A further stand was taken that condonation of deficiency by Utkal University as in the case of Respondent No.1 has not been condoned by other Universities of the State as well as by the University Grants Commission in terms of the Notification issued by the Government on 27.11.1986.

2.7. It is also contended that since under qualified Lecturer are required to acquire M.Phil and Post Master Degree acceptable to UGC by 31.03.1992, but Respondent No.1 never acquired such M.Phil or Post Master Degree within the time stipulated. The condonation of the deficiency in the qualification by Utkal University, was only for the purpose of continuance of the Respondent No.1 in the College and to bring him under grant-in-aid fold in the existing scale of pay applicable to non-Govt. aided College and not to extend the benefit of UGC.

2.8. It is also contended that Respondent No.1 since was appointed as against a post available in an Intermediate College namely Mangala Mohavidyalaya, Kakatpur, Respondent No.1 is not eligible to get the benefit as it is applicable to the Lecturers of Degree Colleges. Respondent No.1 being a Lecturer in an Intermediate College he is also not eligible to get the benefit of UGC Scale of Pay.

2.9. Learned Addl. Government Advocate for the State-Appellants contended that even though all the aforesaid issues were raised by the appellants while filing their counter, but the Tribunal without proper appreciation of the said grounds allowed the claim of Respondent No.1 only placing reliance on the decision in the case of ***Kalidas Mohapatra*** as cited (*supra*).

2.10. It is also contended that in view of the provisions contained in Resolution dtd.06.10.1989 and subsequent Resolution issued on 06.11.1990 so issued by the Government in the Education and Youth Services Department, Respondent No.1 is not covered under the provisions of the said Resolutions to get the benefit of UGC Scale of Pay.

2.11. Learned Addl. Government Advocate for the State while relying on the provisions contained under Clause-3.1 and Clause-3.6.1 of Resolution dtd.06.10.1989 contended that since Respondent No.1 is not covered as per the provisions contained under Claise-3.1. and 3.6.1, he is not eligible to get the benefit of UGC Scale of Pay. Clause-3.1. and 3.6.1 of the Resolution dtd.06.10.1989 reads as follows:-

> *"3.1 Coverage- The revised scales and other measures for improvement of standards in Higher Education shall be applicable to all category of full time teachers working in all affiliated Government Colleges and aided non-government Colleges either covered or eligible to be covered under direct payment schemes till the 1st April 1989. The scheme will also be extended to full time eligible Teachers working in the College of Accountancy and Management Studies, Cuttack."*
>
> *7. That clause 3.6.1 of the resolution dated 6.10.1089 stipulated that " The minimum qualification required for appointment to the post of Lecturers, Readers, Professors will be those prescribed by the University Grants Commission from time to time. Generally, the minimum qualification for appointment to the post of Lecturers in the revised scale of Rs. 2,200-4,400 shall be Master's Degree in the relevant subject with at least 55% marks or its equivalent grade and good academic record".*

2.12. Similarly learned Addl. Government Advocate placing reliance on the Resolution dtd.06.11.1990 contended that since Respondent No.1 was appointed in an Intermediate College i.e. Mangala Mohavidyalaya, Kakatpur, in view of the provisions contained under Para-2 of the Resolution dtd.06.11.1990, Respondent No.1 is also not eligible and entitled to get the benefit of U.G.C scale of pay. Clause-2.(1) with the note

appended thereto and Para-2 of the Resolution dtd. 06.11.1990 are reproduced hereunder:-

> *"2. Category of teachers to whom these instructions shall apply.*
>
> *(1) Save as otherwise provided by or under these instructions, these instructions shall apply to it category of full-time teachers working in all aided non-Government Colleges either covered or eligible to be covered under direct payment scheme till the 1st day of April, 1989.*
>
> *NOTE- "Colleges" under these instructions shall mean said colleges which have been Government concurrence and University affiliation for opening of + 3 Degree courses by 1st day of April 1989 and not thereafter.*
>
> *(2) These instructions shall not apply in-*
>
> *(i) persons engaged on contract except when contract provides otherwise.*
> *(ii) persons reemployed after retirement.*
> *(iii) instructors/lecturers appointed for Vocational subjects under Arts stream of +2.*
> *(iv) teachers appointed against unrecognised subjects/streams even in recognised and aided colleges.*
> *(v) teachers who are appointed primarily(may be read as principally) in +2 institutions as on 1st April 1989 including intermediate Colleges converted in institution.*
> *(vi) teachers appointed after 1st April 1989 to teach in +3 courses in existing Degree Colleges or + 2 institution.*
> *(vii) teachers whose qualifications/norms are below the qualifications/norms prescribed by the U.G.C even if such lack of prescribed qualification has been condoned by Government/University.*
> *(viii) teachers paid out of contingency.*
> *(ix) teachers paid otherwise than monthly basis including those paid only of piece rate basis.*
> *(x) teachers not drawing pay in a regular scale of pay for whom no revised scale is prescribed.*
> *(xi) teachers outside the prescribed yardstick staff.*
> *(x) whom the Government may, by order, specifically exclude from the operation of all or any of the provisions contained in these instructions."*

2.13. It is also contended that the Tribunal though relying on the decisions in the case of ***Kalidas Mohapatra*** so up- held by the Apex Court allowed the claim of Respondent No.1 but Hon'ble Apex Court in the case of ***State of Orissa & Another vs. Mamata Mohanty***, reported in ***(2011) 3 SCC-436*** clearly held that the judgment rendered in the case of Kalidas Mohapatra has got no binding effect and it is a judgment per in curiam. View expressed by the Hon'ble Apex Court in Para-68(XI), (XII) & (XIII) in the case of ***Mamata Mohanty*** are reproduced hereunder:-

> *"68(xi) The power to grant relaxation in eligibility had not been conferred upon any authority, either the University or the State. In absence thereof, such power could not have been exercised.*
>
> *(xii) This Court in Damodar Nayak (supra) has categorically held that a person cannot get the benefit of grant-in-aid unless he completes the deficiency of educational qualification. Further, this Court in Dr. Bhanu Prasad Panda (supra) upheld the termination of services of the appellant therein for not possessing 55% marks in Master Course.*

(xiii) The aforesaid two judgments in Damodar Nayak (supra) and Dr. Bhanu Prasad Panda (supra), could not be brought to the notice of either the High Court or this Court while dealing with the issue. Special leave petition in the case of Kalidas Mohapatra & Ors. (supra) has been dealt with without considering the requirement of law merely making the reference to Circular dated 6.11.1990, which was not the first document ever issued in respect of eligibility. Thus, all the judgments and orders passed by the High Court as well as by this Court cited and relied upon by the respondents are held to be not of a binding nature. (Per in curiam)"

2.14. Mr. S.K. Samal, learned Addl. Government Advocate also relied on the decision in the case of ***State of Orissa & Another vs. Damodar Nayak & Another***, reported in **(1997) 4 SCC 560**. In the case of ***Damodar Nayak***, Hon'ble Apex Court held that since on the date of initial appointment the Respondent therein was not possessing the requisite qualification and acquired the same only on 21.03.1989, he is only eligible to get the benefit of grant-in-aid. Hon'ble Apex Court in Para-3 of the order held as follows:-

"3. The question limited to the notice is whether the respondent would be entitled to payment of salary under the Grant-in-Aid Scheme from the date of initial appointment till he improved his qualification or from the date of his acquiring the qualification? The admitted position is that respondent No.1 came to be appointed as a lecturer in 1978. The Government issued clarification on January 5, 1987 that unqualified lectures having minimum second class, i.e. 48% or above and below 54% of marks in P.G. examination and appointed on or after 1.8.1977 in recognised non-Government Collates would be eligible to receive grant-in-aid. The Resolution dated September 13,1983 issued by the Government prescribes the qualifications for recruitment on Lecturers of affiliated colleges which indicates that " candidate not holding an M. Phil degree should possess a high second class Master's degree, i.e., 54% marks and a second class Honours/pass in the B.A/B.Com./B.Sc. examination." Respondent No.1 secured 53.9% marks, which is almost equivalent of 54% marks on July 10, 1987. Therefore, the question arises, whether the second respondent is entitled to receive grant-in-aid for payment of salary to the first respondent from, the date of his acquiring qualification or from the date of initial appointment? Admittedly, since the first respondent on the date of his appointment was not possssing the requisite qualification and acquired the same only on 21-3-1989, he will be eligible to the benefit of the grant-in-aid w.e.f. 1-4-1989 and onwards .

2.15. Learned Addl. Government Advocate also relied on the decision of the Hon'ble Apex Court in the case of ***Dr. Bhanu Prasad Panda vs. Chancellor, Samablpur University & Others***, reported in ***(2001) 8 SCC 532***. Hon'ble Apex Court in the said decision held that rejection of the claim of the appellants therein to get the benefit of UGC Scale of Pay by the University is justified and declined to relax the minimum percentage of mark. Hon'ble Apex Court in Para-5 of the judgment held as follows:-

"5. We have carefully considered the submissions of the learned counsel appearing on either side. The stipulation regarding the minimum academic qualification reads, "good academic record with at least 55 per cent marks or an equivalent grade of Masters degree level in the relevant subject from an Indian University or an equivalent degree from a foreign university". Though the Department concerned for which the appointment is to be made is that of 'Political Science & Public Administration', the

appointment, with which we are concerned, is of the Lecturer in Political Science and not Public Administration and subject matter-wise they are different and not one and the same. It is not in controversy that the posts of Lecturers in Public Administration and in Political Science are distinct and separate and on selection the appellant could not have been appointed as Lecturer in Public Administration be it in the Department of Political Science and Public Administration since the advertisement was specifically to fill up the vacancy in the post of Lecturer in Political Science. Merely because the Department is of Political Science and Public Administration - the essential requirement of academic qualification of a particular standard and grade, viz., 55%, in the "relevant subject" for which the post is advertised, cannot be rendered redundant or violated by ignoring the relevant subject and carried away by the name of the Department only which, in substance, encompass two different disciplines. That merely depending upon the context he was being referred to or the post is referred to as being available in the Department of political science and Public Administration, is no justification to do away or dispense with the essential academic qualification in the relevant subject for which the post has been advertised. Consequently, the Resolution No. 6.2 dated 18.2.92 or extracts provided from the proceedings of the Board of Studies dated 2.3.96 cannot be of any assistance to support the claim of the appellant. The rejection by the U.G.C. of the request of the Department in this case to relax the condition relating to 55% marks at Post-Graduation level for Research Assistant having M. Phil up to March 1991 or Ph.D. up to December 1992, is to be the last word on the claim of the appellant and there could be no further controversy raised in this regard. In view of the above, no exception could be taken to the decision of the Chancellor and no challenge could be countenanced in this appeal against the well-merited decision of the High Court".

2.16. Making all these submissions and the decisions so relied on, learned Addl. Government Advocate contended that the impugned judgment is not sustainable in the eye of law and requires interference of this Court.

3. Dr. J.K. Lenka, learned counsel appearing for the Respondent No.1 on the other hand made his submission basing on the materials available on record. At the outset, learned counsel for Respondent No.1 contended that the judgment in question so passed by the Tribunal on 31.05.2008 though is under challenge in the present appeal, but delay in filing the appeal was only condoned vide order dtd.17.05.2023 in Misc. Case No.823/2009. In absence of any interim order staying the operation of the judgment, the appellants only on the ground of pendency of the appeal, did not implement the decision of the Tribunal. However, learned counsel for the Respondent No.1 contended that Respondent No.1 was selected and appointed as a Lecturer in English by the Governing Body of Mangala Mohavidyalaya, Kakatpur vide order dtd.20.03.1980 and Respondent No.1 joined in the said post on 22.03.1980. Even though Respondent No.1 had not the required percentage of mark in M.A in English i.e. 55%, but the deficiency in his qualification was not only condoned by Utkal University but also by the appellants. While condoning such deficiency, the appointment of Respondent No.1 was approved vide order dtd.27.01.1992 and the Respondent No.1 was allowed 1/3rd grant w.e.f. 01.06.1988.

3.1. With regard to the stipulation contended in Resolution dtd.06.10.1989 and 06.11.1990, learned counsel for Respondent No.1 contended that Lecturers appointed in +2 Colleges were denied the benefit of UGC Scale of Pay, if the said College got the

affiliation for degree wing after 01.04.1989. The aforesaid cut-off date 01.04.1989 with regard to the receipt of affiliation from the University for degree course was upheld by the Hon'ble Apex Court in the case of ***State of Odisha & Another vs. Aswini Kumar Das & Others***, reported in ***(1998) 3 SCC 613***. Hon'ble Apex Court in Para-13 of the judgment held as follows:-

> ***"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 1st of April, 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 1st of April, 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 paragraph 2(1) of the Government Resolution of 6th of November, 1990, was arbitrary and unreasonable".*

3.2. It is contended that not only Mangala Mohavidyalaya, Kakatpur got the affiliation for its degree course from Utkal University prior to 01.04.1989 but also Respondent No.1 after his transfer to Nayagarh College, Nayagarh in the year 1995, continued in the degree wing and Nayagarh College, Nayagarh had got the affiliation for degree course prior to 01.04.1989.

3.3. It is accordingly contended that since both Mangala Mohavidyalaya, Kakatpur and Nayagarh College, Nayagarh had got the affiliation for degree course prior to 01.04.1989, in view of the stipulation contained in the Resolution dtd.06.11.1990, Respondent No.1 became eligible and entitled to get the benefit of UGC Scale of pay and the same was rightly allowed by the Tribunal in its judgment dtd.31.05.2008.

3.4. With regard to the stand taken by the appellants that Respondent No.1 since was not having the requisite qualification for his appointment as against the post of Lecturer in English in Mangala Mohavidyalaya, Kakatpur on 20.03.1980 and accordingly he is not eligible to get the benefit of UGC Scale of Pay in view of the stipulation contained in Para-2 of the Resolution dtd.06.11.1990, It is contended that since the deficiency with regard to the qualification of Respondent No.1 in M.A. in English was not only condoned by the Utkal University on 06.10.1989 but also his services was approved by making him eligible to get the benefit of grant-in-aid @ 1/3rd w.e.f. 01.06.1988, there was no scope on the part of Respondent No.1 to improve the said deficiency and that cannot be taken as a bar to deny the benefit, which has been rightly allowed by the Tribunal.

3.5. It is accordingly contended that the stand taken by the appellants that since Respondent No.1 had not the requisite qualification at the time of his initial appointment and accordingly is not eligible to get the benefit of UGC Scale of Pay is not sustainable in the eye of law.

3.6. It is also contended that similar issue in the case of ***Kalidas Mohapatra*** when was allowed by this Court, the matter was carried to the Hon'ble Apex Court by the

State. But Hon'ble Apex Court upheld the decision of this Court so passed in the case of ***Kalidas Mohapatra***. Respondent No.1 though was not having the requisite qualification at the time of his initial appointment but since the said deficiency was condoned by the University on 06.10.1989, placing reliance on the decision in the case of ***Kalidas Mohapatra***, the Tribunal rightly allowed the claim of Respondent No.1 to get the benefit of UGC scale of pay and rightly set aside the impugned rejection so passed by appellant No.1 on 06.08.2005.

3.7. It is further contended that the plea taken by the appellants that the decision in the case of ***Kalidas Mohapatra*** has been held as per in curiam by the Hon'ble Apex Court in the case of ***Mamata Mohanty***, as cited (*supra*) and the decision in the case of ***Kalidas Mohapatra*** is not binding as not a good law requires consideration as the decision in the case of ***Kalidas Mohapatra*** as well as in the case of ***Mamata Mohanty*** were rendered by similar Co-ordinate Bench of the Hon'ble Apex Court.

3.8. It is contended that since the decision in the case of ***Kalidas Mohapatra*** was rendered by a Two Judge Bench of the Hon'ble Apex Court, the same could not have been held as not binding by another Co-ordinate Bench of the Hon'ble Apex Court in the case of ***Mamata Mohanty*** and the matter should have been referred to a larger Bench.

3.9. In support of his aforesaid submission, Dr. J.K. Lenka relied on the following decisions of the Hon'ble Apex Court.

1. Dr. Vijay Laxmi Sadho vs. Jagdish reported in (2001) 2 SCC -247.

2. Pradip Chandra Parija & Others vs. Pramod Chandra Patnaik & Others reported in (2002) 1 SCC -1.

3. Union of India & Another vs. Hansoli Devi & Others reported in (2002) 7 SCC -273.

4. State of Bihar vs. Kalika Kuet alia Kalika Singh & Others reported in (2003) 5 SCC-488.

5. State of Punjab & Another vs. Devans Modern Breweries Ltd., & Another reported in (2004) 11 SCC-26.

6. Central Board of Dawoodi Bohra Community & Another vs. State of Maharastra and another, reported in (2005) 2 SCC-673.

7. National Insurance Company Limited vs. Pranay Sethi and Others, reported in (2017) 16 SCC-680.

8. Shah Faesal vs. Union of India, Writ Petition (Civil) No.1099 of 2019.

3.10. Hon'ble Apex Court in the case of ***Dr. Vijay Laxmi Sadho vs. Jagdish*** reported in ***(2001) 2 SCC -247***. Hon'ble Apex Court in Para-33 & 34 has held as follows:-

> ***"33.*** *As the learned Single Judge was not in agreement with the view expressed in Devilal case [Election Petition No. 9 of 1980] it would have been proper, to maintain judicial discipline, to refer the matter to a larger Bench rather than to take a different view. We note it with regret and distress that the said course was not followed. It is well-settled that if a Bench of coordinate jurisdiction disagrees with another Bench of coordinate jurisdiction whether on the basis of "different arguments" or otherwise, on a*

question of law, it is appropriate that the matter be referred to a larger Bench for resolution of the issue rather than to leave two conflicting judgments to operate, creating confusion. It is not proper to sacrifice certainty of law. Judicial decorum, no less than legal propriety forms the basis of judicial procedure and it must be respected at all costs.

***34.** Before parting with this aspect of the case, we wish to recall what was opined in Mahadeolal Kanodia v. Administrator General of W.B. [AIR 1960 SC 936 : (1960) 3 SCR 578] :*

"If one thing is more necessary in law than any other thing, it is the quality of certainty. That quality would totally disappear if Judges of coordinate jurisdiction in a High Court start overruling one another's decisions. If one Division Bench of a High Court is unable to distinguish a previous decision of another Division Bench, and holding the view that the earlier decision is wrong, itself gives effect to that view the result would be utter confusion. The position would be equally bad where a Judge sitting singly in the High Court is of opinion that the previous decision of another Single Judge on a question of law is wrong and gives effect to that view instead of referring the matter to a larger Bench. In such a case lawyers would not know how to advise their clients and all courts subordinate to the High Court would find themselves in an embarrassing position of having to choose between dissentient judgments of their own High Court."

3.11. Hon'ble Apex Court in the case of ***Pradip Chandra Parija & Others vs. Pramod Chandra Patnaik & Others*** reported in ***(2002) 1 SCC -1***. Hon'ble Apex Court in Para-2, 3 & 6 has held as follows:-

***"2.** The question is whether two learned Judges of this Court can disagree with a judgment of three learned Judges of this Court and whether, for that reason, they can refer the matter before them directly to a Bench of five Judges.*

***3.** We may point out, at the outset, that in Bharat Petroleum Corpn. Ltd. v. Mumbai Shramik Sangha [(2001) 4 SCC 448] a Bench of five Judges considered a somewhat similar question. Two learned Judges in that case doubted the correctness of the scope attributed to a certain provision in an earlier Constitution Bench judgment and, accordingly, referred the matter before them directly to a Constitution Bench. The Constitution Bench that then heard the matter took the view that the decision of a Constitution Bench binds a Bench of two learned Judges and that judicial discipline obliges them to follow it, regardless of their doubts about its correctness. At the most, the Bench of two learned Judges could have ordered that the matter be heard by a Bench of three learned Judges.*

6. In the present case the Bench of two learned Judges has, in terms, doubted the correctness of a decision of a Bench of three learned Judges. They have, therefore, referred the matter directly to a Bench of five Judges. In our view, judicial discipline and propriety demands that a Bench of two learned Judges should follow a decision of a Bench of three learned Judges. But if a Bench of two learned Judges concludes that an earlier judgment of three learned Judges is so very incorrect that in no circumstances can it be followed, the proper course for it to adopt is to refer the matter before it to a Bench of three learned Judges setting out, as has been done here, the reasons why it could not agree with the earlier judgment. If, then, the Bench of three learned Judges also comes to the conclusion that the earlier judgment of a Bench of three learned Judges is incorrect, reference to a Bench of five learned Judges is justified".

3.12. Hon'ble Apex Court in the case of **Union of India & Another vs. Hansoli Devi & Others** reported in ***(2002) 7 SCC -273***. Hon'ble Apex Court in Para-2 has held as follows:-

> ***"2.*** *According to the learned Judges, the three-Judge Bench decision of this Court in Jose Antonio Cruz Dos R. Rodriguese v. Land Acquisition Collector [(1996) 6 SCC 746] requires reconsideration. At the outset, it may be stated that the Constitution Bench in Pradip Chandra Parija v. Pramod Chandra Patnaik [(2002) 1 SCC 1] held that judicial discipline and propriety demands that a Bench of two learned Judges should follow a decision of a Bench of three learned Judges. But if a Bench of two learned Judges concludes that an earlier judgment of three learned Judges is so very incorrect that in no circumstances can it be followed, the proper course for it to adopt is, to refer the matter before it to a Bench of three learned Judges setting out the reasons why it could not agree with the earlier judgment and then the Bench of three learned Judges also comes to the conclusion that the earlier judgment of a Bench of three learned Judges is incorrect, then a reference could be made to a Bench of five learned Judges. In view of the aforesaid Constitution Bench decision, the very reference itself made by the two learned Judges was improper and we would have sent the matters to a Bench of three learned Judges for consideration. But since the questions involved are pending in many cases in different High Courts and certain doubts have arisen with regard to the interpretation to the provisions of Section 28-A of the Act, we thought it appropriate to answer the two questions referred. Section 28-A of the Land Acquisition Act reads thus:*
>
> *"28-A. Redetermination of the amount of compensation on the basis of the award of the court.—(1) Where in an award under this Part, the court allows to the applicant any amount of compensation in excess of the amount awarded by the Collector under Section 11, the persons interested in all the other land covered by the same notification under Section 4 sub-section (1) and who are also aggrieved by the award of the Collector may, notwithstanding that they had not made an application to the Collector under Section 18, by written application to the Collector within three months from the date of the award of the court require that the amount of compensation payable to them may be redetermined on the basis of the amount of compensation awarded by the court:*
> *Provided that in computing the period of three months within which an application to the Collector shall be made under this sub-section, the day on which the award was pronounced and the time requisite for obtaining a copy of the award shall be excluded.*
>
> *(2) The Collector shall, on receipt of an application under sub-section (1), conduct an inquiry after giving notice to all the persons interested and giving them a reasonable opportunity of being heard and make an award determining the amount of compensation payable to the applicants.*
>
> *(3) Any person who has not accepted the award under sub-section (2) may, by written application to the Collector, require that the matter be referred by the Collector for the determination of the court and the provisions of Sections 18 to 28 shall, so far as may be, apply to such reference as they apply to a reference under Section 18."*

3.13. Hon'ble Apex Court in the case of ***State of Bihar vs. Kalika Kuet alia Kalika Singh & Others*** reported in ***(2003) 5 SCC -448***. Hon'ble Apex Court in Para-9 to 12 has held as follows:-

> ***"9.*** *In Fuerst Day Lawson Ltd. v. Jindal Exports Ltd. [(2001) 6 SCC 356] this Court observed: (SCC pp. 367 & 368, paras 19 & 23):*

A prior decision of the Supreme Court on identical facts and law binds the Court on the same points of law in a later case. In exceptional instances, where by obvious inadvertence or oversight a judgment fails to notice a plain statutory provision or obligatory authority running counter to the reasoning and result reached, the principle of per incuriam may apply. Unless it is a glaring case of obtrusive omission, it is not desirable to depend on the principle of judgment 'per incuriam'. It has to be shown that some part of the decision was based on a reasoning which was demonstrably wrong, for applying the principle of per incuriam.

***10.** Looking at the matter, in view of what has been held to mean by per incuriam, we find that such element of rendering a decision in ignorance of any provision of the statute or the judicial authority of binding nature, is not the reason indicated by the Full Bench in the impugned judgment, while saying that the decision in the case of Ramkrit Singh [AIR 1979 Pat 250 : 1979 Pat LJR 161 (FB)] was rendered per incuriam. On the other hand, it was observed that in the case of Ramkrit Singh [AIR 1979 Pat 250 : 1979 Pat LJR 161 (FB)] the Court did not consider the question as to whether the Consolidation Authorities are courts of limited jurisdiction or not. In connection with this observation, we would like to say that an earlier decision may seem to be incorrect to a Bench of a coordinate jurisdiction considering the question later, on the ground that a possible aspect of the matter was not considered or not raised before the court or more aspects should have been gone into by the court deciding the matter earlier but it would not be a reason to say that the decision was rendered per incuriam and liable to be ignored. The earlier judgment may seem to be not correct yet it will have the binding effect on the later Bench of coordinate jurisdiction. Easy course of saying that earlier decision was rendered per incuriam is not permissible and the matter will have to be resolved only in two ways — either to follow the earlier decision or refer the matter to a larger Bench to examine the issue, in case it is felt that earlier decision is not correct on merits. Though hardly necessary, we may however, refer to a few decisions on the above proposition.*

***11.** In Vijay Laxmi Sadho (Dr) v. Jagdish [(2001) 2 SCC 247] it has been observed as follows: (SCC p. 256, para 33):*

"33. As the learned Single Judge was not in agreement with the view expressed in Devilal case [Devilal v. Kinkar Narmada Prasad, Election Petition No. 9 of 1980] it would have been proper, to maintain judicial discipline, to refer the matter to a larger Bench rather than to take a different view. We note it with regret and distress than the said course was not followed. It is well settled that if a Bench of coordinate jurisdiction disagrees with another Bench of coordinate jurisdiction whether on the basis of 'different arguments' or otherwise, on a question of law, it is appropriate that the matter be referred to a larger Bench for resolution of the issue rather than to leave two conflicting judgments to operate, creating confusion. It is not proper to sacrifice certainty of law. Judicial decorum, no less than legal propriety forms the basis of judicial procedure and it must be respected at all costs."

***12.** In Pradip Chandra Parija v. Pramod Chandra Patnaik [(2002) 1 SCC 1] it has been held that where a Bench consisting of two Judges does not agree with the judgment rendered by a Bench of three Judges, the only appropriate course available is to place the matter before another Bench of three Judges and in case the three-Judge Bench also concludes that the judgment concerned is incorrect then the matter can be referred to a larger Bench of five Judges.*

3.14. Hon'ble Apex Court in the case of **State of Punjab & Another vs. Devans Modern Breweries Ltd., & Another**, reported in **(2004) 11 SCC -26**. Hon'ble Apex Court in Para-339, 340, 341, 342, 343, 344 has held as follows:-

> ***"339.*** *Judicial discipline envisages that a coordinate Bench follow the decision of an earlier coordinate Bench. If a coordinate Bench does not agree with the principles of law enunciated by another Bench, the matter may be referred only to a larger Bench. (See Pradip Chandra Parija v. Pramod Chandra Patnaik [(2002) 1 SCC 1], SCC at paras 6 and 7; followed in Union of India v. Hansoli Devi [(2002) 7 SCC 273], SCC at para 2.) But no decision can be arrived at contrary to or inconsistent with the law laid down by the coordinate Bench. Kalyani Stores [AIR 1966 SC 1686 : (1966) 1 SCR 865] and K.K. Narula [AIR 1967 SC 1368 : (1967) 3 SCR 50] both have been rendered by the Constitution Benches. The said decisions, therefore, cannot be thrown out for any purpose whatsoever; more so when both of them if applied collectively lead to a contrary decision proposed by the majority.*
>
> ***340.*** *In Halsbury's Laws of England (4th Edn.), Vol. 26 at pp. 297-98, para 578, it is stated:*
>
> *"A decision is given per incuriam when the court has acted in ignorance of a previous decision of its own or of a court of coordinate jurisdiction which covered the case before it, in which case it must decide which case to follow (Young v. Bristol Aeroplane Co. Ltd. [(1944)1 KB 718 :(1944)2 All ER 293 (CA)], KB at p.729 : All ER at p. 300. In Huddersfield Police Authority v. Watson [1947 KB 842 : (1947)2 All ER 193] Lord Goddard, C.J. said that a decision was given per incuriam when a case or statute had not been brought to the court's attention and the court gave the decision in ignorance or forgetfulness of the existence of the case or statute); or when it has acted in ignorance of a House of Lords decision, in which case it must follow that decision; or when the decision is given in ignorance of the terms of a statute or rule having statutory force [Young v. Bristol Aeroplane Co. Ltd. [(1944) 1 KB 718 : (1944) 2 All ER 293 (CA)] , KB at p. 729 : All ER at p. 300. See also Lancaster Motor Co. (London) Ltd. v. Bremith Ltd. [(1941)1 KB 675 :(1941)2 All ER 11(CA)] For a Divisional Court decision disregarded by that court as being per incuriam, see Nicholas v. Penny [(1950) 2 KB 466 : (1950) 2 All ER 89] .] A decision should not be treated as given per incuriam, however, simply because of a deficiency of parties (Morelle Ltd. v. Wakeling [(1955) 2 QB 379 : (1955) 1 All ER 708 (CA)]), or because the court had not the benefit of the best argument (Bryers v. Canadian Pacific Steamships Ltd. [(1957) 1 QB 134 : (1956) 3 All ER 560 (CA)] , per Singleton, L.J.; affd. sub nom. Canadian Pacific Steamships Ltd. v. Bryers [1958 AC 485 : (1957) 3 All ER 572 (HL)]), and, as a general rule, the only cases in which decisions should be held to be given per incuriam are those given in ignorance of some inconsistent statute or binding authority (A. and J. Mucklow Ltd. v. IRC [1954 Ch 615 : (1954) 2 All ER 508 (CA)] ; Morelle Ltd. v. Wakeling [(1955) 2 QB 379 : (1955) 1 All ER 708 (CA)] . See also Bonsor v. Musicians' Union [1954 Ch 479 : (1954) 1 All ER 822 (CA)] where the per incuriam contention was rejected and, on appeal to the House of Lords, although the House overruled the case which bound the Court of Appeal, the House agreed that that court had been bound by it: see Bonsor v. Musicians' Union [1956 AC 104 : (1955) 3 All ER 518 (HL)]). Even if a decision of the Court of Appeal has misinterpreted a previous decision of the House of Lords, the Court of Appeal must follow its previous decision and leave the House of Lords to rectify the mistake (Williams v. Glasbrook Bros. Ltd. [(1947) 2 All ER 884 (CA)])."*

341. *In Vijay Laxmi Sadho (Dr.) v. Jagdish [(2001) 2 SCC 247 : JT (2001) 1 SC 382] it has been observed as follows: (SCC p. 256, para 33)*

"33. As the learned Single Judge was not in agreement with the view expressed in Devilal case [Devilal v. Kinkar Narmada Prasad, Election Petition No. 9 of 1980 (MP)] it would have been proper, to maintain judicial discipline, to refer the matter to a larger Bench rather than to take a different view. We note it with regret and distress that the said course was not followed. It is well settled that if a Bench of coordinate jurisdiction disagrees with another Bench of coordinate jurisdiction whether, on the basis of 'different arguments' or otherwise, on a question of law, it is appropriate that the matter be referred to a larger Bench for resolution of the issue rather than to leave two conflicting judgments to operate, creating confusion. It is not proper to sacrifice certainty of law. Judicial decorum, no less than legal propriety forms the basis of judicial procedure and it must be respected at all costs.

342. *In State of Bihar v. Kalika Kuer [(2003) 5 SCC 448 : JT (2003) 4 SC 489] a Bench of this Court upon taking a large number of decisions into consideration observed: (SCC p. 454, para 10):*

"10. Looking at the matter, in view of what has been held to mean by per incuriam, we find that such element of rendering a decision in ignorance of any provision of the statute or the judicial authority of binding nature, is not the reason indicated by the Full Bench in the impugned judgment, while saying that the decision in the case of Ramkrit Singh [Ramkrit Singh v. State of Bihar, AIR 1979 Pat 250 : 1979 Pat LJR 161 (FB)] was rendered per incuriam." (emphasis in original)

It was further opined: (SCC p. 454, para 10):

"The earlier judgment may seem to be not correct yet it will have the binding effect on the later Bench of coordinate jurisdiction. Easy course of saying that earlier decision was rendered per incuriam is not permissible and the matter will have to be resolved only in two days — either to follow the earlier decision or refer the matter to a larger Bench to examine the issue, in case it is felt that earlier decision is not correct on merits."

343. *It is also trite that the binding precedents which are authoritative in nature and are meant to be applied should not be ignored on application of the doctrine of sub silentio or per incuriam without assigning specific reasons therefor. I, for one, do not see as to how Kalyani Stores [AIR 1966 SC 1686 : (1966) 1 SCR 865] and K.K. Narula [AIR 1967 SC 1368 : (1967) 3 SCR 50] read together can be said to have been passed sub silentio or rendered per incuriam.*

Conclusion

344 [Para 344 corrected as per Official Corrigendum No. F.3/Ed.B.J./98/2004 dated 14-12-2004.]*. The propositions of law which emerge from the discussions made hereinbefore are*

(1) The maxim "res extra commercium" has no role to play in determining the constitutional validity of a statute.

The State, in its discretion having regard to the provisions contained in Article 47 of the Constitution, may part with its right or exclusive privilege but once it does so, the grant being subject to the terms and conditions of a statute, the common-law principle based on the maxim "res extra commercium" shall have no application in relation thereto.

(2) When the constitutionality of a taxing statute is questioned, the same has to be judged on the touchstone of the constitutional provisions including Article 301 thereof.

The freedom guaranteed under Article 301 of the Constitution may not be considered in isolation having regard to the expression contained therein that such freedom is subject to Part XIII of the Constitution.

(3) The right to carry on trade in liquor is a fundamental right within the meaning of Article 19(1)(g) of the Constitution and the State may, however, legislate prohibiting such trade either in whole or in part in terms of clause (6) thereof.

