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Sri Pravakar Ganthia, OSJS

Law Reporter
Smt. Madhumita Panda, Advocate

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Determining cases of medical negligence presents a significant challenge for courts and presiding judges, primarily due to the complexity of the medical facts involved ─ Medical negligence cases often require a deep understanding of intricate medical procedures, standards of care, and the nuances of clinical judgment ─ Judges, who may not have medical expertise, must rely on expert testimonies to interpret these specialized aspects, making it essential to evaluate the credibility and reliability of these experts ─ The task of dissecting complex medical evidence and distinguishing between acceptable and negligent care demands a high level of scrutiny and understanding, which can be daunting without a medical background.

Intricate nature of medical knowledge in negligence cases adds another layer of difficulty ─ Medical professionals employ specialized techniques and make decisions based on evolving clinical data, which can vary widely among practitioners ─ Assessing whether a deviation from standard care constitutes negligence involves not only understanding these standards but also evaluating if the deviation had a direct and significant impact on the patient's outcome ─ This process requires the court to navigate through a labyrinth of medical information, often presented in highly technical language, which can be overwhelming and lead to potential misinterpretations.

Judiciary must carefully balance the expert opinions, ensuring that the medical facts are accurately represented and that justice is served in a manner that upholds both the legal and medical standards.

Court must ensure that every aspect of the alleged negligence is thoroughly examined ─ The Court's responsibility extends beyond delivering

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INDIAN PENAL CODE, 1860 ─ Offence U/ss. 302/304 **─** Offence being committed under the influence of extreme mental or emotional disturbances **─** Slow burn reaction followed by provocation also rendered to the Appellant **─** Whether these can be considered as mitigating circumstances to commit triple murder? **─** Held, Yes **─** The offence being committed under the influence of extreme mental or emotional disturbances can be taken into account as Judges should not be blood thirsty **─** The death penalty would be disproportionate, unwarranted and life imprisonment would be a more appropriate sentence.

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Bhikari C. Samantray (Dead) & Ors. V. Gajendra Ku. Samantray (Dead) & Ors.

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MOULDING OF RELIEF – Whether the Court can mould the relief even such relief has not been claimed by the parties? – Held, Yes.

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SERVICE JURISPRUDENCE ─ Promotion ─ The appellants were given promotion from the post of Forest Rangers to OFS GROUP A (JB) by extending them the benefits of reservation ─ The same promotions granted to them have not been recalled, nor have the same been declared illegal by any Court ─ The appellants were eligible for promotion to the post of OFS Group - A (Senior) Level as they have completed five years service in Group-A (JB) Level ─ The appellants were not considered for promotion ─ Effect of ─ Held, denial of consideration of the case of appellants amount to nullifying their promotion to the rank of OFS Group-A (JB) from the post of Forest Ranger, without following due procedure.

Arun Kumar Biswal & Ors. V. State of Odisha (Forest, Environment and Climate Change Dept.) & Ors.

2024 (III) ILR-Cut…… 01

SERVICE LAW – Odisha Government Press (Industrial Employees Classification, Recruitment, Promotion of Service and Appeal) Rules, 1978 – The petitioner seeks a direction to the Opposite Party authorities to promote him as Junior Production Officer w.e.f. 28.02.2014 – Opposite Parties Nos. 1,2 & 3 through their counter affidavit denied it – Petitioner through his rejoinder alleged that 1978 Rules cannot be made applicable since admittedly there is no

post of Head Reader in the University (Utkal) from its inception – Petitioner and O.P. No. 4 have retired from service in the meantime.

Whether the non-consideration of petitioner's case for promotion is as per law? – Held, No – If the Rules require that the post of Head Reader must exist in between the post of Senior Proof Reader and Junior Production Officer, such a post ought to have been created by the authorities

– Not having created such a post in the first place, the authorities must themselves be held guilty of violating the statutory mandate.

– This would be seriously discriminatory being in violation of the principles of equality enshrined under Article 14 of the Constitution of India.

Held, the authorities should first notionally appoint the petitioner as Reader in-charge and thereafter as Junior Production Officer so as to treat his last pay drawn in such scale – His pension and pensionary benefits should be reworked and revised accordingly.

Niranjan Satapathy V. Utkal University & Ors.

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SERVICE LAW – Pay – Equal pay for equal work – The Opp.Parties have been employed as casual lighting assistants on daily wage basis – They claim equal pay as those covered under the Regularisation Scheme of 1992 and 1994 – Whether they are entitled to the benefits of equal pay as of regular employees? – Held, Yes – The Opp.Parties have been performing the same duties as regular employees since very long time; the failure to pay them equally for equal work is a violation of this fundamental principle.

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SERVICE MATTER – Clause 2 of minutes of meeting of the Board of Directors dt. 20.08.1984 – Clause 5 of the agreement dt. 13.04.1987 – Petitioners were employees of Artificial Limbs Manufacturing Corporation of India (ALIMCO) – Consequent upon formation of Swami Vivekananda National Institute of Rehabilitation Training & Research (SVNIRTAR), Olatpur, Cuttack, the petitioners were transferred to it with protection of all service and monetary benefits – Petitioners were not allowed the pay scale and the revisions thereof.

Whether O.Ps acted arbitrarily in not allowing the pay hike of the Petitioners – Held, No – There is no violation of Art-14 of the Constitution of India – There is no violation of the principle of equal pay for equal work – No procedural irregularity or discrimination in the impugned pay revision.

Yakub Ali Sha & Ors. V. Union of India & Ors.

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STATE FINANCIAL CORPORATIONS ACT, 1951 ─ Sections 29 and 29 (4) ─ The appellant corporation seized the financed truck of the respondent and sold it to a third party on 30.03.1986 ─ After adjustment of the outstanding loan dues from the sold money of the vehicle, the surplus amount should be refunded to the respondent ─ The corporation did not pay the surplus amount

── o ──

2024 (III) ILR-CUT-1

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

W.A. NO. 3028 OF 2023

ARUN KUMAR BISWAL & ORS. .....Appellants

V.

STATE OF ODISHA (FOREST, ENVIRONMENT AND CLIMATE CHANGE DEPT.) & ORS. .....Respondents

(A) SERVICE JURISPRUDENCE ─ Promotion ─ The appellants were given promotion from the post of Forest Rangers to OFS GROUP A (JB) by extending them the benefits of reservation ─ The same promotions granted to them have not been recalled, nor have the same been declared illegal by any Court ─ The appellants were eligible for promotion to the post of OFS Group-A (Senior) Level as they have completed five years service in Group-A (JB) Level ─ The appellants were not considered for promotion ─ Effect of ─ Held, denial of consideration of the case of appellants amounts to nullifying their promotion to the rank of OFS Group-A (JB) from the post of Forest Ranger, without following due procedure. (Para 47)

(B) ODISHA FOREST SERVICE GROUP-A (SENIOR) (METHOD OF RECRUITMENT AND CONDITIONS OF SERVICE) RULES, 2015 ─ Rules 5, 7, 14 ─ The writ petitioners/respondents Nos. 4 to 11 did not fulfil the eligibility criteria as on 01.01.2023 in accordance with Rule 5 of 2015 Rules for promotion to the post of OFS Group-A (Senior) Level ─ The Hon'ble Single Judge directed the authority to consider their case for promotion by relaxation as per Rule 14 or defer the promotional exercise to a date after 01.01.2024 ─ Whether the direction admissible under law? ─ Held, No ─ Such direction is contrary to Rule 7 of 2015 Rules which contemplates to hold the DPC at least once in a year preferably in the month of January. (Paras 48 – 50)

Case Laws Relied on and Referred to :-

1. (2006) 8 SCC 212 : M. Nagaraj v. U.O.I
2. (2012) 7 SCC 1 : U.P. Power Corporation Limited v. Rajesh Kumar and Ors.
3. (2018) 10 SCC 396 : Jarnail Singh v. Lachhmi Narain Gupta.
4. (2020) 15 Supreme Court Cases 297 : 2020 SCC OnLine SC 375 : Pravakar Mallick & Anr. vrs. State of Orissa & Ors.
5. (1996) 2 SCC 715 : Ajit Singh Januja v. State of Punjab.
6. (2011) 8 SCC 737 : State of Tamil Nadu & Ors. v. K. Shyam Sundar & Ors.
7. 1999 (7) SCC 209 : Ajit Singh Januja (II) v. State of Punjab.
8. (1995) 6 SCC 684 : Union of India & Ors. v. Virpal Singh Chauhan & Ors.
9. 2010 SCC Online Ori. 232 : Langjit Roy Vs. State of Odisha.

For Appellants : Mr. N. K. Mishra, Sr. Adv. assisted by Mr.Deepak Ku.Pani.

For Respondents : Mr. R. N. Mishra, Addl. Govt. Advocate.
Mr. Gautam Misra, Sr. Adv. assisted by Mr. Anupam Dash & Mr. J.R. Deo.

JUDGMENT Date of Judgment: 18.06.2024

CHAKRADHARI SHARAN SINGH, C.J.

This intra-Court appeal has been filed against a judgment and order dated 10.11.2023 passed by a learned Single Judge of this Court in W.P.(C) No.7388 of 2023.

2. The dispute in the present intra-Court appeal revolves around consideration of these appellants for promotion to OFS Group-A (Senior) who were granted promotion to the post of OFS Group-A (Junior) from the post of Forest Ranger by giving them the benefit of reservation as provided under Rule-5 of the OFS Group-A (Junior) Rules, much before the writ petitioners (respondents No.4 to 11 herein) were given such promotion though they were above in the seniority list of the Forest Ranger.

Facts in brief:-

3. So as to appreciate the core issue involved in the present appeal, it will be beneficial to take note of the respective joining dates of the appellants and the writ petitioners initially as Forest Rangers and subsequent promotion to the post of ACF i.e., OFS Group-A (Junior), which in the following tabular form:-

Sl. No.	Name	Date of entry into initial service	Date of promotion to ACF	Position in the tentative seniority list dated 29.04.2013
1	Prakash Chandra Das (Pet. No.1)/ Respondent No.4	02.08.1993	01.02.2018	247
2	Gouri Shankar Das (Pet. No.2)/ Respondent No.5	08.08.1993	01.02.2018	248
3	Sarat Kumar Mishra (Pet. No.3)/ Respondent No.6	04.08.1993	01.02.2018	252
4	A. Uma Mahesh (Pet. No.4)/ Respondent No.7	05.08.1994	01.02.2018	262
5	Sisir Kumar Mishra (Pet. No.5)/ Respondent No.8	03.08.1994	25.06.2018	263
6	Soubhagya Kumar Sahoo (Pet. No.6)/ Respondent No.9	01.08.1994	25.06.2018	264
7	Bijay Kumar Parida (Pet. No.7)/ Respondent No.10	05.08.1994	25.06.2018	271

8	**Amareshnath Pradhan (Pet. No.8)/ Respondent No.11**	**01.08.1994**	**25.06.2018**	**272**
9	Subhendu Prasad Behera (Opp. Party No.12) (SC)	07.08.1993	30.05.2014	245
10	Shiba Prasad Rath (Opp. Party No.13) (SC)	08.08.1993	30.05.2014	246
11	Sarat Kumar Sahoo (Opp. Party No.14) (SC)	06.08.1993	30.05.2014	254
12	Rajendra Gochahyat (Opp. Party No.15) (SC)	05.08.1993	26.09.2014	255
13	Peter Tiga (Opp. Party No.16) (ST)	05.08.1993	17.06.2017	256
14	Pabitra Behera (Opp. Party No.17) (SC)	04.08.1993	26.09.2014	257
15	Pradeep Kumar Bhatra (Opp. Party No.18) (ST)	06.08.1993	06.12.2013	258
16	Ashok Kumar Behera (Opp. Party No.19) (SC)	05.08.1993	17.06.2017	259
17	Harekrushna Mallick (Opp. Party No.20) (SC)	07.08.1993	17.06.2017	260
18	Kundan Singh (Opp. Party No.21) (ST)	09.08.1993	27.03.2018	261
19	Pravakar Nayak (Opp. Party No.22) (SC)	05.08.1994	17.06.2017	275
20	Jitendra Kumar Behera (Opp. Party No.23) (SC)	03.08.1994	16.05.2020	276
21	Baidyanath Majhi (Opp. Party No.24) (ST)	09.08.1994	06.12.2013	278
22	Rupchand Soren (Opp. Party No.25) (ST)	06.08.1994	06.12.2013	279
23	Jadumani Kerkete (Opp. Party No.26) (ST)	05.08.1994	06.12.2013	280
24	Ananta Kumar Pradhan (Opp. Party No.27) (ST)	05.08.1994	06.12.2013	281

29	Naveen Chandra Nayak (Opp. Party No.28) (ST)	05.08.1994	06.12.2013	282
30	**Arun Kumar Biswal (Opp. Party No.29) (ST)/appellant No.1**	**06.08.1996**	**06.12.2013**	**297**
31	**Malaya Ranjan Kalo (Opp. Party No.30) (ST)/Appellant No.2**	**05.08.1996**	**12.06.2013**	**302**
32	Ranjan Kumar Nag (Opp. Party No.31) (SC)	02.08.1996	17.06.2017	307
33	**Rama Chandra Murmu (Opp. Party No.32) (ST)/ appellant No.3**	**05.08.1996**	**06.12.2013**	**308**
34	**Khirod Kumar Behera (Opp. Party No.33) (SC)/ Appellant No.4**	**05.08.1995**	**17.06.2017**	**309**
35	**Prafulla Kumar Malik (Opp. Party No.34) (SC)/ Appellant No.5**	**02.08.1997**	**04.09.2018**	**312**

Relevant Statutory Provisions:-

4. The Odisha Forest Service Group-A (Junior Branch) (Method of Recruitment and Conditions of Service) Rules, 2013 (in short, "OFS Group-A (Junior Branch) Rules, 2013) framed under Article 309 of the Constitution of India by the State of Odisha to regulate method of recruitment and conditions of service of the persons appointed to the Odisha Forest Service (OFS), Group-A (Junior) consisting of the posts of Assistant Conservator of Forests (ACF). Rule-4 lays down the methods of recruitment which prescribes as under:

> ***4. Methods of Recruitment:***
>
> *Subject to other provisions of these rules recruitment to the posts in the service shall be made by the following methods, namely:-*
>
> *(a) as nearly as may be but not less than one third (33.33%) of the posts shall be filled up by way of direct recruitment through a competitive examination in accordance with Rule 6; and*
>
> *(b) as nearly as may be but not more than two third (66.66%) of the posts shall be filled up by promotion from among the Forest Rangers in accordance with Rule 15:*
>
> *Provided that if adequate number of suitable candidates shall not be available for promotion the remaining vacancies in the year shall be filled up by way of direct recruitment.*

5. Rule 5 provides for reservation of vacancies or posts which reads as under:

> ***5. Reservations :***
>
> *Notwithstanding anything contained in these rules reservation of vacancies or posts, as the case may be, for the candidates,-*
>
> *(i) belonging to the Scheduled Castes and Scheduled Tribes shall be made in accordance with the provisions of the Odisha Reservation of Vacancies in Posts and Services (For Scheduled Castes and Scheduled Tribes) Act, 1975 and the rules made thereunder; and*
>
> *(ii) belonging to SEBC, Women, Sports person, Ex-servicemen and Physically Handicapped Persons shall be made in accordance with the provisions made under such Act, Rules, Orders or Instructions issued in this behalf by Government from time to time.*

6. Further, the Odisha Forest Service Group-A (Senior) (Method of Recruitment and Conditions of Service) Rules, 2015 (in short, "OFS Group-A (Senior) Rules, 2015") have been framed regulating method of recruitment and conditions of service of persons appointed to Odisha Forest Service (OFS), Group-A (Senior). The said service consists of following posts:-

> *(a) Group 'A' (Senior Branch)*
> *(b) Supertime Scale*
> *(c) Superior Administrative Grade*

7. Promotion from the post of OFS Group-A (Junior) is the only method of recruitment to the post of OFS Group-A (Senior) as is evident from Rules-4 and 5 of Part-II of OFS Group-A (Senior) Rules, 2015. Rule-5 lays down the eligibility criteria for promotion to OFS Group-A (Senior) which reads as under:

> ***5. Eligibility criteria :-*** *(1) No Officer shall be eligible for promotion to the post in Group-A (Senior Branch) of the service unless he or she has completed five years of continuous service in the grade of Odisha Forest Service Group A (Junior Branch) as on the 1st day of January of the year in which the Board meets.*
>
> *(2) Appointment to Supertime Scale in the service shall be made on promotion from amongst the officers who have, completed two years of service in Odisha Forest Service Group'A' (Senior Branch) as on the 1st day of January of the year in which the Board meets.*
>
> *(3) Appointment to Superior Administrative Grade in the service shall be made on promotion from amongst the officers who have completed one year of service in Odisha Forest service (Supertime Scale), as on the 1st day of January of the year in which the Board meets.*

8. The writ petitioners who are respondents No.4 to 11 in the present intra-Court appeal had admittedly entered into initial service to the post of Forest Ranger much before the appellants herein and were above in the tentative seniority list prepared on 29.04.2013. The contesting respondents No.4 to 11 were above the appellants.

9. There is a crucial aspect which is undisputed that at no point of time, grant of promotion in favour of these appellants to the post of OFS Group-A (Junior) by giving them benefit of reservation was not questioned by the writ petitioners or any other person.

10. It is pertinent to notice that the Odisha Reservation of Vacancies in Posts and Services (for Scheduled Castes and Scheduled Tribes) Act, 1975 (In short, the ORV Act) has been enacted to provide for adequate representation of Scheduled Castes and Scheduled Tribes in the posts and services under the Act. Section 4 of which reads thus:

> ***4. Reservation and the percentage thereof :–*** *(1) Except as otherwise provided in this Act, the vacancies reserved for the Scheduled Castes and the Scheduled Tribes, shall not be filled up by candidates not belonging to the Scheduled Castes and Scheduled Tribes.*
>
> *(2) The reservation of vacancies in Posts and Services shall be at such percentage of the total number of vacancies as the State Government may, from time to time, by order determine;*
>
> *Provided that the percentage so determined shall in no case be less than the percentage of the persons belonging to the Scheduled Castes or the Scheduled Tribes as the case may be in the total population of the State:*
> *Provided further that there shall be no reservation of vacancies to be filled up by promotion where –*
>
> *(a) the element of direct recruitment in the grade or cadre in which the vacancies have occurred is more than sixty-six and two-third percent;*
> *(b) the vacancies have occurred in Class I posts and are to be filled up by promotion, through limited departmental examination; or*
> *(c) the vacancies have occurred in Class I posts which are above the lowest rung thereof, and are to be filled upon the basis of selection].*
>
> ***Explanation–*** *The expression "population" means the "population" as ascertained at the last census for which the relevant figures have been published.*
>
> *(3) Notwithstanding anything contained in this section, one third of the vacancies in Class II, Class III (including those specially declared to be Gazetted) and Class IV Services and Posts, reserved for the Scheduled Castes and Scheduled Tribes in a year, which are required to be filled up by direct recruitment, shall be reserved for women belonging to the respective communities and, in the event of non-availability or availability of insufficient number of eligible woman candidates belonging to any particular community, the vacancies or, as the case may be, the remaining vacancies shall be filled up by male candidates of that community.*

11. Through a communication dated 03.03.2023 issued by the Forest, Environment and Climate Change Department of the Government of Odisha addressed to the PCCF and HoFF Odisha, the latter was requested to intimate as to whether any disciplinary proceeding was pending against the ACF OSF Group-A (JB) Officers mentioned in the list at Annexure-1 of the said communication, with the present status of such case(s) forthwith, for presenting the same before the ensuing Department Promotional Committee (DPC) meeting. It is evident from the said communication that a DPC meeting was proposed to be held shortly for consideration of promotion of ACF, OFS Group-A (JB) to the rank of Deputy CF, OFS Group-A (SB).

12. Apparently, in view of the eligibility criteria under OFS Group-A (Senior) Rules, 2015 to the effect that an officer must have completed 5 years of continuous service in the grade of OFS Group-A (JB) as on the first day of January of the year

in which the selection board meets, the names of only such officers figured in the list at Annexure-1 of the communication dated 03.03.2023 who has completed five years in OFS Group-A. Accordingly, whereas the names of the appellants figured in the said list because they had completed 5 years of continuous service in the grade of OFS Group-A (JB), as on 01.01.2023, names of the writ petitioners did not figure as they were granted promotion to the ACF after 01.01.2018 and had thus not completed 5 years of continuous service in OFS Group-A (JB). We reiterate here that grant of promotion to the appellants to the post of ACF, OFS Group-A (JB) giving them benefit of reservation with effect from their respective dates were never under challenge nor challenged in the writ proceeding before the learned Single Judge.

13. Soon after issuance of the said communication, respondents No.4 to 11 filed the writ petition asserting in paragraph-1 of the writ petition as under:

> *"1. That the petitioners in the present writ petition are challenging the action of the opposite party no. 1 in extending reservation to O.P. Nos. 4 to 34 as regards promotion to the post of Deputy Conservator of Forests, OFS -Group A (SB), contrary to a catena of judgments of the Hon'ble Supreme Court and contrary to Section 4 of The Orissa Reservation of Vacancies in Posts and Services (For Scheduled Castes & Scheduled Tribes) Act, 1975 (hereinafter, referred to as "ORV Act"). The action of the State Government is contrary to a series of judgments of the Hon'ble Supreme Court as well as contrary to the ORV Act and thus the opposite parties may be directed to refrain from conducting any promotional exercises on the basis of the communication dated 03.03.2023. Copy of the said communication is annexed as* ***ANNEXURE-1****. It would be highly pertinent to mention that any exercise pursuant to Annexure-1 would run contrary to Section 4 (2) of the ORV Act which reads as follows:-*
>
> *"4. Reservation and the percentage thereof :-*
>
> *(2) The reservation of vacancies in Posts and Services shall be at such percentage of the total number of vacancies as the State Government may, from time to time, by order determine;*
>
> *[Provided that the percentage so determined shall in no case be less than the percentage of the persons belonging to the Scheduled Castes or the Scheduled Tribes as the case may be in the total population of the State :*
>
> ***Provided further that there shall be no reservation of vacancies to be filled up by promotion where-***
>
> *(a) the element of direct recruitment in the grade or cadre in which the vacancies have occurred is more than sixty-six and two third percent;*
>
> ***(b) the vacancies have occurred in Class I posts and are to be filled up by promotion, through limited departmental examination; or***
>
> ***(c) the vacancies have occurred in Class I posts which are above the lowest rung thereof, and are to be filled up on the basis of selection. ''***
>
> *Furthermore, the purported promotional exercise runs contrary to the following judgements:-*
>
> *I. Pravakar Mallick v. State of Orissa, (2020) 15 SCC 297, (Paras 15, 23 & 26)*
>
> *II. M. Nagaraj v. UOI, (2006) 8 SCC 212 (Paras 85, 121 to 123)*
>
> *III. Indra Sawhney v. UOI, AIR 1993 SC 477 (Para 700)*
>
> *IV. Uttar Pradesh Power Corporation Limited v. Rajesh Kumar, (2012) 7 SCC 1 (Paras 81 to 86)"*

14. Respondents No.4 to 11 were aggrieved by the said letter dated 03.03.2023 on the ground that their names were excluded from Annexure-1 of the communication dated 03.03.2023 despite the fact that they were above the appellants and the proforma respondents herein, in the seniority list, based on the respective dates of their initial appointment. The writ petitioners/respondents No.4 to 11 asserted in paragraph-10 of the writ petition as under:

> *"10. That it is pertinent to mention that the post of Deputy Conservator of Forest is a Class-I/Group A post and thus reservation should not be extended while filling the post. Further, since no exercise has been conducted by the State of Odisha in view of judgement of Supreme Court in* ***M. Nagaraj v. U.O.I (2006) 8 SCC 212 , U.P. Power Corporation Limited v. Rajesh Kumar and Ors. (2012) 7 SCC 1, Jarnail Singh v. Lachhmi Narain Gupta (2018) 10 SCC 396*** *and as admitted by the State of Odisha, the aforesaid exercise is not at all permissible in the eye of law and the same is violative of law laid down by the Hon'ble Supreme Court and the underlying statute (ORV Act). Copy of the Resolution dated 07th June, 1999 by the General Administration Department, Govt, of Odisha showing the post of Deputy Conservator of Forests, OFS - Group A (SB) to be a Class- I/Group-A post is annexed as* ***ANNEXURE-3.***"

15. As has been noted above, the promotion of the appellants to the post of ACF, OFS Group-A (JB) with effect from the respective dates by extending benefit of reservation remained unchallenged. Following table demonstrates the dates from which the appellants have been serving in the Grade of OFS Group-A (JB):

Appellant No.1 (Arun Kumar Biswal)	06.12.2013
Appellant No.2 (Malay Ranjan Kalo)	12.06.2013
Appellant No.3 (Rama Chandra Murmu)	06.12.2013
Appellant No.4 (Khirod Kumar Behera)	17.06.2017
Appellant No.5 (Prafulla Kumar Malik)	04.09.2018

16. Similarly, the following table would demonstrate the respective dates with effect from which the writ petitioners (respondents No.4 to 11) are in continuous service in Grade of OFS Group-A (JB):

Respondent No.4/ writ petitioner No.1 (Prakash Chandra Das)	01.02.2018
Respondent No.5/ writ petitioner No.2 (Gouri Shankar Das)	01.02.2018
Respondent No.6/ writ petitioner No.3 (Sarat Kumar Mishra)	01.02.2018
Respondent No.7/ writ petitioner No.4 (A. Uma Mahesh)	01.02.2018

Respondent No.8/ writ petitioner No.5 (Sisir Kumar Mishra)	25.06.2018
Respondent No.9/ writ petitioner No.6 (Soubhagya Kumar Sahoo)	25.06.2018
Respondent No.10/ writ petitioner No.7 (Bijay Kumar Parida)	25.06.2018
Respondent No.11 /writ petitioner No.8 (AmareshnathPradhan)	25.06.2018

Proceedings before the Writ Court:-

17. When the writ petition i.e. W.P. (C) No.7388 of 2023 was taken up by a learned Single Judge of this Court on 15.03.2023, following order was passed:

> *"1. This matter is taken up through Hybrid Arrangement (Virtual/Physical Mode).*
>
> *2. Heard Mr. G. Misra, learned senior counsel for the Petitioners and Mr. T. Pattanaik, learned Additional Standing Counsel appearing for the State.*
>
> *3. Mr.Misra, learned senior counsel appearing for the Petitioners, at the outset, submits that the petitioners have approached this Court by filing the present writ application challenging the gradation list prepared by the Opposite Parties and further prayed for a direction to the Opposite Party Nos.1, 2 and 3 not to give promotion to private Opposite Parties by resorting to the principle of reservation in promotion without recasting the gradation list under Annexure-2 keeping in view the judgment of Hon'ble Supreme Court of India in the case of* ***Pravakar Mallick and another vrs. State of Orissa and others :****reported in* ***(2020) 15 Supreme Court Cases 297 : 2020 SCC OnLine SC 375*** *and other judgments of the Hon'ble Supreme Court.*
>
> *4. Mr.Misra, learned senior counsel appearing for the petitioners further submits that by virtue of 85th Amendment to the Constitution of India, Clause-(4-A) of Article-16 was added and the vires of Article 16 (4-A) was challenged before the Hon'ble Supreme Court in the case of* ***M. Nagraj vrs. Union of India:*** *reported in* ***(2006) 8 SCC 212****. Although validity of clause-(4-A) was upheld by the Hon'ble Supreme Court, the same was subject to State Government carrying out certain exercise for reservation for promotion. He further contended that so far as State of Odisha is concerned, a statement was made on behalf of the State before the Hon'ble Supreme Court in the case of* ***Pravakar Mallick and another vrs. State of Orissa and others****(supra) to the effect that such exercise has not been carried in the State of Odisha and the same has been noted in the body of the aforesaid judgment.*
>
> *5. In such view of the matter, learned senior counsel appearing for the petitioners submits that without carrying out such exercise as has been directed in the case of* ***M. Nagraj vrs. Union of India*** *(supra) and in the subsequent case of the Hon'ble Supreme Court in* ***Jarnail Singh vrs. Lachhmi Narain Gupta; (2018) 10 SCC 396****, no reservation can be provided in promotion. Therefore, the attempt of the Opposite Parties to give promotion to the Opposite Party Nos.4 to 34 by applying the principle of reservation in promotion is illegal, arbitrary and not in conformity with the law laid down by the Hon'ble Supreme Court in the above noted cases.*

6. Learned Additional Standing Counsel for the State seeks some time to take instruction as to whether such exercise has been carried out in the State of Odisha or not in the meantime. He is also directed to obtain instruction as to on what basis the Opposite Party Nos.4 to 34 are likely to be promoted to the next higher post as their names have been sent to the DPC for consideration.