(4) Article 14 is applicable in the matter of grant by the State and, thus, there is no reason as to why the grantee would not be entitled to invoke the commerce clause contained in Article 301 of the Constitution.

(5) In interpreting the constitutional provisions, the court should take into consideration the implication of its decision having regard to the international treaties dealing with countervailing duty, etc.

(6) The decision of Kalyani Stores [AIR 1966 SC 1686 : (1966) 1 SCR 865] being an authoritative pronouncement, the same is binding irrespective of the fact as to whether therein the decisions of this Court in Chamarbaugwala [AIR 1957 SC 699 : 1957 SCR 874] , Har Shankar [(1975) 1 SCC 737 : AIR 1975 SC 1121 :(1975) 3 SCR 254]and Khoday Distilleries [(1995) 1 SCC 574] have been referred to or not, keeping in view the fact that even in K.K. Narula [AIR 1967 SC 1368:(1967)3 SCR 50] another Constitution Bench has held that trade in liquor is a fundamental right.

3.15. Learned counsel for the Respondent relied on the decision of the Hon'ble Apex Court in the case of ***Central Board of Dawoodi Bohra Community & Another vs. State of Maharastra and another***, reported in ***(2005) 2 SCC-673***.

Hon'ble Apex Court in Para-12 of the said judgment has held as follows:-

***"12.** (1) The law laid down by this Court in a decision delivered by a Bench of larger strength is binding on any subsequent Bench of lesser or coequal strength.*

(2) A Bench of lesser quorum cannot disagree or dissent from the view of the law taken by a Bench of larger quorum. In case of doubt all that the Bench of lesser quorum can do is to invite the attention of the Chief Justice and request for the matter being placed for hearing before a Bench of larger quorum than the Bench whose decision has come up for consideration. It will be open only for a Bench of coequal strength to express an opinion doubting the correctness of the view taken by the earlier Bench of coequal strength, whereupon the matter may be placed for hearing before a Bench consisting of a quorum larger than the one which pronounced the decision laying down the law the correctness of which is doubted."

3.16. Hon'ble Apex Court in the case of ***Pranay Sethi and Others***, in Para-16, 17, 21, 23 & 28 has held as follows:-

16. In State of Bihar v. Kalika Kuer alias Kalika Singh and others19, it has been held:-

"10. ...an earlier decision may seem to be incorrect to a Bench of a coordinate jurisdiction considering the question later, on the ground that a possible aspect of the matter was not considered or not raised before the court or more aspects should have been gone into by the court deciding the matter earlier but it would not be a reason to say that the (2003) 5 SCC 448 decision was rendered per incuriam and liable to be ignored. The earlier judgment may seem to be not correct yet it will have the binding effect on the later Bench of coordinate jurisdiction. ..." The Court has further ruled:-

"10. ... Easy course of saying that earlier decision was rendered per incuriam is not permissible and the matter will have to be resolved only in two ways — either to follow the earlier decision or refer the matter to a larger Bench to examine the issue, in case it is felt that earlier decision is not correct on merits."

17. In G.L. Batra v. State of Haryana and others20, the Court has accepted the said principle on the basis of judgments of this Court rendered in Union of India v. Godfrey Philips India Ltd. 21 , Sundarjas Kanyalal Bhatija v. Collector, Thane, Maharashtra22 and Tribhovandas Purshottamdas Thakkar v. Ratilal Motilal Patel 23 . It may be noted here that the Constitution Bench in Madras Bar Association v. Union of India and another 24 has clearly stated that the prior Constitution Bench judgment in Union of India v. Madras Bar Association25 is a binding precedent. Be it clarified, the issues (2014) 13 SCC 759 (1985) 4 SCC 369 (1989) 3 SCC 396 AIR 1968 SC 372 (2015) 8 SCC 583 (2010) 11 SCC 1 that were put to rest in the earlier Constitution Bench judgment were treated as precedents by latter Constitution Bench".

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21. In Chandra Prakash and others v. State of U.P. and another28, another Constitution Bench dealing with the concept of precedents stated thus:- "22. ... The doctrine of binding precedent is of utmost importance in the administration of our judicial system. It promotes certainty and consistency in judicial decisions. Judicial consistency promotes confidence in the system, therefore, there is this need for consistency in the enunciation of legal principles in the decisions of this Court. It is in the above context, this Court in the case of Raghubir Singh29 held that a pronouncement of law by a Division Bench of this Court is binding on a Division Bench of the same or smaller number of Judges. ..."

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23. It also stated what has been expressed in Raghubir Singh (supra) by R.S. Pathak, C.J. It is as follows:- "28. We are of opinion that a pronouncement of law by a Division Bench of this Court is binding on a Division Bench of the same or a smaller number of Judges, and in order that such decision be binding, (2014) 7 SCC 701 (2012) 4 SCC 516 (1995) 4 SCC 96 it is not necessary that it should be a decision rendered by the Full Court or a Constitution Bench of the Court. ..."

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28. In this context, we may also refer to Sundeep Kumar Bafna v. State of Maharashtra and another34 which correctly lays down the principle that discipline demanded by a precedent or the disqualification or diminution of a decision on the application of the per incuriam rule is of great importance, since without it, certainty of law, consistency of rulings and comity of courts would become a costly casualty. A decision or judgment can be per incuriam any provision in a statute, rule or regulation, which was not brought to the notice of the court. A decision or judgment can also be per incuriam if it is not possible to reconcile its ratio with that of a previously pronounced judgment of a co- equal or larger Bench. There can be no scintilla of doubt that an earlier decision of co-equal Bench binds the Bench of same strength. Though the judgment in Rajesh's case was delivered on a later date, it had not apprised itself of the law stated in (2014) 16 SCC 623 Reshma Kumari (supra) but had been guided by Santosh Devi (supra). We have no hesitation that it is not a binding precedent on the co-equal Bench".

3.17. Reliance was also placed in the decisions of the Hon'ble Apex Court in the case of ***Shah Faesal vs. Union of India***, ***Writ Petition (Civil) No.1099 of 2019*** decided on March, 02, 2020. Hon'ble Apex Court in Para-14, 17, 18, 19, 23, 24, 25, 26, 29 & 31 have held as follows:-

"14.*The learned Solicitor General supported the arguments rendered by the learned Attorney General and submitted that a coordinate Bench cannot refer the matter to a larger Bench on minor inconsistencies. Rather, the decisions rendered by an earlier co-ordinate bench are always binding on the subsequent Benches of equal strength. However, if the subsequent Bench expresses doubt on the correctness of the earlier decision rendered by a Bench of equal strength, the same has to be referred to a larger Bench.*

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17. *This Court's jurisprudence has shown that usually the courts do not overrule the established precedents unless there is a social, constitutional or economic change mandating such a development. The numbers themselves speak of restraint and the value this Court attaches to the doctrine of precedent. This Court regards the use of precedent as indispensable bedrock upon which this Court renders justice. The use of such precedents, to some extent, creates certainty upon which individuals can rely and conduct their affairs. It also creates a basis for the development of the rule of law. As the Chief Justice of the Supreme Court of the United States, John Roberts observed during his Senate confirmation hearing, "It is a jolt to the legal system when you overrule a precedent. Precedent plays an important role in promoting stability and even-handedness". [Congressional Record—Senate, Vol. 156, Pt. 7, 10018 (7-6-2010).]*

18. *Doctrines of precedents and stare decisis are the core values of our legal system. They form the tools which further the goal of certainty, stability and continuity in our legal system. Arguably, Judges owe a duty to the concept of certainty of law, therefore they often justify their holdings by relying upon the established tenets of law.*

19. *When a decision is rendered by this Court, it acquires a reliance interest and the society organises itself based on the present legal order. When substantial judicial time and resources are spent on references, the same should not be made in a casual or cavalier manner. It is only when a proposition is contradicted by a subsequent judgment of the same Bench, or it is shown that the proposition laid down has become unworkable or contrary to a well-established principle, that a reference will be made to a larger Bench. In this context, a five-Judge Bench of this Court in Chandra Prakash v. State of U.P. [Chandra Prakash v. State of U.P., (2002) 4 SCC 234 : 2002 SCC (Cri) 496 : 2002 SCC (L&S) 496] , after considering series of earlier rulings reiterated that : (SCC p. 245, para 22)*

"22. … The doctrine of binding precedent is of utmost importance in the administration of our judicial system. It promotes certainty and consistency in judicial decisions. Judicial consistency promotes confidence in the system, therefore, there is this need for consistency in the enunciation of legal principles in the decisions of this Court."

(emphasis supplied)

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23. *This brings us to the question, as to whether a ruling of a coordinate Bench binds subsequent coordinate Benches. It is now a settled principle of law that the decision rendered by a coordinate Bench is binding on the subsequent Benches of equal or lesser strength. The aforesaid view is reinforced in the National Insurance Co. Ltd. v. Pranay Sethi [National Insurance Co. Ltd. v. Pranay Sethi, (2017) 16 SCC 680 : (2018) 3 SCC (Civ) 248 : (2018) 2 SCC (Cri) 205] wherein this Court held that : (SCC pp. 713-14, para 59)*

"59.1. The two-Judge Bench in Santosh Devi [Santosh Devi v. National Insurance Co. Ltd., (2012) 6 SCC 421 : (2012) 3 SCC (Civ) 726 : (2012) 3 SCC (Cri) 160 : (2012) 2

SCC (L&S) 167] should have been well advised to refer the matter to a larger Bench as it was taking a different view than what has been stated in Sarla Verma [Sarla Verma v. DTC, (2009) 6 SCC 121 : (2009) 2 SCC (Civ) 770 : (2009) 2 SCC (Cri) 1002] , a judgment by a coordinate Bench. It is because a coordinate Bench of the same strength cannot take a contrary view than what has been held by another coordinate Bench."

(emphasis supplied)

24. *The impact of non-consideration of an earlier precedent by a coordinate Bench is succinctly delineated by Salmond [Salmond on Jurisprudence [P.J. Fitzgerald (Ed.), 12th Edn., 1966], p. 147.] in his book in the following manner:*

"… A refusal to follow a precedent, on the other hand, is an act of coordinate, not of superior, jurisdiction. Two courts of equal authority have no power to overrule each other's decisions. Where a precedent is merely not followed, the result is not that the later authority is substituted for the earlier, but that the two stand side by side conflicting with each other. The legal antinomy thus produced must be solved by the act of a higher authority, which will in due time decide between the competing precedents, formally overruling one of them, and sanctioning the other as good law. In the meantime the matter remains at large, and the law uncertain." *(emphasis supplied)*

25. *In this line, further enquiry requires us to examine, to what extent does a ruling of coordinate Bench bind the subsequent Bench. A judgment of this Court can be distinguished into two parts : ratio decidendi and the obiter dictum. The ratio is the basic essence of the judgment, and the same must be understood in the context of the relevant facts of the case. The principal difference between the ratio of a case, and the obiter, has been elucidated by a three-Judge Bench decision of this Court in Union of India v. Dhanwanti Devi [Union of India v. Dhanwanti Devi, (1996) 6 SCC 44] wherein this Court held that : (SCC pp. 51-52, para 9)*

"9. … It is not everything said by a Judge while giving judgment that constitutes a precedent. The only thing in a Judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the ratio decidendi. … A decision is only an authority for what it actually decides. … The concrete decision alone is binding between the parties to it, but it is the abstract ratio decidendi, ascertained on a consideration of the judgment in relation to the subject-matter of the decision, which alone has the force of law and which, when it is clear what it was, is binding. It is only the principle laid down in the judgment that is binding law under Article 141 of the Constitution." *(emphasis supplied)*

26. *The aforesaid principle has been concisely stated by Lord Halsbury in Quinn v. Leathem [Quinn v. Leathem, 1901 AC 495 (HL)] in the following terms : (AC p. 506)*

"… that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides." *(emphasis supplied)*

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29. *In this context of the precedential value of a judgment rendered per incuriam, the opinion of Venkatachaliah, J., in the seven-Judge Bench decision of A.R. Antulay v. R.S. Nayak [A.R. Antulay v. R.S. Nayak, (1988) 2 SCC 602 : 1988 SCC (Cri) 372] assumes great relevance : (SCC p. 716, para 183)*

"183. But the point is that the circumstance that a decision is reached per incuriam, merely serves to denude the decision of its precedent value. Such a decision would not be binding as a judicial precedent. A coordinate Bench can disagree with it and decline to follow it. A larger Bench can overrule such decision. When a previous decision is so overruled it does not happen — nor has the overruling Bench any jurisdiction so to do — that the finality of the operative order, inter partes, in the previous decision is overturned. In this context the word "decision" means only the reason for the previous order and not the operative order in the previous decision, binding inter partes. … Can such a decision be characterised as one reached per incuriam? Indeed, Ranganath Misra, J. says this on the point : (para 105)

'Overruling when made by a larger Bench of an earlier decision of a smaller one is intended to take away the precedent value of the decision without effecting the binding effect of the decision in the particular case. Antulay, therefore, is not entitled to take advantage of the matter being before a larger Bench.'" (emphasis supplied)

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***31.** Therefore, the pertinent question before us is regarding the application of the rule of per incuriam. This Court while deciding Pranay Sethi case [National Insurance Co. Ltd. v. Pranay Sethi, (2017) 16 SCC 680 : (2018) 3 SCC (Civ) 248 : (2018) 2 SCC (Cri) 205] , referred to an earlier decision rendered by a two-Judge Bench in Sundeep Kumar Bafna v. State of Maharashtra [Sundeep Kumar Bafna v. State of Maharashtra, (2014) 16 SCC 623 : (2015) 3 SCC (Cri) 558] , wherein this Court emphasised upon the relevance and the applicability of the aforesaid rule : (Sundeep Kumar Bafna case [Sundeep Kumar Bafna v. State of Maharashtra, (2014) 16 SCC 623 : (2015) 3 SCC (Cri) 558] , SCC p. 642, para 19)*

"19. It cannot be overemphasised that the discipline demanded by a precedent or the disqualification or diminution of a decision on the application of the per incuriam rule is of great importance, since without it, certainty of law, consistency of rulings and comity of courts would become a costly casualty. A decision or judgment can be per incuriam any provision in a statute, rule or regulation, which was not brought to the notice of the court. A decision or judgment can also be per incuriam if it is not possible to reconcile its ratio with that of a previously pronounced judgment of a co-equal or larger Bench; or if the decision of a High Court is not in consonance with the views of this Court.

It must immediately be clarified that the per incuriam rule is strictly and correctly applicable to the ratio decidendi and not to obiter dicta." (emphasis supplied)

3.18. Placing reliance on the decision in the case of ***Pranay Sethy*** and other decisions as cited (*supra*). Dr. Lenka contended that since the decision in the case of ***Kalidas Mahapatra*** was rendered by a two Judge Bench of the Hon'ble Apex Court, the same could not have been treated as not a good law and having no binding effect, in the case of ***Mamata Mohanty***, which was also rendered by a two Judge Bench of the Hon'ble Apex Court.

3.19. Learned counsel for the private Respondent also contended that in case of conflicting judgments of equal strength of the Hon'ble Apex Court, it is earlier one which is to be followed by the High Courts. In support of the aforesaid submissions, learned counsel appearing for the private Respondent relied on a decision of the Hon'ble Apex Court in the case of ***Union Territory of Ladakh & Others vs. Jammu & Kashmir***

National Conference & Another, reported in ***2023 LiveLaw (SC) 749***. Hon' ble Apex Court in Para-35 of the said judgment has held as follows:-

> "**35.** We are seeing before us judgments and orders by High Courts not deciding cases on the ground that the leading judgment of this Court on this subject is either referred to a larger Bench or a review petition relating thereto is pending. We have also come across examples of High Courts refusing deference to judgments of this Court on the score that a later Coordinate Bench has doubted its correctness. In this regard, we lay down the position in law. We make it absolutely clear that the High Courts will proceed to decide matters on the basis of the law as it stands. It is not open, unless specifically directed by this Court, to await an outcome of a reference or a review petition, as the case may be. It is also not open to a High Court to refuse to follow a judgment by stating that it has been doubted by a later Coordinate Bench. In any case, when faced with conflicting judgments by Benches of equal strength of this Court, it is the earlier one which is to be followed by the High Courts, as held by a 5-Judge Bench in **National Insurance Company Limited v Pranay Sethi, (2017) 16 SCC 680**[5]. The High Courts, of course, will do so with careful regard to the facts and circumstances of the case before it".

3.20. It is also contended that by the time the appeal was filed by the State challenging the judgment passed by the Tribunal on 31.05.2008, the decision in the case of ***Kalidas Mohapatra*** was governing the field. Not only that in view of the decision in the case of ***Union Territory of Ladakh*** as cited (*supra*), the decision in the case of ***Kalidas Mohapatra*** was to be followed to the facts of the present case.

3.21. Making all these submissions, learned counsel appearing for Respondent No.1 contended that the Tribunal has rightly allowed the claim vide its judgment dtd.31.05.2008, while setting aside the rejection so made by Opposite Party No.1 vide his order dtd.06.08.2005 and it requires no interference.

4. Having heard learned counsel appearing for the Parties and after going through the materials available on record, this Court finds that Respondent No.1 herein was appointed as a Lecturer in English in Mangala Mohavidyalaya, Kakatpur in the district of Puri vide order of appointment issued on 20.03.1980. Pursuant to the said order, Respondent No.1 joined as such on 22.03.1980. Even though at the time of his appointment Respondent No.1 was not having the required percentage of mark in his M.A in English, but the said deficiency was condoned by Utkal University vide its Notification dtd.06.10.1989. After such condonation of the qualification, the services of the Respondent No.1 was approved by the Director Higher Education -Appellant No.2 vide order dtd. 27.08.1992 allowing grant-in-aid @ 1/3rd w.e.f. 01.06.1988.

4.1. Even though Respondent No.1 was appointed as a Lecturer in English in Mangala Mohavidyalaya, Kakatpur, which was a +2 College, but subsequently Mangala Mohavidyalaya, Kakatpur got the affiliation to pursue degree course prior to 01.04.1989. The College to which the Respondent No.1 was transferred in the year 1995 i.e. Nayagarh College, Nayagarh has also got the affiliation from the University to pursue degree course prior to 01.04.1989. Since the College in which Respondent No.1 continued as a Lecturer in English got the affiliation of the University to pursue degree course prior to 01.04.1989, Respondent No.1 as per the stipulation contained in Resolution

dtd. 06.11.1989 and 06.11.1990 became eligible to get the benefit of UGC scale of pay as the College in question has got the affiliation prior to the cut-off date i.e. 01.04.1989 so upheld by the Apex Court in the case of Aswini Kumar Das (as cited *supra*).

4.2. Only ineligibility of Respondent No.1 to get the benefit is with regard to his deficiency in qualification at the time of his initial appointment. But as found from the record the deficiency in qualification of Respondent No.1 at the time of his appointment was condoned by the Utkal University vide Notification dtd.06.10.1989 and after such condonation of his qualification, services of Respondent No.1 was approved by the Appellant No.2 vide order dtd.27.08.1992 allowing grant-in-aid @ 1/3rd w.e.f. 01.06.1988, which is before the cut-off date on 01.04.1989.

4.3. With regard to entitlement of a Lecturer to get the benefit of UGC Scale of Pay on such condonation of qualification was the subject matter of dispute in the case of ***Kalidas Mohapatra*** (as cited *supra*). This Court in the case of ***Kalidas Mohapatra*** taking into account the condonation of the qualification, held him entitled to get the benefit of UGC Scale of Pay. Even though the matter was carried to the Hon'ble Apex Court by the State, but Hon'ble Apex Court while confirming the view of this Court dismissed the SLP. After such dismissal of the SLP, benefit of UGC Scale of Pay was extended in favour of ***Kalidas Mohapatra*** though he was not having the required qualification at the time of his initial appointment. The Tribunal by the time disposed of the matter, judgment in the case of ***Kalidas Mohapatra*** was governing the field.

4.4. With regard to the stand taken by the appellants that in terms of the provisions contained in Resolution dtd.06.11.1990, Respondent No.1 since did not improve his qualification and accordingly not entitled to get the benefit of UGC Scale of Pay, this Court is unable to accept such a plea of the appellants, as the deficiency in his qualification was duly condoned by the University vide Notification dtd.06.10.1989 and basing on such condonation, services of the Respondent No.1 was approved by the Appellant No.2 vide order dtd.27.08.1992 allowing grant-in-aid w.e.f. 01.06.1988.

4.5. Therefore, this Court is of the view that allowing the claim of Respondent No.1 by the Tribunal placing reliance on the decision in the case of ***Kalidas Mohapatra*** was legal and justified. The stand taken by the appellants with regard to the decision rendered in the case of ***Mamata Mohanty*** wherein Hon'ble Apex Court held the decision in the case of Kalidas Mohapatra as a decision per in curiam and not binding, it is the humble opinion of this Court that since the decision in the case of ***Kalidas Mohapatra*** and in the case of ***Mamata Mohanty*** were passed by Co-ordinate Bench of the Hon'ble Apex Court, in view of the decision in the case of ***Pranay Sethy*** and other decisions (as cited *supra*) and so relied on by the learned counsel appearing for the appellants, the matter should have been referred to a larger Bench. Not only that in view of the decision rendered by the Hon'ble Apex Court in the case of ***Union Territory of Ladakh*** as cited (*supra*), the decision in the case of ***Kalidas Mohapatra*** is required to be followed to the facts of the present case. Not only that since the decision in the case of ***Mamata Mohanty*** was not available by the time the Tribunal disposed of the matter placing reliance on the decision in the case

of ***Kalidas Mohapatra***, this Court is unable to accept the contention of the appellants and of the view that the Tribunal rightly allowed the claim of Respondent No.1. This Court accordingly finds no illegality or irregularity with the impugned judgment and is not inclined to interfere with the same. The appeal accordingly fails and stands dismissed.

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2024 (II) ILR-CUT-1022

MURAHARI SRI RAMAN, J.

C.R.P. NO.37 OF 2023
AND
I.A. NO.53 OF 2023

D.K. ENTERPRISERS, BHUBANESWAR ……Petitioner

-V-

JYOTI SANJAY AGRAWAL, V.K.ENTERPRISERS, MAHARASHTRA STATE ……Opp.Party

(A) CODE OF CIVIL PROCEDURE, 1908 – Section 47 – Execution – Whether decree passed by 3rd Jt. Civil Judge, Sr. Division, Nagpur is executable by the learned Civil Judge (Sr. Div.), Bhubaneswar in respect of property situated within its jurisdiction? – Held, Yes – Reason indicated with reference to case laws.

(B) CODE OF CIVIL PROCEDURE, 1908 – Section 47 – Scope & Power of executing court – Discussed. (Paras 7-9.1)

Case Laws Relied on and Referred to :-

1. 1992 (II) OLR 22 : Rajendra Prasad Bose Vrs. Late J.P. Bose, represented by his legal representatives Monimala Bose & 3 Ors.
2. AIR 1956 SC 87 = (1955) 2 SCR 938 : Merla Ramanna Vrs. Nallaparaju.
3. 2022 LiveLaw (SC) 95 : Messer Griesheim GMBH (now called Air Liquide Deutschland GMBH) Vrs. Goyal MG Gases Pvt. Ltd.
4. (2023) 5 SCR 551 : Jini Dhanrajgir Vrs. Shibu Mathew.
5. (2021) 4 SCR 279 : Rahul S Shah Vrs. Jitendra Ku. Gandhi.
6. AIR 1992 SC 473 = (1993) Supp.(1) SCC 49: State of Punjab Vrs. Mohinder Singh Randhawa.
7. (2009) 5 SCC 634 = (2009) 4 SCR 750 : Century Textiles Industries Ltd. Vrs. Deepak Jain.
8. (2011) 15 Addl. SCR 972 = (2012) 4 SCC 307 : Kanwar Singh Saini Vrs. High Court, Delhi.
9. (1971) 1 SCR 66 : Vasudev Dhanjibhai Modi Vrs. Rajabhai Abdul Rehman.

For Petitioner : M/s. Amit Prasad Bose, D.J.Sahu, S. Swain.
For Opp.Party : None

JUDGMENT Date of Hearing : 11.07.2024 : Date of Judgment :18.07.2024

MURAHARI SRI RAMAN, J.

Assailing the Order dated 10.08.2022 passed by the learned Civil Judge, (Senior Division), Bhubaneswar in I.A. No.01 of 2018 (arising out of Execution Case No.40 of 2016), the petitioner approached this Court by way of filing this Civil Revision Petition under Section 115 of the Code of Civil Procedure, 1908.

2. It is unfurled from the pleadings and documents available on record that Special Civil Suit No.76 of 2014 was filed against the D.K. Enterprisers represented by its partners and same was decreed in favpur of the opposite party-Decree Holder (DHr). After registration of the Execution Case, being M.A.N.R.J.E Case No.34 of 2015, it was transferred from 3rd Jt. Civil Judge, Senior Division, Nagpur for execution of the decree.

3. The petitioner has filed an Interlocutory Application being I.A. No.01 of 2018 before the learned Civil Judge, (Senior Division), Bhubaneswar under Section 47 of the Code of Civil Procedure, 1908 ("CPC", for brevity) challenging the Execution Proceeding on the ground that notice was served on neither D.K. Enterprisers nor Sunita Agarwal or Ramavatar Sharma by the trial Court in connection with the Special Civil Suit No.76 of 2014. It was pleaded that the JDr after getting the information about the *ex parte* decree in the above noted suit contemplated steps for setting aside such *ex parte* judgement. It is alleged that the execution petition being completely silent about the proposed attachment of the property allegedly belonging to the JDr, the judgement and decree passed by the trial court was not enforceable.

3.1. Objecting to such pleading, the opposite party-DHr refuted the contention that no notice was served on the parties arrayed in the Special Civil Suit. The ground of attack against the judgment and decree could be raised at appropriate forum and vague allegation of fraud has been made by the petitioner-JDr. Any such irregularity should have been raised in the Special Civil Suit during the trial, but not by way of interlocutory application in the execution proceeding being Execution Case No.40 of 2016. It is, therefore, submitted by the DHr that the decree is neither a nullity nor unenforceable in the eye of law.

3.2. The opposite party-DHr claimed that he is entitled to recover the entire decretal amount of Rs.25,96,822/- with interest till the date of filing of the execution petition. Therefore, it is stated that the interlocutory application filed at the behest of the petitioner-JDr under Section 47, CPC was liable to be rejected.

4. The learned Executing Court at Bhubaneswar having considered the averments in the Interlocutory Application and objection thereto has come to decide the enforceability of decree, which was sought to be executed by the Court of the learned 3rd Jt. Civil Judge, Senior Division, Nagpur by way of transfer. Having taking into consideration, the relevant provisions and case laws, the Executing Court, i.e., the learned Civil Judge, (Senior Division), Bhubaneswar came to hold that,

"In view of such settled principle of law so also the statutory provision itself vide Section 39 of CPC after a careful appreciation of the materials on record, it is found out that there is no defect at all in transfer of the execution by the Court of 3rd Jt. Civil Judge, Senior Division, Nagpur (Maharashtra) to this Court directly. Accordingly, the plea of petitioner/J.Dr regarding to non-observation of the procedure to be followed is found to be without any basis.

*****

There were every opportunities for the defendants under Order 9, Rule 13 of CPC to set aside the ex parte decree. But instead of availing such recourses they have filed present petition under Section 47 of CPC in the execution proceeding.

**** But in an interim application under Section 47 of the CPC such prayers are not to be entertained where there are specific forum for redressal of the grievance of the aggrieved parties. As such, it is being concluded that the petitioner/Judgment Debtor has not succeeded in proving the judgment and decree passed in Special Civil Suit No.76 of 2014 as bad in the eye of law or not enforceable and accordingly the interim application is found to be not maintainable."*

5. Perusal of the record, it appears that this Court vide Order dated 02.11.2023, issued notice to the opposite party in I.A. No.53 of 2023, filed in the present proceeding by the petitioner for condonation of delay of 346 days in filing the Civil Revision Petition. On 11.07.2024, when the matter was taken up, the office note reflected that on account of insufficient address the notice on the petition for condonation of delay issued to opposite party has been received back. Therefore, none appeared for the opposite party on the said date to participate in the proceeding before this Court.

5.1. However, Mr. Amit Prasad Bose, learned counsel for the petitioner instead of taking fresh step in the matter for service of notice in the Civil Revision Petition, very fairly submitted that the suit decreed in favour of the opposite party by the learned 3rd Jt. Civil Judge, Senior Division, Nagpur is executable by the learned Civil Judge (Senior Division), Bhubaneswar.

6. The question posed in the present case whether decree passed by 3rd Jt. Civil Judge, Senior Division, Nagpur is executable by the learned Civil Judge (Senior Division), Bhubaneswar in respect of property situated within his jurisdiction?

7. Sri Amit Prasad Bose, learned counsel for the petitioner has brought to the notice of this Court the decision rendered in the case of *Rajendra Prasad Bose Vrs. Late J.P. Bose, represented by his legal representatives Monimala Bose and 3 others, 1992 (II) OLR 22*, in which the question of jurisdiction of the Executing Court where the property was situated arose. The following was the observation:

"2. A preliminary decree for partition of property located in the districts of Cuttack, Puri and Balasore was passed on 19.02.1955 by the Subordinate Judge, Cuttack, in Title Suit No. 64 of 1949. Pursuant to a partial final decree passed on 27.08.1963 in respect of the residential houses at Cuttack and Puri possession was taken in Execution Case No.10 of 1963. Another partial final decree for mesne profits was passed on 11.07.1973 and in Execution Case No. 80 of 1984 properties located in the districts of Cuttack, Puri and Balasore were attached. Another partial final decree was passed on 28.07.1981 in

respect of the remaining properties situate in the districts of Cuttack and Balasore. Execution Case No.101 of 1986 was dropped as the properties were situate at Balasore. Execution Case No.52 of 1987 was filed on 14.05.1987 and the impugned order dropping the execution case as not maintainable and directing the decree-holder to take certificate of non-satisfaction of the decree to the Court of Subordinate Judge, Balasore, where the property is situate, for execution of the decree was passed. Aggrieved by the said order, the decree-holder has filed this revision."

7.1. After taking note of divergent views expressed by different Courts, this Court has made the following observation:

"8. Part I of the Code of Civil Procedure deals with place of suing. Section 16 provides that suits for recovery of immovable property, for partition of immovable property, for foreclosure, sale or redemption, for determination of any other right to or interest in immovable property for compensation for wrong to immovable property and for recovery of movable property actually under distraint or attachment shall be instituted in the Court within the local limits of whose jurisdiction the property is situate. Provided that suit to obtain relief respecting, or compensation for wrong to, immovable property, held by or on behalf of the defendant may, where the relief sought can be entirely obtained through his personal obedience, be instituted either in the Court within the local limits of whose jurisdiction the property is situate, or in the Court within the local limits of whose jurisdiction the defendant actually and voluntarily resides, or carries on business, or personally works for gain. Section 17 provides that suits may be instituted in any Court within the local limits of which any property is situate. Section 18 provides that where there is uncertainty as to within the local limits of the jurisdiction of which two or more Courts any immovable property is situate, any one of those Courts may, if satisfied that there is ground for the alleged uncertainty, may entertain and dispose of the suit. Section 19 provides for jurisdiction in suits for compensation for wrong to person or movables and Section 20 deals with residuary cases providing that such suits may be instituted in a Court within the local limits of whose jurisdiction the defendants each of the defendants, actually and voluntarily resides, or carries on business, or personally works for gain, etc., or the cause of action, wholly or in part, arises. The provisions contained in Part II of the Code deal with execution of decree. The relevant sections for the present purpose are Sections 37, 38 and 39, which reads as under:

'37. Definition of Court which passed a decree.—

The expression 'Court which passed a decree', or words to that effect, shall in relation to the execution of decrees, unless there is anything repugnant in the subject or context, be deemed to include,

(a) Where the decree to be executed has been passed in the exercise of appellate Jurisdiction, the Court of first instance, and
(b) where the Court of first instance has ceased to exist or to have jurisdiction to execute it, the Court which, if the suit wherein the decree was passed was instituted at the time of making the application for the execution of the decree, would have Jurisdiction to try such suit.

EXPLANATION.—

The Court of first instance does not cease to have jurisdiction to execute a decree merely on the ground that after the institution of the suit wherein the decree was passed or after the passing of the decree, any area has been transferred from the Jurisdiction of that Court to the jurisdiction of any other Court; but in every such case, such other Court

shall also have jurisdiction to execute the decree, if at the time of making the application for execution of the decree it would have jurisdiction to try the said suit.

38. Court by which decree may be executed.—

A decree may be executed either by the Court which passed it, or by the Court to which it is sent for execution.

39. Transfer of decree.—

(1) The Court which passed a decree may, on the application of the decree holder, send it for execution to another Court of competent jurisdiction,—

(a) if the person against whom the decree is passed actually and voluntarily resides or carries on business, or personally works for gain, within the local limits of the Jurisdiction of such other Court, or

(b) if such person has not property within the local limits of the jurisdiction of the Court which passed the decree sufficient to satisfy such decree and has property within the local limits of the jurisdiction of such other Court, or

(c) if the decree directs the sale or delivery of immovable property situate outside the local limits of the jurisdiction of the Court which passed it, or

(d) if the Court which passed the decree considers for any other reason, which it shall record in writing, that the decree should be executed by such other Court,

(2) The Court which passed a decree may of its own motion send it for execution to any subordinate Court of competent jurisdiction.

(3) For the purposes of this section a Court shall be deemed to be a Court of competent jurisdiction i.e. at the time of making the application for the transfer of decree to it, such Court would have jurisdiction to try the suit in which such decree was passed.'