7. In such view of the matter, this Court is inclined to issue notice to the Opposite Parties on the question of admission.

8. Since Mr. T. Pattanaik, learned Additional Standing Counsel accepts notice on behalf of the Opposite Party No.1, 2 and 3, three extra copies of the writ petition be served on him by tomorrow (16.03.2023).

9. So far as private Opposite Parties are concerned, notices to such private Opposite Parties are dispensed with for the time being.

10. List this matter on Tuesday (21.3.2023).

I.A. No.3308 of 2023

11. Heard.

12. Issue notice as above.

13. Copies of the I.A. be served on learned Additional Standing Counsel by tomorrow (16.03.2023), who shall obtain instruction in the matter and file his reply by Tuesday (21.03.2023).

14. As an interim measure, it is directed that the DPC may meet but the final decision of the DPC shall be kept in a sealed cover and shall not be given effect to without the leave of this Court.

Urgent certified copy of this order be granted on proper application."

(Underscored for emphasis)

18. Applications were filed on behalf of the State-respondents as well as these appellants for modification/vacating the interim order of stay, which were disposed of by an order dated 12.05.2023 passed by a learned Single in the following terms:

"I.A. Nos. 3901, 3908 & 4421 of 2023

1. *I.A. No.3901 of 2023 has been filed by the State-Opposite Party No.1 for modification of interim order dated 15.03.2023 passed by this Court in the above noted writ petition.*

2. *I.A. No.3908 of 2023 has been filed by the Opposite Parties No.12 to 14 for vacation of interim order dated15.03.2023 passed in the above noted writ petition.*

3. *I.A. No.4421 of 2023 has been filed by the Opposite Party No.24 representing the Opposite Parties No.18, 19, 27 and 30 with a prayer for vacation of interim order dated 15.03.2023 passed in I.A. No.3308 of 2023.*

4. *Since all the above noted interlocutory applications involve a prayer for modification/vacation of interim order dated15.03.2023 passed in I.A. No.3308 of 2023, they are heard together and the same are being disposed of by the following common order.*

5. *Heard Mr.Goutam Mishra, learned Senior Counsel appearing for the Petitioner and Mr.Budhadev Routray, learned Senior Counsel appearing for the Opposite Parties No.15, 24, 25 & 26 and Mr. K.P. Mishra, learned Senior Counsel appearing for the Opposite Parties No.12 to 14 and Mr.Tarun Pattnaik, learned Additional Standing Counsel appearing for the State-Opposite Parties.*

6. *The above noted writ petition has been filed by the Petitioner with a prayer to quash the communication dated 03.03.2023 issued by the Opposite Party No.1 underAnnexure-1, so far it relates to the promotion exercise of Opposite Party No.4 to 34 on the ground*

that the same is contrary to Section 4 of the O.R.V. Act and the judgment of the Hon'ble Supreme Court in the case of ***Pravakar Mallick v. The State of Orissa, reported in (2020) 15 SCC 297*** *and for a further direction to Opposite Party No.1 to 3 not to promote Opposite Parties No.4 to 34 by resorting to reservations in promotions without recasting the gradation list under Annexure-2 keeping in view the judgment of the Hon'ble Supreme Court in Pravakar Mallick's case (supra) and* ***M. Nagraj v. UOI****, reported in* ***(2006) 8 SCC 212****. The Petitioner has also prayed for a direction to the Opposite Party No.1 to issue a fresh communication for promotion to the post of Deputy Conservator of Forests OFC Group-A (SB) in the Forest, Environment and Climate Change Department, Government of Odisha without considering the aspect of reservation in promotion for such post and by considering the Petitioners seniority over the Opposite PartyNos.4 to 34.*

7. *Mr.Budhadev Routray and Mr. K.P.Mishra, learned Senior Advocates representing the private Opposite Parties at the outset submitted that the present writ petition is not maintainable at the instance of the present Petitioners. They further submitted that since the Petitioners do not have the requisite experience for promotion to the post of Deputy Conservator of Forests (in short 'DCF') as required under the rules, therefore, they are not eligible for promotion to the post of DCF. Accordingly, it was submitted that since the Petitioners do not possess the requisite experience to become eligible for promotion to the post of DCF, the question of their getting promotion does not arise and they have no legal right to claim for such promotion. As such, the present writ petition at the behest of such ineligible candidates is not maintainable in law.*

8. *Both the learned Senior Advocates representing the private Opposite Parties further contended that the State-Opposite Parties have not contravened the provisions of Section 4 of the O.R.V. Act as is evident from the counter affidavit filed by the Opposite Party No.1. Referring to the State counter affidavit, it was submitted by them that the State-Opposite Parties have categorically stated that law of reservation is not applicable for promotion from the post of ACF (Group-A) (JB) (lowest rung post) to the post of DCF Group-A (SB). In such view of the mater, both the learned Senior Advocates appearing for the private Opposite Parties contended that the argument of learned Senior Advocate appearing for the Petitioners is prima facie fallacious and untenable in the eye of law.*

9. *In course of their argument, both the learned Senior Advocates led much emphasis on the ground that the Petitioners do not have the requisites experience as provided under Rule-5 of the 2015 Rules to come within the zone of consideration for promotion to the post of DCF. On the contrary, the Private Opposite Parties have acquired such experience and, as such, they have the eligibility criteria as provided under Rule-5 of the 2015 Rules. Therefore, the private Opposite Parties are coming within the zone of consideration. Accordingly, it was argued that through the present writ petition, the Petitioners are making an attempt to stall the promotion of private Opposite Parties although they are eligible to be promoted to the next higher post of DCF. On such ground, learned Senior Advocates appearing for the private Opposite Parties submitted that the interim order dated 15.03.2023 passed in the present case be vacated.*

10. *Mr.Tarun Pattnaik, learned Additional Standing Counsel appearing on behalf of the Opposite Party No.1, on the other hand, submitted that large number of posts of DCF are lying vacant at the moment. He further submitted that there is a dearth of eligible officers for appointment as DCF. He further contended that since the private Opposite Parties have acquired five years of experience in the post of ACF, i.e., OFS (Group-A)(JB) as on 1st date of January, 2023, which is in conformity withRule-5 of 2015 Rules,*

therefore, they are eligible to be promoted to the next higher post of DCF. Further, referring to Section 4 of the O.R.V. Act, learned Additional Standing Counsel submitted that in view of the provisions contained in Section 4 of the O.R.V. Act for promotion to the next higher post from the lowest rung post of the cadre, principle of reservation is not applicable.

11. *In view of the above position, learned Additional Standing Counsel further submitted that the private Opposite Parties have been considered on the basis of their eligibility as provided under the Rules, 2015 and, accordingly, it has been decided to give them promotion from ACF to the post of DCF. So far the eligibility of the Petitioners are concerned, learned Additional Standing Counsel echoed the voice raised by the learned Senior Advocates appearing for the private Opposite Parties and, accordingly, submitted that the Petitioners have not yet acquired the eligibility to be considered for promotion to the post of DCF. Finally, learned Additional Standing Counsel submitted that since a large number of posts are lying vacant, unless such posts are allowed to be filled up, the Government would face difficulty in the normal functioning of the entire department. Therefore, it was prayed by learned Additional Standing Counsel that the entire order dated 15.03.2023 be vacated forthwith giving handle to the Government to go ahead with promotion and appointment to the post of DCF.*

12. *Mr.Goutam Mishra, learned Senior Counsel appearing on behalf of the Petitioners argued vehemently that admittedly the Petitioners are seniors to the Private Opposite Parties. He further contended that the Petitioners belong to unreserved category whereas the private Opposite Parties belong to the reserved category. With the aid of reservation policy, the Opposite Parties have been promoted ahead of the Petitioners. Although the Petitioners were promoted to the post of ACF subsequently, by applying the catch-up principle they have been kept above the private Opposite Parties in the common gradation list. Mr. Goutam Mishra further contended that the Petitioners were initially appointed prior to the private Opposite Parties and, therefore, all throughout their service career they have been shown as senior to the private Opposite Parties in the common gradation list.*

13. *Learned Senior Counsel appearing for the Petitioners very fairly submitted that the Opposite Parties No.4 to 11 are senior to the Petitioners considering their date of entry into the service. Therefore, he submitted that he has no objection in the event their cases are considered for promotion to the post of DCF by the State-Opposite Parties. So far Opposite Parties No.12 to 34 are concerned, he further contended that such Opposite Parties have been given promotion illegally by ignoring the law laid down by the Hon'ble Supreme Court in M. Nagraj'scase (supra)and* ***Jarnail Singh v. Lachhmi Narain Gupta,*** *reported in* ***(2018) 10 SCC 396.*** *Mr.Goutam Mishra, learned Senior Counsel appearing for the Petitioners also relied upon the judgment of the Hon'ble Supreme Court in* ***Uttar Pradesh Power Corporation Limited v. Rajesh Kumar****, reported in* ***(2012) 7SCC 1*** *and submitted that the private Opposite Parties could not have been given promotion had the State-Opposite Parties followed the law laid down by the Hon'ble Supreme Court in the above noted judgments.*

14. *Additionally, Mr. Mishra, learned Senior Counsel appearing for the Petitioners also argued that the Opposite Parties have taken an unfair and undue advantage and, accordingly, they are trying to steal a march over the Petitioners, especially the Opposite Parties No.12 to 34, who are admittedly juniors to the Petitioners at least as per the undisputed gradation list. In such view of the matter, learned Senior Counsel appearing for the Petitioners further contended before this Court that the interim order passed by this Court protecting the interest of the Petitioners is legally justified, other-*

wise the matter would become infructuous as the State-Opposite Parties are going to give promotion to the Opposite Parties forthwith.

15. *Regard being had to the contentions raised by the learned Senior Counsels appearing for the respective parties and upon a prima facie examination of the records, this Court after taking into consideration the submission made by the learned Senior Counsel appearing for the Petitioners as well as the learned Additional Standing Counsel that the Opposite Party No.4 to 11are admittedly senior to the Petitioners, this Court deems it proper and in the interest of justice to modify the interim order dated 15.03.2023 passed in I.A. No.3308 of 2023 to the extent that the State-Opposite Parties are permitted to consider the case of promotion of Opposite Parties No.4 to 11 to the post of DCF immediately.*

16. *So far private Opposite Parties No.12 to 34 are concerned, this Court on a careful analysis of the averments as well as the contentions raised before this Court, is of the considered view that the issue of seniority between the Petitioners vis-à-vis the private Opposite Parties No.12 to 34 needs to be further examined and the matter requires an elaborate hearing. Further, this Court is of the prima facie view that in the event the law of reservation is not applicable for promotion to the post of DCF, then the private Opposite Parties No.12 to 34, who have been promoted as A.C.F. prior to the Petitioners by applying the law of reservation would definitely steal a march over the Petitioners even though they are juniors to the Petitioners and that too without the reservation policy being applicable for promotion to the post of DCF. Therefore, this Court is also of the view that the promotion to the post of DCF, when the law of reservation is not applicable, has to take place on a fair field and by treating the Petitioners as well as the Opposite Party No.12 to 34 at par without their being any undue advantage accruing in favour of any of the officers on a level playing field. Any other approach would be hit by the underlying principles of Article 14 and 16 of the Constitution of India.*

17. *In such view of the matter, this Court deems it proper to further examine the issues raised by the learned counsel for the Petitioners, particularly keeping in view the seniority of the Petitioners as well as the private Opposite Party No.12 to 34. Hence, this Court is not inclined to modify the interim order dated 15.03.2023 passed in I.A. No.3308 of 2023, so far Opposite Parties No.12 to 34 are concerned. Accordingly, the interim order dated 15.03.2023 passed in I.A. No.3308 of 2023in respect of Opposite Parties No.12 to 34 shall continue till the next date.*

18. *List W.P.(C) No.7388 of 2023 on 27th June, 2023 for final hearing.*

19. *Parties are directed to complete their pleadings and exchange the same well before the next date of hearing.*

20. *Accordingly, the above noted I.As. are disposed of."* ***(Underlined for emphasis)***

19. Later, by another order dated 04.09.2023, the interim orders, so far as they related to opposite parties No.12 and 13 were modified in the following terms:-

"xxx xxx xxx

I.A. No.10103 of 2023

2. Heard Mr. K.P. Mishra, learned Senior Counsel appearing for the Opposite Party Nos.12 & 13. It is submitted by Mr. Mishra, learned Senior Counsel that admittedly both Opposite Party Nos.12 & 13 are senior to the Petitioners. Therefore, the Petitioners possibly cannot have any grievance if any promotion is granted to Opposite Party Nos.12 & 13.

3. Learned counsel appearing for the Petitioner, on the other hand contended that he has taken instruction from the Petitioners. He further submitted that it is a fact that the Opposite Party Nos.12 & 13 are Petitioners in I.A. No.10103 of 2023. Accordingly, the Petitioners will have no objection in the event the Interim order, so far the Opposite Party No.12 & 13 is vacated.

4. In such view of the matter, this Court disposes the I.A. application by modifying the interim order that the Interim order passed by this Court shall not bind for the Opposite Party Nos.12 & 13. Accordingly, their cases may be considered for promotion subject to availability of vacancy recommended by the DPC.