9. The explanation to Section 37 was inserted with a view to setting at rest the doubt created by conflict of decisions as to whether the Court of the first instance ceases to have jurisdiction to execute a decree on the ground that after the institution of the suit wherein the decree was passed or after the passing of the decree an area has been transferred from the jurisdiction of that Court to the jurisdiction of another Court and whether that Court to which the subject-matter has been transferred, could on its own authority, that is to say, without any formal order of transfer by the Court which passed the decree, execute the decree. Section 38 contains the general provision of law. Section 39 lays down the condition for transfer of a decree to another competent Court for execution. Section 39 is an enabling provision and is not in derogation of the provisions contained in Section 38. It does not curtail the ambit and scope of the general principle. It permits transfer of a decree in the contingencies stated in Clauses, (a), (b), (c) and (d). Section 39 contains principle of expediency for the convenience of the Court executing a decree and parties— the decree-holder, the judgment-debtor and even third parties who may lay claim to the property in respect of which execution is sought. The legislature deliberately used the expression 'may' both in sub-sections (1) and (2) which should not be construed as 'shall' or 'must' casting an obligation on Court to transfer. The provision is directory in nature and not mandatory. It is not incumbent on the Court which passed the decree to send it for execution to another Court because it has ceased to possess or does not possess territorial jurisdiction either over the person or over the property of the judgment debtor. It was held by the Full Bench of the Rajasthan High Court in Tarachand's case (supra) [Tarachand Vrs. Misrimal, AIR 1970 Rajasthan 53], the word 'may' cannot be construed as 'shall' or 'must', and it was also observed:

'Section 39 has been enacted for the purpose that it will be more convenient for a Court which passed a decree to get it executed by a Court within local limits of whose jurisdiction the person resides or the property is situate in cases mentioned in Clauses (a) to (c), but it does not debar a court which passed a decree itself to execute if the circumstances of the case so warrant or it has the means to do so.'

*10. I do not agree with the contrary view "the word 'may' used, in Section 39 does not mean that it is in the discretion of the Court which passed the decree either to execute the decree itself or to send the application for execution to another Court where the property against which execution is sought is situated outside the Jurisdiction of the Court which passed the decree" taken in Hari Das Basu Vrs. National Insurance Company Ltd., AIR 1932 Calcutta 213. I would with respect follow the view taken in Tarachand's case (supra) for if 'may' is construed as 'shall' or 'must', then the impact and scope of Section 30 would stand curtailed by Section 39. No doubt, Section 39 vests discretion in the Court in the matter of transfer of a decree for execution to another competent Court, but the discretion so vested has to be judiciously exercised having regard to all facts and circumstances, namely, conveniences of the Court and of the parties, expediency, the difficulties that would be faced by the Court and the parties, etc.***"*

7.2. This Court in the case of *Rajendra Prasad Bose (supra)* held that simultaneous execution decree at different places is permissible under the Code of Civil Procedure unless the relief sought in the execution application are not the same or the identical. It has been observed as follows:

"12. The next contention of the counsel for the petitioner that simultaneous execution in Courts at Cuttack and Balasore is impermissible, is untenable, it has been held by a Full Bench of the Patna High Court in Radheshyam Vrs. Devendra, AIR 1952 Patna 213, that there can be simultaneous execution of a decree. The same view has been taken by a Full Bench of the Punjab High Court in Mehar Singh's case (supra). It is well-established that it is open to the decree holder to try for execution of his decree simultaneously in various Courts provided the relief claimed is not identical. The same view has been taken by a Full Bench of the Mysore High Court in S. Sundara Rao Vrs. B. Appaih, AIR 1954 Mys. 1 (FB) and a Division Bench of the Allahabad High Court in Bhagwan Das Vrs. Gomti Bai, AIR 1962 Allahabad 619. In Premalata Agarwal Vrs. Lakshman Prasad Gupta and Ors., AIR 1970 Supreme Court 1525, it has been stated:

'Simultaneous execution proceedings in more places than one can be allowed in exceptional cases by imposing proper terms so as to avoid hardship to the judgment-debtors.'

I am, therefore, of the view that simultaneous execution of decree is permissible under the Code unless the reliefs sought in the execution application are not the same or identical. I respectfully differ from the view taken by the Calcutta High Court in Kusum Karmini Devi Vrs. Sailesh Chandra Chakravarty and Ors., AIR 1935 Caloutta 118, that there is no provision in the Civil Procedure Code under which a decree-holder who has obtained a decree can divide a decree into several parts and execute them piecemeal in different Courts or in the same Court. I would rather say that there is no provision prohibiting simultaneous execution."

7.3. In *Rajendra Prasad Bose (supra)* with respect to requirement of filing application for exercise of jurisdiction under Section 39 of the CPC, repelling the contention that in the absence of an application by the DHr the Court cannot transfer

the decree for execution to another subordinate Court, this Court made the following observation:

> *"I may simply observe that the Court has also been vested with suo motu jurisdiction under the sub-section (2), which reads as under:*
>
> *'39(2). The Court which passed a decree may of its own motion send it for execution to any subordinate Court of competent Jurisdiction.'*
>
> *Convenience of the decree-holder alone is not the sole consideration, for transfer. That may be one of the considerations. Convenience and difficulties of the Court executing the decree, the hard ships that may be faced by the parties' and the third parties also in the course of execution are also legitimate factors. That is why, suo motu jurisdiction has been vested in the Court to judiciously exercise its discretion and direct transfer having regard to the facts and circumstances of the case."*

7.4. It has been held in the case of *Merla Ramanna Vrs. Nallaparaju, AIR 1956 SC 87 = (1955) 2 SCR 938*, the Court which actually passed the decree does not lose its jurisdiction to execute it, by reason of the subject-matter thereof being transferred subsequently to the jurisdiction of another Court.

8. The Hon'ble Supreme Court of India has observed the difficulty faced in execution of decree in *Messer Griesheim GMBH (now called Air Liquide Deutschland GMBH) Vrs. Goyal MG Gases Pvt. Ltd., 2022 LiveLaw (SC) 95* as follows:

> *"It is an old saying that the difficulties of the litigant in India begin when he has obtained a decree. The evil was noticed as far back in 1872 by the Privy Council in relation to the difficulties faced by the decree holder in execution of the decree (MIA p.612) [General Manager of the Raj Durbhunga Vrs. Coomar Ramaput Sing, (1871-72) 14 MIA 605 : 20 ER 912]. After more than a century, there has been no improvement and still the decree holder faces the same problem what was being faced in the past. A litigant coming to Court seeking relief is not interested in receiving a paper decree when he succeeds in establishing his case. What he primarily wants from the Court of Justice is the relief and if it is a money decree, he wants that money what he is entitled for in terms of the decree, must be satisfied by the judgment debtor at the earliest possible without fail keeping in view the reasonable restrictions/rights which are available to the judgment debtor under the provisions of the statute or the Code, as the case may be."*

8.1. The Hon'ble Supreme Court made following further observations in the context of resistance to deliver possession to the DHr in the case of *Jini Dhanrajgir Vrs. Shibu Mathew, (2023) 5 SCR 551*:

> *"2. More than a century and a half back, the Privy Council (speaking through the Right Hon. Sir James Colville) in The General Manager of The Raj Durbhunga, Under the Court of Wards Vrs. Maharajah Coomar Ramaput Singh, (1871-72) 14 Moo IA 605 lamented that the difficulties of litigants in India indeed begin when they have obtained a decree. A reference to the above observation is also found in the decision of the Oudh Judicial Commissioner's Court in Kuer Jang Bahadur Vrs. Bank of Upper India Ltd., Lucknow, AIR 1925 Oudh 448. It was ruled there that the Courts had to be careful to ensure that the process of the Court and the laws of procedure were not abused by judgment-debtors in such a way as to make the courts of law instrumental in defrauding creditors, who had obtained decrees in accordance with their rights.*

3. Notwithstanding the enormous lapse of time, we are left awestruck at the observation of the Privy Council which seems to have proved prophetic. The observation still holds true in present times and this case is no different from cases of decree-holders' woes commencing while they are in pursuit of enforcing valid and binding decrees passed by civil courts of competent jurisdiction. The situation is indeed disquieting, viewed from the perspective of the decree-holders, but the law, as it stands, has to be given effect whether the court likes the result or not. In Martin Burn Ltd. Vrs. Corporation of Calcutta, AIR 1966 SC 529, this Court held that a court has no power to ignore that provision to relieve what it considers a distress resulting from its operation."

8.2. In the case of *Rahul S Shah Vrs. Jitendra Kumar Gandhi, (2021) 4 SCR 279*, following is the observation of the Hon'ble Supreme Court in connection with delay in the execution proceedings and abuse of process of execution court:

"23. This court has repeatedly observed that remedies provided for preventing injustice are actually being misused to cause injustice, by preventing a timely implementation of orders and execution of decrees. This was discussed even in the year 1872 by the Privy Counsel in The General Manager of the Raja Durbhunga Vrs. Maharaja Coomar Ramaput Sing, (1871-72) 14 Moore's I.A. 605 which observed that the actual difficulties of a litigant in India begin when he has obtained a decree. This Court made a similar observation in Shub Karan Bubna @ Shub Karan Prasad Bubna Vrs. Sita Saran Bubna, (2009) 9 SCC 689, wherein it recommended that the Law Commission and the Parliament should bestow their attention to provisions that enable frustrating successful execution. The Court opined that the Law Commission or the Parliament must give effect to appropriate recommendations to ensure such amendments in the Code of Civil Procedure, 1908, governing the adjudication of a suit, so as to ensure that the process of adjudication of a suit be continuous from the stage of initiation to the stage of securing relief after execution proceedings. The execution proceedings which are supposed to be handmaid of justice and sub-serve the cause of justice are, in effect, becoming tools which are being easily misused to obstruct justice.

24. In respect of execution of a decree, Section 47 of CPC contemplates adjudication of limited nature of issues relating to execution, i.e., discharge or satisfaction of the decree and is aligned with the consequential provisions of Order XXI. Section 47 is intended to prevent multiplicity of suits. It simply lays down the procedure and the form whereby the court reaches a decision. For the applicability of the section, two essential requisites have to be kept in mind.

Firstly, the question must be the one arising between the parties and secondly, the dispute relates to the execution, discharge or satisfaction of the decree.

Thus, the objective of Section 47 is to prevent unwanted litigation and dispose of all objections as expeditiously as possible.

25. These provisions contemplate that for execution of decrees, Executing Court must not go beyond the decree. However, there is steady rise of proceedings akin to a re-trial at the time of execution causing failure of realisation of fruits of decree and relief which the party seeks from the courts despite there being a decree in their favour. Experience has shown that various objections are filed before the Executing Court and the decree holder is deprived of the fruits of the litigation and the judgment debtor, in abuse of process of law, is allowed to benefit from the subject matter which he is otherwise not entitled to.

26. The general practice prevailing in the subordinate courts is that invariably in all execution applications, the Courts first issue show cause notice asking the judgment debtor as to why the decree should not be executed as is given under Order XXI Rule 22 for certain class of cases. However, this is often misconstrued as the beginning of a new trial. For example, the judgement debtor sometimes misuses the provisions of Order XXI Rule 2 and Order XXI Rule 11 to set up an oral plea, which invariably leaves no option with the Court but to record oral evidence which may be frivolous. This drags the execution proceedings indefinitely.

27. This is anti-thesis to the scheme of Civil Procedure Code, which stipulates that in civil suit, all questions and issues that may arise, must be decided in one and the same trial. Order I and Order II which relate to Parties to Suits and Frame of Suits with the object of avoiding multiplicity of proceedings, provides for joinder of parties and joinder of cause of action so that common questions of law and facts could be decided at one go.

*****

40. In Ghan Shyam Das Gupta Vrs. Anant Kumar Sinha, AIR 1991 SC 2251, this Court had observed that the provisions of the Code as regards execution are of superior judicial quality than what is generally available under the other statutes and the Judge, being entrusted exclusively with administration of justice, is expected to do better. With pragmatic approach and judicial interpretations, the Court must not allow the judgment debtor or any person instigated or raising frivolous claim to delay the execution of the decree. For example, in suits relating to money claim, the Court, may on the application of the plaintiff or on its own motion using the inherent powers under Section 151, under the circumstances, direct the defendant to provide security before further progress of the suit. The consequences of non-compliance of any of these directions may be found in Order XVII Rule 3.

41. Having regard to the above background, wherein there is urgent need to reduce delays in the execution proceedings we deem it appropriate to issue few directions to do complete justice. These directions are in exercise of our jurisdiction under Article 142 read with Article 141 and Article 144 of the Constitution of India in larger public interest to subserve the process of justice so as to bring to an end the unnecessary ordeal of litigation faced by parties awaiting fruits of decree and in larger perspective affecting the faith of the litigants in the process of law.

42. All Courts dealing with suits and execution proceedings shall mandatorily follow the below-mentioned directions:

1. In suits relating to delivery of possession, the court must examine the parties to the suit under Order X in relation to third

2. party interest and further exercise the power under Order XI Rule 14 asking parties to disclose and produce documents, upon oath, which are in possession of the parties including declaration pertaining to third party interest in such properties.

3. In appropriate cases, where the possession is not in dispute and not a question of fact for adjudication before the Court, the Court may appoint Commissioner to assess the accurate description and status of the property.

4. After examination of parties under Order X or production of documents under Order XI or receipt of commission report, the Court must add all necessary or proper parties to the suit, so as to avoid multiplicity of proceedings and also make such joinder of cause of action in the same suit.

5. Under Order XL Rule 1 of CPC, a Court Receiver can be appointed to monitor the status of the property in question as custodia legis for proper adjudication of the matter.

6. The Court must, before passing the decree, pertaining to delivery of possession of a property ensure that the decree is unambiguous so as to not only contain clear description of the property but also having regard to the status of the property.

7. In a money suit, the Court must invariably resort to Order XXI Rule 11, ensuring immediate execution of decree for payment of money on oral application.

8. In a suit for payment of money, before settlement of issues, the defendant may be required to disclose his assets on oath, to the extent that he is being made liable in a suit. The Court may further, at any stage, in appropriate cases during the pendency of suit, using powers under Section 151 CPC, demand security to ensure satisfaction of any decree.

9. The Court exercising jurisdiction under Section 47 or under Order XXI of CPC, must not issue notice on an application of third-party claiming rights in a mechanical manner. Further, the Court should refrain from entertaining any such application(s) that has already been considered by the Court while adjudicating the suit or which raises any such issue which otherwise could have been raised and determined during adjudication of suit if due diligence was exercised by the applicant.

10. The Court should allow taking of evidence during the execution proceedings only in exceptional and rare cases where the question of fact could not be decided by resorting to any other expeditious method like appointment of Commissioner or calling for electronic materials including photographs or video with affidavits.

11. The Court must in appropriate cases where it finds the objection or resistance or claim to be frivolous or mala fide, resort to Sub-rule (2) of Rule 98 of Order XXI as well as grant compensatory costs in accordance with Section 35A.

12. Under section 60 of CPC the term "…in name of the judgment-debtor or by another person in trust for him or on his behalf" should be read liberally to incorporate any other person from whom he may have the ability to derive share, profit or property.

13. The Executing Court must dispose of the Execution Proceedings within six months from the date of filing, which may be extended only by recording reasons in writing for such delay.

14. The Executing Court may on satisfaction of the fact that it is not possible to execute the decree without police assistance, direct the concerned Police Station to provide police assistance to such officials who are working towards execution of the decree. Further, in case an offence against the public servant while discharging his duties is brought to the knowledge of the Court, the same must be dealt stringently in accordance with law.

15. The Judicial Academies must prepare manuals and ensure continuous training through appropriate mediums to the Court personnel/staff executing the warrants, carrying out attachment and sale and any other official duties for executing orders issued by the Executing Courts."

8.3. Bearing in mind such effect and impact of execution of decree, from a plain reading of Section 47 of CPC, it is amply clear that at the stage of execution, the powers of the executing court are very limited. Section 47 of the CPC contemplates that all questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction

of decree, have got to be determined by the court executing the decree and not by a separate suit. The scope of Section 47 is that it empowers the court executing the decree to determine all questions arising between the parties to the suit or their representatives relating to the execution, discharge or satisfaction of the decree and not the questions which ought to have been raised during trial, at the time of filing written statement, framing of issues or arguments. Section 47 of the CPC has been enacted for the beneficial object of checking needless litigation and eliminating unnecessary delay. The Supreme Court in *Merla Ramanna Vrs. Nallaparaju, AIR 1956 SC 87 = (1955) 2 SCR 938* has observed that for Section 47 to apply the following conditions must be satisfied:

> (i) The questions must be one arising between the parties to the suit in which the decree is passed, or their representatives; and
>
> (ii) It must relate to the execution, discharge or satisfaction of the decree.
> Thus, the condition for the applicability of Section 47 is that the question must relate to execution, discharge or satisfaction of the decree. Any question, which hinders or in any manner affects execution of the decree, are covered by Section 47.

8.4. In *State of Punjab Vrs. Mohinder Singh Randhawa, AIR 1992 SC 473 = (1993) Supp.(1) SCC 49*, it has been laid down that in the absence of any challenge to the appellate decree in further proceedings, in execution this is not open to challenge.

8.5. There is no quarrel with the general proposition of law and indeed, it is unexceptionable that a court executing a decree cannot go behind the decree; it must take the decree according to its tenor; has no jurisdiction to widen its scope and is required to execute the decree as made. [*Century Textiles Industries Ltd. Vrs. Deepak Jain, (2009) 5 SCC 634 = (2009) 4 SCR 750*].

8.6. Said principle has been reiterated in *Kanwar Singh Saini Vrs. High Court, Delhi, (2011) 15 Addl. SCR 972 = (2012) 4 SCC 307* and it has been held that it is a settled legal proposition that the executing court does not have the power to go behind the decree. Thus, in absence of any challenge to the decree, no objection can be raised in execution. When a statute gives a right and provides a forum for adjudication of rights, remedy has to be sought only under the provisions of that Act. When an Act creates a right or obligation and enforces the performance thereof in a specified manner, that performance cannot be enforced in any other manner. Thus for enforcement of a right/obligation under a statute, the only remedy available to the person aggrieved is to get adjudication of rights under the said Act.

9. Such being the position, it is now examined whether the learned Executing Court has considered the petition under Section 47 of the CPC in true perspective. Said Section 47 of the CPC stands thus:

> *"47. Questions to be determined by the Court executing decree.—*
>
> *(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the*

decree, shall be determined by the Court executing the decree and not by a separate suit.

(2) [* *]*
[Sub-section (2) has been omitted by Act 104 of 1976, with effect from 01.02.1977]

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court.

Explanation I.—

For the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed are parties to the suit.

Explanation II.—

(a) For the purposes of this section, a purchaser of property at a sale in execution of a decree shall be deemed to be a party to the suit in which the decree is passed; and

(b) all questions relating to the delivery of possession of such property to such purchaser or his representative shall be deemed to be questions relating to the execution, discharge or satisfaction of the decree within the meaning of this section."

9.1. In the present case, the validity of the *ex parte* decree being questioned on the ground of fraud, the petitioner is not remediless to raise such issue before the competent Court. Unless the decree is set aside the Executing Court cannot go beyond the decree.

9.2. In *Vasudev Dhanjibhai Modi Vrs. Rajabhai Abdul Rehman, (1971) 1 SCR 66*, a decree for possession was passed by the Court of Small Causes which was confirmed in appeal as well as in revision. In execution proceedings, it was contented that the Small Causes Court had no jurisdiction to pass the decree and, hence, it was a nullity. Rejecting the contention, the Court stated:

"The High Court was of the view that where there is lack of inherent jurisdiction in the Court which passed the decree, the executing Court must refuse to execute it on the ground that the decree is a nullity. But, in our judgment, for the purpose of determining whether the Court which passed the decree had jurisdiction to try the suit, it is necessary to determine facts on the decision of which the question depends, and the objection does not appear on the face of the record, the executing Court cannot enter upon and enquiry into those facts."

9.3. Therefore, taking cue from the above judgment, it can safely be said that the plea of fraud being played or otherwise, as contended by the petitioner, cannot be decided in an application under Section 47 of the CPC. In the instant case, it seems there was no material available with the petitioner to prove that the decree was obtained by the opposite party by practising fraud in the original suit. Since no step has been taken by the petitioner to set aside the *ex parte* decree, there was no occasion for the learned Civil Judge (Senior Division), Bhubaneswar to go beyond the decree and the Executing Court has rightly dismissed the Interlocutory Application filed under Section 47 of the CPC on contest as against the opposite party.

9.4. The petitioner admittedly did not challenge the judgment and decree despite having knowledge about the same and wished to stall the execution proceeding. The Civil Judge (Senior Division), Bhubaneswar cannot undo the decree passed by the 3rd Jt. Civil Judge, Senior Division, Nagpur at the stage of execution.

10. Having found no infirmity in the decision of the learned Civil Judge (Senior Division), Bhubaneswar in rejecting the Interlocutory Application, i.e., 01 of 2018 (arising out of Execution Case No.40 of 2016 connected to Special Civil Suit No.76 of 2014, this Court is not inclined to condone the inordinate delay of 346 days (as pointed out by the Registry of this Court) in preferring the civil revision petition.

10.1. In order to appreciate the reason for condonation of delay the contents petition being I.A. No.53 of 2023 require to be taken note of, which are extracted hereunder:

> *"1. That, petitioner filed this civil revision in this Hon'ble Court and there is a delay of 446 days in filing the Civil Revision due to document misplaced by the previous advocate hired by the present petitioner. The present civil revision is filed on delay after recollecting certified copy of those documents.*
>
> *2. That the petitioner has a strong prima facie case and has every chance of success in this case. The averments made in the main application be read and treated as part and parcel of this petition for clarity and brevity.*
>
> *3. That the delay in filing the Civil Revision is neither intentional wilful but due to the good and sufficient reason shown herein above. Interest of justice demand that the present petition may be allowed and delay in filing civil revision may be condoned so that the matter can be adjudicated upon its merit.*
>
> *4. That unless delay of 446 days is condoned to file civil revision, the petitioner will be highly prejudiced."*

10.2. In absence of material particulars with respect to time consumed for obtaining documents as contended by the petitioner, the petition does not reveal any good ground to consider condonation of inordinate delay in approaching this Court. No sufficient and reasonable cause being shown in the petition for condonation of delay filed under Section 5 of the Limitation Act, 1963, I.A. No.53 of 2023, is dismissed.

11. In the result, this Court is not persuaded to show any indulgence in the matter and interfere with the Order dated 10.08.2022 passed by the learned Civil Judge (Senior Division), Bhubaneswar in I.A. No.01 of 2018 (arising out of Execution Case No.40 of 2016 in connection with the Special Civil Suit No.76 of 2014). Accordingly, the Civil Revision Petition as well as the Interlocutory Application stands dismissed, but in the circumstances, there shall be no order as to costs.

—— o ——

2024 (II) ILR-CUT-1035

SANJAY KUMAR MISHRA, J.

W.P.(C) NO.17216 OF 2017

GOUTAM AGARWAL ……Petitioner

-V-

CHYTI MAHATO (DEAD)
MAHESWAR MAHATO & ORS. ……Opp.Parties

MOTOR ACCIDENT – Claim of compensation – Whether non-mentioning of relevant provision or mentioning of wrong provision of law in an application/petition can be a ground to reject the petition? – Held, No.

Case Laws Relied on and Referred to :-

1. AIR 2001 S.C. 43 : Hari Singh Mann Vs. Harbhajan Singh Bajwa.
2. AIR 2005 SC 242 : National Institute of Mental Health & Neuro Sciences Vs. C. Parameshwara.
3. AIR 2008 SC 1190 : State of U.P. Vs. V. Roshan Singh (D) by Lrs. & others.
4. 2011 (I) OLR (SC) 923 : Parimal Vs. Veena @ Bharti.
5. 2007 (Supp.I) OLR 1037 : Lokanath Sahoo Vs. Thuri Bewa.

For Petitioner : Mr S. Udgata.

For Opp.Parties : Mr. P.K. Nayak & None appeared for O.P.No.2.

JUDGMENT Date of Hearing : 18.04.2024: Date of Judgment : 24.06.2024

SANJAY KUMAR MISHRA, J.

This Writ Petition has been preferred challenging the Order dated 28.11.2016 passed by the 2nd Additional District & Sessions Judge-cum-5th M.A.C.T., Rourkela, in C.M.A. No.02 of 2015, arising out of M.A.C. Case No.305 of 2013, vide which the petition filed by the Opposite Party No.2 under Order 9 Rule 13 of C.P.C. was allowed and the *ex-parte* judgment and award dated 16.05.2015 passed in M.A.C. Case No.305 of 2013 was set aside.

2. The factual matrix of the case, as pleaded in the Writ Petition, is that the Opposite Party No.1 (Claimant before the Claims Tribunal) filed M.A.C. Case No.305 of 2013 before the Additional District Judge-cum-3rd M.A.C.T., Rourkela, claiming compensation for death of her husband in the hospital on 18.02.2013 due to vehicular accident caused by one Bolero bearing Registration No.OR-14R-0166 on 19.01.2013, arraying the present Opposite Party No.2 as the owner of the offending vehicle as the sole Opposite Party.

3. However, the Opposite Party No.2 did not appear in the said case despite service of notice on him. Ultimately, the Claims Tribunal, by judgment and order dated 16.05.2015, directed the Opposite Party No.2 to pay an amount of 1,75,000/- with interest @ 6% per annum from the date of application till the payment is made and it was ordered to make the payment within a period of two months from the date of the said order. Thereafter, the Opposite Party No. 2 filed an application under

Order 9 Rule 13 of C.P.C., which was registered as C.M.A. No.02 of 2015, praying therein to set aside the judgment and order dated 16.05.2015 passed in M.A.C. Case No.305 of 2013 on the ground that he is not the owner of the offending vehicle and the impugned order has been passed against a wrong person. On being so moved, the Claims Tribunal, by order dated 28.11.2016 in C.M.A. No.02 of 2015, had been pleased to set aside the judgment and award dated 16.05.2015 passed in M.A.C. Case No.305 of 2013. Thereafter, the Claims Tribunal, by order dated 20.03.2017, ordered for substituting the Petitioner in place of the Opposite Party No.2 as the sole Opposite Party, followed by order dated 12.04.2017, vide which it was ordered to issue notice to the Petitioner. On receiving notice to Show Cause in M.A.C. Case No.305 of 2013 from the Claims Tribunal, the Petitioner (sole Opposite Party before the Claims Tribunal) has preferred the present Writ Petition challenging the order dated 28.11.2016 passed in C.M.A. No.02 of 2015, arising out of M.A.C. Case No.305 of 2013, with a prayer to quash the said order and further proceeding in M.A.C. No.305 of 2013, now pending in the Court of 2nd Additional District Judge-cum-5th M.A.C.T., Rourkela.

4. The said order passed in C.M.A. No.02 of 2015 has been challenged on the ground that the Claims Tribunal failed to appreciate that it became functus officio after delivery of judgment and order dated 16.05.2015 in M.A.C. Case No.305 of 2013 and the Tribunal committed grave illegality with material irregularity in allowing the said application and setting aside the judgment and decree on the grounds other than those mentioned in Order 9 Rule 13 of C.P.C.

5. It is worthwhile to mention here that being noticed, the Opposite Party No.1, who is the claimant before the Claims Tribunal, appeared through her Counsel. However, as the Opposite Party No.1 died during pendency of the Writ Petition, on being substituted and noticed, the legal heirs of Opposite Party No.1 (Claimant before the Court below) have appeared through their Counsel. However, the Opposite Party No.2, who was the original Opposite Party in M.A.C. Case No.305 of 2013, despite valid service of notice, did not appear in the present case.

6. Mr. Udgata, learned Counsel for the Petitioner, drawing attention of this Court to the provisions under Order 9, Rule 13 of C.P.C., submitted that the scope under the said provision is limited for setting aside the ex parte decree against the Defendant. Under the said provision, the Defendant can apply to the Court, by which the decree was passed, for an order to set it aside; if he satisfies the Court that the summon was not duly served, or that he was prevented by sufficient cause from appearing when the suit was called on for hearing. Only then the Court shall make an order setting aside the decree as against the Defendant upon such terms as to costs, payment into Court or otherwise as it thinks fit. Apart from these two grounds, no other ground can be agitated under the said provision for setting aside an ex parte decree.

7. Mr. Udgata further submitted that though the Claims Tribunal, vide impugned order dated 28.11.2016 passed in C.M.A. No.02 of 2015, observed that the plea of the Petitioner to set aside the said ex parte judgment passed in M.A.C.

Case No.305 of 2013 is not coming under any of the two grounds prescribed under Order 9 Rule 13 of C.P.C., but allegedly exercising its inherent jurisdiction under Section 151 C.P.C. and on the plea of doing complete justice between the parties, irrespective of procedural bottle neck, ordered to set aside the judgment and award dated 16.05.2015 passed in C.M.A. No.305 of 2013, subject to payment of cost of Rs.3,000/- payable to the present Opposite Party No.1.

8. To buttress his submission, learned Counsel for the Petitioner relied on the judgments reported in AIR 2001 S.C. 43 (**Hari Singh Mann Vs. Harbhajan Singh Bajwa**), AIR 2005 SC 242 (**National Institute of Mental Health & Neuro Sciences Vs. C. Parameshwara**), AIR 2008 SC 1190 (**State of U.P. Vs. V. Roshan Singh (D) by Lrs. & others**),2011 (I) OLR (SC) 923 (**Parimal Vs. Veena @ Bharti**) and 2007 (Supp.I) OLR 1037 (**Lokanath Sahoo Vs. Thuri Bewa**)

9. Per contra, Mr. Nayak, learned Counsel for the substituted legal heirs of the deceased-Opposite Party No.1, drawing attention of this Court to the impugned order dated 28.11.2016 passed in C.M.A. No.02 of 2015, submitted that there is no illegality or infirmity in the impugned order passed by the Claims Tribunal in C.M.A. No.02 of 2015, vide which the *ex parte* judgment dated 16.0.5.2015 passed by the said Court in M.A.C. Case No.305 of 2013 was set aside and subsequently, the present Petitioner, being the real owner of the offending vehicle, was substituted in place of the present Opposite Party No.2, who is the brother of the present Petitioner.

10. Mr. Nayak further submitted that though the Petitioner is the own brother of the Opposite Party No.2, intentionally the same has not been disclosed in the Writ Petition. The Claims Tribunal, after recording evidence in C.M.A. No.02 of 2015, has rightly passed the impugned order dated 28.11.2016 thereby setting aside the ex parte judgment dated 16.05.2015 passed in M.A.C. Case No.305 of 2013. Mr. Nayak submitted that the Writ Petition is a collusive one to harass and humiliate so also debar the claimant to get the compensation, as the offending vehicle had no valid insurance when the accident occurred. Mr. Nayak further submitted there being no infirmity in the impugned order passed in C.M.A. No.02 of 2015, arising out of M.A.C. Case No.305 of 2013, the Writ Petition deserves to be dismissed. Mr. Nayak submitted that since at the instance of the present Petitioner further proceeding in M.A.C. Case No.305 of 2013 has been stayed since 01.09.2017, necessary direction be given to the Claims Tribunal to dispose of the M.A.C. Case No.305 of 2013 in a time bound manner.

11. Mr. Nayak, learned Counsel for the legal heirs of the deceased-Opposite Party No.1, submitted that even if the Claims Tribunal came to a conclusion that the prayer made in the C.M.A. No.02 of 2015 for setting aside the ex parte judgment dated 16.05.2015 passed in M.A.C. Case No.305 of 2013 does not fall under the provision under Order 9 Rule 13 of C.P.C., but has rightly exercised its inherent jurisdiction under Section 151 of C.P.C. for imparting complete justice between the parties after taking into consideration the evidence laid in C.M.A. No.02 of 2015.

12. Since a stand has been taken in the Writ Petition as to non-applicability of Order 9 Rule 13 C.P.C. so also in view of the observation made by the Claims Tribunal vide the impugned order that the said provision is not applicable for setting aside the ex parte award and the Opposite Party No.2, who is the brother of the Petitioner, avoided to appear in the present case, this Court ordered to call for the L.C.R. From the order sheet in M.A.C. Case No.305 of 2013, it is ascertained that the claim application was presented before the Court of 1st Additional District Judge-cum-3rd M.A.C.T., Rourkela, on 17.12.2013. The Claim Application was admitted on 03.01.2014 and it was ordered for issuance of notice to the sole Opposite Party. Thereafter, the matter got adjourned from time to time awaiting service return from the Opposite Party. When the matter stood thus, vide order dated 08.09.2014, the case record was ordered to be transferred to the Court of 2nd Additional District Judge-cum-5th M.A.C.T., Rourkela, which received the record on 16.09.2014. Thereafter the matter got adjourned to 25.09.2014 and then to 23.10.2014.

13. It is further evident from para-7 of the affidavit evidence filed by the present Opposite Party No.2 as P.W.1 in C.M.A. No.02 of 2015 that after receiving copy of the judgment/order in M.A.C. No.305 of 2013, he could know about the filing of M.A.C. No.305 of 2013 so also judgment and order passed in the said case and prior to that, he had no occasion to know about the filing/pendency of M.A.C. No.305 of 2013, as no summon has been received by him. Through him the certified copy of the Registration Certificate in respect of the offending vehicle bearing No.OR-14R-0166 was marked as Ext.1 without any objection. The Claims Tribunal passed the impugned order with an observation that the plea of the present Opposite Party No.2 (Petitioner in C.M.A. No.02 of 2015) is not coming under any of the two grounds prescribed under Order 9 Rule 13 of C.P.C. However, exercising its inherent power under Section 151 of C.P.C., the Claims Tribunal ordered for setting aside the ex parte judgment and award dated 16.05.2015 passed against the present Opposite Party No.2, who was the then sole Opposite Party, as the offending vehicle was not insured.

14. In view of the submissions made by the learned Counsel for the parties and the facts on record as detailed above, it would be apt to reproduce below the relevant paragraphs from the impugned order dated 28.11.2016 passed in C.M.A. No.02 of 2015.

> *"For proper appreciation of submission of learned counsels, I perused the pleading in MAC 30513. In that case a specific plea was taken by the Claimant/OP that the accident has occurred due to rash and negligent driving of a Bolero vehicle bearing Regd. N. OR-14-R-0166 and the present petitioner is the registered owner of the said vehicle. In that case, notice was properly served on the present petitioner but he did not turn up to contest the case and after taking evidence, an exparte order was passed by this tribunal in shape of judgment dated 16.5.15, directing the present petitioner who was OP in that case to pay compensation of Rs.1.75,000/-, on the finding that he is the registered owner of the offending vehicle.* ***In that case, the RC book of the offending vehicle was never produced. Basing upon the police paper in GR case 157/13 of the Court of SDJM,***

Panposh such a finding has been given by this tribunal that the present petitioner who is the OP in that case is the owner of the offending vehicle and as such he is liable to pay compensation. So the compensation/liability has been imposed upon the present petitioner on the allegation/finding that he is the registered owner of the offending vehicle. But in the evidence of PW1 as well as through Ext.1, it is now very certain that he was/is not the owner of the offending vehicle. According to the MAC case filed before this tribunal, the accident occurred on 19.1.13 at about 7.30 PM. According the Ext.1 the Scorpio MDI vehicle bearing No.OR-14-R-0166 has been transferred in favour of Goutam Agarwal, son of Pawan Kumar Agarwal, of Sector-B, Main Road, Bandamunda, with effect from 10.3.11. So as on the date of accident the present petitioner was not the owner of the vehicle.

Order IX Rule 13 of the CPC provides that the exparte judgment/order can only be set aside if a party satisfied the Court/Tribunal that summons has not been served on him properly or that he has been prevented by some reason which was beyond under his control to attend the Court/Tribunal. In fact the plea and the case of petitioner is not coming under any of the two grounds enacted under Order IX Rule 13 of the CPC. ***However, can the Court/Tribunal refused a reasonable relief, if it does not comes within the per-view of a particular section of law. The Legislature in their wisdom have enacted 151 of the CPC conferring inherent jurisdiction in Court to do complete just between the parties irrespective of any procedure bottle neck. The procedure is the handmade of justice. It is only meant to facilitate trial of a case. In the present case liability has been imposed on the petitioner perhaps basing upon a wrong notion that he is the registered owner of the offending vehicle. If his grievance is not addressed properly, he is going to suffer most and that too being an innocent. The procedural law cannot create an obstacle in imparting complete justice between the parties***. *In exercising inherent jurisdiction of the Court U/S 151 of the CPC, in my considered opinion this is a case where relief must be granted in favour of the petitioner so as to avoid him to be a causality of blind justice. Hence order.*

ORDER

The CMA is allowed on contest against the OP subject to payment of cost of Rs 3,000/-. The judgment and award dated 16.5.15 is hereby set aside. Put up on 5.12.16 for payment of cost of Rs. 3,000/- by the petitioner to the OP." (Emphasis supplied)

15. In the relevant portion of the order, as extracted above, though the Claims Tribunal observed that notice was properly served on the present Opposite Party No.2 (Petitioner in C.M.A. No.02 of 2015), but the said order does not reflect as to when the notice was served on the present Opposite Party No.2.

16. On perusal of the L.C.R. it is ascertained that the Claims Tribunal vide order dated 03.01.2014 ordered to issue notice to the Opposite Party fixing the date to 20th March, 2014 for his appearance awaiting S.R. from the O.P. and thereafter the matter got adjourned to 19th June, 2014, 4th July, 2014, 26th July, 2014 and again to 22nd August, 2014. On 8th September, 2014, the matter was transferred to the Court of 2nd Additional District Judge-cum-5th M.A.C.T., Rourkela, and the case record was received by the said Court on 16.09.2014. After the case record was transferred, the matter got adjourned to 25.09.2014 and then to 23.10.2014 and again to 21.11.2014, on which date it has been reflected in the order sheet that A.D. card

against Opposite Party has been received on the very same day i.e. 21st November, 2014, to which the matter stood adjourned from 23.10.2014. But there is no such copy of notice or postal receipt or A.D. Card available in the L.C.R. to substantiate the plea that notice was duly sent and served on the present Opposite Party No.2. Further, the remark column of the order sheet of the L.C.R. under the heading "Office Note as to action taken on order (if any) and date" is also blank and does not indicate that pursuant to order dated 03.01.2014 notice was issued to the Opposite Party No.2. Apart from the same, it is further revealed from the order sheet of case record in M.A.C. Case No.305 of 2013 that number of corrections have been made in orders dated 21.11.2014, 08.01.2015, 04.02.2015 and 19.02.2015 as to the purpose of posting of the case without bearing initials of the Presiding Officer, Claims Tribunal. That apart, there is a clear cut manipulation in the order dated 21.11.2014. The so called A.D. Card, which was allegedly received on 21.11.2014 from the Opposite Party No.2, is also missing from the L.C.R. Though the Claims Tribunal, vide the impugned order, has observed that application under Order 9 Rule 13 of C.P.C. is not applicable to the case of the present Opposite Party No.2 as notice was duly served on him, the Claims Tribunal has not indicated in the impugned order as to when the notice was served and what was the basis to observe so in the order sheet so also in the impugned order.

17. Apart from that, during hearing, learned Counsel for the legal heirs of deceased-Opposite Party No.1, who have already been substituted vide order dated 23.11.2023 passed in I.A. No.18407 of 2023, submitted that the present Writ Petitioner-Gautam Agarwal and the Opposite Party No.2 namely, Deepak Kumar Agarwal, S/o Pawan Kumar Agarwal, resident of Main Road, Sector-B, Bandamunda, Dist: Sundargarh, are brothers and since the Zimanama was signed by the present Opposite Party No.2 and the police paper indicates that the offending vehicle so also the R.C. Book of the Scorpio bearing Regd. No.OR-14R-0166 was in Zima by Deepak Kumar Agarwal, who is the brother of the present Petitioner, the present Opposite Party No.1 (dead) was under a bonafide impression that Deepak Kumar Agarwal, the present Opposite Party No.2, is the owner of the offending vehicle. Accordingly, he was arrayed as the sole Opposite Party in the Claim Case before the Claims Tribunal, as the said offending vehicle had no valid insurance during the said period.

18. From the discussions made in the foregoing paragraphs, this Court is of the view that the Opposite Party No.2 rightly filed an application under Order 9 Rule 13 of C.P.C. for setting aside the ex parte judgment & order and the said provision is applicable to the facts and circumstances of the present case because of the reasons detailed above. In view of the admitted facts on record that the present Petitioner as well as Opposite Party No.2 are brothers and the Petitioner was the rightful owner of the offending vehicle during the relevant period, as was being proved through the Opposite Party No.2 in C.M.A. No.02 of 2015 on 08.11.2016, which was marked as Ext.1, the Claims Tribunal was justified to pass the impugned order, followed by

subsequent order dated 20.03.2017, vide which the name of the present Petitioner was substituted in place of Opposite Party No.2 in M.A.C. No.305 of 2013 as the sole Opposite Party and thereafter the Claims Tribunal, vide the order dated 12.04.2014, ordered for issuance of notice to the Petitioner, he being the legal and rightful owner of the offending vehicle, which has not been disputed by the Petitioner. Rather, because of the conduct of the present Petitioner the wife of late Nabin Chandra Mahato, who died in a road accident, was debarred to get the compensation, who also died during pendency of the present Writ Petition and has been substituted by her legal heirs.

19. Law is well settled that non-mentioning of relevant provision or mentioning of wrong provision of law in an application/petition cannot be a ground to reject the petition. It is the duty of the Court, which dispenses justice, to apply the correct provisions of law so as to deliver the relief to the party, who is entitled to it. Admittedly, it is proved by the present Opposite Party No.2 before the Claims Tribunal in C.M.A. No.02 of 2015 that he was not the registered owner of the offending vehicle and rather the Petitioner is the owner of the said vehicle. The R.C. Book of the offending vehicle was exhibited in C.M.A. No.02 of 2015 as Ext.1, wherefrom it is well revealed that, though the said offending vehicle was originally registered in the name of one Kashinath Shah, S/o Late Gopiram Shah, subsequently, the same has been transferred to the name of Gautam Agarwal, S/o Pawan Agarwal, the present Petitioner. Provisions under the Motor Vehicles Act to award compensation in favour of the Claimant being a benevolent legislation, the Claims Tribunal has rightly passed the impugned order in C.M.A. No.02 of 2015, thereby setting aside the judgment and award dated 16.05.2015 passed in M.A.C. Case No.305 of 2013. Thereafter, the Claims Tribunal was justified to substitute the present Petitioner, who is the brother of Opposite Party No.2 and real owner of the offending vehicle when the accident occurred, in order to give complete justice to the parties. Hence, this Court is of the view that the Writ Petition deserves to be dismissed.

20. In view of the above, the Writ Petition stands dismissed. No order as to costs.

21. As the M.A.C. Case No.305 of 2013 is pending since 2013, in order to avoid further delay, the Petitioner, who is the sole Opposite Party in the said case, is directed to appear before the Court below on 1st July, 2024. Since the legal heirs of Late Chyti Mahto have already rendered appearance in this case, on being substituted at the instance of the present Petitioner, they are also directed to remain present on the said date in person or through their Counsel before the Claims Tribunal and may take steps for substitution. On filing such application for substitution, the Claims Tribunal shall do well to allow the said application on the very same day and shall proceed further in accordance with law and conclude the proceeding in M.A.C. Case No.305 of 2013 at the earliest, preferably within a period of three months from the said date.

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2024 (II) ILR-CUT-1042

SANJAY KUMAR MISHRA, J.

W.P.(C) NO. 38193 OF 2023

M/s. S.A.PLYWOOD INDUSTRY (P) LTD., KOLKATA. ……Petitioner

-V-

M/s. TIRUPATI ENTERPRISES, CUTTACK. ……Opp.Party

CONSTITUTION OF INDIA, 1950 – Article 226 – The writ petition has been filed challenging the order passed by the learned Arbitrator in Arbitration proceeding, where petition for appointment of hand writing expert stood rejected – Whether writ petition is maintainable against an interlocutory order? – Held, No – If the petitioner feels aggrieved by such an order, he has to wait till an award is passed by learned Arbitrator in terms of Section 31(1) of the Act, 1996.

Case Laws Relied on and Referred to :-

1. (2005) 8 SCC 618 : S.B.P & Co. Vs. Patel Engineering Ltd. & Ors.
2. 1986 SCR (1) 731: Umaji Keshao Meshram Vs. Smt. Radhikabai.
3. 2022 (1) SCC 75 : Bhaven Construction Vs. Executive Engineer Sardar Sarovar Narmada Ltd. & Anr.
4. 2022 live law SC 297 : Manorama Naik vs. State of Orissa.
5. AIR 2006 SC 450 : S.B.P & Co. Vs. M/s. Patel Engineering Ltd. & Anr.
6. (2023) 7 SCC 1 : N.N Global Mercantile Pvt. Ltd, Vs. Indo Unique Flame Ltd.
7. (1986) 4 SCC 447 : Chandavarkar Sita Ratna Rao Vs. Ashalata S. Guram.

For Petitioner : Mr M. Kanungo, Sr. Advocate, Assisted by Mr. S.R. Mohanty.

For Opp.Party : Mr. S.K. Sarangi, Sr. Advocate, Assisted by S.K. Sarangi.

JUDGMENT Date of Hearing : 12.04.2024 : Date of Judgment : 24.06.2024

SANJAY KUMAR MISHRA, J.

This Writ Petition has been preferred challenging the Order No.32 dated 13.11.2023 passed by the learned Arbitrator in Arbitration Proceeding No. 23 of 2022, vide which the application filed by the Petitioner for appointment of handwriting expert stood rejected.

2. The brief background facts, which led to filing of the present Writ Petition is that on 22.09.2017, a consigning and forwarding agreement (CFA) was executed between the Petitioner Company and the Opposite Party agreeing therein that the Opposite Party should act as the Petitioner Company’s consigning, storing and forwarding Agent in the territory of Odisha in respect of the goods i.e. plywood manufactured by the Petitioner Company. By virtue of para-41 of the CFA, which contains the arbitration clause, Dr. Justice A.K Mishra was appointed as the sole Arbitrator to resolve the dispute between the parties in pursuance of order dated 08.04.2022 passed by Hon’ble the Chief Justice of this Court under section 11(6) of the Arbitration and Conciliation Act, 1996, shortly, ‘the Act, 1996’, in ARBP No.1 of 2022.

3. The Opposite Party filed the Statement of Claim along with the documents as detailed in order No.5 dated 14.07.2022. The Petitioner also filed his statement of defence and Counter Claim as recorded vide Order No.8 dated 02.09.2022 in Arbitration Proceeding No.23 of 2022. A Rejoinder Affidavit was also filed by the Opposite Party in the said Arbitration Proceeding. Thereafter, issues have been framed vide Order No.12 dated 04.11.2022. On 09.01.2023, both the Petitioner and the Opposite Party filed list of admission/denial of document statements along with list of witnesses. As both the parties were going to adduce oral evidence, it was agreed that the documents would be exhibited in course of examination of witnesses and it transpires from Order No.16 dated 02.02.2023 that both the parties agreed to file the affidavit evidence-in-chief of their witnesses after completion of cross examination of the witnesses of which affidavit evidence was filed. Accordingly, the Opposite Party's witnesses (C.W-1 to C.W-6) filed their affidavit evidence-in-chief and they were cross-examined and discharged.

4. It is the case of the Petitioner that on 02.09.2023, during the cross-examination of Mr. Atul Kumar Halan (C.W.7) before the learned Arbitral Tribunal, when the minutes of the meeting dated 20.02.2019, in which the price list of plywoods of different grade and thickness are reflected, shown to C.W. No.7 and he was asked as to whether it was signed by him, he denied the same stating that the signature does not belong to him.

5. It is further case of the Petitioner that the document containing the price of the goods prescribed by the Company from time to time is a most vital and relevant point for adjudication as one of the factors on which the issue, which has been framed in the Arbitral Proceeding, is that whether the Petitioner (Respondent in the Arbitration Proceeding) is entitled to get Rs.2,24,42,925.80 from the Opposite Party (Claimant in Arbitration Proceeding) towards the account calculation of CFA. Clause 16 (ii) of CFA contemplates that CFA shall be responsible for raising Invoices and Bills in the format and at prices and in the manner prescribed from time to time by the Company.

6. In the circumstances, the admissibility of the minutes of the meeting dated 20.02.2019 (the price list of plywood of different grade and thickness) in evidence depends upon the proof of handwriting and signature of Atul Kumar Halan (C.W.7) in the said document. Therefore, in order to meet the ends of justice and to bring out the truth, the Petitioner filed an application before the learned Arbitrator to appoint a handwriting expert directing to enquire into the question of the authenticity and genuineness of the signature and handwriting of Atul Kumar Halan (C.W. No.7) made in the minutes of the meeting dated 20.02.2019. But the learned Arbitrator rejected the said application vide Order No.32 dated 13.11.2023 in Arbitration Proceeding No.23 of 2022 thereby failed to exercise its power under section 26 of the Act, 1996. Being aggrieved by the same, the Petitioner has preferred the present Writ Petition.

7. The grounds on which the Petitioner challenges the rejection order passed by the learned Arbitrator are that, the impugned order of the learned Arbitrator rejecting the application for appointment of handwriting expert has caused a gross miscarriage of justice and the Petitioner has no other remedy than to invoke the supervisory jurisdiction of this Court to keep the subordinate court within its jurisdiction. The power of High Court under Article 227 is wider than the power conferred under Article 226 in the sense that the power of superintendence is not subject to those technicalities of procedure or traditional fetters which are to be found in certiorari jurisdiction. A further ground has also been agitated that the learned Arbitrator has failed to exercise its power under section 26 of the Act, 1996 and consequently, such action is also in gross violation of section 18 of the Act, 1996, which mandates equal and full opportunity to be given to a party to contest/present his case.

8. Mr. Kanungo, learned Senior Counsel, to buttress his contentions, relied on the judgments of the Supreme Court in **S.B.P & Co. Vs. Patel Engineering Ltd. & Others**, reported in (2005) 8 SCC 618, **Umaji Keshao Meshram Vs. Smt. Radhikabai**, reported in 1986 SCR (1) 731, **Bhaven Construction Vs. Executive Engineer Sardar Sarovar Narmada Ltd. & Anr**, reported in 2022 (1) SCC 75.

9. Mr. Kanungo further submitted that even though the apex Court in **S.B.P & Co.** (Supra), held that the writ petition is not maintainable to challenge in between orders passed by the learned Arbitrator under section 16 of the Act, 1996 and where the statute provides for remedy under sections 34 and 37 of the Act, 1996 the case in hand is definitely a sui-generis one as the Petitioner will be rendered remediless and has no other remedy than the present invocation before this Court. Further, looking into the present trend of limited scope of interference by the higher Courts under sections 34 & 37 of the Act, 1996 will grossly affect the Petitioner as his irrevocable right for a just and fair trial before the learned Arbitrator is affected for want of opportunity to present its case to its full satisfaction and accord. Hence, the decision in **S.B.P & Co.** (Supra) is distinguishable in the facts of the present case.

10. In **Umaji Keshao Meshram** (Supra), the apex Court held that the power may be exercised in cases occasioning grave injustice or failure of justice such as:

> a) When the court or tribunal has assumed a jurisdiction which it does not have,
>
> b) When the court has failed to exercise a jurisdiction which it does have, such failure occasioning a failure of justice, and
>
> c) When the jurisdiction though available is being exercised in a manner which tantamount to overstepping the limits of jurisdiction.

11. Relying on the said Judgment, Mr. Kanungo submitted that in the present case, as the Court has failed to exercise the power to appoint a handwriting expert under section 26 of Arbitration and Conciliation Act, 1996, such a failure has occasioned a failure of justice.

12. In **Bhaven Construction** (Supra), the apex Court held that it is prudent for a judge not to exercise discretion to allow judicial interference beyond the procedure established under the enactment. This power needs to be exercised in exceptional rarity, wherein one party is left remediless under the statute or a clear bad faith shown by one of the parties. This high standard set by the Court is in terms of the legislative intention to make the arbitration fair and efficient. For better appreciation, the para-18 of the said judgment is extracted below:

> *"**18.** In any case, the hierarchy in our legal framework, mandates that a legislative enactment cannot curtail a constitutional right. In Nivedita Sharma v. COAI [Nivedita Sharma v. COAI, (2011) 14 SCC 337 : (2012) 4 SCC (Civ) 947] , this Court referred to several judgments and held : (SCC p. 343, para 11)*
>
> *"11. We have considered the respective arguments/submissions. There cannot be any dispute that the power of the High Courts to issue directions, orders or writs including writs in the nature of habeas corpus, certiorari, mandamus, quo warranto and prohibition under Article 226 of the Constitution is a basic feature of the Constitution and cannot be curtailed by parliamentary legislation — L. Chandra Kumar v. Union of India [L. Chandra Kumar v. Union of India, (1997) 3 SCC 261 : 1997 SCC (L&S) 577] . However, it is one thing to say that in exercise of the power vested in it under Article 226 of the Constitution, the High Court can entertain a writ petition against any order passed by or action taken by the State and/or its agency/instrumentality or any public authority or order passed by a quasi-judicial body/authority, and it is an altogether different thing to say that each and every petition filed under Article 226 of the Constitution must be entertained by the High Court as a matter of course ignoring the fact that the aggrieved person has an effective alternative remedy. Rather, it is settled law that when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation."*
>
> *(Emphasis supplied)*
>
> ***It is therefore, prudent for a Judge to not exercise discretion to allow judicial interference beyond the procedure established under the enactment. This power needs to be exercised in exceptional rarity, wherein one party is left remediless under the statute or a clear "bad faith" shown by one of the parties. This high standard set by this Court is in terms of the legislative intention to make the arbitration fair and efficient." (Emphasis supplied)***

13. Relying on the said Judgment, Mr. Kanungo further argued, though it is evident that intervention under Article 226/227 by the constitutional Courts in Arbitration Proceedings cannot be invoked in a routine manner, it can only be invoked in exceptional circumstances where the party is remediless and bad faith shown by one of the parties. Hence, the case of the Petitioner clearly falls under the exceptional circumstances and the same deserves interference of this Court in the interest of fair administration of Justice and also under the Doctrine of Complete Justice.

14. It is pertinent to mention here that though the Writ Petition was presented on 20th November, 2023 and was listed on 23rd November, 2023 under the heading "Fresh Admission", the Opposite Party appeared suo motu through its counsel to oppose the prayer made in the Writ Petition so also application for interlocutory

order, vide which a prayer has been made to stay the further proceeding in Arbitration Proceeding No.23 of 2022 till final disposal of the Writ Petition. Instead of filing the Counter Affidavit, learned Senior Counsel for the Opposite Party opposed the maintainability of the Writ Petition and also file a Written Notes of Submission and citations to substantiate his submission.

15. Mr. Sarangi, learned Senior Counsel, supporting the impugned order, submitted that the Writ Petition is not maintainable. He further submitted that the original of the alleged document was not produced before the learned Tribunal and the application was also filed after cross-examining the witness on five deferent dates i.e. on 15.07.2023, 05.08.2023, 14.08.2023, 02.09.2023 and 04.11.2023, during which the C.W.7 was asked 208 questions. Out of which, the Petitioner relied on question Nos.169, 170 & 174 and the relevant question was asked on 02.09.2023. The Respondent had also categorically denied in its statement of defence and stated that the document has been fabricated/ manipulated.

16. A stand has been taken by the Opposite Party that there is a provision of Appeal under section 37 of the Act, 1996 and similarly, an application if not considered under section 16 of the Act, 1996 that is to be challenged only after passing of the award under section 34 of the Act. Further, section 5 also makes it clear that there will be least interference of the Courts in an arbitration proceeding. Since the Arbitrator is appointed by the parties, the Court should not interfere. The learned Arbitrator, while not entertaining the application, has rightly observed that the scope of reference under section 28 of the Act shall be enlarged if such application is entertained, which is not the subject matter of reference. It is the stand of the Opposite Party that, since the Opposite Party (Claimant in the Arbitral Proceeding) has denied the existence of the document from the very threshold, the filing of the petition at a latter stage is not entertainable, more so in an arbitration proceeding, which is time bound.

17. Mr. Sarangi, learned Senior Counsel further argued that, Article 5 of the Model Law emphasizes on arbitral Tribunal to being at the first instance to determine all issues relating to matters of law or construction, as well as issue of jurisdiction and scope of authority which exclusively determines the manner and form of judicial intervention in the arbitration process. Section 5 of the Act, 1996 is based on Article 5 of the Modern Law. However, section 5 also incorporates a non-obstante clause setting out the scope of judicial intervention. In comparison between the two provisions, Section 5 begins with an non-obstante clause unlike Article 5 and it also limits the scope of judicial intervention to the extent so provided in part-1. Section 5 has been enacted in the Act, 1996 to minimize the supervisory role of Courts in the arbitral process to bare minimum and only to the extent so provided under the part 1 of the Act, 1996. Thus, every provision of the Act, 1996 ought to be construed in view of section 5 to give true effect to the legislative intention of minimal judicial intervention.

18. To substantiate his submissions, Mr. Sarangi, learned Senior Counsel for the Opposite Party, relied on the judgments of the Supreme Court in **Manorama Naik vs. State of Orissa**, reported in 2022 live law SC 297, **S.B.P & Co. Vs. M/s. Patel Engineering Ltd. & another**, reported in AIR 2006 SC 450, **N.N Global Mercantile Pvt. Ltd, Vs. Indo Unique Flame Ltd**., reported in (2023) 7 SCC 1 and **Chandavarkar Sita Ratna Rao Vs. Ashalata S. Guram**, reported in (1986) 4 SCC 447.

19. In **Manorama Naik** (Supra) it was held that, there are several ways of proving the signature and documents under sections 45, 47 & 73 of the Indian Evidence Act. Besides, the learned Arbitrator has found that the mode of proof, as prescribed in Indian Evidence Act, will not be strictly followed in the matter of arbitration and provision of CPC are also not applicable. The order passed in **Manorama Naik** (Supra) is extracted below for ready reference:

> *"The impugned order dated 27.06.2016 has quashed the order taking cognizance passed by the Sub-Divisional Judicial Magistrate, Puri in G.R. Case No.854/2010 under Sections 467 and 471 of the Indian Penal Code, on the ground that the opinion of the handwriting expert on the disputed signatures was non-conclusive.*
>
> ***It is pointed out that the opinion of the handwriting expert was filed for the first time before the High Court and was not available with the Trial Court at the time when cognizance was taken. That apart, the signatures and handwriting of the person can also be proved under Sections 45, 47 and 73 of the Indian Evidence Act, 1872. Therefore, opinion of the handwriting expert is not the only way or mode of providing the signature and handwriting of a person.***
>
> *In view of the aforesaid position, the impugned order is set aside and Crl. M.C. No.37/2013 would be treated as dismissed. However, we make it clear that we have not commented on the merits of the matter. It will be open to the accused to raise all questions and contentions before the Trial Court in accordance with law."*
>
> ***(Emphasis Supplied)***

20. In **S.B.P & Co.** (Supra) it was held that, once the arbitration has commenced in the Arbitral Tribunal, parties have to wait until the award is pronounced. A right to appeal is also available to them under section 37 of the Act, 1996 at an earlier stage. Further, it was held that once the matter reaches the Arbitral Tribunal or the sole Arbitrator, the High Court would not interfere with the orders passed by the Arbitrator or Arbitral Tribunal and the parties could approach the Court only in terms of section 37 or section 34 of the Act. Paragraph Nos.45 & 46 of the said judgment are extracted below:

> *"45.* ***It is seen that some High Courts have proceeded on the basis that any order passed by an Arbitral Tribunal during arbitration, would be capable of being challenged under Article 226 or 227 of the Constitution. We see no warrant for such an approach****. Section 37 makes certain orders of the Arbitral Tribunal appealable.* ***Under Section 34, the aggrieved party has an avenue for ventilating its grievances against the award including any in-between orders that might have been passed by the Arbitral Tribunal acting under Section 16 of the Act****. The party aggrieved by any order of the Arbitral Tribunal, unless has a right of appeal under Section 37 of the Act, has to*

wait until the award is passed by the Tribunal. This appears to be the scheme of the Act. The Arbitral Tribunal is, after all, a creature of a contract between the parties, the arbitration agreement, even though, if the occasion arises, the Chief Justice may constitute it based on the contract between the parties. But that would not alter the status of the Arbitral Tribunal. It will still be a forum chosen by the parties by agreement. ***We, therefore, disapprove of the stand adopted by some of the High Courts that any order passed by the Arbitral Tribunal is capable of being corrected by the High Court under Article 226 or 227 of the Constitution. Such an intervention by the High Courts is not permissible****.*

46. The object of minimising judicial intervention while the matter is in the process of being arbitrated upon, will certainly be defeated if the High Court could be approached under Article 227 or under Article 226 of the Constitution against every order made by the Arbitral Tribunal. ***Therefore, it is necessary to indicate that once the arbitration has commenced in the Arbitral Tribunal, parties have to wait until the award is pronounced unless, of course, a right of appeal is available to them under Section 37 of the Act even at an earlier stage."*** ***(Emphasis supplied)***

21. In **N.N Global Mercantile Pvt. Ltd.** (Supra) the seven judge constitution bench of the apex Court vide paragraph No.76, reiterated the principle of minimum judicial interference. The said paragraph is extracted below for ready reference.

"ii. ***Principle of minimum judicial interference***

76. The principle of judicial non-interference in arbitral proceedings is fundamental to both domestic as well as international commercial arbitration. The principle entails that the arbitral proceedings are carried out pursuant to the agreement of the parties or under the direction of the tribunal without unnecessary interference by the national courts.61 This principle serves to proscribe judicial interference in arbitral proceedings, which would undermine the objective of the parties in agreeing to arbitrate their disputes, their desire for less formal and more flexible procedures, and their desire for neutral and expert arbitral procedures.62 The principle of judicial non-interference in arbitral proceedings respects the autonomy of the parties to determine the arbitral procedures. This principle has also been incorporated in international instruments, including the New York Convention and the Model Law."

22. In **Chandavarkar Sita Ratna Rao** (Supra), the apex Court, vide para-67, held that a non- obstante clause is appended in a provision to give such provision overriding effect over other provisions of the law. For better appreciation, para-67 is extracted below.

*"**67.** A clause beginning with the expression "notwithstanding anything contained in this Act or in some particular provision in the Act or in some particular Act or in any law for the time being in force, or in any contract" is more often than not appended to a section in the beginning with a view to give the enacting part of the section in case of conflict an overriding effect over the provision of the Act or the contract mentioned in the non obstante clause. It is equivalent to saying that in spite of the provision of the Act or any other Act mentioned in the non obstante clause or any contract or document mentioned the enactment following it will have its full operation or that the provisions embraced in the non obstante clause would not be an impediment for an operation of the enactment. See in this connection the observations of this Court in South India Corpn. (P) Ltd. v. Secretary, Board of Revenue, Trivandrum [AIR 1964 SC 207, 215 : (1964) 4 SCR 280]."*

23. In view of the submissions made by the learned Senior Counsel for the parties so also the judgments cited in support of their respective contentions, before dealing with the issue involved in the present lis, it would be apt to extract below the provision under sections 16, 18, 19, 26 & 37 of the Act, 1996 for ready reference.

> *"**16. Competence of arbitral tribunal to rule on its jurisdiction**.—(1) **The arbitral tribunal may rule on its own jurisdiction**, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,—*
>
> *(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and*
>
> *(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.*
>
> *(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.*
>
> *(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.*
>
> *(4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.*
>
> *(5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.*
>
> *(6) **A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34**.*
>
> ***18. Equal treatment of parties**.—The parties shall be treated with equality and each party shall be given a full opportunity to present his case.*
>
> ***19. Determination of rules of procedure.—(1) The arbitral tribunal shall not be bound** by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872 (1 of 1872).*
> ***(2)** Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.*
> ***(3)** Failing any agreement referred to in sub-section (2), the arbitral tribunal may, subject to this Part, conduct the proceedings in the manner it considers appropriate.*
> ***(4)** The power of the arbitral tribunal under sub-section (3) includes the power to determine the admissibility, relevance, materiality and weight of any evidence.*
>
> ***26. Expert appointed by arbitral tribunal**.—(1) Unless otherwise agreed by the parties, the arbitral tribunal may—*
>
> *(a) appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal, and*
>
> *(b) require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.*
>
> *(2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral*

report, participate in an oral hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.

(3) Unless otherwise agreed by the parties, the expert shall, on the request of a party, make available to that party for examination all documents, goods or other property in the possession of the expert with which he was provided in order to prepare his report.

37. Appealable orders*.—(1) An appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:—*

[(a) refusing to refer the parties to arbitration under section 8;
(b) granting or refusing to grant any measure under section 9;
(c) setting aside or refusing to set aside an arbitral award under section 34.]

(2) Appeal shall also lie to a court from an order of the arbitral tribunal—

(a) accepting the plea referred to in sub-section (2) or sub-section (3) of section 16; or
(b) granting or refusing to grant an interim measure under section 17.

(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court." ***(Emphasis Supplied)***

24. Vide paragraph Nos.7, 8 & 9 of the impugned order No.32 dated 13.11.2023, passed in Arbitration Proceeding No.23 of 2022, the learned Tribunal observed and ordered as follows:

"7. Having heard learned counsel for both the parties, the facts which assume importance for the consideration of this prayer is that after settlement of issues on 04.11.2022, both parties had filed list of admission and denial of documents by 09.01.2023. Vide order dt. 02.02.2023 it was agreed by both the parties that "as per procedure to be followed, the claimant and the respondents are to file the affidavit evidence in chief of their witness after completion of cross-examination of witnesses of which affidavit evidence was filed." This was in furtherance to sec 19(2) of the Arbitration and Conciliation Act, 1996. Thereafter six witnesses of claimant were examined and cross-examined. On 15.07.2023 C.W.7, the witness in question, was examined in chief and cross-examination could not be completed. He was cross-examined on 5.8.2023, 14.08.2023, 02.09.2023 and 4.11.2023 by which date he was asked 208 questions. The respondent has taken two adjournments i.e. 30.09.2023 and 12.10.2023. The later was granted on imposition of cost. On 12.10.2023 the period for making award for a further period of six months with effect from 17.10.2023 under section 29A (3) of Ar. Act was extended. The question no.169 was asked on 02.09.2023. The above fact demonstrates that the action of respondent has already prolonged this proceeding.

8. In the decision reported in 2022 live Law Sc 297, MANORAM NAIK VERSUS THE STATE OF ODISHA & ANR., the Hon'ble Supreme Court has reiterated that opinion of the handwriting expert is not the only way or mode of proving the signature and handwriting of a person and the signatures and handwriting of the person can also be proved under Sections 45, 47 and 73.

9. On giving careful reading to the provisions of law under which the application is filed, I am of the considered opinion that the petition was filed under section 19(4) of the Arbitration and Conciliation Act and the provision of Civil Procedure Code and Indian Evidence Act. ***Pertinently in course of submission today learned counsel for the***

> ***respondent invokes the jurisdiction under section 26 of the Arbitration and Conciliation Act. The object of the arbitration proceeding is fully crystallized under section 19 of the Arbitration and Conciliation Act which speaks that tribunal shall not be bound by the CPC and Indian Evidence Act. As stated above on 02.02.2023 the procedure to be followed was considered on consent of both the parties in view of section 19 sub-clause 3. The respondent did not whisper anything about examination of any document by the expert by then and also till completion of 208 questions to C.W.7. The relevancy or admissibility of documents is quite different from the manner in which the said document is to be introduced to the arbitration proceeding. The mode of proof as prescribed under Indian Evidence Act is not to be strictly followed***.
>
> *Having regards to above facts and circumstances, as well as law centering around the prayer I am of the considered opinion that the petition is devoid of merit and hereby stands rejected."* ***(Emphasis Supplied)***

25. It is pertinent to mention here that during hearing, a query being made by this Court, Mr. Kanungo, learned Senior Counsel submitted that the said Minutes of Meeting has been marked as exhibit from the side of the present Petitioner through its witness. In addition to the same, when the said document was confronted to C.W. No.7, he denied the same to have been signed by him. Hence, an application was rightly filed before the arbitrator for sending the said document to the handwriting expert and the rejection order passed by the learned Arbitrator needs interference.

26. Section 19(2) of the Act, 1996 permits the parties to agree on the procedure to be followed by the learned Arbitrator. In the present case, in terms of section 19(2) of the Act, 1996, on consent of the parties, the learned Tribunal vide order dated 02.02.2023 recorded the procedure to be followed in the said proceeding. After considering the aforesaid aspect, the learned Arbitrator has rejected the petition and in the meantime cross-examination of witnesses have been completed and the matter has been posted for oral argument.