5. With the aforesaid observation, the I.A. is disposed of.

xxx xxx xxx"

20. Finally, the writ petition came to be allowed by the impugned judgment of learned Single Judge dated 10.11.2023 after noticing Rule 5 of the Odisha Forest Service Group-A (Senior) (Method of Recruitment and Conditions of Service) Rules, 2015 (in short, "OFS Group-A (Senior) Rules, 2015) and the decisions in cases of ***M. Nagaraj*** (supra)***, Uttar Pradesh Power Corporation Ltd.*** (supra)***, Jarnail Singh*** (supra) *and* ***PravakarMallick*** (supra) concluded in paragraphs-17 to 19 as under:

*"**17.** Now the question is, whether the principle of reservation is sought to be extended by the authorities in the proposed promotion. The impugned communication under Annexure-1, on the face of it does not say so. The State counsel as well as the learned Senior counsel appearing for the private Opposite Parties have emphatically argued that the principle of reservation is not sought to be extended for promotion to the rank of DCF, rather the promotion is sought to be made by invoking the eligibility clause. This being the fact situation, the decisions cited by Shri G. Misra in relation to the applicability or otherwise of Article 16(4A) of the Constitution would not be relevant at all. To amplify, the need of obtaining quantifiable data by the State regarding inadequacy of representation of reserved category persons in public service being sine qua non to apply the principles of promotion with consequential seniority to them as envisaged in **M. Nagaraj, U.P. State Power, Jarnail Singh, Pravakar Mallick (supra)** are rendered redundant.*

***18.** Rule 5 of 2015 Rules reads as follows;*

"Eligibility Criteria:- (1) No Officer shall be eligible for promotion to the post in Group-A (Senior Branch) of the service unless he or she has competed five years of continuous service in the grade of Odisha Forest Service Group 'A' (Junior Branch) as on the 1st day of January of the year in which the Board meets.

(2) Appointment to Supertime Scale in the service shall be made on promotion from amongst the officers who have completed two years of service in Odisha Forest Service Group 'A' (Senior Branch) as on the 1st day of January of the year in which the Board meets.

(3) Appointment to Superior Administrative Grade in the service shall be made on promotion from amongst the officers who have completed one year of service in Odisha Forest Service (Supertime Scale) as on the 1st day January of the year in which the Board meets."

Thus, the Rule provides that an Officer shall not be eligible for promotion to the post in Senior Branch unless he has completed 5 years of continuous service in the Junior Branch as on the first day of January of the year in which the Board meets. The proposed promotional exercise being scheduled to be held in the current year i.e. 2023,

the relevant date for consideration of eligibility would be 1st January, 2023.Admittedly as on that date the private Opposite Parties had completed 5 years of continuous service whereas the Petitioners had not. Thus, prima facie, they are not eligible for being considered for promotion to the Senior Branch, but then if only the eligibility clause is harped upon and the proposed promotions are effected, it would entail a situation where the private Opposite Parties, who by virtue of the principle of reservation had been promoted to the Junior Branch earlier than the Petitioners (General Category candidates) would definitely steal a march over the Petitioners. Since on the face of it and on record the principle of reservation would not be applied in case of promotion to the post of DCF, the catch-up principle would also not be applicable if and when the Petitioners are promoted to the Senior Branch. In other words, this would lead to a situation where the inherent seniority of the Petitioners restored by application of the catch-up principle in the year 2022 would be lost forever. It would be back to square one. To further elaborate, the private Opposite Parties, who are inherently junior to the Petitioners but had marched ahead of them by virtue of the principle of reservation would become seniors to them for all times to come. According to the considered view of this Court, this would be entirely contrary to the principle of equality enshrined under Articles 14 and 16(1) of the Constitution of India. Thus, as between the question of seniority and the eligibility criteria, this Court is of the view that the former shall take precedence over the latter as otherwise the balance between Articles 16(1) and 16(4A) of the Constitution would be disturbed.

***19.** In its judgment rendered in the case of **Ajit Singh Januja v. State of Punjab**; (1996) 2 SCC 715, the Supreme Court's following observations are noteworthy;*
"Whenever a question arises for filling up a post reserved for Scheduled Caste/Tribe candidate in a still higher grade then such candidate belonging to Scheduled Caste/Tribe shall be promoted first but when the consideration is in respect of promotion against the general category post in a still higher grade then the general category candidate who has been promoted later shall be considered senior and his case shall be considered first for promotion applying either principle of seniority-cum-merit or merit-cum-seniority." (Emphasis added)

***Thus, the principle laid down is that the inherent seniority between reserved category candidates and general candidates in the promoted category shall continue to be governed by their interse seniority in the lower grade."** (Emphasis added)*

21. Learned Single Judge relied on the Supreme Court's decision in case of ***State of Tamil Nadu and others v. K. Shyam Sundar and others***; reported in ***(2011) 8 SCC 737*** to reach a conclusion that what could not be done directly, the State was attempting to do so indirectly which was not conscionable in law. After having said so, learned Single Judge noticed the admitted position as regards number of vacancies in the rank of OFS Group-A (Senior) were available and respondent No.4 to 11 having been promoted to the OFS Group-A (JB) on different dates in the year 2018 and thus acquired or will be acquiring the eligibility on different dates in the said year itself, directed the State-respondents, "in public interest", to consider relaxation of Rule 5 in exercise of its power under Rule 14 of the Rule or in the alternative defer the promotional exercise to a date after 01.01.2024 so as to consider all the officers for promotion as per the gradation list available as on 09.09.2022. Learned Single Judge "quashed the communication dated 03.03.2023" (Annexure-1) and thus allowed the writ petition with a direction to the State-respondents to take

necessary steps to fill up the posts in the cadre of OFS Group-A (Senior) in terms of the observations made in the judgment. Learned Single Judge, however, clarified, that if any promotion had been granted to any officer pursuant to the interim orders dated 12.05.2023 and 04.09.2023 passed by this Court, the same shall remain unaffected by the said judgment. The said judgment of the learned Single dated 10.11.2023, in the background of the facts as noted above is under challenge in the present intra-Court appeal.

Proceedings in the present intra-Court appeal

22. When this appeal was taken up by a Co-ordinate Bench of this Court on 14.12.2023, while issuing notices to the respondents including respondents No.4 to 11 (the writ petitioners), an interim order, the operation of the impugned judgment passed by the learned Single Judge was stayed till 11.01.2024, which order continued till 29.02.2024. On 29.02.2024, the following order was passed modifying the interim order of stay on an application (IA No.333 of 2024) filed on behalf of the State-respondents:

> *"xxx xxx xxx*
>
> ***LA. No.333 of 2024***
>
> *3. In the meanwhile, though the Departmental Promotion Committee (DPC), in terms of paragraph-21 of the judgment dated 10.11.2023 passed by the learned Single Judge in W.P.(C) No.7388 of 2023, may proceed with the matter of promotion, 5 posts shall be kept reserved so as to protect the interest of the appellants.*
>
> *4. It goes without saying that any action of the respondents shall be subject to the final outcome of the present appeal."*

23. The said order was passed in view of the stand taken on behalf of the State that filling up of vacant posts of Deputy Conservator of Forest, OFS Group-A (Senior Branch) was essentially required and because of the interim order passed in the present appeal, the State was not in a position to fill up the vacant posts of DCF, OFS Group-A (Senior Branch). It was categorically stated in the said application that as against the sanctioned strength of 84 DCF, only 49 persons were holding the post and 35 posts were lying vacant.

24. It is also noteworthy to mention at this stage that when the present appeal was being heard, the Court had required the State-respondents to file a short affidavit stating the stage of DPC meeting pursuant to the notice dated 03.03.2023, which notice was under challenge in the writ proceeding. An affidavit has accordingly been filed on behalf of the State. It has been stated in the said affidavit that by said communication dated 03.03.2023 the State Government had requested the PCCF and HoFF, Odisha by forwarding a list of 31 officers under OFS Group-A (JB) for consideration of their promotion to the rank of DCF, OFS Group-A (Senior Branch) in which names of the appellants had figured at Sl. No.26 to 31. By an order dated 15.03.2023, a learned Single Judge of this Court had passed an interim order directing that the DPC may meet, but the final selection of DPC would be kept in a sealed cover and shall not be given effect to without leave of this Court. In the light of the order passed by the learned Single Judge, a meeting of the DPC was held on

20.03.2023 wherein 30 officers were found eligible, having completed 5 years of service in ACF cadre as on 01.01.2023 as required under Rule 5 of the OFS Group-A (Senior) Rules, 2015. Certain applications were filed for vacating the order of stay, which were rejected. An interim application was also filed by the pro-forma respondents No.20 and 21 (opposite parties No.12 and 13 in the writ proceeding). Modifying the interim order passed in the writ petition, by an order dated 04.09.2023 observed that the said interim order shall not apply for the cases of opposite parties No.12 & 13, and accordingly their cases might be considered for promotion subject to availability of vacancy recommended by the DPC.

25. It has also been stated that the proceeding of the DPC was held on 20.03.2023 and has been approved by the State Government on 19.10.2023 whereupon the eligible officers, namely, Subhendu Prasad Behera and Shiba Prasad Rath have been granted promotion to the rank of DCF as per the DPC held on 20.03.2023, in the light of the aforesaid interim order of the learned Single Judge dated 04.09.2023. It has also been stated that by the impugned judgment of the learned Single Judge dated 10.11.2023, the impugned communication dated 03.03.2023 was quashed and the State-respondents were directed to take necessary steps to fill up the post in the promotional cadre in DCF in terms of the observations made in the judgment and it was further made clear that if any promotion had been granted to any other officer pursuant to order dated 12.05.2023 and 04.09.2023, the same shall remain unaffected by the said judgment. Learned Single Judge had further observed that Government shall do well to consider relaxation of Rule 5 in exercise of its power under Rule 14 or in the alternative, to defer the promotional exercise to a date after 01.01.2024 so as to consider all officers as per the gradation list published as on 09.09.2022. It has been stated that during the pendency of the present appeal, the writ petitioners (respondents No.4 to 11) have also completed 5 years of service as ACF and moreover there are large number of vacancies available in DCF cadre.

26. It has also been stated that pursuant to the Court's order dated 29.02.2024 in the present appeal, a fresh DPC was also convened on 11.03.2024 and in the light of the observation made in paragraph-21 of the impugned judgment passed by the learned Single Judge, the DPC has already considered the cases of eligible officers, who have completed 5 years of service as ACF as on 01.01.2024 and accordingly as against available vacancies the State Government has already promoted 36 eligible officers to the rank of DCF, OFS Group-A (SB) on *adhoc* basis, which have been made subject to outcome of the present writ appeal, in the light of this Court's order dated 29.02.2024. In the light of the said notification dated 13.03.2024, all the officers have already submitted their joining against promotional post and further 5 posts have already been kept reserved in respect of the appellants in terms of the order passed by this Court. It has also been stated in the said affidavit that the promotion order issued on 13.03.2024 has covered the most of the candidates who were found suitable as per the DPC held in 2023. Moreover, respondents No.4 to 11, except respondent No. 7 (petitioners in the writ petition) have been given

promotion to the rank of DCF. So far as the present appellants are concerned, 5 posts have already been kept reserved, whose cases shall be considered if they are found eligible.

27. An affidavit has been filed on behalf of the appellants on 17.03.2024 stating therein that in the meeting of the DPC held on 20.03.2023 for considering promotion against 30 vacancies, 30 officers including these appellants were found eligible. However, the decision of the DPC was kept in the sealed cover due to the interim order passed by this Court. It has further been stated that it has reliably been learnt that the said proceeding of the meeting dated 20.03.2023 of the DPC was approved by the State Government on 19.10.2023 from which two persons namely Subhendu Prasad Behera and Shiba Prasad Rath have been promoted in the light of an interim order passed by the learned Single Judge in the writ proceeding. It has also been stated that the order of promotion dated 13.03.2024 contains names of such Officers who had not completed five years of continuous service as ACF as on 01.01.2024, contrary to Rule 5 (1) of the OFS Group-A (Senior) Rules, 2015.

28. We have heard Mr. N.K. Mishra, learned Senior Counsel assisted by Mr. Deepak Kumar Pani, learned counsel appearing on behalf of the appellants, Mr. R.N. Mishra, learned Additional Government Advocate (AGA) for respondents No.1 to 3-State and Mr. Gautam Misra, learned Senior Counsel for respondents No.4 to 11.

Argument on behalf of the appellants:-

29. Mr. N. K. Mishra, learned Senior Counsel appearing on behalf of the appellants has argued that the entire case of respondent Nos.4 to 11 in the writ petition was laid with a grievance that the State-respondents were intending to extend reservation in the matter of promotion to the rank of OFS Group-A (SB), a Class-1 post. Such exercise, as pleaded in the writ petition, was violative of Section 4 of the ORV Act. Further such exercise was contrary to law laid down by the Supreme Court in cases of ***M. Nagaraj*** (supra)***, Uttar Pradesh Power Corporation Ltd.*** (supra)***, Jarnail Singh*** (supra) and ***Pravakar Mallick*** (supra). Noticing the express provision under Rule 4 of the OFS Group-A (SB) Rules 2015, learned Single Judge, he contends, has rightly held in paragraph 17 that the said Supreme Court's decisions were inapplicable in the facts of the present case. He has further argued that the impugned judgment of the learned Single Judge has taken note of the Supreme Court's decision in case of ***Ajit Singh Januja v. State of Punjab*** reported in ***(1996) 2 SCC 715***, wherein it has been held that whenever a question arises for filling up a post reserved for Schedule Caste/Tribe candidate in a still higher grade then such candidate belonging to Schedule Caste/Tribe shall be promoted first but when the consideration is in respect of promotion against the General category post in a still higher grade then the General category candidate who has been promoted later shall be considered senior and his case shall be considered first for promotion applying either the principle of seniority-cum-merit or merit-cum-seniority. He has however submitted that the said principle laid down in case of ***Ajit Singh Januja*** (supra) has been further elaborated in ***Ajit Singh Januja (II) v. State of Punjab***

reported in ***1999 (7) SCC 209.*** He has submitted that it has been clearly held in Paragraphs-84 and 85 of the said decision that even if seniority for roster point alone does not count, yet experience of both the groups can be considered as per the merit for further promotion. He has argued that undisputably, the experience of the appellants as Assistant Conservator of Forests is more than that of respondents No.4 to 11 for which, the former being otherwise eligible for promotion as Deputy Conservator of Forests ahead of the said respondents, no illegality can be found in the process. He has further argued that direction by the learned Single Judge to defer the promotional exercise to another date after January, 2024 so as to consider all officers as per the Gradation list as on 09.09.2022 is unsustainable as it renders Rule 5 of the OFS Group-A (Senior) Rules, 2015 nugatory and redundant, which is impermissible.