27. From the pleadings made in the Writ Petition so also documents on record and the impugned order passed by the Arbitral Tribunal, it is amply clear that the present Petitioner, who is the Respondent before the Arbitral Tribunal, did not produce the original minutes of meeting dated 20th February, 2019 for the purpose of confrontation to Claimant Witness No.7, even though the genuineness of the said documents was disputed by the present Opposite Party (Claimant before the Arbitral Tribunal) from the very beginning. While making Counter Claim against the present Opposite Party, though vide sub-para (q) in para -5, the said document was referred to and disputing the said averment made in the Counter Claim the Opposite Party filed its Rejoinder stating the said document to be manipulated and fabricated, no step was taken by the Petitioner (Respondent/Counter Claimant) promptly to produce the original of the said document and prove the same in accordance with law. Rather, much after cross-examining C.W.7 exhaustively on five occasions and putting around 208 questions to the said witness during his cross-examination, such an application was filed for sending the said document to the handwriting expert relying on the answer to question Nos.169, 170 and 174. The said questions and

answers tendered by the C.W. No.7, which have been quoted in para-12 of the Writ Petition, are extracted below for ready reference.

> *"169. Q. Shown you the minutes of meeting at page -55 to 57 of the counter claim, is it signed by you"*
> *Ans. No. The signature available at page – 55 above does not belong to me.*
>
> *170. Q. Can you tell who has written this minutes of the meeting at page 55 to 57?*
> *Ans. No. I cannot.*
>
> *174. Q. I am showing your signature in the CFA agreement and the signature at page 55 and 57 of the counter claim, is it not identical?*
> *Ans. It does not seem so as far as my knowledge goes."*

28. From the conduct of the Petitioner (Respondent/Counter Claimant), as detailed above, so also reasons noted by the Arbitral Tribunal vide the impugned order and the settled position of law, the impugned order dated 13.11.2023 passed in Arbitration Proceeding No.23 of 2022 being an interlocutory and reasoned order, this Court is of the view that the Writ Petition is not maintainable and the Petitioner, if feels aggrieved by such an order, has to wait till an Award is passed by the learned Arbitrator in terms of Section 31(1) of the Act, 1996. This Court is also of the view that there is no infirmity or illegality in the impugned order passed by the learned Arbitral Tribunal and if at all, it being an interlocutory order, in view of the provisions the Act, 1996 and the settled position of law, as detailed above, the Writ Petition challenging the said order dated 13.11.2023 is not maintainable. Accordingly, the same stands dismissed.

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2024 (II) ILR-CUT-1052

CHITTARANJAN DASH, J.

CRLA NO. 132 OF 2010

A. VENKAT RAO ……Appellant

-V-

STATE OF ORISSA ……Respondent

CODE OF CRIMINAL PROCEDURE, 1973 – Section 164 – Recording of the statements – Delay of 8 years in recording such statements – Evidentiary value of such statements – Held, the long delay in recording the statements raises serious doubts about their reliability and relevance – Such statements, recorded after an unreasonable amount of time, cannot be taken as evidence against the appellant – This lapse highlights a procedural flaw, suggesting that the statements recorded u/s. 164 Cr.P.C lose their evidentiary value and should not be relied upon to establish the guilty of the Appellant.

Case Laws Relied on and Referred to :-

1. (1974) 4 SCC 560 : Raghubir Singh Vs. State of Haryana.
2. (2004) 3 SCC 753 : T. Shankar Prasad Vs. State of A.P.

3. (2020) 77 OCR (SC) 310 : Vinod Kumar Garg Vs. State (Govt. of NCT of Delhi).
4. Criminal Appeal No.1669 of 2009 : Neeraj Dutta Vs. State (Govt. of NCT of Delhi).
5. (2006) 12 SCC 277 : B. Noha Vs. State of Kerala and Another.
6. CRLA 293 of 2009 : Sudam Pattanaik Vs. State of Orissa.

For Appellant : Mr. S.K.Dash.
For Respondent : Mr. M.S.Rizvi, ASC (Vigilance)

JUDGMENT Date of Judgment : 20.05.2024

CHITTARANJAN DASH, J.

1. The Appellant, namely A. Venkat Rao faced the trial on the charges under Section 13(2) read with Section 13(1)(d) and Section 7 of the Prevention of Corruption Act, 1988 (in short, herein after referred to "P.C. Act") before the learned Special Judge (Vigilance), Balangir for having demanded ₹1000/- bribe wherein, the learned court found him guilty in the offences charged as above, convicted and sentenced the Appellant to undergo rigorous imprisonment for six months and to pay a fine of ₹1000/- in default to suffer one-month rigorous imprisonment for the offence under section 7 of Prevention of Corruption Act and to undergo rigorous imprisonment for one year and to pay fine of ₹2000/- in default to suffer rigorous imprisonment or two months for the offence under section 13(2) read with section 13(1)(d) of Prevention of Corruption Act with a direction that both the sentences shall run concurrently.

2. The prosecution case in brief is that the complainant, Dinger Mahakud, P.W.2, filed a case under Section 144 of the Cr.P.C. in the Court of Sub-collector, Birmahrajpur, against his cousins for disturbing his possession of ancestral land. The Sub-collector's office directed R.I. Subalaya and the A.S.I. of Police, Subalaya Out-post, to demarcate the land on a specified date. However, neither the cousin brothers of the complainant were served with any notice nor was the disputed land demarcated. When approached by the complainant, the Appellant claimed to not have received any order from the Sub-collector's office. Subsequently, upon further interaction, the Appellant demanded ₹1000/- and instructed the complainant to inquire about the matter at the R.I.'s office. Similar demands were made by the R.I. himself. On September 26, 2002, the complainant lodged a written report with the S.P. Vigilance, Sambalpur, which led to the registration of a Vigilance case followed by laying a trap.

3. In the process of trap setup, a preparatory meeting, attended by executive magistrate Harichandan Mishra, among others, was held on September 27, 2002. During this meeting, the complainant presented ₹2000/- worth of G.C. notes of 100-rupee denomination, intended for payment to the Appellant-A.S.I. and R.I. Subalaya. Chemical testing was conducted during the meeting, using Phenolphthalein powder on the G.C. notes. A junior clerk, Sri Tiwari, was instructed to accompany the complainant and signal upon the payment of the bribe money. Upon completion of formalities, a preparatory note was drafted and signed by the meeting attendees. Around 11 A.M., members of the raiding party arrived near Subalaya out-post. The

complainant and Sri Tiwari entered the out-post, where the Appellant-A.S.I. of Police, asked if the demanded bribe money of ₹1000/- had been brought. The complainant handed over the tainted money, which the A.S.I. placed in his wallet. He then proceeded to keep ₹200/- in a wooden box and instructed the complainant to deliver a message to Gram Rakhi. Sri Tiwari signaled the raiding party, who then confronted the A.S.I., accusing him of accepting the bribe amount. Initially, the Appellant denied receiving any money, but subsequently, tainted G.C. notes were discovered in his wallet and in a box at his quarters adjacent to the out-post. Hand wash and wallet wash tests with sodium carbonate solution indicated contamination, leading to its seizure. A Detection Report, signed by all witnesses, including the Appellant, was prepared after the completion of the investigation. Inspector of Vigilance, B.B. Patel, filed a chargesheet against the Appellant, resulting in the current case.

4. The case of the defense is one of complete denial and false implication. Further case of the defense is that the evidence of the Decoy that the Overhearing Witness was offered a chair in the outpost and that he introduced him as his cousin could not have been accepted since the Overhearing Witness deposed that he was at a distance of 25 cubits and was able to see the decoy only and has not heard their conversation.

5. To bring home the charge, the Prosecution examined 4 witnesses in all. P.W.1, Rajesh Kumar Tiwari being the accompanying witness; P.W.2, Dinger Mahakud being the Complainant; P.W.3, Binodbihari Patel being the I.O.; and P.W.4, Harichandan Mishra being the trap procedure and seizure witness. The defense on the other hand examined none.

6. 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.

7. The learned counsel for the Appellant asserts that the lower court failed to address the discrepancies and contradictions evident in the evidence, particularly concerning the essential elements of the alleged offense. He submits that convicting the Appellant based solely on the testimony of a decoy is not only illegal but also imprudent, highlighting the lack of corroboration. Furthermore, the lower court's reliance on circumstantial evidence failed to dispel conjecture and suspicion, leaving legal proof unresolved and the emphasis on Section 20 of the Prevention of Corruption Act, 1988, was misplaced, as it does not apply, and surrounding circumstances suggesting rebuttal of presumption were ignored. Regarding the hand wash and chemical examination report, the learned counsel asserts that their significance is diminished without evidence to establish their timing in relation to the recovery of tainted money. He also challenges the credibility of the decoy's testimony regarding the overhearing witness, highlighting inconsistencies in their

versions. The learned counsel further alleges unfairness in the investigation conducted by a member of the raiding party, claiming prejudice against the Appellant. He criticizes the absence of examination of the sanctioning authority and deem the prosecution's case as thoroughly illegal. Lastly, he argues that the lower court erred in dismissing the defense's plea as an alibi without considering its probability, thereby misdirecting itself in passing the judgment of conviction.

8. The learned counsel for the State (Vigilance), Mr. Rizvi, argues that positive results of the hand wash of the Appellant, the tainted G.C. Notes, and the recovery from the Appellant's wallet collectively corroborate against the Appellant. He furthers that his assertion finds support in established legal principles, as exemplified in the case of *Raghubir Singh Vs. State of Haryana (1974) 4 SCC 560*, where it was held that the possession of tainted GC Notes by the Appellant, especially when demanded and received, speaks for itself (res ipsa loquitor). Similarly, in *T. Shankar Prasad Vs. State of A.P. (2004) 3 SCC 753*, it was observed that the legal presumption can be drawn if it's proven during trial that the Appellant accepted or agreed to accept gratification. He adds that the recent judicial precedents such as *Vinod Kumar Garg Vs. State (Govt. of NCT of Delhi) (2020) 77 OCR (SC) 310*, Para-13 and 14, reinforce the necessity of drawing such presumptions under Section 20 of the Act when the Appellant fails to rebut them. The defense's contention that the Appellant was unaware of the matter concerning the issuance of notice to the complainant's brother is contradicted by the Appellant's statement and the Investigating Officer's report. Additionally, the false explanations provided by the Appellant further weaken their defense. In line with the recent ruling by the constitutional bench of the Hon'ble Supreme Court in *Neeraj Dutta Vs. State (Govt. of NCT of Delhi) (Criminal Appeal No.1669 of 2009*, Judgment Dtd 15 December 2022), culpability of a public servant under Section 7 and Section 13(1)(d) read with Section 13(2) of the Act can be inferred from other evidence presented by the prosecution in the absence of direct evidence from the complainant. Here, the oral testimonies of the Decoy/ Complainant, Accompanying Witness, and Official Witness consistently support the prosecution's case. Furthermore, the demand for bribery need not be explicit when there is voluntary or conscious acceptance of money, as highlighted in the case of *B. Noha Vs. State of Kerala and Another (2006) 12 SCC 277*, Para-10. He concludes that the Appellant's voluntary acceptance and retention of the tainted money in his wallet, subsequently recovered during the trap, substantiate this argument.

9. To appreciate the aforesaid submissions, the relevant provisions with respect to the charges are required to be referred to –

> ***Prevention of Corruption Act 1988***
> **7. Offence relating to public servant being bribed.**—Any public servant who,— (a) obtains or accepts or attempts to obtain from any person, an undue advantage, with the intention to perform or cause performance of public duty improperly or dishonestly or to forbear or cause forbearance to perform such duty either by himself or by another public servant; or

(b) obtains or accepts or attempts to obtain, an undue advantage from any person as a reward for the improper or dishonest performance of a public duty or for forbearing to perform such duty either by himself or another public servant; or

(c) performs or induces another public servant to perform improperly or dishonestly a public duty or to forbear performance of such duty in anticipation of or in consequence of accepting an undue advantage from any person, shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine.

Explanation 1.—For the purpose of this section, the obtaining, accepting, or the attempting to obtain an undue advantage shall itself constitute an offence even if the performance of a public duty by public servant, is not or has not been improper.

Explanation 2.—For the purpose of this section,—
(i) the expressions "obtains" or "accepts" or "attempts to obtain" shall cover cases where a person being a public servant, obtains or "accepts" or attempts to obtain, any undue advantage for himself or for another person, by abusing his position as a public servant or by using his personal influence over another public servant; or by any other corrupt or illegal means;

(ii) it shall be immaterial whether such person being a public servant obtains or accepts, or attempts to obtain the undue advantage directly or through a third party.

13. Criminal misconduct by a public servant.—
(1) A public servant is said to commit the offence of criminal misconduct,—
(a) ***
(b) ***
(c) ***
(d) If a public servant, by corrupt or illegal means or by otherwise abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage.

Explanation 1.—A person shall be presumed to have intentionally enriched himself illicitly if he or any person on his behalf, is in possession of or has, at any time during the period of his office, been in possession of pecuniary resources or property disproportionate to his known sources of income which the public servant cannot satisfactorily account for.

Explanation 2.—The expression ''known sources of income'' means income received from any lawful sources.]

(2) Any public servant who commits criminal misconduct shall be punishable with imprisonment for a term which shall be not less than [four years] but which may extend to 3[ten years] and shall also be liable to fine.

10. To sustain the charge under sections 7/13(1)(d) read with Section 13(2) of the Act, the prosecution is obliged to establish the basic ingredients of demand and acceptance of bribe as an illegal gratification which is sine qua non to attract the offences.

11. Having regard to the oral evidence led to by the prosecution, the evidence of P.W.1 and 2 are found relevant even though P.W.1 has been declared hostile.

12. P.W.1, the accompanying witness, stated that on 26.09.2002, he was a junior Clerk in the R. & B. Division, Sambalpur. On that day, his authority directed him to

attend the Vigilance office the following day. Accordingly, on 27.09.2002 at 6:20 A.M. morning, he went to the Vigilance Office and found Vigilance D.S.P., One Mishra, A.C.F., Vigilance staff, and one Mahakud of Subalaya present. The complainant narrated before him that the A.S.I. of Subalaya outpost and R.I. of Subalaya were demanding a bribe of ₹1000/- each for the demarcation of his land. In response, the complainant produced ₹2000/- in the form of twenty numbers of hundred-rupee G.C. notes. Sri Mishra noted down the numbers of the G.C. notes in a chit paper. A.S.I. (Vigilance) demonstrated the reaction of Sodium carbonate solution with Phenolphthalein powder. Some powder was smeared on those G.C. notes by A.S.I. (Vigilance), and they were kept in the pocket of the complainant with instructions to hand over the notes to the accused person on demand. Only Sri Mishra & A.S.I. had handled Phenolphthalein Powder and solution, and they both washed their hands after the demonstration with soap and water. Members of the raid party proceeded to the spot. They were instructed to follow the complainant and witness the transaction of bribe money, relaying a signal by brushing their head with both hands. P.W.1 first accompanied the complainant to the office of R.I., Subalaya, who was found absent. He then moved to the Subalaya police outpost along with the complainant and other members of the raiding party. They parked the vehicle a little away from the spot. The complainant entered inside the outpost while he (P.W.1) was only instructed to watch the transaction and relay signals to the raid party members. On receiving a signal from the complainant, he relayed it to the raid party members who arrived at the spot. According to P.W.1 the D.S.P. (Vigilance) disclosed the identity of raid party members to the Appellant-ASI of the outpost, challenging him to have received the bribe money to which the Appellant-ASI fumbled and was perturbed. The hand wash of the Appellant ASI was thereafter taken in Sodium Carbonate Solution, which turned into pink color. The Appellant-ASI brought out the money from his pocket and produced it before the raiding party. He produced seven to eight G.C. notes of rupees hundred from his pocket and two or three G.C. notes of rupees hundred each from a trunk. Vigilance DSP seized the G.C. notes produced by the Appellant, and seizure lists were prepared. The Vigilance police also seized the wearing apparels of the Appellant.

13. P.W.2, the Decoy/Complainant in his deposition identified the Appellant standing in the dock. According to him, the occurrence took place in the year 2002 after the death of his father. He possessed the ancestral land, and when he was going to the agricultural land, the sons of the elder brother of his father protested. He filed a case u/s 144 of Cr.P.C. against his cousin brothers in the Court of Sub-collector, Birmaharajpur. A date was fixed by the Court for the demarcation of the land. Orders were sent to the R.I. of Subalaya and A.S.I. of Subalaya police outpost. No notice was served on his cousin brothers, and the land was not demarcated. He went to the outpost and requested the ASI to serve the notice on his cousin brother. On the first occasion, the Appellant told him that he had received no order from the office of the Sub-collector. On his subsequent approach, the Appellant demanded a bribe of ₹ 1000/- from him and asked him to inquire about the matter in the office of R.I.

He also approached the R.I. Nabaghana Suna, who also demanded Rs. 1000/- from him for the demarcation of the land. On 23.9.2002 and 25.9.2002, he again approached the ASI and RI to reduce the demanded amount, but they did not concede. On 26.9.2002, he went to the office of S.P. Vigilance, Sambalpur, and submitted a written report. Being asked by the S.P., he returned and again went to the office of the S.P., Vigilance on the next day. A preparation meeting was held in the office of S.P., Vigilance where members of Vigilance staff, executive Magistrate Sri Mishra, and One Tewari babu were present. He was introduced to the members present in the meeting, and he narrated the incident. He paid ₹2000/- of 100 rupee denomination. The G.C. notes were counted, and the serial number was noted on a separate sheet of paper. Chemical demonstration was held by Sri Mishra, and the chemical solution was prepared. Sri Mishra dipped his fingers in the solution, which did not change color, but after applying chemical powder, he again dipped his finger in another bottle, which turned pink. The G.C. notes of ₹2000/- were treated with Phenolphthalein Powder. The amount of ₹2000/- was wrapped in two separate packets, each containing ₹1000/-. One Tewari babu was instructed to accompany him to the office of A.S.I. and R.I. of Subalaya and to observe silently the transaction. A preparatory note was made (Ext.1). They went in the vehicle of the vigilance department to Subalaya and reached there at 11 A.M. They got down from the vehicle at a distance of about 50 meters from the Subalaya Police Outpost. Tewari Babu and he went to the Police Outpost. The Appellant ASI who was sitting in the chair of his office asked him whether he had brought the demanded ₹1000/-. On query, he introduced Tiwari Babu as his cousin brother. The Appellant-ASI asked him to sit in the chair. On demand, he paid ₹1000/- to the Appellant who kept the same in his wallet. The Appellant then left his chair, went inside, and kept ₹200/- inside a wooden box. He wrote something on a piece of paper and asked him to hand it over to the Gram Rakhi. Tewari Babu came out and passed a signal to the raiding party. Immediately thereafter, the D.S.P. along with other members of the party arrived there and asked him as to whom he had paid the amount. He replied that he had paid the amount to the Appellant. The Appellant-A.S.I. first denied to have accepted any money from him but subsequently brought out the wallet and produced ₹800/-. The Appellant also brought out ₹200/- from the wooden box. The hand wash of the Appellant was taken in sodium carbonate, and the solution was kept in two separate bottles. Sri Mishra who had noted down the serial number of the tainted money tallied with the serial number of the note which he had previously noted on another sheet of paper.

14. In his cross-examination, the complainant states that he had visited the Subalaya police outpost on 29.06.2002, 10.07.2002, 23.07.2002, and 06.08.2002 to request the ASI to serve the concerned notice of demarcation. During these visits, Jatru Budhia was the ASI at the outpost. The complainant asserts, "It is not a fact that the Appellant was not the ASI of Subalaya police outpost on the above four dates." He further mentions seeing the Appellant at the outpost about 12 days before

the trap, suggesting that Jatru Budhia was the ASI until 12 days prior to the trap, after which the Appellant took over.

15. P.W.2 describes arriving at the Subalaya police outpost at 11 A.M. with P.W.1, where the Appellant ASI. was sitting in a chair on the verandah of the outpost and asked P.W.2 about the accompanying witness (P.W.1) to which he replied him to be his brother. The Appellant invited P.W.1 to have a seat and asked P.W.2 if he had brought the demanded ₹1000./- He states that upon his arrival, the Appellant inquired about the money, which he confirmed and then handed over to him. According to him, the Appellant took the money, placed it in his wallet, and later put out ₹200 and kept in a wooden box inside the outpost. In contrast, P.W.1 provides a different version. He states that he and the complainant, along with the members of the raiding party, went to the Subalaya outpost. P.W.1 was instructed to watch the complainant from a distance and relay a signal to the raiding party once the transaction takes place. P.W.1 stated that he followed the complainant and remained at a distance of 15 cubits and standing 25 cubits away from the Appellant, and further that it was neither clearly visible nor audible from where he stood and further stated that he only saw the tainted money lying on the table.

16. P.W.3's testimony adds another layer of complexity. According to P.W.3, P.W.1 stated during his examination that when they arrived at the police outpost, the Appellant-ASI, inquired whether the complainant had brought the money to which the complainant gave the ₹1000/- bribe that was then accepted by him, placing it in his wallet and subsequently in his back pocket. The detection report describes the ASI seated on the verandah with the complainant standing on his left side and the accompanying witness below the verandah. The I.O. observed that the Appellant had demanded and accepted the bribe, as confirmed by the witness.

17. According to P.W.1, upon receiving the signal from the complainant, he relayed it to the raiding party, which then arrived at the Subalaya police outpost. The D.S.P. (Vigilance) introduced the members of the raiding party to the Appellant ASI, and confronted him of accepting bribe money to which the ASI appeared perturbed and fumbled. His hand was then washed in a sodium carbonate solution, which turned pink, indicating the contact with the tainted G.C. Notes. P.W.1 further detailed that the ASI produced money from his pocket and a trunk, and seizure lists were prepared, documenting the events. P.W.1 admitted that due to the passage of time, his memory of the facts might not be accurate, leading to minor discrepancies in his recounting.

18. P.W.2, the complainant, on the other hand, described how he paid ₹1000/- to the appellant on demand. The appellant then allegedly placed ₹200/- inside a wooden box after initially keeping the full amount in his wallet. P.W.1 then signalled the raiding party, which promptly arrived. Upon confrontation, the appellant initially denied accepting the money but eventually produced ₹800/- from his wallet and ₹200/- from the wooden box. P.W.2 noted that the appellant's hand

wash turned pink in a sodium carbonate solution. The vigilance staff matched the serial numbers of the tainted money with those noted previously during preparation. P.W.2 also gave an observation that the appellant wrote a note to be given to the Gram Rakhi and stated that the entire trap operation lasted until approximately 3:30 P.M., during which the vigilance staff restricted the appellant's movements.

19. The detection report corroborates some details but introduces additional context. It notes that the appellant, upon being challenged, claimed the complainant had voluntarily given him ₹1000/- to expedite his work, which he accepted and placed in his wallet. The report also reveals that some of the currency notes fell out of his purse while paying a washerman who had come to take his dues, which he then kept in a trunk from where the alleged ₹200/- was seized later on. This version highlights a partial acknowledgment of accepting money but under different circumstances than alleged by the prosecution.

20. P.W.4 provided a different perspective, emphasizing the logistical details of the raid. He noted the presence of several people outside the police outpost and mentioned that the raiding party did not involve any outside witnesses. The raiding operation, according to P.W.4, lasted about five hours, ending around 6 P.M. He gave a detailed story of the subsequent visit to the appellant's house, where they found and seized currency notes from a trunk. P.W.4 noted that no family members were present at the appellant's house, and the trunk was not locked. He confirmed that no other articles were seized from the box, and no chemical test was conducted at the house. The chemical test on the tainted notes and the appellant's hands was performed later, around 1:30 P.M.

21. The timeline discrepancy raises substantial doubts about the prosecution's claim that the Appellant was involved in the alleged bribe demands during the specified dates. The complainant's conflicting timeline and acknowledgment of Jatru Budhia's presence during the relevant period cast significant doubt on the prosecution's ability to unequivocally involve the appellant in the bribery and the demand thereof. Furthermore, the complainant admitted that the notice was kept on the table to be served on his cousins upon their arrival at the outpost. As also discussed by this Court in the matter of ***Sudam Pattanaik Vs. State of Orissa CRLA 293 of 2009***, this admission strongly suggests that no pending work of the complainant required the Appellant's intervention, negating any motive for the alleged bribe. These contradictions, combined with inconsistencies in the testimonies of other witnesses, such as P.W.3 and P.W.4, significantly weaken the prosecution's case.

22. In his cross-examination, the complainant denied certain assertions related to the case. He had submitted an application to the Sub-Collector, Birmaharajpur regarding the non-service of notice, and clarified that in the application, he had only alleged misconduct against the R.I., not against the A.S.I. of Police. This testimony further complicates the prosecution's case raising questions about the complainant's

credibility and suggesting that the allegations against the A.S.I. might have been influenced by external factors. This discrepancy casts doubt on the authenticity of the charges against the appellant and suggests that the evidence may not be as straightforward or reliable as required to uphold a conviction.

23. Moreover, the version of the I.O. is inconsistent with the testimonies of P.W.1 and P.W.2 regarding the exact details of the transaction and their positions. P.W.2 mentioned that the Appellant was not allowed to go anywhere by the vigilance staff. According to P.W.1, they arrived at the outpost around 11:40 A.M., while P.W.4 stated that the signal was sent to the raiding party approximately half an hour after their arrival. Furthermore, the seizure story involving ₹200 from the Appellant's residence is questionable, particularly since the handwash of the Appellant was taken at 1:30 P.M.

24. Given these contradictions, coupled with the discrepancies regarding the location and timing of the chemical test, as highlighted by P.W.4, significantly undermine the prosecution's narrative. The conflicting details about the number of currency notes and their seizure, as described by P.W.1 and P.W.2, further cast doubt on the reliability of the evidence and fail to establish the appellant's guilt beyond a reasonable doubt. The contradictions in testimonies, the delayed recording of statements under Section 164 CrPC, and the selective targeting of individuals in earlier complaints significantly weaken the case against the appellant. Therefore, the conviction based on such flawed evidence is unsustainable.

25. The examination under section 164 CrPC is also found discrepant to the prosecution's case regarding the alleged acceptance of bribe by the Appellant. While P.W.4's testimony aligns with the seizure story presented, it fails to conclusively establish the Appellant's acceptance of tainted money from the complainant knowing it to be bribe. The Appellant's response during examination indicated that he produced a money purse containing a different number of denominations of G.C. notes than what was alleged to have been received as a bribe. He produced his wallet which contained 8 numbers of 100-rupees notes, one 500-rupees note, three 10-rupees notes. This discrepancy further casts doubt on the prosecution's version of events. Moreover, the complainant's version of the seizure story contradicts P.W.4's testimony. According to the complainant, he handed over ₹1000/- to the Appellant, who then kept ₹800/- in his wallet before placing ₹200/- inside a wooden box. This version of events differs from P.W.4's testimony as discussed above and raises eyebrow to the consistency and reliability of the prosecution's evidence. Additionally, it is noteworthy that P.W.4 stated that the chemical test was conducted after the tainted notes were seized, rather than at the location where the ₹200/- was allegedly found in the Appellant's possession. This discrepancy further undermines the prosecution's case and highlights inconsistencies in the evidence presented. In light of the same and lacunae in the prosecution's story, it cannot be conclusively established that the Appellant voluntarily accepted the bribe. The prosecution has

failed to provide clear and consistent evidence to prove the Appellant's guilt beyond a reasonable doubt. Therefore, the argument stands that the prosecution's case lacks the necessary credibility and coherence to sustain the charges against the Appellant.

26. It is disturbing to notice that the statements under Section 164 CrPC were recorded after an inordinate delay of eight years from the date of the trap. It is highly improbable for any person to recall the precise details of an incident that transpired eight years earlier. Any discrepancies found in the evidence vis-à-vis the statements recorded under Section 164 cannot be used for any substantive purpose. The prosecution's failure to provide an explanation for this significant delay further undermines the credibility of these statements. The long delay in recording the statements raises serious doubts about their reliability and relevance. Such statements, recorded after an unreasonable amount of time, cannot be taken as evidence against the Appellant. This lapse highlights a procedural flaw, suggesting that the statements recorded under Section 164 CrPC lose their evidentiary value and should not be relied upon to establish the guilt of the Appellant.

27. Based on a thorough review of the impugned judgment and the evidence presented, this Court finds that the learned Special Judge erred in recording findings and appreciating the evidence, leading to an unsustainable conviction. The evidence available does not provide clear, cogent, and reliable proof beyond reasonable doubt to support the conviction and the prosecution has failed to unequivocally establish the ingredients of offence under Section 7 of the P.C. Act. Consequently, the offence under Section 13(1)(d) will not be attracted. Hence, it is irresistible to hold that the prosecution has not been able to prove the charges against the Appellant beyond all reasonable doubt and the Appellant as such is entitled to an acquittal.

28. 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 7 and section 13(2) read with section 13(1)(d) of the P.C. Act are hereby set aside.

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2024 (II) ILR-CUT-1062

SIBO SANKAR MISHRA, J.

CRLMC NO.385 OF 2023

Dr. PRIYANK TAPURIA ....Petitioner

-V-

STATE OF ODISHA & ANR. ....Opp.Parties

INDIAN PENAL CODE, 1860 – Section 306 – The petitioner has shown his reluctancy to the marriage proposal of the deceased from the very beginning – Whether reluctancy to marry the deceased after the engagement would make out an element of an offence punishable U/s. 306 IPC? – Held, No, reason indicated. (Paras 14-15)

Case Laws Relied on and Referred to :-

1. (2011) 3 SCC 626 : M. Mohan vs. State.
2. SLP(Crl) Diary No.39981/2022 : Prabhu vs. The State Rep. By Inspector of Police & Anr.
3. 2021 SCC Online SC 873 : Geo Varghese vs. State of Rajasthan and Anr.
4. (2019) 76 OCR 565 : Nursingha Charan Dash @ Babulu vrs. State of Odisha.

For Petitioner : Mr. Samir Kumar Mishra, Sr. Adv.
For Opp.Parties : Mr. P.K. Maharaj, ASC (for O.P.No.1),
Mr.Himanshu Sekhar Mishra. (for O.P.No.2)

JUDGMENT Date of Hearing : 21.03.2024 : Date of Judgment : 20.06.2024

S.S. MISHRA, J.

The pain of loneliness, despair and agony suffered by a mind contemplating suicide have been realistically captured by the American President, Abraham Lincon in following lines:

> *"Yes! I'm prepared, through endless night,*
> *To take that fiery berth!*
> *Think not with tales of hell to fright*
> *Me, who am damn'd on earth!"*
>
> "The Suicide's Soliloquy"
> by Abraham Lincon

The present case unveil the kind of damage caused in the minds of young people due to societal pressure, particularly in this age where psyche of the society as a whole is dominated by internet and social media platforms. It is unfathomable that a highly educated young girl like the deceased namely *Sheetal*, who was pursuing her Ph.D in Electrical Engineering, could even thought of taking her own life.

2. The uncontroverted facts germinating from the record are that:

(a) The families of the petitioner and the deceased were in the process of arranging and formalising the marriage between the petitioner and the deceased since 2019. The petitioner at that time was pursuing his medical education at AIIMS, Bhubaneswar so he insisted upon postponing the marriage ceremony by two years.

(b) Apparently, family of the deceased could not agree for waiting for such long time. Therefore, sometime in the month of November, 2020 they settled the marriage of the deceased with a boy from Nagpur and the ring ceremony took place at Nagpur.

The photographs of the ring ceremony as well as pre wedding photoshoots were posted on social media platforms. Be that as it may, this engagement at Nagpur could not be fructified into marriage and the same was called off sometime in February 2021 by deceased family due to discontentment.

(c) In May 2021, again talks between the families of the petitioner and the deceased to formalise the proposal of marriage of the petitioner and the deceased restarted, which culminated into the engagement/ring ceremony being celebrated on 30.05.2021.

(d) In between, in the month of August 2021, both the families organized birthday celebrations for petitioner as well as the deceased, whereafter, the deceased realized that the petitioner was not happy with the marriage proposal with her. The poor soul brought this fact to the notice of her parents and family members. The family members of the deceased brought this to the notice of the family members of the petitioner. However, parents and family members from both the side insisted upon the petitioner as well as on the deceased that they should talk to each other and expected that over the period of time things will fall in place.

(e) The respective families encouraged the petitioner and the deceased to spend some time together, however, there is nothing on record to indicate that physical intimacy between the deceased and the petitioner was ever established. Although, in July 2021 deceased had gone to Bangalore, where sister of the petitioner was studying BDS course there. Both the petitioner as well as the deceased met for some time at Banglore, but nothing seems to have worked in favour of alliance.

(f) It's borne out from the record that since the Petitioner wanted to pursue his Fellowship selection scheduled on 16.11.2021, he proposed to postpone the marriage but the family of the deceased insisted to conduct marriage ceremony on 21.11.2021. The petitioner came under the pressure of both the families to agree upon the schedule of marriage at the cost of his fellowship selection. Apparently it was not a happy situation.

(g) On 12.11.2021 the petitioner, his sister, deceased and her sister at about 2.30 P.M. had long group video call, it is alleged by the complainant (mother of the deceased) that they were having discussion about the marriage and preparation for it, to which the petitioner was not showing any interest. It has been further alleged by the complainant that father of the petitioner at about 10.20 P.M. called the deceased and informed that marriage between the petitioner and the deceased might not materialised as the petitioner was not willing to get married and further expressed his sorrow for that. Thereafter, at about 12.20 A.M. the sister of the deceased called the petitioner from deceased phone and talked to the petitioner for about two hours and after that the petitioner and the deceased remained on call till 4.00 A.M. during which the conversation was alleged to have taken an ugly turn and the petitioner was alleged to have communicated his decision to call off the marriage in a harsh manner to the deceased.

(h) It has been alleged that the telephonic conversation between the petitioner and the deceased made the deceased very volatile and mentally unstable, the complainant tried to console the deceased but after sometime the deceased was found to have committed suicide at 8 A.M. by hanging herself with ceiling fan with the aid of her "Odhani".