Argument on behalf of respondents No.4 to 11:-

30. Mr. Gautam Misra, learned Senior Counsel has submitted, placing heavy reliance on the Supreme Court's decision in case of ***Pravakar Mallick*** (supra) to argue that the appellants were illegally granted benefit of reservation in promotion to the post of ACF, in contravention of the law laid down by the Supreme Court in case of ***M. Nagaraj*** (supra)***, Uttar Pradesh Power Corporation Ltd.*** (supra) and ***Jarnail Singh*** (supra) and therefore they should not be given advantage of such promotion for further promotion. He has contended that the learned Single Judge has rightly relied on the Supreme Court's decision in case of ***Ajit Singh Januja*** (supra) wherein it has been held that when a question arises for consideration of filling up of a post reserved for SC/ST, a candidate belonging to the SC/ST can be promoted first, but when the consideration is in the respect of promotion against a general category post and still higher grade, then the general category candidates who has been promoted later shall be considered senior and his case shall be considered first for promotion applying either principle of seniority-cum-merit or merit-cum-seniority. He has submitted that the learned Single Judge has rightly applied the law laid down by the Supreme Court in case of ***Ajit Singh Januja*** (supra) and ***K. Shyam Sundar*** (supra). He has argued that the State-respondents were clearly directed by an order of this Court dated 15.03.2023 to inform as to whether an exercise in terms of the Supreme Court's decision in case of ***M. Nagaraj*** (supra) and ***Jarnail Singh*** (supra) had been carried out or not. This specific query remained unanswered by the State-respondents. He has contended that the ultimate decision in the present case would be governed by the Supreme Court's decision in case of ***M. Nagaraj*** (supra), ***Uttar Pradesh Power Corporation Ltd.*** (supra) ***Jarnail Singh*** (supra), ***Pravakar Mallick*** (supra) and ***Mukesh Kumar v. State of Uttarakhand, (2020) 3 SCC 1.*** He has submitted that the appellants are beneficiaries of illegal promotion orders. Relying on the aforesaid Supreme Court's decisions, he has submitted that the appellants and proforma respondents No.22 to 37 could not have been promoted to the post of ACF with effect from the dates they have been granted such promotion by giving them benefit of reservation without following the law laid down by the Supreme Court in case of in ***M. Nagaraj*** (supra). He has submitted that the writ petitioners were

compelled to approach this Court by filing the writ petition since with the issuance of the letter dated 13.03.2023, the State Government had initiated the exercise for grant of promotion to the post of DCF. If that were to be allowed, that would have resulted into the appellants and proforma respondents No.22 to 37 marching ahead of the petitioners by virtue of being beneficiaries of promotion to the post of ACF, which is contrary to the aforesaid decision of the Supreme Court, without collecting the quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment, as held in the case of ***M. Nagaraj*** (supra). He contends that if the appellants and proforma respondents No.22 to 37 were to be promoted to the post of DCF, the respondents No.4 to 11 for all times to come will become the junior to them and therefore, the writ petitioners were definitely the persons aggrieved so far as the promotional exercise of the appellants as well as proforma respondents No.22 to 37 were concerned as they are junior to the writ petitioners at stage of initial entry into service as Forest Ranger. This argument has been made to counter the stand taken by the appellants in the writ proceeding that the writ petitioners did not have the *locus standi* to question the selection process for promotion to the post of DCF, they being not eligible for consideration in terms of Rule 5 (1) of the OFS Group-A (Senior) Rules, 2015. He has submitted that the appellants as well as the proforma respondents were promoted to OFS Group-A (JB) from the post of Forest Ranger to ACF by resorting to reservation in promotions in gross violation of the Supreme Court's decisions.

Stand of the State of Odisha:-

31. The stand of the State Government is clear from the counter affidavit which was filed in the writ proceeding wherein it was stated that the State did not intend to resort to any reservation in the promotional post of OFS Group-A (Senior). The assertion of the writ petitioners with regard to reservation for promotion to the post of OFS Group-A (Senior) was disputed and denied. A plea was taken that there being no provision for reservation in promotion to the post of OFS Group-A (Senior), the judgments of the Supreme Court relied on by the petitioners were inapplicable in the present set of facts of the case. A plea was taken that the writ petitioners had not completed 5 years of service in the grade of OFS Group-A (JB) and therefore they had not been considered for promotion to OFS Group-A (Senior). In view of their ineligibility they did not have any *locus standi* to prefer the writ petition, the State had contended. A clear stand was taken that rules of reservation would not be applicable for filling up the posts of OFS Group-A (Senior).

32. The State relied on Rule-3 (b) of the Odisha Civil Services (Criteria for Promotion) Rules, 1992 which prescribes that selection for promotion to State Civil Services and Posts shall be made on the basis of the merit and suitability in all respects with due regard to seniority and the names of the persons included in the select list shall be arranged in the order of seniority in the feeder service or grade. It was stated in the counter affidavit that the writ petitioners had represented before the State on 06.02.2023 seeking relaxation of the residency period from 5 years to 2

years and 6 months and convening the DPC at an early date, knowing well that they did not satisfy the eligibility criteria of minimum 5 years of residency period. They did not disclose the said fact before this Court that they had represented the State for relaxation in eligibility criteria amounting to suppression of a material fact.

33. A stand was also taken that relaxation of residency period is not a matter of right, which could be considered only if there was urgency to fill up the promotional posts and enough eligible officers were not present in the feeder cadre.

34. We have carefully examined the pleadings and other documents available on records of the writ proceeding as well as the present intra-Court appeal and have given our thoughtful consideration to the rival submissions advanced on behalf of the parties as noted above.

35. We need to record at the outset that there is no dispute over the legal position emerging from the provisions under the OFS Group-A (Senior) Rules, 2015 and the rival submissions made on behalf of the parties that there is no provisions for grant of reservation in the matter of promotion to the rank of OFS Group-A (Senior). Though the writ petitioners asserted in the writ petition that the State-respondents were going to apply reservation policy for SC & ST candidates for promotion to OFS Group-A (Senior) for which DPC was subsequently held on 20.03.2023, it has clearly emerged from pleadings, the extant statutory provisions, pleadings and submissions advanced on behalf of parties that neither there is provision for reservation nor there was any move to apply reservation policy for such promotion.

36. In the aforesaid background, the Supreme Court's decisions in cases of ***M. Nagaraj*** (supra)***, Jarnail Singh*** (supra) and ***Pravakar Mallick*** (supra), in our considered view, have no application apropos promotion to the post of OFS Group-A (Senior) in view of the admitted position that no reservation policy is applicable for promotion under the said Rules. On close scrutiny of the facts as has been noticed hereinabove, we notice the appellants No.1, 2 and 3 were granted promotion to the Grade of OFS Group-A (JB) in 2013 from the post of Forest Rangers by following the reservation policy under OFS Group-A (JB) Rules, 2013. Similarly, appellants No.4 and 5 were granted such promotion with effect from 17.06.2017 and 04.09.2018. The writ petitioners were admittedly seniors as Forest Rangers than these appellants. The writ petitioners did not even question grant of promotion to OFS Group-A (Junior) to these appellants by extending them the benefit of reservation. The writ petitioners were promoted to OFS Group-A (JB) in 2018 much after the appellants No.1, 2 and 3, as can be seen from the table under Paragraph-5.

37. However, after the writ petitioners (respondents No.4 to 11) were given promotion to the OFS Group-A (JB), applying the catch-up rule evolved by the Supreme Court in case of ***Union of India and others v. Virpal Singh Chauhan and others*** reported in (***1995) 6 SCC 684*** and subsequently approved in case of ***Ajit Singh Januja (II)*** (supra), their seniority was restored and a tentative Seniority List was prepared. In the said tentative Seniority List, names of the writ petitioners

figured accordingly. The promotions granted to the appellants by extending them benefit of reservation to the post of OFS Group-A (JB) with effect from respective dates remained unchallenged, even in the present writ petition/proceeding filed by respondents No.4 to 11, on the ground that such promotions were in the teeth of the Supreme Court's decisions in cases of ***M. Nagaraj*** (supra) and ***Jarnail Singh*** (supra). The appellants have thus continued to hold the post of OFS Group-A(Junior Branch), ACF with effect from the dates of their respective promotions to the said post. In the aforesaid background, accepting the arguments as advanced on behalf of respondents No.4 to 11 will amount to declaring the promotions granted to the appellants to the rank of ACF from their respective dates as illegal, without any challenge to such promotions. The question might have been different had there been any challenge to their promotions at appropriate stage before appropriate Court. As a matter of fact, no grievance of any sort was raised by the writ petitioners questioning grant of promotion to the appellants in OFS Group-A (JB).

38. In the absence of any challenge to the promotions of the appellants to the rank of OFS Group-A (JB) on the ground of such promotions being violative of the law laid down by the Supreme Court in the case of ***M. Nagraj*** *(supra)* and ***Jarnail Singh*** *(supra)*, their right to hold the said post with effect from such dates cannot be taken way without giving them an opportunity to defend the grant of such promotions. We are, thus, of the view that for all purposes the appellants shall have to be treated as promoted to the rank of OFS Group-A (JB) with effect from the respective dates i.e. 06.12.2013 (Appellant No.1), 12.06.2013 (Appellant No.2), 06.12.2013 (Appellant No. 3), 17.06.2017 (Appellant No. 4) and 04.09.2018 (Appellant No.5).

39. A considerable reliance has been placed on the Supreme Court's decision in the case of ***Pravakar Mallick*** *(supra)* on behalf of the writ petitioners/respondents No.4 to 11. The said decision, in our opinion, has no application in the present case. In the case of ***Pravakar Mallick*** *(supra)* by a Government resolution dated 20.03.2022, the Government of Odisha had issued instructions to the effect that the catch up principle adopted earlier by the State Government in General Administration Department vide resolution No.39374 dated 02.11.2000 shall not be followed any longer. The resolution further ordained that the Government servants of Odisha belonging to SCs/STs shall retain their seniority in the case of their promotion by virtue of a Rule of Reservation. It had further been clarified that the Government servants belonging to General/OBC category promoted later will be placed junior to SC/ST Government servants promoted earlier, by virtue of the Rule of Reservation. The said Government resolution and the consequential gradation list of Odisha Administrative Service, Class-I (JB) when put to challenge, this Court by a judgment and order dated 24.12.2010 passed in the case of ***Langjit Roy Vs. State of Odisha***, reported in ***2010 SCC Online Ori. 232***, quashed the said resolution dated 20.03.2002 and the consequential gradational list, following the law laid down by the Supreme Court in the case of ***Virpal Singh*** *(supra)* and ***Ajit Singh (II)*** supra. In the aforesaid background, the Supreme Court while dismissing the appeal in the case

of ***Pravakar Malick*** *(supra)* held in paragraphs 24 and 25 as under:-

> "24. The Government Resolution dated 20-3-2002 can neither be termed as law made in exercise of enabling power of the State under Article 16(4-A), nor does it satisfy the parameters laid down in the various decisions of this Court. The Resolution has no legal basis. The seniority/gradation list dated 16-5-2001 of OAS I (JB) was prepared correctly by following the ratio laid down by this Court and in absence of any law or decision by way of executive order based on acceptable material for conferring additional benefit of consequential seniority, the gradation list dated 3-3-2008 was prepared by altering the positions which were maintained in the list dated 16-5-2001. While it is open for the State to confer benefit even through an executive order by applying mandatory requirements as contemplated under Article 16(4-A) but the Resolution dated 20-3-2002 is merely issued by referring to the instructions of the Union of India without examining the adequacy of representation in promotional posts, as held by this Court.
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> 25. Further, the submission of the learned counsel Shri A. Subba Rao that the benefit of reservation in promotion is given in the services of OAS I for Scheduled Caste and Scheduled Tribe officers as per Section 10 of Orissa Act 38 of 1975, but the same cannot be countenanced for the reason that such Act was enacted by the State of Orissa in the year 1975 but no provision is brought to our notice in such Act for giving the benefit of seniority for the promotees who were promoted in reserved vacancies. In absence of any provision in the said Act for conferring the benefit of seniority, and in absence of any amendment after the Constitution (85th Amendment) Act, 2001, by which Article 16(4-A) was amended, benefit of seniority cannot be extended relying on Section 10 of the Act."

40. In the present case, the dispute does not pertain to seniority of the respondents No.4 to 11 that has been maintained in the tentative seniority list applying the 'catch up rule' in case of ***Virpal Singh Chauhan*** *(supra)* approved in case of ***Ajit Singh (II)*** supra.

41. Now coming back to the facts of the present case for the purpose of adjudication as regards the right of the appellants to be considered for promotion to the post of OFS Group-A (Senior) in accordance with the OFS Group-A (Senior Branch) Rules, 2013 as on 20.03.2023 when the DPC was held for the said purpose. We have, at the outset, noted the relevant statutory provisions under the said Rules, particularly Rule 5 thereof. Rule 7 of the OFS Group-A (Senior) Rules, 2015 prescribes that the Board within the meaning of Section 2(a) of the Rules shall ordinarily meet at least once in a year, preferably in the month of January, to prepare a list of officers as are held by the Board 'suitable' for promotion to the next higher grade taking into account the existing and anticipated vacancies for the year. Sub-Rule (2) of Rule 7 lays down that the Board while considering the cases of promotion of 'suitable' officers shall follow the provisions of the following Rules:-

> "(a) The Odisha Civil Services (Zone of Consideration for promotion) Rules, 1988 (in short 'Rules of 1988')
>
> (b) The Odisha Civil Services (Criteria for Promotion) Rules, 1992; (in short, 'Rules of 1992') and
>
> (c) The Odisha Civil Services (Criteria for Selection for Appointment including promotion) Rules, 2003 (in short, 'Rules of 2003')"

42. Rule 7, thus, requires the Selection Board/DPC to ordinarily meet at least once in a year preferably in the month of January. For the year 2023, a meeting of the DPC was admittedly held on 20.03.2023. The eligibility criteria under Rule 5 of the said Rules provides that no officer shall be eligible for promotion to the post of Group-A (SB) unless such officer has completed five years of continuous service in the Grade of OFS Group-A (JB) as on the 1st Day of January of the year in which the Board meets. Manifestly, such officers who had not completed five years of continuous service in Grade of OFS Group-A (JB) as on 01.01.2023 were not eligible for consideration and those who had completed five years of such continuous service were eligible.