(i) At about 9.45 A.M. on 13.09.2021, the incident was first reported to the IIC, Town P.S. Dhenkanal, by the complainant. In her complaint, she did not make any elaborate allegations against the petitioner other than stating that the deceased had discussed with her that between 3.30 A.M. to 4 A.M. the deceased had a "*hot discussion*" with the petitioner. So, she prayed for conducting an inquiry. On the basis of the same, U.D. Case No.40 of 2021 was registered at the P.S. The complaint made by the mother of the deceased is extracted herein below:-

"To
The IIC, Town Police Station,
Dhenkanal
Sub: FIR regarding suicide by hanging of my daughter Sheetal Chandak.
Sir,
As above, I would like to intimate that I Smt. Kamala Devi Chandak aged about 53 years wife of Jugal Kishrore Chandak of Laxmi Bajar, DKL that my daughter Sheetal Chandak aged about 30 yrs had a discussion with me today 13/10/2021 near about at 7.30 am and went to her Bedroom. After few time when I went there found the room was locked from inside. Suspecting foul play I called my family members and forcibly opened the door and found she was hanging by using her wearing napkin (Odni).

During discussion with my daughter she said me that around 3.30 am to 4 am the boy with whom her marriage was fixed had called her over mobile phone and there was a hot discussion with them. Please have an inquiry about that matter."

3. The complainant for the second time reported the incident after 7 days on 20.09.2021 at about 9.30 P.M., wherein specific allegations against the petitioner were made by the complainant. This complaint was registered as F.I.R. No.382 of 2021 U/s. 306 IPC against the petitioner.

After investigation, police filed charge-sheet No.616 dated 23.11.2022 against the petitioner U/s.306 IPC. It may be pertinent to extract the relevant portion of the charge-sheet to have a meaningful appreciation of the prospective.

> *"On 16.07.2021 Sheetal Chandak had been to Bangalore to the house of Kajal Tapuria where she spent some time with Kajal Tapuria and Priyank Tapuria. After return Sheetal was very un-happy. Getting this information Shibani Chandak @Kankari talked to Priyank Tapuria over telephone of Sheetal Chandak on 12.09.2021. On this Priyank Tapuria denied out rightly to marry Sheetal Chandak. On this Shibani and Sheetal tried a lot to make him understand that they have raised photographs of different occasions and sent all those in social media. The Marwari community in Odisha is very less and the breaking of marriage proposal* ***time and again of a girl of this community*** *after ring ceremony and proceeding a lot towards marriage is a matter of question mark on her for every one of this community. This is reason for which Sheetal was very much sad and felt ashamed. So, she tried a lot to make understand Priyank Tapuria not to break the relationship. But Mr. Priyank Tapuria without thinking the mental condition of Sheetal, out rightly and harshly denied to marry Sheetal.* ***They talked hours together over telephone, but what he has told to Sheetal no one knows except this much that he has mentally harassed Sheetal.***

4. The learned S.D.J.M., Dhenkanal vide order dated 28.11.2022 took cognizance of offence punishable U/s.306 IPC against the petitioner in G.R. Case No.1111 of 2021 corresponding to Dhenkanal Town P.S. Case No.382 of 2021 on charge-sheet No.616 dated 23.11.2022. The petitioner has challenged the aforesaid order of taking cognizance in the present proceeding by invoking jurisdiction of this Court U/s.482 Cr.P.C.

5. Heard Mr. Samir Kumar Mishra, learned Senior Counsel for the petitioner, Mr. Himanshu Sekhar Mishra, learned counsel for the informant and Mr. P.K. Maharaj, learned Addl. Standing Counsel for the State.

6. Mr. Samir Kumar Mishra, Ld. Sr. Advocate appearing for the petitioner has forcefully argued that no case of offence U/s.306 IPC is made out against the petitioner even if the allegation made in the charge-sheet as well as the material forming the part of the charge-sheet is taken on its face value to be true, as such material does not disclose the essential ingredient necessary for initiating the trial for the offence punishable U/s.306 of IPC.

Learned Sr. Counsel has argued that neither the F.I.R. nor the charge-sheet filed after the investigation whisper about any kind of explanation about the material improvement made in the complaint in the F.I.R. from the complaint made in the U.D. Case. This fact itself gives credence to his argument that the allegations made in the F.I.R. and the statements recorded thereafter are nothing but an afterthought and pre-planned attempt to harass the petitioner in vengeful manner by implicating the petitioner in false criminal case. The family of the deceased are bent upon to spoil the life of the petitioner under the false notion that he is responsible for the death of their daughter.

7. Learned Sr. Counsel for the petitioner, in support of his arguments has relied upon the ratio laid down by the Hon'ble Supreme Court in the case of ***M. Mohan vs. State*** reported in ***(2011) 3 SCC 626***, wherein the Hon'ble Supreme Court has held that:

> "37. The word 'suicide' in itself is nowhere defined in the Indian Penal Code, however, its meaning and import is well known and requires no explanation. 'Sui' means 'self' and 'cide' means 'killing', thus implying an act of self-killing. In short a person committing suicide must commit it by himself, irrespective of the means employed by him in achieving his object of killing himself.
>
> 38. In our country, while suicide itself is not an offence considering that the successful offender is beyond the reach of law, attempt to suicide is an offence under section 309 of I.P.C.
>
> 39. 'Abetment of a thing' has been defined under section 107 of the Code. We deem it appropriate to reproduce section 107, which reads as under:
>
> "107 Abetment of a thing- A person abets the doing of a thing, who-
> First - Instigates any person to do that thing; or Secondly - Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes places in pursuance of that conspiracy, and in order to the doing of that thing; or Thirdly - Intentionally aides, by any act or illegal omission, the doing of that thing.
> Explanation 2 which has been inserted along with section 107 reads as under:
> "Explanation 2 - Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitate the commission thereof, is said to aid the doing of that act."
>
> *44.* Abetment involves a mental process of instigating a person or intentionally aiding a person in doing of a thing. Without a positive act on the part of the accused to instigate or aid in committing suicide, conviction cannot be sustained.
>
> *45.* The intention of the Legislature and the ratio of the cases decided by this court are clear that in order to convict a person under section 306 IPC there has to be a clear ***mens rea*** to commit the offence. **It also requires an active act or direct act which led the deceased to commit suicide seeing no option and this act must have been intended to push the deceased into such a position that he/she committed suicide**."

8. It has been further argued on behalf of the petitioner that ratio laid down by the Hon'ble Apex Court in the case of ***Prabhu vs.The State Rep. By Inspector of Police & Anr.,*** SLP (Crl.) Diary No.39981 of 2022 squarely covers the case of the petitioner as the facts in the present case and the facts in the above cited judicial pronouncement are matching except for the fact that allegations in the case dealt by the Hon'ble Supreme Court are much graver than present case. Ld. Senior Counsel has relied on para 9 to 12 of the judgment in the case of ***Prabhu*** (*supra*) to elucidate upon the essential ingredients of offence punishable U/s.306 IPC, which reads as follows:-

> *"***9**. In a recent judgment of this Court in ***Kamalakar vs. State of Karnataka*** *in* ***Criminal Appeal No.1485 of 2011 (decided on 12.10.2023),*** one of us (Vikram Nath J.) explained the ingredients of Section 306 IPC. The Court has held as follows:-
>
> 8.2. Section 306 IPC penalizes abetment of commission of suicide. To charge someone under this Section, the prosecution must prove that the accused played a role in the suicide. Specifically, the accused's actions must align with one of the three criteria

detailed in Section 107 IPC. This means the accused either encouraged the individual to take their life, conspired with others to ensure the person committed suicide, or acted in a way (or failed to act) which directly resulted in the person's suicide.

8.3. In *Ramesh Kumar v. State of Chhattisgarh*, this Court has analysed different meanings of "instigation". The relevant para of the said judgment is reproduced herein:

*"**20.** Instigation is to goad, urge forward, provoke, incite or encourage to do "an act". To satisfy the requirement of instigation though it is not necessary that actual words must be used to that effect or what constitutes instigation must necessarily and specifically be suggestive of the consequence. Yet a reasonable certainty to incite the consequence must be capable of being spelt out. The present one is not a case where the accused had by his acts or omission or by a continued course of conduct created such circumstances that the deceased was left with no other option except to commit suicide in which case an instigation may have been inferred. A word uttered in the fit of anger or emotion without intending the consequences to actually follow cannot be said to be instigation."*

8.4. The essentials of Section 306 IPC were elucidated by this Court in *M. Mohan v. State*, as under:

"43. This Court in Chitresh Kumar Chopra v. State (Govt. of NCT of Delhi) *[(2009) 16 SCC 605: (2010) 3 SCC (Cri) 367] had an occasion to deal with this aspect of abetment. The Court dealt with the dictionary meaning of the word "instigation" and "goading". The Court opined that there should be intention to provoke, incite or encourage the doing of an act by the latter. Each person's suicidability pattern is different from the others. Each person has his own idea of self-esteem and self-respect. Therefore, it is impossible to lay down any straitjacket formula in dealing with such cases. Each case has to be decided on the basis of its own facts and circumstances.*

44. Abetment involves a mental process of instigating a person or intentionally aiding a person in doing of a thing. Without a positive act on the part of the accused to instigate or aid in committing suicide, conviction cannot be sustained.

45. The intention of the legislature and the ratio of the cases decided by this Court are clear that in order to convict a person under Section 306 IPC there has to be a clear mens rea to commit the offence. It also requires an active act or direct act which led the deceased to commit suicide seeing no option and this act must have been intended to push the deceased into such a position that he/she committed suicide."

8.5. The essential ingredients which are to be meted out in order to bring a case under Section 306 IPC were also discussed in *Amalendu Pal alias Jhantu v. State of West Bengal* in the following paragraphs*:*

"12. Thus, this Court has consistently taken the view that before holding an accused guilty of an offence under Section 306 IPC, the court must scrupulously examine the facts and circumstances of the case and also assess the evidence adduced before it in order to find out whether the cruelty and harassment meted out to the victim had left the victim with no other alternative but to put an end to her life. It is also to be borne in mind that in cases of alleged abetment of suicide there must be proof of direct or indirect acts of incitement to the commission of suicide. Merely on the allegation of harassment without there being any positive action proximate to the time of occurrence on the part of the accused which led or compelled the person to commit suicide, conviction in terms of Section 306 IPC is not sustainable.

13. In order to bring a case within the purview of Section 306 IPC there must be a case of suicide and in the commission of the said offence, the person who is said to have abetted the commission of suicide must have played an active role by an act of instigation or by doing certain act to facilitate the commission of suicide. Therefore, the act of abetment by the

person charged with the said offence must be proved and established by the prosecution before he could be convicted under Section 306 IPC."

8.6. On a careful reading of the factual matrix of the instant case and the law regarding Section 306 IPC, there seems to be no proximate link between the marital discord between the deceased and the appellant and her subsequent death by burning herself. The appellant has not committed any positive or direct act to instigate or aid in the commission of suicide by the deceased.*"*

10. On a perusal of the above, and relying upon this Court's previous judgments discussing the elements of Section 306 IPC, the following principles emerge:

10.1 Where the words uttered are casual in nature and which are often employed in the heat of the moment between quarrelling people, and nothing serious is expected to follow from the same, the same would not amount to abetment of suicide. [**Swami Prahaladdas v. State of M.P. 1995 Supp. (3) SCC 438, Paragraph 3; Sanju v. State of M.P. (2002) 5 SCC 371**, Paragraph 12]

10.2 In order to constitute 'instigation', it must be shown that the accused had, by his acts or omission or by a continued course of conduct, created such circumstances that the deceased was left with no other option except to commit suicide. The words uttered by the accused must be suggestive of the consequence [**Ramesh Kumar v. State of Chhatisgarh (2001) 9 SCC 618**, Paragraph 20]

10.3 Different individuals in the same situation react and behave differently because of the personal meaning they add to each event, thus accounting for individual vulnerability to suicide. [**Chitresh Kumar Chopra v. State (Government of NCT of Delhi) (2009) 16 SCC 605**, Paragraph 20]

10.4 There must be direct or indirect acts of incitement to the commission of suicide. The accused must be shown to have played an active role by an act of instigation or by doing certain act to facilitate the commission of suicide [**Amalendu Pal v. State of West Bengal (2010) 1 SCC 707**, Paragraph 12-14]

10.5 The accused must have intended or known that the deceased would commit suicide because of his actions or omissions [**Madan Mohan Singh v. State of Gujarat (2010) 8 SCC 628**]

11. Applying the above yardstick to the facts of the present case in question, even if we take the case as a whole and test the prosecution case on a demurrer, it could not be said that the actions of the accused instigated Kousalya to take her life or that he conspired with others to ensure that the person committed suicide or any act of the appellant or omission instigated the deceased resulting in the suicide.

12. **Broken relationships and heart breaks are part of everyday life. It could not be said that the appellant by breaking up the relationship with Kousalya and by advising her to marry in accordance with the advice of her parents, as he himself was doing, had intended to abet the suicide of Kousalya**. Hence the offence under Section 306 is not made out."

9. The learned Sr. Counsel has further relied upon the judgment of the Hon'ble Supreme Court in the case of ***Geo Varghese vs. State of Rajasthan and Anr.***, reported in ***2021 SCC Online SC 873***. He has emphasized paragraphs-20 to 23 of the said judgment and submits that the Hon'ble Supreme Court has enunciated the law regarding the offence U/s.306 IPC.

"20. At this stage, we may also refer to another recent judgment of a two-Judge Bench of this Court in the case of ***Ude Singh v. State of Haryana***, which elucidated on the essential ingredients of the offence under Section 306 IPC in the following words:

16. In cases of alleged abetment of suicide, there must be a proof of direct or indirect act(s) of incitement to the commission of suicide. It could hardly be disputed that the question of cause of a suicide, particularly in the context of an offence of abetment of suicide, remains a vexed one, involving multifaceted and complex attributes of human behaviour and responses/reactions. In the case of accusation for abetment of suicide, the court would be looking for cogent and convincing proof of the act(s) of incitement to the commission of suicide. In the case of suicide, mere allegation of harassment of the deceased by another person would not suffice unless there be such action on the part of the accused which compels the person to commit suicide; and such an offending action ought to be proximate to the time of occurrence. Whether a person has abetted in the commission of suicide by another or not, could only be gathered from the facts and circumstances of each case.

16.1. For the purpose of finding out if a person has abetted commission of suicide by another; the consideration would be if the accused is guilty of the act of instigation of the act of suicide. As explained and reiterated by this Court in the decisions above referred, instigation means to goad, urge forward, provoke, incite or encourage to do an act. If the persons who committed suicide had been hypersensitive and the action of accused is otherwise not ordinarily expected to induce a similarly circumstanced person to commit suicide, it may not be safe to hold the accused guilty of abetment of suicide. But, on the other hand, if the accused by his acts and by his continuous course of conduct creates a situation which leads the deceased perceiving no other option except to commit suicide, the case may fall within the four corners of Section 306IPC. If the accused plays an active role in tarnishing the self-esteem and self-respect of the victim, which eventually draws the victim to commit suicide, the accused may be held guilty of abetment of suicide. The question of *mens rea* on the part of the accused in such cases would be examined with reference to the actual acts and deeds of the accused and if the acts and deeds are only of such nature where the accused intended nothing more than harassment or snap show of anger, a particular case may fall short of the offence of abetment of suicide. However, if the accused kept on irritating or annoying the deceased by words or deeds until the deceased reacted or was provoked, a particular case may be that of abetment of suicide. Such being the matter of delicate analysis of human behaviour, each case is required to be examined on its own facts, while taking note of all the surrounding factors having bearing on the actions and psyche of the accused and the deceased.

21. We may also refer to a two-Judge Bench judgment of this Court in the case of *Narayan Malhari Thorat v. Vinayak Deorao Bhagat*, wherein the judgment rendered by the High Court quashing the FIR under Section 482 was set aside. In the said case, an FIR was registered under Section 306 IPC stating that the son and daughter-in-law were teachers in a Zila Parishad School where the accused was also a teacher used to make frequent calls on the mobile of the daughter-in-law, and used to harass her. Despite the efforts of the son of the informant in trying to make the accused see reason and stop calling, the accused continued with his activity. On 9-2-2015, there was a verbal altercation between the son of the informant and the accused and on 12-2-2015, he committed suicide leaving a note stating that his family life has been ruined by the accused who should not be pardoned and should be hanged. Under Section 482 CrPC, a petition was filed by the accused challenging the FIR, which was allowed by the High

Court and thereafter, was challenged before this Court. The appeal was allowed by this Court and made the following observations:-

"We now consider the facts of the present case. There are definite allegations that the first respondent would keep on calling the wife of the victim on her mobile and keep harassing her which allegations are supported by the statements of the mother and the wife of the victim recorded during investigation. The record shows that 3-4 days prior to the suicide there was an altercation between the victim and the first respondent. In the light of these facts, coupled with the fact that the suicide note made definite allegation against the first respondent, the High Court was not justified in entering into question whether the first respondent had the requisite intention to aid or instigate or abate the commission of suicide. At this juncture when the investigation was yet to be completed and charge-sheet, if any, was yet to be filed, the High Court ought not to have gone into the aspect whether there was requisite mental element or intention on the part of the respondent."

22. In the above quoted observations of this Court, there is a clear indication that there was a specific averment in the FIR that the respondent had continuously harassed the spouse of the victim and did not rectify his conduct despite being objected by the victim. Thus, as a matter of fact he had actively facilitated in the commission of suicide.

23. What is required to constitute an alleged abetment of suicide under Section 306IPC is there must be an allegation of either direct or indirect act of incitement to the commission of offence of suicide and mere allegations of harassment of the deceased by another person would not be sufficient in itself, unless, there are allegations of such actions on the part of the accused which compelled the commission of suicide. Further, if the person committing suicide is hypersensitive and the allegations attributed to the accused are otherwise not ordinarily expected to induce a similarly situated person to take the extreme step of committing suicide, it would be unsafe to hold the accused guilty of abetment of suicide. Thus, what is required is an examination of every case on its own facts and circumstances and keeping in consideration the surrounding circumstances as well, which may have bearing on the alleged action of the accused and the psyche of the deceased."

Relying upon the aforesaid precedence, Ld. Sr. Counsel has contended that as a key ingredient for making out an offence U/s.306 IPC there should be clear ***mens rea*** to commit offence of abatement of suicide on the part of the accused, it requires commission of direct or active act by the accused which led deceased to commit suicide finding no other option and such act must be intended to push the victim to a point of no return and she commits suicide which is clearly missing in the facts of present case as has been missing in the relied upon judgments, wherein the Hon'ble Apex Court quashed the criminal proceedings initiated against the accused persons U/s.306 IPC.

10. On the other hand, Mr. P.K. Maharaj, Ld. Additional Standing Counsel for the State as well as Mr. Himnshu Sekhar Mishra learned counsel for the complainant has vehemently opposed the petition. It has been argued that in the present case the complainant has lost her young daughter due to alleged mental pressure created by the accused-petitioner by harshly refusing to the proposed marriage after having been engaged with the deceased and after photographs of various ceremonies having been posted on the social media. In that view of the matter the deceased who belonged to Marwari community, which is a very small community in Odisha, the deceased would

be facing hardship and humility for her future marriage alliances, as she has already suffered a broken engagement at Nagpur, which forced the deceased to take the drastic step to commit suicide.

11. It has been strenuously argued by Mr. Himanshu Sekhar Mishra, learned Counsel for the complainant that in view of the fact that there are ample material on record in the form of statement of the complainant that immediately before the incident deceased disclosed to the complainant that she had a heated discussion with the petitioner on phone call where he has harshly called off the marriage. This statement itself attains relevance U/s.6 of Indian Evidence Act being *res gestae*. To substantiate his contention, Mr. Mishra, learned counsel relied upon a judgment of this Court in the case of ***Nursingha Charan Dash @ Babulu vrs. State of Odisha***, reported in ***(2019) 76 OCR 565***. The relevant is reproduced below:

> "The immediate disclosure about the occurrence by the victim before her mother is admissible as *res gestae* under Section 6 of the Evidence Act as it is a spontaneous statement connected with the fact in issue and there is no time interval for fabrication."

12. With regard to relied upon judicial pronouncements by the petitioner side, learned Counsels for the State as well as the complainant have argued that the same are very much distinguishable on facts. Moreover, prima facie case against the petitioner have been adequately made out, therefore, Ld. S.D.J.M. has rightly taken the cognizance of the offence punishable U/s.306/34 of IPC and this Court should not interfere with it at this stage by appreciating the material placed on record by the police in the charge sheet.

13. Having heard the counsel for the respective parties at length and having perused the material brought on record, this court is anguished to pose a question as to whether a young life of a highly qualified engineer could have been saved had the sequence of events been different or the petitioner deliberately created circumstances to push the deceased to take such drastic step of ending her life?

> Some of the factors which may be evaluated to answer the aforesaid question are:
>
> a) That the petitioner has been reluctant to enter into marital relationship with the deceased from the very beginning and had been postponing the marriage.
>
> b) That it is admitted case of the prosecution that initial reluctancy showed by the petitioner led to engagement of the deceased with some other boy from Nagpur, however, unfortunately, the said engagement could not be converted into marital relationship and the engagement was broken by the deceased's family. According, to the prosecution the deceased was having a sense of humiliation and frustration due to the fact that one engagement was broken and the petitioner was not inclined to convert the engagement to marital relationship. Therefore, breaking of earlier marriage proposal with the boy from Nagpur was also a contributing factor to push the deceased to take her own life.
>
> c) That both the family members were very much aware about the fact that petitioner was trying to avoid the company of deceased and this was making the deceased very un-happy about the relationship. Despite this fact both the families tried to thrust the relationship upon the petitioner and the deceased.
>
> d) The exact telephonic conversation that took place between the deceased and the petitioner between 3.30 A.M. to 4.00 A.M. is not known to anyone.

The only inference that could be drawn from the facts borne out of record is that the deceased has fell victim to reluctance of petitioner to get married and the desperation of parents of both the sides to get her married to the petitioner.

14. In this context the statement of the complainant mother and the sister of the deceased recorded U/s.161 Cr.P.C. acquires much importance, wherein complainant does not even say that she was told by the deceased about the heated arguments that took place between the petitioner and the deceased on the phone call between 3.30 A.M. and 4.00 A.M. rather she states that the deceased fell to sleep at about 4 A.M. with heavy heart. Which is contrary to two complaints lodged by the complainant i.e. one which led to registering of U.D. case and the other which became the foundation for lodging of F.I.R. The relevant portion of the statements of the mother/complainant witnesses are extracted herein above:-

"On 16.07.2021 my daughter Sheetal has gone to Bangalore to meet the would be sister in law Kajal Tapuria and there she spent time with Priyank Tapuria. Our family member realised that our daughter Sheetal has been upset for Priyank Tapuria after this my younger daughter Shivani Kankar on 12.09.2021 in the night tried to convince Priyank Tapuria by calling from the mobile phone of Sheetal. Despite all efforts to convince Priyank Tapuriya to marry my daughter, but he refused to marry her. My husband on that day i.e. 12.09.2021 had gone to Bombay. On that night after Shivani, Sheetal also tried to convince Priyank Tapuriya but he did not listen. At about 4 O'Clock in the morning Sheetal had gone to her bed room to sleep with a heavy heart. After date of marriage being fixed the behaviour of Priyank Tapuria caused mental shock to my daughter. On 13.09.2021 at about 8:00 O'clock I told my husband to come back from Bombay because Sheetal is upset. There after I came outside, the guest room door was closed, thereafter I peeped through the window by sliding the window pane with a stick and saw my daughter was hanging from the ceiling fan with her Odhni.

Similarly, statement of the sister of the deceased is extracted herein below:-

"I called Priyank Tapuria at night on 12.09.2021 by Sheetal Didi's mobile phone to convince him to marry my sister, despite my best efforts Priyank Tapuria refused to marry her. My father was at Bombay on that day i.e. on 12.09.2021. On that night after I spoke, Sheetal didi also spoke to Priyank Tapuria and tried to convince him but he did not listen. My mother Kamala Devi Chandak called up my father and told everything about Sheetal. On that day i.e. 13.09.2021 at about 8 O'clock my mother called my father to come back from Bombay because Sheetal is upset. There after my mother came outside, the guest room door was closed, thereafter my mother peeped through the window by sliding the window pane with a stick and saw my sister was hanging from the ceiling fan with her Odhni."

Although, the probative value of the statements of the witnesses cannot be gone into at this stage, but the statements of these witnesses do not disclose what exactly transpired between the deceased and the petitioner. The same fact is also reflected in the Charge-sheet filed by the investigating officer. This aspect of the matter cannot be elucidated from the evidence of any witness and that would always be speculative.

Therefore, in answer to the aforesaid question posed in the preceding paragraph I find that in the absence of exact conversations that had taken place between the deceased and the petitioner on that fateful night, crucial element of offence punishable U/s.306 IPC i.e. *mens rea* to commit offence of abatement of suicide on the part of the accused, which requires commission of direct or active act by the accused which led deceased to commit suicide seeing no other option and such act must be intended to push

the victim to a point of no return and she commits suicide are clearly missing in the facts of present case.

15. Further, from the charge-sheet itself, the prosecution's case is that the deceased was very sad and felt ashamed as she had already suffered a broken engagement with the boy from Nagpur. Previous to that also, talks for finalising marriage between the petitioner and the deceased could not be finalised, such repeated breaking of engagement of a girl belonging to Marwari community, which is a very small community in Odisha, would definitely cause severe mental stress. Therefore, in view of the fact that it is admitted case of the prosecution that breaking of the engagement with the boy from Nagpur also contributed to the mental stress and agony of the deceased for which the petitioner cannot be blamed for.

It's also eminent from record that the petitioner has shown his reluctance to the proposal of marrying the deceased from the very beginning. It is definitely expected from anyone to be very clear about his or her stand in any relationship, from the petitioner it was expected even more as he himself is a doctor, if he did not wish to marry the deceased he should have said no to the proposal at the very first instance without any caveats. Getting himself engaged with reluctancy to marry the deceased was even worse. At the same time, it is to be considered, that every relationship carries very heavy emotional burden and feelings and hence, those are matter of emotions where rationality and objectivity takes a backseat. Thus, in such delicate issues of heart, much is expected from the elders of families and the parents of both sides to act maturely and empathically, understands the views of the people engaged or going to be engaged in a relationship, the views so expressed vocally as well as the feeling which have not so expressly showed. Therefore, this court feels that act of entering into the engagement with the deceased by the petitioner with reluctancy to marry her alone cannot be made a penal offence, much less under Section 306 IPC. Reluctance to give irrevocable commitment for life-time and to take responsibility cannot culminate into *mens rea* to commit a criminal offence.

16. In the light of above discussion, the petition is allowed and the order dated 28.11.2022 taking cognizance of offence punishable U/s.306 IPC against the petitioner in G.R. Case No.1111 of 2021 corresponding to Dhenkanal Town P.S. Case No.382 of 2021 on charge-sheet No.616 dated 23.11.2022, by the learned S.D.J.M., Dhenkanal and all the consequential proceedings are quashed.

17. The CRLMC is accordingly disposed of.

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2024 (II) ILR-CUT-1073

SIBO SANKAR MISHRA, J.

CRLMC NO. 3816 OF 2023

NRUPARAJ SAHU ....Petitioner

-V-

STATE OF ODISHA & ANR. ....Opp.Parties

CODE OF CRIMINAL PROCEDURE, 1973 – Section 197 – Sanction – Whether mere allegation of offence U/s. 120-B of the IPC apart from other offences would deprive a Government Officer from the statutory protection provided U/s. 197 of Cr.P.C? – Held, No, reason indicated.

Case Laws Relied on and Referred to :-

1. Criminal Appeal No.458 of 2020 : D. Devaraja vs. Owais Sabeer Hussain.
2. 2022 LiveLaw (Ori) 154 : Ajaya Kumar Barik vs. State of Odisha and Anr.
3. (2005) 8 SCC 202 : Centre for Public Interest Litigation & Anr. vs. Union of India & Anr.
4. 2023 Live Law (SC) 485 : A. Srinivasulu vs. The State Rep. by the Inspector of police.
5. (2004) 2 SCC 349 : State of H.P. vs. M.P. Gupta.

For Petitioner : Mr. Devidutta Mohapatra.
For Opp.Parties : Mr. P.K. Maharaj, ASC (for O.P.No.1)

JUDGMENT Date of Hearing : 02.05.2024 : Date of Judgment : 20.06.2024

S.S. MISHRA, J.

This application under Section 482 Cr.P.C. has been filed by the petitioner praying for quashing of the order dated 02.05.2015 passed by the learned J.M.F.C., Saintala in G.R. Case No.192 of 2012 corresponding to Saitala P.S. Case No.123 of 2012 taking cognizance of the offences punishable under Sections-420/467/468/ 471/477-A/120-B of the IPC in so far as the petitioner is concerned. By the impugned order, cognizance of offences has been taken against the petitioner and six others for various other offences without there being a valid sanction from the competent officer against the petitioner.

2. Heard Mr. Devidutta Mohapatra, learned counsel appearing for the petitioner and Mr. P.K. Maharaj, learned Addl. Standing Counsel appearing for the State.

3. The prosecution story in the present case is that on 09.08.2012, the opposite party No.2 vide its office letter bearing No.1883/SSD had complained to the I.I.C., Saintala Police Station for lodging the F.I.R. against one Kuni Mallick @ Pratibha Pradhan and others, wherein it was alleged that they had obtained fake Caste Certificates from the Revenue Officer of Balangir. It is alleged that the State Level Scrutiny Committee has found that the Caste Certificate has been fraudulently obtained by Kuni Mallick with the help of other accused persons. It is also stated that Kuni Mallick had adopted several means to manipulate the records of the Revenue Department. On 09.08.2012, the I.I.C. has registered the case.

The present petitioner was posted as Tahaslidar, Titlagarh at the time of the alleged commission of offence. Against the petitioner, it is alleged that he had issued the Caste Certificate to Kuni Mallick without appropriately verifying and by entering into a criminal conspiracy with the main accused.

4. After investigation, the charge sheet was filed on 22.04.2015 arraying as many as seven accused persons. The present petitioner is accused No.7.

5. Mr. Mohapatra, learned counsel for the petitioner submits that apart from the merits of the case, the cognizance order is not sustainable under law in absence of proper sanction contemplated under Section 197 of Cr.P.C. The Court ought not to have taken cognizance for the offences under Sections-420/467/468/471/477-A/120-B of the IPC against the petitioner sans valid sanction as the petitioner is admittedly a Government servant.

6. Mr. Mohapatra, learned counsel for the petitioner contended that on the basis of the report submitted by the Revenue Inspector, the Petitioner being the Tahasildar, had issued the Caste Certificate. The relevant part of the charge sheet would indicate that the petitioner had issued the Caste Certificate while discharging his official duty which reads as under:

> *"That apart, the concerned Addl. Tahasildars, Dungripali and Tahasildar, Titlagarh, Ex-RI Saintala, who had issued caste certificate in favour of the lady Kuni Mallik @ Pratibha Padhan without proper application of mind and improper verification, enquiry into their caste status taking into consideration of their genealogy of both the families. Hence, they are liable for such omission and commission according to rule 08 (05) of the Orissa Caste Certificate (for SC & ST), Rules, 1980."*

7. Even if the allegations are taken at its face value, it is apparent that the petitioner had issued the Caste Certificate while exercising his official authority as Tahasildar. Therefore, "the act complained of" is coming under "the colour of duty" assigned to the petitioner. In that view of the matter, the sanction contemplated under Section 197 of Cr.P.C. was necessary and pre-condition for taking cognizance of offences against the petitioner. Therefore, in absence of such sanction, the cognizance order is bad in law.

8. Mr. Mohapatra, learned advocate has relied upon the judgment of the Hon'ble Supreme Court in the case of ***D. Devaraja vs. Owais Sabeer Hussain passed in Criminal Appeal No.458 of 2020 [arising out of SLP (Crl.) No.1882 of 2018]***. He has emphasized on Paragraphs-72, 73, 74 and 77 of the judgment, which read as under:

> *"72. The language and tenor of Section 197 of the Code of Criminal Procedure and Section 170 of the Karnataka Police Act makes it absolutely clear that sanction is required not only for acts done in discharge of official duty, it is also required for an act purported to be done in discharge of official duty and/or act done under colour of or in excess of such duty or authority.*
>
> *73. To decide whether sanction is necessary, the test is whether the act is totally unconnected with official duty or whether there is a reasonable connection with the official duty. In the case of an act of a policeman or any other public servant unconnected with the official duty there can be no question of sanction. However, if the act alleged against a policeman is reasonably connected with discharge of his official duty, it does not matter if the policeman has exceeded the scope of his powers and/or acted beyond the four corners of law.*
>
> *74. If the act alleged in a complaint purported to be filed against the policeman is reasonably connected to discharge of some official duty, cognizance thereof cannot be taken unless requisite sanction of the appropriate government is obtained under Section 197 of the Code of Criminal Procedure and/or Section 170 of the Karnataka Police Act.*

xxx xxx xxxx xxx

77. It is well settled that an application under Section 482 of the Criminal Procedure Code is maintainable to quash proceedings which are ex facie bad for want of sanction, frivolous or in abuse of process of Court. If, on the face of the complaint, the act alleged appears to have a reasonable relationship with official duty, where the criminal proceeding is apparently prompted by mala fides and instituted with ulterior motive, power under Section 482 of the Criminal Procedure Code would have to be exercised to quash the proceedings, to prevent abuse of process of Court."

9. To buttress his argument, Mr. Mohapatra further relied upon the judgment of this Court in ***Ajaya Kumar Barik vs. State of Odisha and Another*** reported in ***2022 LiveLaw (Ori) 154***. He has emphasized on Paragraphs-5 & 9, which read as under:

"5. Section 197 Cr.P.C. stipulates that when a public servant 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 of the Government. It does mean that a public servant not removable from his office save by or with the sanction of the Government cannot be criminally prosecuted unless a sanction under Section 197 Cr.P.C. is obtained provided the mischief which is alleged against him was committed while he was acting or purporting to act in the discharge of official duty. The law in this regard is well settled. If the act complained of has any nexus with the official duty, in that case, the public servant cannot be subjected to prosecution without sanction of the Government. The Apex Court in D. Devaraja (Supra) elaborately discussed about the sanction referring to numbers of its earlier judgment and finally concluded that the object of Section 197 Cr.P.C. is to prevent public servants from being subjected to vexatious proceedings for the acts which are done in discharge of official duty or committed in excess of such duty or authority.