43. As has been noticed above, the writ petition was filed questioning a communication dated 03.03.2023 which had indicated initiation of the process for holding DPC for promotion to such post. We have already quoted hereinabove an interim order passed by a learned Single Judge of this Court dated 15.03.2023 to the effect that though the DPC might meet but the outcome shall be kept in a sealed cover and shall not be given effect to without leave of the Court. The said order was passed in view of the submission that the attempt of the State of Odisha to grant permission to these appellants and others by applying the principle of reservation in promotion was illegal and not in conformity with the law laid down by the Supreme Court in the case of ***M. Nagaraj*** *(supra)* and ***Jarnail Singh*** *(supra).* We reiterate that it is an admitted position that no policy of reservation was being applied for the process of selection for promotion to the post of OFS Group-A (Senior). In the light of an interim order passed in the writ proceeding dated 04.09.2023, in view of the admitted fact that opposite parties No.12 and 13 were senior to the writ petitioners and they (writ petitioners) did not have any grievance against them, an application filed on behalf of opposite parties No.12 and 13 in the writ petition was allowed with the observation that the interim order earlier passed in the writ proceeding shall not apply in their cases. Apparently, thus, the outcome of the meeting of the DPC held on 20.03.2023 was given effect to, to the extent it related to the opposite parties No.12 and 13 in the writ petition, namely, Suvendu Prasad Behera and Shiba Prasad Rath (Respondents No.20 and 21 herein). They have been granted promotion accordingly to the post of OFS Group-A (SB) based on a meeting of the DPC held on 20.03.2023.

44. It is not in dispute that the cases of these appellants were considered by the DPC held on 20.03.2023. However, the outcome of the said meeting *qua* such appellants, who had completed five years as on 01.01.2023, in the meeting held on 20.03.2023, is not available on record. The learned Single Judge, noticing the facts in the writ petition to the effect that the writ petitioners will be acquiring the eligibility on different dates in the year 2023 itself and as on 1st January, 2024 they would have acquired the required eligibility, observed that the Government may relax the eligibility criteria in respect of the petitioners and effect promotion to the senior Branch based on final gradation list. This observation has been made with reference to Rule 14 of the OFS Group-A (Senior) Rules, 2015 which reads as under :-

> "14. **Relaxation**- Whenever it is considered by the Government that it is necessary or expedient to do so in the 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 officers in consultation with the Commission."

45. The learned Single Judge further observed that in the alternative, the State may defer the promotional exercise to a date after 01.01.2024 so as to consider all officers as per the gradation list as on 09.09.2022. After having observed, thus, the learned Single Judge sets aside the impugned communication dated 03.03.2023 with a direction to the take necessary steps to fill up the post in the promotional cadre in terms of the observations made in the judgment, saving the promotions granted to the officers namely, Suvendu Prasad Behera and Shiba Prasad Rath which was based on the DPC held on 20.03.2023.

46. Based on the discussions noted above, we conclude as under :

> (i) We don't find any legal infirmity in the communication dated 03.03.2023 issued by the Government of Odisha in Forest, Environment and Climate Change Department seeking inputs for consideration of promotion of the eligible officers to the rank of OFS Group-A (Senior) in accordance with the Rules of 2015 by the DPC for the year 2023.
>
> (ii) The writ petitioners/respondents No.4 to 11 did not fulfill the eligibility criteria as on 01.01.2023 in accordance with the Rules of 2015 for consideration of their promotion by the DPC held on 20.03.2023.
>
> (iii) Denial of consideration of the cases of the appellants, who had completed five years of continuous service in the rank of OFS Group-A (JB) for their promotion in the rank of OFS Group-A (Senior), in the present set of facts amount to nullifying their promotions to the rank of OFS Group-A (JB) from the post of Forest Rangers, without following due procedure.

47. We are unable to concur with the view taken by the learned Single Judge in view of the clear provision under the OFS Group-A (Senior) Rules, 2015 which requires *inter alia* meeting of the DPC once in a year for preparing a list of the officers suitable for promotion to OFS Group-A (Senior). The communication dated 03.03.2023 was issued by the Government seeking information from the Chief Conservator of Forests for consideration of promotion in a meeting scheduled to be held in the year 2023. Rule 5, in no uncertain terms, prescribes that no officer shall be eligible for promotion to the post of OFS Group-A (SB) unless he has completed five years of continuous service in the grade of OFS Group-A (JB) as on the 1st Day of January of the year in which the Board meets i.e., in the present case 01.01.2023. The writ petitioners/respondents No. 4 to 11 were ineligible for consideration of promotion as they had not completed five years of service in OFS Group-A (Senior). Such appellants, who had completed five years in OFS Group-A (JB) were eligible for such promotion as on the date of issuance of the said letter dated 03.03.2023, which is an undisputed fact. It is true that the appellants were given promotion from the post of Forest Rangers to OFS Group-A (JB) by extending them the benefit of reservation. The said promotions granted to them have not been recalled nor the same have been declared illegal by any Court. Their promotions were not challenged when they were granted several years back, on the ground of the same being in

breach of the Supreme Court's decisions in the case of ***M. Nagaraj*** *(supra)* and ***Jarnail Singh*** *(supra).* In the writ petition, the petitioners did not seek any relief for declaring the promotions granted to these appellants to the rank of OFS Group-A (JB) by extending them the benefit of reservation illegal. In such view of the matter, they had a right to be considered for promotion in the DPC meeting held on 20.03.2023.

48. Further, we do not concur with the view taken by the learned Single Judge, to defer the promotional exercise to a date after 01.01.2024 so that all officers as per the gradation list as on 09.09.2022 are considered. Such direction is contrary to the scheme of the statutory OFS Group-A (Senior) Rules, 2015, Rule 7 of which contemplates holding of meeting of the DPC at least once in a year.

49. The effect of non-consideration of the cases of the writ petitioners for the promotion in question in the year 2023 and consideration of those appellants, who were granted promotions by extending benefit of reservation to the post of OFS Group-A (Senior) in the year 2023 would be that such appellants who are eligible in terms of Rule 5 of the OFS Group-A (Senior) Rules, 2015 shall be granted promotion, if found suitable, prior to the writ petitioners and, therefore, their seniority shall be fixed above the writ petitioners, if they are granted promotions later. The said grievance of the writ petitioners cannot be a basis for this Court to deny such of the appellants who had completed five years of service in OFS Group-A (JB), their right to be considered for promotion in the DPC held on 20.03.2023, in accordance with Rules, having force of law.

50. In our considered opinion, the effect of the impugned order passed by the learned Single Judge is nullifying the entire exercise of DPC held on 20.03.2023, however, saving the recommendations made by the DPC in relation to Suvendu Prasad Behera and Shiba Prasad Rath. We respectfully disagree with this approach of the learned Single Judge as we do not find any illegality in the impugned communication dated 03.03.2023 and consideration of such officers who had completed five years of service in OFS Group-A (JB) for promotion to OFS Group-A (Senior) by the DPC in its meeting held on 20.03.2023. Such promotion is not hit by the law laid down by the ***M. Nagaraj*** *(supra)* ***and Jarnail Singh*** *(supra)* as no reservation policy is applicable for such promotion. The learned Single Judge has, however, referred to Rule 14 of the OFS Group-A (Senior) Rules, 2015 requiring the State Government to consider relaxation as regards eligibility criteria taking into account that the State Government had in past relaxed the eligibility condition of five years with the concurrence of OPSC for promotion to the rank of OFS Group-A (Senior).

51. In the given facts and circumstances of the case, for the reasons noted above, we consider it apt to dispose of the present writ appeal with the following directions:-

> (i) Considering the peculiar facts and circumstances that the appellants were granted promotion to the rank of OFS Group-A(JB) from the post of Forest Rangers by extending

them the benefit of reservation, admittedly without following the law laid down by the Supreme Court in the case of ***M. Nagaraj* (supra) *and Jarnail Singh*** *(supra)* though they were appointed as Forest Rangers much after the writ petitioners, the State of Odisha shall consider grant of relaxation in eligibility criteria under Rule 14 of the OFS Group-A (Senior) Rules, 2015 in respect of the writ petitioners/respondents No.4 to 11 in consultation with the OPSC for the purpose of the DPC of the year 2023, which in the present case was held on 20.03.2023. Such decision must be taken within two months from today.

(ii) If such relaxation is granted by applying Rule 14 of the OFS Group-A (Senior) Rules, 2015, the Selection Board/DPC shall hold a meeting within one month after the decision on the point of relaxation is taken; as if the meeting was being held on 20.03.2023 to consider the cases of all eligible officers in accordance with the Rules 5 and 7 of the OFS Group-A (Senior) Rules, 2015 and proceed accordingly in accordance with the other provisions under the said Rules. In case the State Government decides not to grant such relaxation, it shall be required to pass a reasoned order and in such case the affected parties shall be at liberty to question the decision of the Government not to grant relaxation, before the appropriate forum including by way of filing writ petition under Article 226 of the Constitution of India.

(iii) Further, in the event the relaxation is not granted, the State-respondents shall proceed with the recommendation of the DPC held on 20.03.2023 which is said to have been approved by the Government and out of the select list so prepared by the DPC, two persons have been promoted. The State Government shall, in such a case, consider grant of promotion in accordance with the provisions under OFS Group-A (Senior) based on the recommendation made by the DPC in accordance with the OFS Group-A (Senior) Rules, 2015.

(iv) Soon after final outcome of the DPC held/deemed to have been held on 20.03.2023, another DPC meeting shall be held as if the said DPC was sitting on 11.03.2024 to consider the cases of such officers, who are eligible to be considered as on 01.01.2024 in terms of Rule 5 of OFS Group-A (Senior) Rules, 2015. Needless to say that the State Government shall take all possible steps to ensure that the promotions are granted to the suitable candidates in accordance with the provisions of the Rules as expeditiously as possible by completing the entire exercise preferably within three months from today.

52. We are of the view that the directions noted above, balance equities and at the same time, do not breach or deviate from any provision under the OFS Group-A (Senior) Rules, 2015. The appeal is allowed with the aforesaid directions and observations.

53. There shall be no order as to costs.

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2024 (III) ILR-CUT-27

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

W.A. NO. 1995 OF 2014

PRAVATI SAHOO ….Appellant

V.

UNION OF INDIA & ORS. ….Respondents

REGULARIZATION OF SERVICE ─ Whether a person selected by a service provider to an establishment within the meaning of Article 12 of the Constitution of India can claim regularization in the said establishment on the ground of continuous service? ─ Held, No ─ A selection made basing upon walk-in interview by a service provider for providing services to the state within the meaning of Article 12 of the Constitution of India cannot be treated as selection satisfying the requirements of Articles 14 & 16 of the Constitution of India. (Para 13)

Case Laws Relied on and Referred to :-

1. AIR 1957 SC 264 : Dharangadhara Chemical Works Ltd. v. State of Saurashtra & Ors.
2. AIR 1965 SC 360 : State of U.P. and Another Vs. Audh Narain Singh and Another.
3. W.P.C(OAC) No.2430/2015 (19.01.2022) : Rudrakanta Panda Vs. State of Odisha & Ors.
4. W.P.C No.6661/2018 (10.05.2018) : State of Odisha & Ors. Vs. Jatin Kumar Das & Ors.
5. (2006) 4 SCC 1 : State of Karnataka Vs. Uma Devi (3).
6. (2008) 10 SCC 1 : Official Liquidator Vs. Dayanand.

For Appellants : Mr. Bhabani Sankar Tripathy.
For Respondents : Mr. P.K. Parhi, Deputy Solicitor General.

JUDGMENT Date of Judgment : 29.07.2024

CHAKRADHARI SHARAN SINGH, C.J.

1. The present intra-Court appeal has been filed putting to challenge a judgment dated 25.06.2024 passed by a learned Single Judge of this Court in W.P.(C) No.16471 of 2016 whereby the said writ petition filed by the appellant has been dismissed.

2. The appellant in the said writ petition had sought for quashing of the orders dated 07.04.2016 and 11.05.2016 passed by the concerned respondents declining to regularize her services as Staff Nurse at CGHS Wellness Centre-II, Kharvelnagar, Unit-III, Bhubaneswar (CGHS Wellness Centre). She had also sought for a direction to absorb/regularize her services against the regular vacancy of Staff Nurse at CGHS Wellness Centre, Bhubaneswar.

3. It is evident from the pleadings in the writ petition itself that a decision dated 24.02.2004 was taken by respondent No.1 on for opening of a new dispensary under CGHS in Bhubaneswar and other places and an advertisement was issued. The said decision/ communication dated 24.02.2004 indicated the post of officers and staff for the dispensary. It was indicated in the said letter that for the initial period the post shall be filled up by CGHS on contract basis from retired staff of the Central Government. A private company namely, Team Lease Services (P) Ltd., Mumbai was engaged as a service provider for providing the manpower services including that of a Staff Nurse. The said Team Lease Services (P) Ltd., Mumbai (in short 'service provider') issued an advertisement on 27.04.2005 inviting applications for engagement against various posts including the post of Staff Nurse, through Walk-in-interview. It was indicated that remuneration shall be attractive and will be matching to industry standards. In the said walk-in-interview notice, the aspirants

were required to appear at Hindustan Latex Family Planning Promotion Trust, Bhubaneswar. The appellant was selected by the service provider as a Staff Nurse.

4. It is also the petitioner's case that she was engaged as Staff Nurse on contractual basis. She joined the post on 23.06.2005. Later, the service provider expressed its unwillingness to provide the service to CGHS and, therefore, a tender was invited from the local companies to provide services of Staff Nurse on contract basis in absence of regular vacancy. It was decided to give preference to the existing staff Nurse while inviting the tenders locally. Admittedly, no post of Staff Nurse was duly created against which the appellant could be said to be working on contractual basis. On 31.12.2015 one regular post of Staff Nurse was created diverting a post from CGHS, New Delhi to Bhubaneswar. Respondent No.1 issued guidelines on 07.04.2016 for filling up of the post of Staff Nurse and Pharmacist through written examination for the post in question. It is the appellant's case as disclosed in the writ petition that the guidelines in form of executive instructions would not override the then existing recruitment Rules of 2015 which did not stipulate any written examination. The appellant filed a representation for her absorption which was rejected on 11.05.2016.

5. The appellant thereafter approached the Central Administrative Tribunal (CAT) by filing an original application bearing OA No.616 of 2016 for continuance of her service by way of regularization. The said application was disposed of as not maintainable, apparently because the appellant, whose services were provided by a service provider to the CGHS, did not come within the scope of provisions of the Administrative Tribunals Act, 1985. The appellant thereafter filed the aforesaid writ application before this Court which has been dismissed by the impugned judgment.

6. The learned Single Judge has dismissed the appellant's case mainly on the ground that the appellant was not selected against the available sanctioned vacancy by following the rules and regulations governing entry into the services. The learned Single Judge noted that the petitioner's engagement was through an agency and there was no contract of the Central Government with the appellant. The appellant knew this well when the appellant had left her previous contractual engagement with the State Government to join the present post through a manpower service provider. She knew it well that her engagement was only on contractual basis for a certain period of time. The regular post came into existence only on 31.12.2015. In such view of the matter, the learned Single Judge dismissed the writ petition.

7. Mr. B.S. Tripathy, learned counsel appearing for the appellant has vehemently argued that it is an admitted fact that the appellant discharged her duties as Staff Nurse at CGHS Wellness Centre, Bhubaneswar right from her initial engagement in 2005 till creation of regular post in 2015. He has submitted that though she was engaged by a private party (service provider) to provide service to CGHS, there was an employer and employee relationship between the appellant and the respondent No.1. To bolster his contention, he has relied on the Supreme Court's decision in the case of ***Dharangadhara Chemical Works Ltd. v. State of Saurashtra***

and Others, AIR 1957 SC 264 which relates to the definition of a 'workman' under section 2(s) of the Industrial Disputes Act, 1947 (ID Act). He has also relied on the decision of the Supreme Court in the case of ***State of U.P. and Another Vs. Audh Narain Singh and Another, AIR 1965 SC 360*** to submit that there existed employer and employee relationship between the appellant and the respondent, though the appellant's engagement was by a service provider. He has next relied on a Single Bench decision of this Court dated 19.01.2022 rendered in ***W.P.(C) (OAC) No.2430 of 2015 (Rudrakanta Panda Vs. State of Odisha and Others)*** *and batch,* wherein the learned Single Judge relying on a Division Bench decision in the case of ***State of Odisha and others Vs. Jatin Kumar Das and Others (WPC No.6661 of 2018)*** decided on 10.05.2018 has held that since the appointments were made with the concurrence of the Finance Department and the posts were exclusively created by the Government by abolition of equal number of regular posts, the petitioners in the said case were entitled to regularization.

8. Mr. P.K. Parhi, learned Deputy Solicitor General appearing for the respondents has argued that there is no illegality in the impugned judgment passed by the learned Single Judge inasmuch as it is an admitted fact that the appellant was engaged by a service provider on contractual basis for providing services to CGHS. Further when the appellant was engaged to provide services as Staff Nurse, the said post was not created. Further she knew it well right from the beginning that her appointment was on contractual basis and she had no right to be absorbed in service.

9. We have heard learned counsel appearing for the appellant and the respondents.

10. The moot questions which arise for consideration in the present appeal are:-

(i) Whether the impugned judgment passed by the learned Single Judge denying the appellant's claim for regularization suffers from any legal infirmity requiring this Court's interference in an intra-court appeal in the facts and circumstances of the case ?

(ii) Whether a person selected by a service provider to an establishment within the meaning of Article 12 of the Constitution of India can claim regularization in the said establishment on the ground of continuous service ?

11. To address the issue it would be profitable to notice at the outset the observations made in paragraphs 47 and 49, the Supreme Court's decision in the case of ***State of Karnataka Vs. Uma Devi (3)*** reported in ***(2006) 4 SCC*** *1*, which are as under :

"*47*. *When a person enters a temporary employment or gets engagement as a contractual or casual worker and the engagement is not based on a proper selection as recognised by the relevant rules or procedure*, he is aware of the consequences of the appointment being temporary, casual or contractual in nature. Such a person cannot invoke the theory of legitimate expectation for being confirmed in the post when an appointment to the post could be made only by following a proper procedure for selection and in cases concerned, in consultation with the Public Service Commission. Therefore, the theory of legitimate expectation cannot be successfully advanced by temporary, contractual or casual employees. *It cannot also be held that the State has held*

> *out any promise while engaging these persons either to continue them where they are or to make them permanent*. The State cannot constitutionally make such a promise. It is also obvious that the theory cannot be invoked to seek a positive relief of being made permanent in the post.
>
> *** *** ***
>
> 49. It is contended that the State action in not regularising the employees was not fair within the framework of the rule of law. The rule of law compels the State to make appointments as envisaged by the Constitution and in the manner we have indicated earlier. In most of these cases, no doubt, the employees had worked for some length of time but this has also been brought about by the pendency of proceedings in tribunals and courts initiated at the instance of the employees. Moreover, accepting an argument of this nature would mean that the State would be permitted to perpetuate an illegality in the matter of public employment and that would be a negation of the constitutional scheme adopted by us, the people of India. It is therefore not possible to accept the argument that there must be a direction to make permanent all the persons employed on daily wages. When the court is approached for relief by way of a writ, the court has necessarily to ask itself whether the person before it had any legal right to be enforced. Considered in the light of the very clear constitutional scheme, it cannot be said that the employees have been able to establish a legal right to be made permanent even though they have never been appointed in terms of the relevant rules or in adherence of Articles 14 and 16 of the Constitution." (Underscored for emphasis)

12. The case of ***Uma Devi (3)*** *(supra)* was considered in case of ***Official Liquidator Vs. Dayanand*** reported in ***(2008) 10 SCC 1*** when the Supreme Court made the following observation in paragraph 52 :-

> "52. … In this context, we may also mention that though the Official Liquidators appear to have issued advertisements for appointing the company-paid staff and made some sort of selection, more qualified and meritorious persons must have shunned from applying because they knew that the employment will be for a fixed term on fixed salary and their engagement will come to an end with the conclusion of liquidation proceedings. *As a result of this, only mediocres must have responded to the advertisements and joined as company-paid staff. In this scenario, a direction for absorption of all the company-paid staff has to be treated as violative of the doctrine of equality enshrined in Articles 14 and 16 of the Constitution.*" *(Emphasis added)*

13. In our considered view, the learned Single Judge has rightly rejected the appellant's claim for regularization against a post which was not created. Secondly, we are of the considered view that a selection made based on walk-in-interview by a service provider for providing services to the State within the meaning of Article 12 of the Constitution of India cannot be treated to be a selection satisfying the requirements of Articles 14 and 16 of the Constitution of India. The appellant knew that she was being engaged by a service provider. The payments were made to her by the service provider. She could not claim a legitimate expectation of absorption/regularization as she knew when she was appointed that her appointment was temporary and the respondents had not given nor could have given an assurance of regularization without following the regular recruitment process. As held in the case of ***Dayanand*** *(supra)*, such "company appointed" persons cannot claim to be regularized alleging violation of Article 21 of the Constitution. Also, the equity in

favour of millions who are waiting to be employed through regular recruitment process outweighs the equity in favour of a number of such persons, who claim regularization.

14. Coming to the decision in the case of ***Rudrakanta Panda*** *(supra),* we notice that an intra-court appeal giving rise to W.A. No.470 of 2024 was preferred, which came to be dismissed by a Division Bench of this Court on the ground of limitation. In a Special Leave Petition filed by the State of Odisha, the said order passed by this Court has been stayed on 12.07.2024, by the Supreme Court.

15. For the reasons stated above, we do not find any merit in the present intra-Court appeal, which is accordingly dismissed.

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2024 (III) ILR-CUT-32

CHAKRADHARI SHARAN SINGH, C.J.

ARBP NO. 26 OF 2023 & BATCH

M/s. R.P. CONSTRUCTION ….Petitioner (s)

V.

M/s. ODISHA STATE DISASTER MANAGEMENT AUTHORITY ….Opp.Party

AND

ARBP NOS. 27 & 30 OF 2023

(RABINDRA PRASAD BARIK V. M/s. ODISHA STATE D.M.A.)

(A) ARBITRATION AND CONCILIATION ACT, 1996 – Ss. 14 & 15 – Appointment of a substitute arbitrator – Petitioner filed this case U/s. 15(2) of the Arbitration and Conciliation Act, 1996 for appointment of a substitute arbitrator as the learned Arbitrator withdrew himself from the office of the Arbitrator.

(B) Whether Court has jurisdiction to appoint a substitute arbitrator? – Held, Yes – Court has the jurisdiction to appoint a Substitute Arbitrator in accordance with the provision under Section 15(2) r/w Section 11 of the Arbitration and Conciliation Act, 1996, if the parties fail to appoint an Arbitrator on an application made by a party after satisfying the requirement of appointment of an Arbitrator under the provision U/s. 11 of the Act. (Para 9)

(C) Reference has been made to *Sailesh Dhairyawan v. Mohan Balkrishna Lulla; (2016) 3 SCC 619, Yashwith Construction (P) Ltd. v. Simplex Concrete Piles India Ltd. ; (2006) 6 SCC 204.*

Case Laws Relied on and Referred to :-

1. (2016) 3 SCC 619 : Sailesh Dhairyawan v. Mohan Balkrishna Lulla.
2. (2006) 6 SCC 204 : Yashwith Construction (P) Ltd. v. Simplex Concrete Piles India Ltd.

For Petitioner(s) : Mr. Sandeep Parida
For Opp.Party : Mr. Sonak Mishra

JUDGMENT Date of Judgment : 11.09.2024

CHAKRADHARI SHARAN SINGH, C.J.

1. There were agreements between the petitioner and the opposite party, i.e., M/s. Odisha State Disaster Management Authority (OSDMA) executed on 01.11.2011 containing the arbitration clause for resolution of disputes arising out of the said agreements. It is not disputed that the sole Arbitrator Mr. L. Pangari, Senior Advocate was appointed with the consent of the parties on 05.02.2020. Later, the learned Arbitrator withdrew himself from the office of the Arbitrator as recorded in Order No.5 dated 11.03.2022 (Annexure-5 to this application). Consequent upon withdrawal of Mr. Pangari, learned Arbitrator from the office of the Arbitrator, the petitioner put the opposite party on a notice for appointment of a substitute arbitrator. As no substitute arbitrator could be appointed by the parties, the present petitions have been filed under Section 15(2) read with 11 of the Arbitration and Conciliation Act, 1996 (in short 'the Act') for appointment of a substitute arbitrator.

2. Section 14 of the Act prescribes *inter alia* that the mandate of an arbitrator shall terminate and he would be substituted by another arbitrator, if he withdraws from his office or parties agree to terminate of his mandate. Section 15 of the Act deals with termination of mandate and substitution of arbitrator, which reads as under:

> *"**Termination of mandate and substitution of arbitrator.***
> *(1) In addition to the circumstances referred to in section 13 or section 14, the mandate of an arbitrator shall terminate—*
> *(a) where he withdraws from office for any reason; or*
> *(b) by or pursuant to agreement of the parties.*
>
> ***(2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.***
>
> *(3) Unless otherwise agreed by the parties, where an arbitrator is replaced under sub-section (2), any hearings previously held may be repeated at the discretion of the arbitral tribunal.*
> *(4) Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this section shall not be invalid solely because there has been a change in the composition of the arbitral tribunal."*
>
> *(Emphasis supplied)*

3. It is with reference to sub-Section 2 of Section 15 of the Act that this application has been filed by the petitioner for appointment of a substitute arbitrator, in these applications.

4. Mr. Sandeep Parida, learned counsel appearing on behalf of the petitioner with reference to sub-Section 2 of Section 15 of the Act has submitted that a substitute arbitrator, in the given circumstance, is required to be appointed in accordance with the rules/laws applicable to the appointment of the arbitrator being

replaced. He has submitted that following the provisions of the Act, the petitioner had put the opposite party on notice for appointment of an arbitrator and as the parties failed to appoint a substitute arbitrator, this application has been filed under Section 15(2) read with Section 11 of the Arbitration and Conciliation Act, 1996. Mr. Parida has placed reliance on a Supreme Court's decision in case of ***Sailesh Dhairyawan v. Mohan Balkrishna Lulla; (2016) 3 SCC 619***.

5. Mr. Sonak Mishra, learned counsel appearing on behalf of the opposite party has not disputed the above legal position and has assisted this Court by referring to another Supreme Court's decision in case of ***Yashwith Construction (P) Ltd. v. Simplex Concrete Piles India Ltd.; (2006) 6 SCC 204***.

6. I have perused the contents of the application, the materials available on record and have examined the relevant statuory provisions and the laid down by the Supreme Court in case of ***Yashwith Construction*** (*supra*) and ***Sailesh Dhairyawan*** (*supra*). In the case of ***Yashwith Construction*** (*supra*) the Supreme Court has held that the withdrawal of an arbitrator from the office for any reason is within the purview of Section 15(1)(a) of the Act and, therefore, Section 15(2) would be attracted and a substitute arbitrator has to be appointed according to the rules that are applicable for appointment of arbitrator to be replaced.

7. Clarifying further, the Supreme Court has held that what Section 15(2) contemplates is an appointment of the substituted arbitrator or the replacing of the arbitrator by another according to the 'rules' that were applicable to the appointment of the original arbitrator who was being replaced. The term 'rules' in Section 15(2), the Supreme Court has held, refers to the provision for appointment contained in the arbitration agreement or any rules of any institution under which the disputes were referred to arbitration.