9. If the seizure of the vehicle has been carried out in due discharge of official duty, in that case, the learned court below was to demand sanction under Section 197 Cr.P.C. If it is otherwise and that the petitioner did mischief and illegally seized the vehicle by misutilising the authority and official position and committed the excess in the colour of discharging duty, no sanction would be required. The Apex Court in D. Devaraja (supra) while dealing with a matter concerning sanction held and observed that an application under Section 482 Cr.P.C. is maintainable to quash proceedings which are ex facie bad for want of sanction, frivolous or in abuse of process of court. It has been further held therein that to decide whether sanction is necessary, the test is whether the act is totally unconnected with the official duty or if there is a reasonable nexus with the official duty and in that case the allegation was with regard to gross mischief committed during custodial interrogation. The Supreme Court in the above case concluded that if the act alleged against a policeman is reasonably connected with discharge of his official duty, it does not matter if he has exceeded the scope of his powers and/or acted beyond the four corners of law. In the case at hand, the seizure of the vehicle was carried out by the petitioner which is alleged to be on the instigation of a person with whom opposite party No.2 was not pulling on well and in good terms and that some excess was committed by him which in the considered opinion of the Court may have amounted to commission of offences, however, basically connected to the official duty or having nexus with the investigation and hence, sanction should have been insisted upon before proceeding with the complaint which is a view derived from the ratio of the Apex Court in D. Devaraja ibid."

10. In the case of ***Centre for Public Interest Litigation and Another vs. Union of India and Another*** reported in ***(2005) 8 SCC 202***, the Hon'ble Apex Court in Paragraph Nos.9, 10 & 11 has held as under :-

"9. The protection given under Section 197 is to protect responsible public servants against the institution of possibly vexatious criminal proceedings for offences alleged to have been committed by them while they are acting or purporting to act as public servants. The policy of the legislature is to afford adequate protection to public servants to ensure that they are not prosecuted for anything done by them in the discharge of their official duties without reasonable cause, and if sanction is granted, to confer on the Government, if they choose to exercise it, complete control of the prosecution. This protection has certain limits and is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty and is not merely a cloak for doing the objectionable act. If in doing his official duty, he acted in excess of his duty, but there is a reasonable connection between the act and the performance of the official duty, the excess will not be a sufficient ground to deprive the public servant from the protection. The question is not as to the nature of the offence such as whether the alleged offence contained an element necessarily dependent upon the offender being a public servant, but whether it was committed by a public servant acting or purporting to act as such in the discharge of his official capacity. Before Section 197 can be invoked, it must be shown that the official concerned was accused of an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duties. It is not the duty which requires examination so much as the act, because the official act can be performed both in the discharge of the official duty as well as in dereliction of it. The act must fall within the scope and range of the official duties of the public servant concerned. It is the quality of the act which is important and the protection of this section is available if the act falls within the scope and range of his official duty. There cannot be any universal rule to determine whether there is a reasonable connection between the act done and the official duty, nor is it possible to lay down any such rule. One safe and sure test in this regard would be to consider if the omission or neglect on the part of the public servant to commit the act complained of could have made him answerable for a charge of dereliction of his official duty. If the answer to this question is in the affirmative, it may be said that such act was committed by the public servant while acting in the discharge of his official duty and there was every connection with the act complained of and the official duty of the public servant. This aspect makes it clear that the concept of Section 197 does not get immediately attracted on institution of the complaint case.

10. Use of the expression "official duty" implies that the act or omission must have been done by the public servant in the course of his service and that it should have been in discharge of his duty. The section does not extend its protective cover to every act or omission done by a public servant in service but restricts its scope of operation to only those acts or omissions which are done by a public servant in discharge of official duty.

11. If on facts, therefore, it is prima facie found that the act or omission for which the accused was charged had reasonable connection with discharge of his duty then it must be held to be official to which applicability of Section 197 of the Code cannot be disputed."

11. In the case of **A. Srinivasulu vs. The State Rep. by the Inspector of police** reported in **2023 Live Law(SC)485** Hon'ble Supreme Court while dealing with similar such matter has held as under-:

"41. In Devinder Singh vs. State of Punjab through CBI , this Court took note of almost all the decisions on the point and summarized the principles emerging therefrom, in paragraph 39 as follows:

39. The principles emerging from the aforesaid decisions are summarised hereunder:

39.1. Protection of sanction is an assurance to an honest and sincere officer to perform his duty honestly and to the best of his ability to further public duty. However, authority cannot be camouflaged to commit crime.

39.2. Once act or omission has been found to have been committed by public servant in discharging his duty it must be given liberal and wide construction so far its official nature is concerned. Public servant is not entitled to indulge in criminal activities. To that extent Section 197 CrPC has to be construed narrowly and in a restricted manner.

39.3. Even in facts of a case when public servant has exceeded in his duty, if there is reasonable connection it will not deprive him of protection under Section 197 CrPC. There cannot be a universal rule to determine whether there is reasonable nexus between the act done and official duty nor is it possible to lay down such rule.

39.4. In case the assault made is intrinsically connected with or related to performance of official duties, sanction would be necessary under Section 197 CrPC, but such relation to duty should not be pretended or fanciful claim. The offence must be directly and reasonably connected with official duty to require sanction. It is no part of official duty to commit offence. In case offence was incomplete without proving, the official act, ordinarily the provisions of Section 197 CrPC would apply. ....”

12. Mr. Maharaj, learned Addl. Standing Counsel appearing for the opposite party-State vehemently opposed the contentions raised by Mr. Mohapatra, learned counsel for the petitioner at the Bar and submitted that the learned J.M.F.C., Saintala has rightly taken cognizance by relying upon the judgment of the Hon’ble Supreme Court in the case of ***State of H.P. vs. M.P. Gupta*** reported in ***(2004) 2 SCC 349***. He has strongly relied upon the judgment of the Hon’ble Supreme Court and contended that once there is an allegation of criminal conspiracy, there is no question of sanction required to prosecute a public servant. Mr. Maharaj, learned State Counsel contends that the Court below has taken cognizance for the offences under Sections-420/467/468/471/477-A/120-B of the IPC. Since the cognizance under Section 120-B of the IPC has been taken, the petitioner cannot take the plea of sanction at this stage.

13. I am unable to accept the contentions raised by Mr. Maharaj, learned State Counsel. Mere allegation of the offence under Section 120-B of the IPC apart from the other offences, shall not deprive a Government Officer from the statutory protection provided under Section 197 of Cr.P.C. The protection given under Section 197 of Cr.P.C. is only to ensure that the public servants are not subjected to the ordeal of the criminal prosecution, for some bonafide official act carried out by the officers by following due procedure during the course of their official duty. The intent behind the statutory protection is to protect the honest and sincere officers to perform their duty honestly and to the best of their ability to further the public cause. However, the authority, under the guise of the protection, is not to camouflage the commission of any crime. If the “act complained of” is coming under the official function of a delinquent officer, he cannot be subjected to criminal trial without there being a valid sanction. Even on merits, the analysis of the present case would reveal that the evidences are not adequate to proceed against the petitioner.

14. The substratum of the allegations is that one Kuni Mallick @ Prativa Pradhan is naturally born to one Gobinda Pradhan who belongs to Dumal (SEBC) by caste. It appears that Kuni Pradhan was adopted by one Subhas Mallick, who belongs to Kandha caste (ST). After adoption, Kuni Mallick was admitted to the Primary School and in the School, her father’s name was mentioned as Subash Mallick. After completion of her study, she appears to have obtained the Caste Certificate and on the strength of the said

Caste Certificate, she got employment as a Cook-cum-Attendant in the SC/ST Development Department of the Government of Odisha. It is alleged that she had manipulated the documents and event of adoption to obtain the Caste Certificate. The doubt appears to have been created after Kuni Mallick married to one Purushottam Kalia, who too belongs to Dumal caste. From the narration of the facts, it is illuminating from the record that the real issue appears to be the issue as to whether Kuni Mallick was validly adopted or not. If the adoption is found to be valid, no fault could be found from the Caste Certificate. However, the investigation carried out by the police had gone in a completely different tangent, the police simply presumed that the adoption itself was invalid. On the presumption that the adoption was invalid, the I.O. has proceeded with the case. It is evident that no evidence was collected regarding the validity of the adoption except to say that there is no adoption agreement/deed produced by Kuni Mallick.

15. Mere non-existence or non-execution of adoption deed per se would not invalidate the adoption. Therefore, there is no material collected by the police to create a genuine doubt regarding the fact that Kuni Mallick was validly adopted by Subhas Mallick.

16. The Investigating Officer has not taken into account the fact that the present petitioner being the Tahasildar had issued the Caste Certificate on the basis of the report submitted by the Revenue Inspector. On the basis of the enquiry report conducted by the Revenue Officer, the petitioner while exercising his official function as the Tahasildar had issued the Caste Certificate on the bonafide belief that Kuni Mallick was validly adopted by one Subhas Mallick and after adoption even she had taken admission in the Primary School and completed her study. In the school record Kuni Mallick was shown as the daughter of Subash Mallick.Therefore, issuance of the Caste Certificate by the petitioner also cannot be questioned on merit besides the fact that he had issued the Caste Certificate while exercising his official duty as Tahasildar.

17. Mr. Maharaj, learned Addl. Standing Counsel further submits that no indulgence should be given to the petitioner in the present case because petitioner has been absconding and the charge sheet was filed showing him as an absconder. To controvert this aspect of the matter, Mr. Mohapatra, has taken me to ground no.5 of the petition which reads as follows:

> *"E. For that being a Class-1 Govt. Servant of the State Govt., the petitioner after serving at the Tahasil Office at Titlagarh was transferred to different places which are reproduced below in the chart. Therefore the petitioner at no point of time was avoiding the court process or the investigating officer, though it was well within the knowledge of the prosecution/Investigating Officer, that the petitioner is a Govt. Servant and there is nothing on record to show that the petitioner has acted beyond the capacity as envisaged under law for issuance of caste certificate but he has been arrayed as an accused person & thereafter shown as absconder. That the petitioner was discharging his official duties at his posted places of service hence the submission of the charge sheet describing the petitioner to be an absconder is vague, evasive in nature and cannot be sustained in the eyes of law.*

YEARS	*POSTINGS OF THE PETITIONER*
2008	*Tahasildar, Titlagarh*
2008-2012	*District Project Coordinator, Kalahandi*
2013-2016	*Sub-Collector, Malkangiri*
2016-2018	*Joint-Secretary, Panchayati Raj Department.*
2018-2020	*Joint-Secretary, S.C. & S.T. Department*
2020-2021	*Joint-Coordinator, Koraput*
2021onwards	*Registrar, Sambalpur University*

18. On the face of the aforementioned, the Investigating Officer declaring the petitioner to be an absconder and filing the charge sheet is misconceived and cannot be believed, as the petitioner is a Government servant and has been posted in different places in different capacity right through.

19. Taking into consideration the entire facts and circumstances of the case and weighing the same in the light of the judgments discussed in the preceding paragraphs, I am of the considered view that the petitioner was entitled to the protection provided under Section 197 of Cr.P.C. While the petitioner was functioning as Tehsildar he had bonafidely issued the subject caste- certificate to Co-accused Kuni Mallick during the course of his official duty, therefore, he was entitled to the statutory protection before subjecting him to criminal prosecution. In view thereof, the cognizance taken for the offences U/ss.420/467/468/471/477-A/120-B of the IPC against the petitioner without valid sanction is barred under law and is not sustainable.

20. In the result, the CRLMC is allowed and the order dated 02.05.2015 passed by the learned J.M.F.C., Saintala in G.R. Case No.192 of 2012 corresponding to Saitala P.S. Case No.123 of 2012 is set-aside.

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2024 (II) ILR-CUT-1080

A.C. BEHERA, J.

SA NO. 348 OF 1996

DHRUBA CHARAN PRADHAN ……Appellant

-V-

NIDRABATI SUNA @ BANKRA ……Respondent

PROPERTY LAW – Possession – Without title – Undisputedly neither the plaintiff nor the defendant have any title over the suit land – The suit land is a Government land – Person in possession for several years dispossessed by another person who had no better title than the person whom he dispossessed – Effect of – The person who was in possession earlier is entitled to be restored to possession.

Case Laws Relied on and Referred to :-

1. 100 (2005) CLT (S.C.) 147 : Sona Bala Bora & Ors. Vrs Jyotirindra Bhatacharjee.
2. 1968(3) SCR 163: Nair Service Society Ltd. Vrs. Rev. Father K.C.Alexander & Ors.
3. AIR 1972 (Patna) 138: Srinath Singh & Anr. Vrs. Kali Bhawani Prasad & Anr.
4. 1963 C.L.T (Notes) 105 : Gadadhar Sahu Vrs. Karsanbasta Patel & Ors

5. 2005 (II) OLR 330:Pragnya Rout Vrs. Hemaprava Ray & Ors.
6. 1988 (1) OLR 549 & 65 (1988) C.L.T. 669 : Madan Mohan Panigrahi Vrs. The Executive Officer, Berhampur Municipality.

For Appellant : Mr.A.K.Mahakud.
For Respondent : None

JUDGMENT Date of Hearing : 01.07.2024:: Date of Judgment : 12.07.2024

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.3 of 1991 and he was the appellant before the 1st Appellate Court in the first appeal vide T.A. No.35/5 of 1993-96.

The respondent of this 2nd Appeal was the sole plaintiff before the Trial Court in the suit vide T.S. No.3 of 1991 and she was the respondent before the 1st Appellate Court in the 1st appeal vide T.A. No.35/5 of 1993-96.

3. The suit of the plaintiff (respondent in this 2nd appeal) vide T.S. No.3 of 1991 against the defendant (appellant in this 2nd appeal) before the Trial Court was a suit for declaration of possessory title, recovery of possession and permanent injunction.

4. The case of the plaintiff in her suit vide T.S. No.3 of 1991 as per her plaint was that, the suit land is a Government land. When, 28 to 29 years before the suit land was lying vacant, she (plaintiff) possessed the same and made it fit for cultivation and raised paddy crops therein. As such, she (plaintiff) was possessing and cultivating the suit land. On the basis of the continuous possession of the plaintiff over the suit land, in the Hal major settlement, the possession of the plaintiff has been noted in the remarks column of the suit plot. While, the plaintiff was possessing the suit land, surprisingly, on dated 20.04.1991, the defendant started digging a well over a portion of the suit land, to which, the plaintiff objected, but the defendant did not respond the same and terrorized the plaintiff and forcibly continued in digging the well on the suit land. For which, without getting any way, the plaintiff approached the Civil Court by filing the suit vide T.S. No.3 of 1991 against the defendant praying for declaration of her possessory title over the suit land and for recovery of possession of the same from the defendant and to injunct the defendant permanently from interfering in the possession of the plaintiff over the suit land.

5. Having been noticed from the Trial Court in the suit vide T.S. No.3 of 1991, the defendant contested the same denying the averments made by the plaintiff in her plaint admitting the Government as the owner of the suit land.

6. It was the case of the defendant that, the suit land was lying vacant (fallow), for which, he (defendant) possessed the same and dug a well on the same in the year 1965 and he (defendant) has been possessing the suit land and also has been using the water of the said well since 1965. But, the plaintiff, by influencing the staffs of the Settlement Authorities, she (plaintiff) has managed to record the noting of her possession in the remarks column of the Hal R.o.R. of suit plot No. 626 under Hal Khata No.410 behind

his back. The said noting of possession in favour of the plaintiff is not binding upon him (defendant).

The further case of the defendant was that, as the Government is the owner of the suit land, for which, in absence of the state of Orissa, the suit of the plaintiff is not maintainable. The suit of the plaintiff is also barred by limitation and the Court has no pecuniary jurisdiction to adjudicate the same. As such, the plaintiff has no cause of action for filing the suit. Therefore, the suit of the plaintiff is liable to be dismissed against him (defendant) with cost.

7. 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. 3 of 1991 and the said issues are:-

Issues

1. Is there any cause of action?
2. Is the suit in time?
3. Is the suit maintainable?
4. Is the plaintiff ever possessed the suit land?
5. Has the plaintiff any right over a Government land?
6. Is the plaintiff entitled to any relief?
7. Is the note of possession recorded behind the back of the defendant?
8. Is the defendant possessing the land since long?

8. In order to substantiate the aforesaid relief(s), sought for by the plaintiff in the suit vide T.S. No. 3 of 1991 against the defendant, she (plaintiff) examined altogether three numbers of witnesses from her side including her as P.W.1 and relied upon one document i.e. certified copy of the Hal R.o.R. of the suit land i.e. Hal Khata No.410 as Ext.1.

On the contrary, in order to nullify/defeat the suit of the plaintiff, the defendant examined two witnesses from his side including him as D.W.1 and relied upon two documents on his behalf vide Exts.A and B.

9. After conclusion of hearing and on perusal of the materials, documents and evidence available in the record, the Trial Court answered all the issues in favour of the plaintiff and against the defendant and basing upon the findings and observations made by the Trial Court in all the issues in favour of the plaintiff and against the defendant, the Trial Court decreed the suit of the plaintiff in part on contest against the defendant with cost and declared that, the plaintiff is lawfully entitled to the possession of the suit land and she (plaintiff) is entitled to recover the possession of the suit land from the defendant through the process of Court and the defendant is permanently restrained from interfering in the possession of the plaintiff in the suit land as per its judgment and decree dated 14.05.1993 and 22.06.1993 respectively assigning the reasons that, though the suit land is Government land, but the plaintiff was possessing the same prior to 20.04.1991 and the possession of the plaintiff over the suit land finds support from the unchallenged noting of possession of the plaintiff in the remarks column of the Hal R.o.R. of the suit land vide Ext.1 and the defendant has forcibly dispossessed the plaintiff from the suit land on dated 20.04.1991 and as the plaintiff was in prior possession over the suit land having no title in the same and as the defendant having no

title in the same, he (defendant) has forcibly dispossessed the plaintiff from the suit land on 20.04.1991 unauthorizedly, then, she (plaintiff) is entitled for the recovery of the possession of the suit land from the defendant and she (plaintiff) is also entitled for the decree of injunction against him (defendant).

10. On being dissatisfied with the aforesaid part judgment and decree dated 14.05.1993 and 22.06.1993 respectively passed by the Trial Court in T.S. No.3 of 1991 in favour of the plaintiff and against the defendant, he (defendant) challenged the same by preferring the 1st Appeal vide T.A. No.35/5 of 1993-96 being the appellant against the plaintiff arraying her (plaintiff) as respondent.

11. After hearing, from both the sides, the 1st Appellate Court dismissed the first Appeal vide T.A. No.35/5 of 1993-96 of the defendant on contest against the plaintiff as per its judgment and decree dated 07.08.1996 and 14.08.1996 respectively concurring/ accepting the findings and observations made by the Trial Court in its judgment and decree of the suit vide T.S. No.3 of 1991 in favour of the plaintiff and against the defendant.

12. On being aggrieved with the aforesaid judgment and decree of the dismissal of the 1st Appeal vide T.A. No.35/5 of 1993-96 of the defendant, he (defendant) challenged the same by preferring this 2nd appeal being the appellant against the plaintiff arraying her (plaintiff) as respondent.

13. This 2nd Appeal was admitted on formulation of the following substantial question of law, i.e., :-

> Whether in view of the provisions of Section 16 of the Orissa Prevention of Land Encroachment Act, a suit for eviction is maintainable or not?

14. I have already heard from the learned counsel for the appellant (defendant only), as none appeared from the side of the respondent (plaintiff) to participate in the hearing of the appeal.

15. It is the settled propositions of law that, issues of civil matters are to be decided on a balance of probabilities.

On this aspect, the propositions of law has already been clarified by the Apex Court in the ratio of the following decision:-

> ***(i) 100 (2005) CLT (S.C.) 147—Sona Bala Bora & Others Vrs Jyotirindra Bhatacharjee***—Suit—Issues of Civil matter—To be decided on a balance of probabilities. (Para-21)

16. The parties to the suit vide T.S. No.3 of 1991are fighting for possession over the suit land having their no title in the same. Because, it is the undisputed case of the parties that, the suit land is a Government land and the Government is the owner of the same.

17. When, there is fighting for possession over the suit land between the parties without having their title in the same, then for adjudication of this nature of dispute, I thought it proper to refer the ratios of the following decisions of the Hon'ble Courts in the like nature cases and the said decisions are:-

(i) 1968(3) SCR 163: Nair Service Society Ltd. Vrs. Rev. Father K.C.Alexander & Others—When the facts disclose no title, possession alone decides the suit.

(ii) AIR 1972 (Patna) 138: Srinath Singh & Another Vrs. Kali Bhawani Prasad & Another—Specific Relief Act (1877)—Section-9—Where both the plaintiff and the defendant have no title to the suit land but the plaintiff proves his prior possession he is entitled to decree of possession against the defendant who has dispossessed him.

(iii) 1963 C.L.T (Notes) 105—Gadadhar Sahu Vrs. Karsanbasta Patel & Others— a person in possession of land without title has an interest in the property, which is heritable and good against all the world excepting the true owner. This interest, unless the true owner interferes, is transferable.

(iv) 2005 (II) OLR 330:Pragnya Rout Vrs. Hemaprava Ray & Others—One who was in possession for several years, if dispossessed by another who had no better title than the person whom he dispossessed, the person who was in possession earlier is entitled to be restored to possession. (Para Nos.6 & 16)

(v) 1988 (1) OLR 549 & 65 (1988) C.L.T. 669—Madan Mohan Panigrahi Vrs. The Executive Officer, Berhampur Municipality—Possession—Without title—Person in possession without title has an interest in the property which is heritable and good against all the world except the true owner—This interest is transferable unless the true owner interferes. (Para-6)

18. Here in this suit/appeal at hand, when undisputedly, the plaintiff and defendant have their no title over the suit land, then at this juncture, which party shall be able to establish his prior possession, then, such party shall be entitled to get protection of his possession through the interference of the Court.

19. It is the undisputed case of the parties that, the possession of the plaintiff has been noted in the remarks column of the Hal suit Plot No.626 under Hal Khata No.410 vide Ext.1. The said noting of possession of the plaintiff in the remarks column of the Hal R.o.R. of the suit plot No.626 as the possessor of the suit land has not been varied/altered or set aside till yet by any competent authority. The defendant has not also approached any Court or authority challenging the noting of possession of the plaintiff as a possessor of the suit land in the Hal R.o.R. vide Ext.1. The plaintiff has adduced evidence before the Trial Court corroborating her pleadings stating about her prior possession over the suit land till her forcible dispossession from the same on dated 20.04.1991 by the defendant. The prior possession of the plaintiff over the suit land has been corroborated/supported through the noting of her possession in the Hal R.o.R. of the suit land vide Ext.1. The plea of the defendant about his continuous possession over the suit land has not been corroborated/supported through any document.

Therefore, on comparison of the evidence of both the sides concerning the rival claim of possession of the parties over the suit land, the claim of the plaintiff regarding her prior possession over the suit land has become more probable/acceptable than the claim of possession of the defendant over the same. Because, the claim of possession of the plaintiff over the suit land is supported through its reflection/indication in the Hal R.o.R. vide Ext.1. For which, the concurrent findings of both the Courts i.e. the Trial Court and 1st Appeal Court regarding the prior possession of the plaintiff over the suit land and her forcible dispossession from the same on dated 20.04.1991 by the defendant cannot be held inacceptable under law.

As such, the concurrent findings of the Trial Court and 1st Appellate Court about the prior possession of the plaintiff over the suit land and her forcible dispossession from the same on dated 20.04.1991 by the defendant has become acceptable under law.

20. As per the discussions and observations made above, when it is held that, the plaintiff without having her title on the suit land, she (plaintiff) was in continuous possession over the same up to 20.04.1991 and when on dated 20.04.1991, the defendant without having his title on the suit land, he (defendant) has forcibly dispossessed her (plaintiff) from the same, then at this juncture, by applying the principles of law enunciated in the ratio of the aforesaid decisions of the Hon'ble Courts and Apex Court, it is held accepting the findings and observations of the Trial Court and 1st Appellate Court that, the plaintiff is entitled for the recovery of possession of the suit land from the defendant, as she (plaintiff) has been forcibly dispossessed from the same on dated 20.04.1991 by the defendant.

21. Now, it will be seen, whether, the suit of the plaintiff was barred under Section 16 of The Orissa Prevention of Land Encroachment Act, 1972 is concerned;

The preamble of The Orissa Prevention of Land Encroachment Act, 1972 provides, means, by which, persons, those are in unauthorized occupation of Government land can be evicted and possession of the same can be restored to its owner i.e. Government.

22. So, The Orissa Prevention of Land Encroachment Act, 1972 provides the medium for recovery of possession of the Government land from the unauthorized occupiers on behalf of its owner i.e. the Government.

23. Here, in this suit/appeal at hand, there is fighting between the parties (those are two private persons) over the suit land in absence of the Government/State. As, the government is the undisputed owner of the suit land, for which, as per the preamble of The Orissa Prevention of Land Encroachment Act, 1972, Section 16 of the OPLE Act has its no applicability to the dispute for possession between the two private persons (parties) over the Govt. land.

So, Section 16 of the OPLE Act, 1972 cannot be held as a bar for the maintainability of the suit of the plaintiff against the defendant.

24. On analysis of the facts and law as per the discussions and observations made above, when, it is held that, the concurrent findings made by the Trial Court and 1st Appellate Court in passing the judgment and decree of suit of the plaintiff vide T.S. No.3 of 1991 in part in favour of the plaintiff and against the defendant are not unreasonable, then, the question of interfering with the same through this 2nd appeal filed by the appellant (defendant) does not arise.

Therefore, there is no merit in the appeal of the appellant (defendant). The same must fail.

25. In result, the appeal filed by the appellant/defendant is dismissed on merit, but without cost.

The judgment and decree passed by the Trial Court and 1st Appellate Court in T.S. No.3 of 1991 and T.A. No.35/5 of 1993-96 respectively are confirmed.

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2024 (II) ILR-CUT-1086

A.C. BEHERA, J.

SA NO.16 OF 1999

SRI RADHAMOHAN DEB & ANR. .....Appellants

-V-

RADHAMOHAN DEB BIJE BHARATIPUR & ORS. .....Respondents

SEBAYAT RIGHT – Whether Sebayats right is transferable? – Held, No, it is heritable if there is any transfer of sebayatship either through seva samarpan patra or otherwise.

Case Laws Relied on and Referred to :-

1. 110 (2010)CLT 574: Sri Mangala Thakurani Bije,Kakatpur & Ors Vs. State of Orissa & Ors.
2. 2010 (Supp.-II) OLR 594 & 2010 (II) CLR 219 : Kasinath Panda & Ors Vs. Raghunath Panda (deleted) Basudeb Panda & Ors.
3. 2014 (4) Civ.L.T. 477 (Kerala) : Narayan Pandarathil Vs. Vasudevan Pillai.
4. 2015 (I) CLR 998: Niranjan Mekap & Ors. Vs. State of Orissa & Ors.
5. AIR 1979 (SC) 1682 : Profulla Chorone Requitte & Ors. Vs. Satya Choron Requitte.
6. 2003 (1) C.J.D. (H.C.) 295 : Sri Jagannath Temple Managing Committee, Puri & Anr. Vs. Narayan Mohapatra

For Appellants : Mr. D.P. Mohanty.
For Respondents: None.

JUDGMENT Date of Hearing : 25.06.2024 : Date of Judgment : 15.07.2024

A.C. BEHERA, J.

This 2nd Appeal has been preferred against the reversing Judgment.

2. The appellants of this 2nd Appeal were the plaintiffs before the Trial Court in the suit vide T.S. No.350 of 1991 and they were the respondent Nos.1 and 2 before the First Appellate Court in the 1st Appeal vide T.A. No.64 of 1995.

The respondents of this 2nd Appeal were the defendants before the Trial Court in the suit vide T.S. No.350 of 1991 and they were the appellants and respondent No.3 before the First Appellate Court in the 1st Appeal vide T.A. No.64 of 1995.

The suit of the plaintiffs vide T.S. No.350 of 1991 against the defendants was a suit for declaration, confirmation of possession and in alternative recovery of possession.

The plaintiff No.1 (Radhamohan Deb) is a deity and the plaintiff No.1-deity has been represented through plaintiff No.2.

3. As per the plaintiff's case the plaintiff No.1-deity (Radhamohan Deb) is a private deity of Prusti Family i.e. the family of the plaintiff No.2 and defendant Nos.1 & 4. The suit properties are the properties of the Deity (plaintiff No.1).

The defendant No.1 along with others were the Sebayats as well as Marfatdars of the plaintiff No.1-Deity. In lieu of their Seva Puja of the plaintiff No.1 deity, the defendant No.1 along with other Sebayats and Marfatdars were enjoying the properties of the deity (plaintiff No.1) including the suit properties. The defendant No.4 is the wife of the defendant No.1.The plaintiff No.2 is the adopted son of defendant Nos.1 and 4.

On dated 21.09.1990, the other co-Sebayats and Marfatdars of the plaintiff No.1 deity executed a Seva Samarpan Patra in favour of the defendant No.1 entrusting him (defendant No.1) to perform the Seva Puja of the deity on special occasions such as, Janmastami, Radhastami & Dola Purnima and to manage and enjoy the properties of the deity (plaintiff No.1). Accordingly, the defendant No.l was enjoying the properties of the deity (plaintiff No.1) including the suit properties and in lieu of such enjoyment, he (defendant No.1) was performing the Seva Puja as well as above annual festivals/rituals of the deity. There are some houses over the properties of the deity i.e. over the suit properties and some houses thereof have been let out and out of the collected rents from the said houses, the expenditures of the Seva Puja of the plaintiff No.1 deity were managing. When, some dissention arose in the family between defendant No.1, his wife (defendant No.4) and their adopted son (plaintiff No.2), for which, the plaintiff No.2 stayed outside from the house of the defendant Nos.1 & 4 in the same village in a rented house with his wife and children. For which, the defendant No.1 and defendant No.4 claimed maintenance under Section 125 of the Cr.P.C. from the plaintiff No.2 by filing a case and the said case was allowed and the plaintiff No.2 was directed by the court to pay monthly maintenance to the defendant Nos.1 & 4 as their adopted son. The defendant No.3 being one of the co-Marfatdar of the plaintiff No.1-deity, he (defendant No. 3) was looking after the maintenance case of the defendant Nos.1 & 4 against the plaintiff No.2 on behalf of the defendant Nos.1 and 4. Therefore, there was closeness between the defendant No.1 and defendant No.3. So, the defendant No.1 executed and registered a Seva Samarpan Patra on dated 03.04.1991 in respect of the suit properties in favour of the defendant No.3 entrusting all acts, duties and obligations of the defendant No.1 for the plaintiff No.1-Deity to the defendant No.3 through that Seva Samarpan Patra. As such, by executing the said Seva Samaparpan Patra in favour of the defendant No.3 on dated 03.04.1991, he (defendant No.1) was released from his Marfatdarship and Sevayatship of the plaintiff No.1 (deity). As, the defendant No.3 is a stranger to the family of defendant Nos.1, 4 & plaintiff No.2, for which, the said deed i.e. Seba Samarpan Patra dated 03.04.1991 executed by the defendant No.1 in favour of the defendant No.3 in respect of the properties of the deity i.e. in respect of the suit properties is invalid and bad under law. Because, that deed dated 03.04.1991 has been executed between defendant Nos.1 & 3 with a mala fide intention in order to defeat the legitimate rights, duties and obligations of the plaintiff No.2 for the plaintiff No.1-Deity including his rights of Seva Puja and management of the plaintiff No.1-Deity. Because, he (plaintiff No.2) is non-else, but he is the son and the next successor of the defendant Nos.1 & 4. When, on the strength of the aforesaid illegal deed i.e. Seva Samarpan Patra dated 03.04.1991 executed by the defendant No.1 in favour of the defendant No.3 in respect of the suit properties, the defendant No.3 tried to possess the suit properties forcibly, then without getting any way, the plaintiff No.1-deity and plaintiff No.2 approached the Civil Court by filing the suit vide T.S. No.350 of 1991 against the defendants praying for a declaration that, the deed i.e. Seva Samarpan Patra bearing No.1226 dated 03.04.1991 executed by the defendant No.1 in favour of the defendant No.3 in respect of the suit properties as invalid and to confirm the possession of the plaintiffs over the suit properties and to recover the possession of the suit properties from the defendant No.3, if they (plaintiffs) are found to be dispossessed from the suit properties during the pendency of the suit by the defendant No.3.

4. Having been noticed from the Trial Court in the suit vide O.S. No.350 of 1991 filed by the plaintiffs, the defendant Nos.1 and 3 filed their joint written statement challenging the suit of the plaintiffs taking their stands *inter alia* therein that:

The plaintiff No.1 deity Radhamohan Deb is a private deity of the Prusti Family and they are the Marfatdars of the deity and they being the Marfatdars of the deity, they are enjoying the usufructs of the properties of the deity i.e. suit properties by rendering Seva Puja and observing all the festivals/rituals of the plaintiff No.1-deity. Previously, other Marfatdars of the deity had executed a Seva Samarpan Patra in favour of the defendant No.1 entrusting him (defendant No.1) to perform the Seba Puja of the deity, but when due to the old age, the defendant No.1 became incapable to perform the Seva Puja and the rituals of the plaintiff No.1-deity, then, he (defendant No.1) executed a Seva Samarpan Patra in favour of the defendant No.3 on dated 03.04.1991 in respect of the suit properties, as he (defendant No.3) is also a co-Marfatdar of the deity with the defendant No.1 and he (defendant No.3) has also been performing the Seva Puja and rituals of the plaintiff No.1-Deity. Therefore, the deed i.e. Seva Samarpan Patra dated 03.04.1991 executed by the defendant No.1 in favour of the defendant No.3 in respect of the suit properties is not an illegal and invalid deed. The plaintiffs have no locus standie to challenge that deed. Therefore, the suit of the plaintiffs is liable to be dismissed against them (defendant Nos.1 & 3).

The defendant No.4 (wife of the defendant No.1) filed her written statement supporting the case of the plaintiffs stating therein that, the defendant No.3 has managed to execute the so-called Seva Samarpana Patra dated 03.04.1991 from the defendant No.1 in respect of the suit properties by practising fraud. For which, the defendant No.3 has no manner of right, title and interest over the suit properties on the basis of the said fraudulent Seva Samarpan Patra dated 03.04.1991. That apart, he (defendant No.3) is a stranger to their family. For which, he (defendant No.3) is not entitled to perform the Seba Puja of the deity in place of her husband i.e. defendant No.1. Therefore, the suit filed by the plaintiffs is to be decreed.

5. Basing upon the aforesaid pleadings and matters in controversies between the parties, altogether 9 numbers of issues were framed by the Trial Court in the suit vide T.S. No.350 of 1991 and the said issues are:

ISSUES

1. ***Whether the suit is maintainable?***
2. ***Whether there was any cause of action for the suit?***
3. ***Whether the suit is vitiated with fraud and collusion?***
4. ***Whether the suit property is the absolute Debottar property of the deity?***
5. ***Whether the deed of Seba Samarpan Patra is valid and legal?***
6. ***Whether the plaintiff No.2 has any right, title and interest over the suit property?***
7. ***Whether the plaintiff No.2 or defendant No.3 are in possession of the suit property?***
8. ***Whether the plaintiff No.2 is performing the Seba Puja of the deity?***
9. ***What other relief the plaintiff is entitled to?***

6. In order to substantiate the aforesaid reliefs sought for by the plaintiffs against the defendants, the plaintiffs examined 2 witnesses from their side including the plaintiff No.2 as P.W.1 & exhibited 3 documents on their behalf vide Exts.1 to 3.

The supporting defendant of the plaintiffs i.e. defendant No.4 examined 2 witnesses on her behalf.

The contesting defendant No.3 examined 3 witnesses on his behalf including him as D.W.5 and exhibited series of documents from his side vide Exts.A/1 to D/1.

7. After conclusion of hearing and on perusal of the materials, documents and evidence available in the record, the trial court answered all the issues in favour of the plaintiffs and against the defendant Nos.1 and 3 and basing upon the findings and observations made by the Trial Court in the issues in favour of the plaintiffs and against the defendant Nos.1 and 3, the Trial Court decreed the suit of the plaintiffs vide T.S. No.350 of 1991 as per its Judgment and Decree dated 29.04.1995 and 08.05.1995 respectively on contest against the defendants, but without cost and declared that, the Seva Samarpan Patra (Ext.B/1) executed by the defendant No.1 in favour of the defendant No.3 on dated 03.04.1991 is invalid and the same is not binding on the plaintiffs and the plaintiffs are entitled to recover the possession of the suit properties from the defendant No.3 and directed the defendant No.3 to deliver the vacant possession of the suit properties to the plaintiffs within a period of one month from the date of the Judgment and Decree assigning the reasons that, the Seva Samarpan Patra dated 03.04.1991 vide Ext.B/1 executed by the defendant No.1 in favour of the defendant No.3 is invalid and the same is not binding upon the plaintiff No.2, because, Sebayati right is heritable, but the same is not transferable. As, the defendant No.3 is possessing the suit properties i.e. the properties of the deity (plaintiff No.1) on the strength of that invalid Seva Samarpan Patra vide Ext.B/1, for which, the plaintiffs are entitled to get the decree of recovery of possession of the suit properties from the defendant No.3, because, after the death of defendant No.1 during the pendency of the suit, the plaintiff No.2 being the only son and the successor of the defendant No.1, he (plaintiff No.2) is entitled under law to succeed all the rights, duties and obligations of the defendant No.1, those were attached with him (defendant No.1) for the plaintiff No.1-Deity.

8. On being dissatisfied with the aforesaid Judgment and Decree dated 29.04.1995 and 08.05.1995 respectively passed in T.S. No.350 of 1991 by the Trial Court in favour of the plaintiffs and against the defendant No.3, he (defendant No.3) challenged the same by preferring the 1st Appeal vide T.A. No.64 of 1995 being the appellant No.1 against the plaintiffs arraying the plaintiffs and defendant No.4 as respondents, as by then, the defendant No.1 had expired leaving behind the plaintiff No.2 and defendant No.4 as his successors.

After hearing from both the sides, the First Appellate Court allowed that 1st Appeal vide T.A. No.64 of 1995 of the defendant No.3 and set aside the Judgment and Decree of the Trial Court and dismissed the suit vide T.S. No.350 of 1991 of the plaintiffs assigning the reasons that, the transfer of Sevayatship through Seva Samarpan Patra dated 03.04.1991 vide Ext.B/1, by one Sevayat i.e. defendant No.1 in favour of his next heir in the line of succession i.e. defendant No.3 is permissible under law, as, he (defendant No.3) is non-else, but, he (defendant No.3) is the son of the brother of the defendant No.1. As, he (defendant No.1) is serving as a Junior Clerk in the Collectorate, Puri, for which, it was not possible for him to perform the Seva Puja and rituals of the deity wholeheartedly, because, he (defendant No.1) may not be allowed to come from Puri in all the times, for which, the defendant No.1 executed the Seva Samarpan Patra dated 03.04.1991 vide Ext.B/1 in favour of the defendant No.3 for performing of the Seva Puja and rituals of the deity like him (defendant No.1) properly and there is custom

among the Marfatdars of the plaintiff No.1-Deity for the execution of Seva Samarpan Patra, when one Sevayat like the defendant No.1 becomes unable to perform Seva Puja and the rituals of the plaintiff No.1-Deity. That apart, the so-called adoption of the plaintiff No.2 as the adopted son of defendant Nos.1 & 4 cannot be established only on the basis of claim of maintenance by the defendant Nos.1 & 4 under Section 125 of the Cr.P.C. from the plaintiff No.2 as their son. Therefore, the Seva Samarpan Patra dated 03.04.1991 vide Ext.B/1 executed by the defendant No.1 in favour of the defendant No.3 is not invalid under law. Therefore, the Judgment and Decree passed by the Trial Court cannot be sustainable under law. So, the 1st Appellate Court set aside the Judgment and Decree of the Trial Court.

9. On being aggrieved with the aforesaid Judgment and Decree dated 07.12.1998 and 02.01.1999 respectively passed by the First Appellate Court in T.A. No. 64 of 1995 in favour of the defendant No.3 in dismissing the suit of the plaintiffs, they (plaintiffs) challenged the same by preferring this 2nd Appeal being the appellants against the defendant No.3 arraying him as respondent No.2 and also arraying the defendant Nos.2 & 4 as other respondents.

10. This 2nd Appeal was admitted on formulation of the following substantial questions of law i.e.

> ***i.*** *When the adoption of plaintiff No.2 by Defendant No.1 and his wife defendant No.4 is admitted at all levels, more so when defendant No.1 is realizing maintenance from his adopted son plaintiff No.2, if the court below is correct in ignoring the adoption of plaintiff No.2 on the ground that he should have got himself declared as the adopted son by a competent civil court?*
>
> ***ii.*** *Plaintiff No.2 being the son and successor of late defendant No.1, if defendant No.1 ignoring the claim of plaintiff No.2, is within his right to transfer his Sebait Marfatdari right by a Seba Samarpan Patra in favour of defendant No.3 who is not in the line of succession?*
>
> ***iii.*** *The Seba Samarpan Patra Ext.B/1 itself having recited passing of consideration if the court below is justified in ignoring this recital and holding that the valuation has been mentioned for the purpose of stamp duty only?*

11. I have already heard from the learned counsel for the appellants (plaintiffs) only, as none appeared from the side of the contesting respondent No.2 (defendant No.3) to participate in the hearing of the 2nd Appeal.

12. So far as the 1st substantial question of law i.e. When the adoption of plaintiff No.2 by Defendant No.1 and his wife defendant No.4 is admitted at all levels, more so when defendant No.1 maintenance from his adopted son i.e. plaintiff No.2, if the court below is correct in ignoring the adoption of plaintiff No.2 on the ground that he should have got himself declared as the adopted son by a competent civil court is concerned,

When the adoptive parents of the plaintiff No.2 i.e. defendant Nos.1 & 4 are admitting the plaintiff No.2 as their adopted son claiming maintenance from him under Section 125 Cr.P.C, 1973 and when, in the written statement of the defendant Nos.1 & 4, they have admitted the plaintiff No.2 as their adopted son, then, at this juncture, the First Appellate Court should not have held that, there is no material in the record to establish the relationship of the plaintiff No.2 as the adopted son of the defendant Nos.1 & 4. Because, as per the provisions of law envisaged in Sections 58, 17 & 18 of the Evidence

Act, 1872, there cannot be any better evidence than the admissions of the parties in the suit. Because, facts admitted need not be proved.

Therefore, the findings and observations made by the First Appellate Court in its Judgment and Decree that, the plaintiff No.2 has not established lawfully that, he (plaintiff No.2) is the adopted son of defendant Nos.1 & 4 cannot be held as correct under law. Therefore, it is held that, the plaintiff No.2 is the adopted son of defendant Nos.1 & 4.

13. So far as the 2nd and 3rd formulated substantial questions of law i.e.

Whether the Seba Samarpan Patra dated 03.04.1991 vide Ext.B/1 in favour of the defendant No.3 in respect of the suit properties transferring all the rights and duties of the defendant No.1 as Shebait and Marfatdar of the plaintiff No.1-deity in favour of the defendant No.3 and transferring the possession of the suit properties in his favour is sustainable and valid or invalid under law is concerned,

> *"It is the settled propositions of law that, Shebait Rights are obligations and duties. Sebayats are given the duty of performing sevapuja, in return, they are given certain benefits like share in the offerings and bhoga. Any transfer of sebayat right is opposed to public policy and that cannot be accepted by the Court. Therefore, Sebayat right is not transferable. Because, Sebayatship being a property devolve like any other property according to the ordinary Hindu Law of inheritance. The Seva Samarpan Patra is incapable of conveying any title in favour of the transferees, so far as the Sebait right of the transferor is concerned. The properties of the deity belong to the deity, but not to the Marfatdars. Sebayats have only the right to possess the land of the deity as long as they render specific service to the deity. Sebayats have no alienable right to the Seva Land. Therefore, the Sebayats cannot transfer any right, title and interest in the property belonging to the deity. Sebayati Right is not transferable, but the same is heritable. If there is transfer of Sebayati Right through any deed by any Sebayat, the same is void ab-initio. Shebaiti as trustee must act jointly and the office Vests on the shebaits collectively, though some sort of division amongst the shebaits inter se/ is permissible for doing sevapuja by turn, which is allowed only on the ground of convenience. In the eye of law, the shebaits remain one body, and the deity is represented by all of them acting together and no one shebait represents the idol in part or possesses any interest in fractional shares in respect of the idol's property. Thus, the Sevasamarpana Patra, is incapable of conveying any title in favour of the transferees."*

14. On this aspect the propositions of law has been clarified by the Apex Court and Hon'ble Courts in the ratio of the following decisions:

I. **110 (2010) CLT 574: Sri Mangala Thakurani Bije, Kakatpur & Others Vs. State of Orissa & Others**—*Land—Land of the deity belong to the deity & not to the Marfatdars. (Para No.5)*

II. **2010 (Supp.-II) OLR 594 & 2010 (II) CLR 219:Kasinath Panda & Others Vs. Raghunath Panda (deleted) Basudeb Panda & Others**—*RELIGIOUS ENDOWMENT—Sebait rights—Transfer of—Sebayati rights are obligations and duties—Sebayats are given the duty of performing sevapuja, in return, they are given certain benefits like share in the offerings and bhoga—Any transfer of sebayat right is opposed to public policy and that cannot be accepted by the Court.{Para No.23}*

III. **2014 (4) Civ.L.T. 477 (Kerala):Narayan Pandarathil Vs. Vasudevan Pillai**—*Right of Uraima or 'Shebaitship' is considered by Hindu Law as inalienable as personal interest of Shebaits cannot be detached from their duties. (Para No.24)*

IV. **2015 (I) CLR 998: Niranjan Mekap & Others Vs. State of Orissa & Others**—*Endowment— Sevayats—Only right to possess to land as long as they render specific service—Sevayats have no alienable right to the seva land. Held, therefore, the Sevayats could not have transferred any right, title and interest on the property belonging to the deity. (Para 60)*

V. **AIR 1979 (SC) 1682:Profulla Chorone Requitte and Others Vs. Satya Choron Requitte**—*Hindu Law-Religious Endowment—Shebaits— Shebaitship being property devolves like any other species of heritable property. (Para Nos.20 to 23 & 26)*

VI. **2003 (1) C.J.D. (H.C.) 295:Sri Jagannath Temple Managing Committee, Puri & Another Vs. Narayan Mohapatra: Shebaiti right**—*Transfer—Shebaiti right is not transferable—If transfer/sale is made, the same is abinitio void. (Para No.13)*

15. It appears from the Order No.27 dated 08.02.2024 that, Commissioner of Endowments through its counsel has submitted a memo indicating that, the plaintiff No.2 is not indexed as public religious endowment institution. So, on the basis of the aforesaid submission on behalf of the Commissioner of Endowment, it is held that, the plaintiff No.1 deity is a private deity of the defendant No.1's family.

As per the discussions and observations made above, it has already been held that, the defendant Nos.1 & 4 are the husband and wife and the plaintiff No.2 is their adopted son. The plaintiff No.2 is the successor of defendant No.1.

In view of the propositions of law enunciated in the ratio of the aforesaid decisions, Shebait Rights are obligations and duties. Shebaits are given the duties of performing Seba Puja of the deity. Sehebait right is not transferable but the same is heritable. If there is any transfer of Shebaitishp either through Seba Samarpan Patra like Ext.B/1 or otherwise, the same is ab-initio void as per law. Therefore, the transfer of Sebayat right of the defendant No.1 through Seva Samarpan Patra vide Ext.B/1 in favour of the defendant No.3 debaring/excluding the plaintiff No.2 from his legitimate right of Seba Puja of the plaintiff No.1-deity is held to be invalid and void ab initio. Because, the plaintiff No.2 being the son of defendant No.1, he (plaintiff No.2) is the successor of defendant No.1.

16. When it has been indicated in the so-called Seba Samarpan Patra vide Ext.B/1 about the transfer of possession of the properties of the plaintiff No.1-deity i.e. the suit properties in favour of the defendant No.3, then in view of the principles of law enunciated in the ratio of the aforesaid decisions, the transfer of possession of the suit properties by the defendant No.1 through Ext.B/1 is held to be illegal under law. Because, as per law, the suit properties are the properties of the plaintiff No.1-deity, but the same are not the properties of any Marfatdar including defendant No.1. Because, the owner i.e. plaintiff No.1-deity is the lawful possessor of the suit properties. The possession thereof cannot be transferred by the defendant No.1 in favour of the defendant No.3. Sebayats like the defendant No.1 has no transferable right including the right of transfer of possession of the Seba Land i.e. the suit properties. When Seba Right is not transferable, but the same is heritable and when as per law, after the death of the Sebayat i.e. defendant No.1, all his rights and obligations of the defendant No.1 for the plaintiff No.1-deity has already been devolved upon the plaintiff No.2, as the plaintiff No. 2 is the only son as well as successor of the defendant No.1, for which, the findings and observations made by the Trial Court in the suit vide T.S. No.350 of 1991 that, the

Seba Samarpan Patra vide Ext.B/1 executed by the defendant No.1 on dated 03.04.1991 in favour of the defendant No.3 is invalid and the same is not binding on the plaintiffs and the possession of the defendant No.3 over the suit properties is illegal cannot be held erroneous.

17. As per the discussions and observations made above, when the findings and observations made by the First Appellate Court in T.A.No. 64 of 1995 that, the transfer of Sebayatiship and possession of the suit properties by the defendant No.1 in favour of the defendant No.3 through Seba Samarpan Patra vide Ext.B/1 as lawful has been held to be unsustainable under law and the Judgment and Decree passed by the Trial Court in the suit has been held as sustainable under law, then at this juncture, there is justification under law for making interference with the Judgment and Decree passed by the First Appellate Court in T.A. No. 64 of 1995 through this 2nd Appeal filed by the appellants (plaintiffs).

18. Therefore, there is merit in the 2nd Appeal filed by the appellants (plaintiffs). The same must succeed.

19. In result, the 2nd Appeal filed by the appellants (plaintiffs) is allowed on contest, but without cost.

The Judgment and decree passed by the 1st Appellate Court in T.A. No.64 of 1995 is set aside.

20. The Judgment and Decree passed by the Trial Court in T.S. No.350 of 1991 is confirmed.

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2024 (II) ILR-CUT-1093

A.C. BEHERA, J.

SA NO. 355 OF 1997

MOTOR RANSINGH & ORS. …..Appellants

-V-

HARA PATRA & ORS. ..…Respondents

ODISHA LAND REFORMS ACT, 1960 – Section 22 – Whether the delivery of possession of the suit properties by a scheduled caste person to a non-scheduled caste person through the agreement to sell without the permission from the revenue authority U/s. 22 is valid? – Held, No – Without obtaining necessary permission from the revenue authorities U/s. 22 of the Act, transfer is invalid under law.

Case Laws Relied on and Referred to :-

1. 76 (1993) CLT 367 : Ramnaresh Singh Vs. Padmalochan Jaypuria (dead) & after him Gulapi Devi & Ors.
2. 2019 (II) CLR 1178 : (Sri) Muchiram Barik Vs. Revenue Officer, Sadar, Sambalpur & Ors.
3. AIR 1994 (Allhabad) 298 (Full Bench) : Nutan Kumar & Ors. Vs. IInd Addl. District Judge, Banda & Ors.
4. III (2004) Civ.L.T 204 (SC) : Jayamma Vs. Maria Bai dead by proposed LRs & Anr.
5. 2017 (II) OLR 660 : Abdul Aziz Vs. Member, Board of Revenue, Orissa, Cuttack & Ors.

For Appellants : Mr. D.P. Mohanty, Mr. B.H. Mohanty.
For Respondents : None

ORDER Date of Hearing :18.06.2024 : Date of Order : 24.06.2024

A.C. BEHERA, J.

This 2nd Appeal has been preferred against the confirming Judgment.

2. The appellants of this 2nd Appeal were the plaintiffs before the Trial Court in the suit vide T.S. No.24 of 1988 and they were the appellants before the First Appellate Court in the 1st Appeal vide T.A. No.23 of 1991.

The predecessor of the respondents of this 2nd Appeal i.e. Bakuli Patra was the sole defendant before the Trial Court in the suit vide T.S. No.24 of 1988 and he was the original respondent before the First Appellate Court in the 1st Appeal vide T.A. No.23 of 1991. When during the pendency of the 1st Appeal, the said sole respondent i.e. Bakuli Patra expired, then, his L.Rs. were substituted as respondent Nos.1(a) to 1(j) in that 1st Appeal vide T.A. No.23 of 1991 and the said respondent Nos.1(a) to 1(j) of the 1st Appeal are the respondents in this 2nd Appeal.

3. The suit of the plaintiffs (appellants in this 2nd Appeal) vide T.S. No.24 of 1988 against the predecessor of the respondents i.e. against the defendant (Bakuli Patra) was a suit for specific performance of contract.

The case of the plaintiffs before the Trial Court vide T.S. No.24 of 1988 against the defendant (Bakuli Patra) as per their pleadings was that, the plaintiffs belong to Scheduled Tribe community, but the defendant belong to Scheduled Caste community. The plaintiffs are 5 brothers being the 5 sons of Kanduru Ransingh.

The defendant (Bakuli Patra) was the exclusive owner of the suit properties. In order to sell the suit properties to the plaintiff No.1 (Motor Ransingh), he defendant (Bakuli Patra) executed an agreement for sale on 31.03.1971 in favour of the plaintiff No.1 and received consideration amount of Rs.1100/- from the plaintiff No.1 and delivered the possession of the suit properties to the plaintiff No.1 with the conditions that, he (defendant, Bakuli Patra) shall execute and register the sale deed in respect of the suit properties in favour of the plaintiff No.1 after obtaining permission for sale of the same from the Competent Revenue Authorities as per Orissa Land Reforms Act, 1960. Thereafter, the defendant Bakuli Patra applied before the Sub-Divisional Officer, Keonjhar for granting permission under Section 22 of the OLR Act, 1960 in order to sell the suit properties to the plaintiff No.1 and obtained permission from the SDO, Keonjhar under Section 22 of the OLR Act, 1960 for selling the suit properties in favour of the plaintiff No.1, as he (defendant, Bakuli Patra) is a person of Scheduled Caste Community and the plaintiff No.1 is a person of non-Scheduled Caste community, but in spite of receiving the permission for selling the suit properties in favour of the plaintiff No.1, the defendant did not execute and register the sale deed in respect of the suit properties in favour of the plaintiff No.1 in compliance with the conditions indicated in the agreement to sell dated 31.03.1971. For which, the plaintiff No.1 requested the defendant time and again for executing and registering the sale deed in respect of the suit properties in his favour in pursuance to the written agreement dated 31.03.1971 executed by the defendant in his favour, but he defendant (Bakuli Patra) avoided to execute and register the sale deed in respect of the suit properties in favour of the plaintiff No.1. For which, the plaintiff No. 1 issued a notice through his Advocate on dated 20.05.1988 to

the defendant requesting him to execute and register the sale deed in respect of the suit properties in his favour in compliance with the conditions indicated in the agreement dated 31.03.1971, but, the defendant replied such notice dated 20.05.1988 of the plaintiff No.1 disputing the execution of the so-called agreement to sell dated 31.03.1971. For which, without getting any way, the plaintiffs being 5 brothers approached the Civil Court by filing the suit vide T.S. No.24 of 1988 against the defendant praying for the decree of specific performance of contract on the basis of agreement to sell dated 31.03.1971 directing the defendant to execute and register the sale deed in respect of the suit properties in favour of the plaintiffs.

4. Having been noticed from the Trial Court in the suit vide T.S. No.24 of 1988 filed by the plaintiffs, the defendant contested the same denying all the allegations alleged by the plaintiffs in their plaint against him (defendant) by taking his pleas/stands inter alia therein that, he (defendant) is a member of Scheduled Caste Community, but the plaintiffs belong to Scheduled Tribe community. The so-called agreement to sell dated 31.03.1971 was executed without permission from the competent authority under the Orissa Land Reforms Act, 1960, for which, such agreement dated 31.03.1971 is invalid and void.

The further case of the defendant was that, in order to purchase the suit properties from him (defendant), the plaintiff No.1 had paid Rs.700/- to him with an understanding to sell the suit properties in his favour after obtaining permission from the competent Revenue Authority as per the provisions of OLR Act, 1960 and after receiving due (proper) consideration amount of the same from him (plaintiff No.1). When, after obtaining permission from the Revenue Authority for selling the suit properties in favour of the plaintiff No.1, the plaintiffs including the plaintiff No.1 did not agree to pay the due (proper/ adequate) consideration amount of the suit properties to him (defendant) for purchasing the same, then, he (defendant) did not sell the suit properties to the plaintiff No.1. The further case of the defendant was that, he has never entered into an agreement to sell of the suit properties with the plaintiff No.1, for which, the suit of the plaintiffs is not maintainable in view of the bar under law provided in the Orissa Land Reforms Act, 1960. The suit of the plaintiffs is also barred by the law of limitation. For which, the suit of the plaintiffs is liable to be dismissed against him (defendant) with cost.

5. Basing upon the aforesaid pleadings and matters in controversies between the parties, altogether 7 numbers of issues were framed by the Trial Court in the suit vide T.S. No.24 of 1988 and the said issues are:

Issues

i. *Is the suit maintainable under law?*
ii. *Is the suit barred by law of limitation?*
iii. *Is the suit barred for non-joinder of necessary party?*
iv. *Is the agreement for sale illegal, void and not binding on defendant?*
v. *Are the plaintiffs in possession of the suit land?*
vi. *Have the plaintiffs done their part of the contract?*
vii. *To what other relief, the plaintiffs are entitled to?*

6. In order to substantiate the aforesaid relief sought for by the plaintiffs against the defendant, the plaintiffs examined one witness from their side i.e. plaintiff No.1 as P.W.1 and exhibited series of documents on their behalf vide Exts.1 to 7.

But the defendant neither examined any witness from his side nor proved any document on his behalf.

7. After conclusion of hearing of the suit vide T.S. No.24 of 1988 and on perusal of the materials, documents and evidence available in the record, the Trial Court dismissed the suit of the plaintiffs vide T.S. No.24 of 1988 against the defendant on contest without cost as per its Judgment and Decree dated 31.08.1991 and 13.09.1991 respectively answering issue Nos.2,4,6 & 7 against the plaintiffs and in favour of the defendant by giving observations therein that, the agreement to sell dated 31.03.1971 vide Ext.7 executed by the defendant in favour of the plaintiff No.1 in respect of the suit properties for selling the suit properties is void, because that agreement vide Ext. 7 was executed in contravention of the provisions of Section 22 of the OLR Act,1960 without obtaining necessary permission from the competent Revenue Authorities. Because, on the basis of that agreement vide Ext.7, possession of the suit properties was delivered by its owner i.e. defendant (who is a scheduled caste person) in favour of the plaintiff No.1 (who is a non-scheduled caste person). For which, the plaintiffs are not entitled for the decree of specific performance of contract in respect of the suit properties against the defendant on the basis of that void agreement vide Ext.7.

8. On being dissatisfied with the aforesaid Judgment and Decree of the dismissal of the suit of the plaintiffs vide T.S. No.24 of 1988 passed by the Trial Court on dated 31.08.1991 and 13.09.1991 respectively, they (plaintiffs) challenged the same by preferring the 1st Appeal vide T.A. No. 23 of 1991 being the appellants against the defendant (Bakuli Patra) by arraying him as respondent.

When, during the pendency of that 1st Appeal vide T.A. No.23 of 1991, the respondent (defendant, Bakuli Patra) expired, then his LRs were substituted as respondent Nos.1(a) to 1(j) in the said 1st Appeal vide T.A. No.23 of 1991 in place of deceased respondent Bakuli Patra.

After hearing of that 1st Appeal vide T.A. No.23 of 1991 of the plaintiffs, the 1st Appellate Court also dismissed to that 1st Appeal vide T.A. No.23 of 1991 of the plaintiffs confirming the Judgment and Decree dated 31.08.1991 and 13.09.1991 respectively passed by the Trial Court in T.S. No.24 of 1988 as per its Judgment and Decree dated 30.08.1997 and 12.09.1997 respectively passed in T.A. No.23 of 1991 accepting the findings and observations made by the Trial Court that, the agreement in question vide Ext.7 is void, because as per the contents of Ext.7, delivery of possession of the suit properties was given by the defendant in favour of the plaintiff No.1 without obtaining the required permission from the Revenue Authorities as per Section 22 of the OLR Act, 1960. For which, the plaintiffs are not entitled for the decree of specific performance of contract on the strength of the said void agreement vide Ext.7, which is invalid and non-est in the eye of law. Therefore, the plaintiffs are also not entitled for refunding back any amount paid through the said void agreement vide Ext.7, because, that Ext.7 was executed in contravention of the provisions of the statute i.e. The OLR Act, 1960.

9. On being aggrieved with the aforesaid Judgment and Decree of the dismissal of the 1st Appeal vide T.A. No.23 of 1991 of the plaintiffs passed by the 1st Appellate Court, they (plaintiffs) challenged the same by preferring this 2nd Appeal being the appellants against all the respondents of the 1st Appeal by arraying them as respondents.

10. This 2nd Appeal was admitted on formulation of the following substantial question of law i.e.

Whether the courts below were correct in taking a view that the transfer within the meaning of Section 22 of the Orissa Land Reforms Act, 1960 includes even the agreement for sale?

11. I have already heard from the learned counsel for the appellants (plaintiffs) only, as none appeared from the side of the respondents to participate in the hearing of the 2nd appeal.

12. It is the own case of the plaintiffs (appellants in this 2ndAppeal) as per their pleadings and evidence in the suit vide T.S. No.24 of 1988 before the Trial Court that, the owner of the suit properties i.e. Bakuli Patra (defendant) is a man of Scheduled Caste Community, but they (plaintiffs) do not belong to Scheduled Caste Community. As such, they (plaintiffs) are the persons of non-Scheduled Caste Community. It is also the own case of the plaintiffs (appellants in this 2ndAppeal) that, the possession of the suit properties was delivered by the defendant in favour of the plaintiff No.1 on the basis of such agreement to sell dated 31.03.1971 vide Ext.7 and the said agreement to sell dated 31.03.1971 vide Ext.7 in respect of the suit properties was executed by its owner i.e. defendant in favour of the plaintiff No.1 without obtaining required permission under Section 22 of the OLR Act from the competent Revenue Authority.

As per Section 22 (1) to (5) of The OLR Act, 1960, any transfer of holding or part thereof by a Raiyat belonging to the Schedule Caste community in favour of a person belonging to non-Scheduled Caste Community without any permission in writing of the Revenue Officer shall be invalid (void).

On that aspect, the propositions of law has already been clarified in the ratio of the following decisions:

76 (1993) CLT 367:Ramnaresh Singh Vs. Padmalochan Jaypuria (dead) & after him Gulapi Devi & Others & 2019 (II) CLR 1178:(Sri) Muchiram Barik Vs. Revenue Officer, Sadar, Sambalpur & Others.

Where delivery of possession of land was made upon execution of agreement to sell with a promise to sell after obtaining permission, mere contract for sale on a future date would not be void. When there is transfer of possession on the basis of such a contract, it would require permission of the Revenue Officer under Section 22 of the OLR Act. **(Para Nos.14 & 15)**

13. When it is the own case of the plaintiffs that, delivery of possession of the suit properties was given by its owner i.e. the defendant to the plaintiff No.1 through the agreement to sell dated 31.03.1971 vide Ext.7 with specific conditions therein to sell the suit properties to the plaintiff No.1 after obtaining required permission from the Revenue Authority, then in view of the propositions of law enunciated in the ratio of the above decisions, such agreement to sell vide Ext.7 is invalid, void and non-est in the eye of law. Because, due to transfer of possession of the suit properties on the basis of such agreement to sell vide Ext.7 without obtaining necessary permission from the Revenue Authorities under Section 22 of the OLR Act, the said agreement to sell vide Ext.7 is invalid under law, as,there was transfer of possession of the suit properties by a Scheduled Caste person in favour of a non-Scheduled Caste person.

As, the agreement dated 31.03.1971 vide Ext.7 was executed in contravention of the statutory provisions of The OLR Act, 1960 opposing the public policy defeating the provisions of Section 22 of the OLR Act, 1960 offending such statute forbidding the aforesaid statutory provisions of law, then, such agreement in question dated 31.03.1971 vide

Ext.7 is not merely void, but, the same was invalid from its nativity i.e. from its inception. For which, no legal relationship had arisen between the parties through such invalid agreement vide Ext.7, as the said agreement vide Ext.7 was executed offending the statute, i.e. OLR Act, 1960.

14. The conclusions drawn above finds support from the ratio of the following decisions of the Hon'ble Courts and Apex Court:

i. **AIR 1994 (Allhabad) 298 (Full Bench):Nutan Kumar and Others Vs. IInd Addl. District Judge, Banda & Others**—*An agreement offending a statute or public policy or forbidden by law is not merely void, but it is invalid from nativity. It cannot become valid even if the parties thereto agree to it. No legal relations come into being from an agreement offending a Statute or Public Policy.* **(Para Nos.22 & 23)**

ii. **III (2004) Civ.L.T 204 (SC):Jayamma Vs. Maria Bai dead by proposed LRs & Another**—*Assignment or transfer made in contravention of statutory provisions: Invalid and opposed to public policy and attract provisions of Section 23, Contract Act, 1872.* **(Para No.20)**

iii. **2017 (II) OLR 660:Abdul Aziz Vs. Member, Board of Revenue, Orissa, Cuttack & Others**—*Any Court or authority which is discharging the public function and in sesin of the matter, can take into consideration this principle of law and simply refuse to act upon such document which is void ab initio.* **(Para No.12)**

15. On application of the propositions of law enunciated in the ratio of the aforesaid decisions of the Hon'ble Courts and Apex Court to the facts and law of this appeal at hand as discussed above, it is held that, the agreement dated 31.03.1971 vide Ext.7 was executed by the owner of the suit properties i.e. defendant (Bakuli Patra) in favour of the plaintiff No.1 in contravention of the statutory provisions of the OLR Act, 1960 without obtaining the necessary and mandatory permission under Section 22 of the OLR Act, 1960, for which, such agreement vide Ext.7 was invalid from its nativity. Therefore, the plaintiffs are not entitled under law for the decree of specific performance of contract against the defendant on the basis of such void and invalid agreement vide Ext.7.

Therefore, the Trial Court and First Appellate Court are correct in their views that, the agreement to sell in question dated 31.03.1971 vide Ext.7 transferring the possession of the suit properties by the Scheduled caste person i.e. defendant in favour of the non-Scheduled caste person i.e. plaintiff No.1 through that agreement vide Ext.7 is a transfer within the meaning of Section 22 of the OLR Act, 1960. For which, in order to execute that agreement to sell dated 31.03.1971 vide Ext.7 prior permission under Section 22 of the OLR Act, 1960 was mandatory and compulsory and due to lack of such permission, that agreement in question vide Ext.7 was invalid and non-est in the eye of law. For which, the concurrent findings of the Trial Court and First Appellate Court in dismissing the suit for specific performance of contract of the plaintiffs (appellants in this 2nd Appeal), claimed through the invalid agreement vide Ext.7 cannot be held erroneous. Therefore, the question of interfering with the same through this 2nd Appeal filed by the appellants (plaintiffs) does not arise.

16. As such, there is no merit in the appeal of the appellants (plaintiffs). The same must fail.

17. In result, the 2nd appeal filed by the appellants (plaintiffs) is dismissed on merit, but without cost.

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