8. In case of ***Sailesh Dhairyawan*** (*supra*), the Supreme Court, speaking through Justice Nariman, J. has held in paragraphs 19 and 21 as under:

> *"19. The scheme of Section 8 of the 1940 Act and the scheme of Section 15(2) of the 1996 Act now need to be appreciated. Under Section 8(1)(b) read with Section 8(2) of the 1940 Act if a situation arises in which an arbitrator refuses to act, any party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in a fresh appointment, and if such appointment is not made within 15 clear days after service of notice, the Court steps in to appoint such fresh arbitrator who, by a deeming fiction, is to act as if he has been appointed by the consent of all parties. This can only be done where the arbitration agreement does not show that it was intended that the vacancy caused be not supplied. However, under Section 15(2), where the mandate of an arbitrator terminates, a substitute arbitrator "shall" be appointed. Had Section 15(2) ended there, it would be clear that in accordance with the object sought to be achieved by the Arbitration and Conciliation Act, 1996 in all cases and for whatever reason the mandate of an arbitrator terminates, a substitute arbitrator is mandatorily to be appointed. This Court, however, in the judgments noticed above, has interpreted the latter part of the section as including a reference to the arbitration agreement or arbitration clause which would then be "the rules" applicable to the appointment of the arbitrator being replaced. It is in this manner that the scheme of the repealed Section 8*

of the 1940 Act is resurrected while construing Section 15(2) of the 1996 Act. The arbitration agreement between the parties has now to be seen, and it is for this reason that unless it is clear that an arbitration agreement on the facts of a particular case excludes either expressly or by necessary implication the substitution of an arbitrator, whether named or otherwise, such a substitution must take place. In fact, sub-sections (3) and (4) of Section 15 also throw considerable light on the correct construction of sub-section (2). Under sub-section (3), when an arbitrator is replaced, any hearings previously held by the replaced arbitrator may or may not be repeated at the discretion of the newly-appointed Tribunal, unless the parties have agreed otherwise. Equally, orders or rulings of the earlier Arbitral Tribunal are not to be invalid only because there has been a change in the composition of the earlier Tribunal, subject, of course, to a contrary agreement by parties. This also indicates that the object of speedy resolution of disputes by arbitration would best be subserved by a substitute arbitrator continuing at the point at which the earlier arbitrator has left off.

21. In fact, as has correctly been pointed out by the learned counsel for the respondent, Section 89 CPC specifically provides that a court hearing a suit may formulate terms of settlement between the parties and may either settle the same or refer the same for settlement by conciliation, judicial settlement, mediation or arbitration. On the facts in the present case, it is clear that following the mandate of Section 89, the Bombay High Court disposed of the suit between the parties by recording the settlement between the parties in Clauses 1 to 7 of the consent terms and by referring the remaining disputes to arbitration. In the present case therefore it is clear that it is the Bombay High Court that was the appointing authority which had in fact appointed Mrs Justice Sujata Manohar as arbitrator in terms of Clause 8 of the consent terms. We must remember, as was held in C.F. Angadi v. Y.S. Hirannayya [C.F. Angadi v. Y.S. Hirannayya, (1972) 2 SCR 515 at p. 523 : (1972) 1 SCC 191 at pp. 197-199] , that an order by consent is not a mere contract between the parties but is something more because there is superadded to it the command of a Judge. On the facts of the present case, it is clear that the Bombay High Court applied its mind to the consent terms as a whole and appointed Mrs Justice Sujata Manohar as arbitrator for the disputes that were left to be resolved by the parties. The said appointing authority has been approached by the respondent for appointment of a substitute arbitrator, which was then done by the impugned judgment. This would therefore be "according to the rules that were applicable to the appointment of the arbitrator being replaced" in accordance with Section 15(2) of the Act. We, therefore, find that the High Court correctly appointed another independent retired Judge as substitute arbitrator in terms of Section 15(2) of the Arbitration Act, 1996. The appeal is, therefore, dismissed."

9. After having gone through the averments made in this application, examined the statutory provisions of the law laid down by the Supreme Court in case of ***Sailesh Dhairyawan*** (*supra*) and ***Yashwith Construction*** (*supra*), I am satisfied that in a case where the mandate of an arbitrator stands terminated because of his withdrawal from his office, this Court has the jurisdiction to appoint a substitute arbitrator in accordance with the provision under Section 15(2) read with Section 11 of the Arbitration and Conciliation Act, 1996, if the parties fail to appoint an arbitrator on an application made by a party after satisfying the requirements of appointment of an arbitrator under the provision under Section 11 of the Act.

10. With the consent of learned counsel appearing on behalf of the parties, ***Sri Justice B.K. Nayak***, a former Judge of this Court is appointed as the Arbitrator to

conduct the arbitration proceedings and adjudicate the dispute between the parties including their claims and counter claims. The arbitration proceedings shall take place under the aegis of the High Court of Orissa Arbitration Centre.

11. Accordingly, these petitions stand disposed of.

12. A copy of this order be communicated to the learned Arbitrator as well as the Coordinator, High Court of Orissa Arbitration Centre forthwith.

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2024 (III) ILR-CUT-36

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

MATA NO. 211 OF 2022

SANJEEB DEEPAK SAHU …. Appellant

V.

SUKANTI MALA BAGH @ SAHU …. Respondent

DIVORCE ACT, 1869 – Section 10(x) – The appellant had filed petition for divorce earlier, which was dismissed – After dismissal of earlier divorce petition the respondent along with her father, her advocate and others had formed unlawful assembly in front of the residence of the appellant's mother – For which a complaint was lodged before the police and the respondent along with others were forwarded to the Court – Whether the behaviour and attitude of the respondent amounts to cruelty under clause (x) of Sec.10 ? – Held, Yes – There is nothing wrong if a wife wants to return her matrimonial home but doing so in company of several persons from her side, including her advocate requiring intervention of police is a serious thing. (Para 9)

For Appellant : Mr. Brundaban Rout
For Respondent : None

JUDGMENT Date of Judgment: 30.07.2024

ARINDAM SINHA, J.

1. The appeal has been preferred by the husband. He says the parties are Christian and their marriage was solemnized on 6th February, 2007 in J.E.L. Church, Koraput by the Reverend. According to him respondent resided in` the matrimonial home for 45 days only, during which time she frequently visited her parent's house. In his petition he said he had earlier filed petition under section 10 of Divorce Act, 1869, dismissed on 10th January, 2014. On 14th April, 2014 respondent along with her father, her advocate and others had formed unlawful assembly in front of residence of his mother. Complaint was lodged before the police, registered as F.I.R. on that day under sections 147, 148, 454, 294, 506 and 149 in Indian Penal Code, 1860. Police arrested, inter alia, respondent and she along with others were forwarded to the Court in G.R. Case no.213 of 2014. On 20thJanuary,

2017 petitioner happened to meet husband of his sister-in-law. From him he came to know of respondent's promiscuity. Inter alia, on such pleadings appellant had filed for divorce.

2. Mr. Rout, learned advocate appears on behalf of appellant but none appears on behalf of respondent. Coordinate Bench on order dated 17th March, 2023 recorded that notice had been delivered to respondent but there is no representation. This was reiterated by said coordinate Bench on 17th April, 2023. Reproduced below are paragraphs 3 to 5 from said order dated 17th April, 2023

> *"3. It transpires from the record that the LCRs have already been received. Further, from the tracking report, it appears that registered letter containing the notice has been received by the respondent, but none has entered in the appearance for the respondent.*
>
> *4. Let the matter be listed again on 27.06.2023.*
>
> *5. In the meanwhile, if none appears to represent the respondent, the matter will proceed in absentia."*

Another Bench, to which one of us was party (M.S. Sahoo, J.), adjourned hearing of the appeal to give opportunity to respondent. Reproduced below are paragraphs 2 and 3 from order dated 23rd February, 2024.

> *"2. Though notice is made sufficient against the respondent, none appears at the time of call.*
>
> *3. To give an opportunity to the respondent, put up this case after three weeks."*

We by our order dated 24thJune, 2024 had requested Mr. Rout to communicate website copy of the order to learned advocate, who had appeared for respondent in the Family Court. By order dated 15th July, 2024 we recorded that Mr. Rout had filed memo dated 5th July, 2024 in the department saying, the order was served on Mr. Manoj Pattnaik, learned advocate in the Family Court, who had represented respondent. The memo is in the file. The appeal has been called on for hearing. We cannot keep on adjourning the appeal in hope that respondent will appear.

3. Mr. Rout submits, the Family Court by impugned judgment dated 3rd August, 2022, dismissed his client's petition for dissolution of the marriage on saying, it was barred by res judicata. The marriage had broken down with no reconciliation. His client should not be tied to respondent just because his earlier attempt to obtain divorce had resulted in dismissal order dated 10th January, 2014. Ground is continuing cruelty. He seeks interference in appeal, for impugned judgment to be reversed.

4. We have perused materials on record before the Family Court. In addition to events mentioned in paragraph-1 above, we find from the record appellant had, earlier to his dismissed proceeding, filed for divorce which proceeding he withdrew.

5. On analysis of the pleadings it emerges that incident occurred on 14th April, 2014 resulted in, inter alia, respondent being taken into custody. It had happened when respondent along with her father and others had visited residence of appellant's

mother. Respondent in her cross-examination admitted to having been taken into custody by the police on that day. Case initiated consequent to the incident remains pending. We focus on this event because it is included in the cause of action pleaded by appellant in his petition. The event took place after dismissal of his earlier proceeding filed for divorce, dismissed by order dated 10th January, 2014.

6. We also note petitioner in paragraph-6 alleged promiscuous behavior of respondent. He alleged he came to know from chance meeting with husband of his sister-in-law. We reproduce below paragraph-6 from his petition.

> *"6. That prior to this proceeding the petitioner had filed a petition under Section- 10 of the Indian Divorce Act in this court which was dismissed on 10.01.2014. Since the said date there was no resumption of marriage between the parties and that they are living separately in other words the petitioner have been living at Bariniput, Jeypore on the other hand the Respondent has been living at Koraput without any access to each other. On 20.01.2017 the Petitioner had interview with his cobrother (husband of elder sister of the respondent whose name is Manoj Suna) at 11.30 A.M. on that day the Petitioner suddenly met him near Bariniput chowk when the said Manoj Kumar Suna driving his official vehicle was going to Bhubaneswar alone he halted his vehicle and that the Petitioner talked with him and that during course of conversation the petitioner had kept open the Voice recording of his mobile on and kept the same in his front pocket, the discussion continued nearly half-an hour during such discussion, the said Manoj Suna disclosed about the leading of adulterous life, her engagement for purpose of sexual intercourse with the C.R.P.F. Jawans at Koraput, her moving with the said Advocate- Rajat Khora, Koraput verily and their night halt at Lodge at Jeypore and her going with said Rajat Khora to Cuttack and her night halt at Cuttack, purchasing of dress for the Respondent by the said Rajat Khora on the occasion of last Christ Mas 2016."*

There is reference to the allegation in the written statement. Respondent said it was an attempt to assassinate her character. She did not specifically deny the allegation of chance meeting.

7. There were three witnesses on side of appellant and two from respondent's side. Appellant himself, his sister and an acquaintance were three witnesses from his side. It is sufficient for us to deal with evidence adduced by appellant and respondent. As aforesaid, respondent in her evidence admitted the incident occurred on 14th April, 2014. No question was asked of her in cross-examination regarding her promiscuity. We have also perused the documents tendered in evidence. We are convinced the incidents happened on 14th April, 2014, mentioned as aforesaid, are facts.

8. Section 10 in Divorce Act, 1869 provides for grounds, on which a marriage may be dissolved. Clause (x) in the section is reproduced below.

> *"**10. Grounds for dissolution of marriage**.- (1) Any marriage solemnized, whether before or after the commencement of the Indian Divorce (Amendment) Act, 2001, may, on a petition presented to the District Court either by the husband or the wife, be dissolved on the ground that since the solemnization of the marriage, the respondent-*
>
> *xxx xxx xxx xxx xxx xxx*
>
> *(x) has treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it would be harmful or injurious for the petitioner to live with the respondent."*

9. In this case while appellant alleged that togetherness lasted 45 days since solemnization of the marriage, respondent alleged that togetherness was for four months. Togetherness ceased long before earlier prosecuted civil proceeding for divorce filed by appellant was dismissed on 10th January, 2014. There is no evidence on record that the parties reconciled soon thereafter. Instead, aforesaid occurrence on 14th April, 2014 requiring the police to physically remove respondent from residence of petitioner's mother, who subsequently died on 17th September, 2016. There is nothing wrong in a wife wanting to and returning to her matrimonial home but doing so in company of several persons from her side, including her advocate, requiring intervention of the police is a serious thing. Where the parties had not reconciled after dismissal of petitioner's earlier prosecuted civil proceeding on 10th January, 2014, respondent's conduct leading to her being taken into custody from residence of appellant's mother does indicate cruelty. There is evidence on record that appellant was employed as driver and subsequently lost his regular job. Also there in the evidence is that parties used to live with appellant's mother and appellant, at the material time, used to be away on doing his job during the day. Appellant was not present at the time of occurrence on 14th April, 2014. The parties being bound together in the marriage, it cannot be said that adjudication on their relationship up to a certain point would be true for their relationship as might unfold on their equation in the facts and circumstances as would happen in future. In the premises, we must presume that it was culmination of cruelty signified by the occurrence and not beginning of it.

10. Appellant was not able to prove promiscuity of respondent before the Family Court. We are not inclined to probe this additional cause alleged. However, as appears from our scrutiny of the materials on record, ground under clause (x) stands attracted. It cannot be gainsaid that respondent's conduct in the occurrence on 14th April, 2014 was deliberate.

11. We dissolve the marriage solemnized on 6th February, 2007 on aforesaid ground. On query from Court Mr. Rout submits, the wife did not present petition for expenses of the proceeding or alimony, pending the suit. We note that there is also available in the record, respondent is with the son.

12. The appeal is disposed of.

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2024 (III) ILR-CUT-39

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

ITA NO. 79 OF 2023

M/s. SULTAN ENTERPRISES PVT. LTD. ……Appellant

V.

PRINCIPAL COMMISSIONER OF INCOME TAX, BHUBANESWAR .…….Respondent

INCOME TAX ACT, 1961 – Sections 260-A, 263(2) r/w Section 3(1)(a) in Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020 – The appellant challenged the power of legislature to frame subsequent Relaxation Act without amending the mandatory provision of prior Special Act – Whether the High Court, while exercising the Appellate Jurisdiction has the scope to decide the above issue? – Held, No – The exercise requires interpretation of law which is outside the scope of Appellate Court. (Para 10)

Case Laws Relied on and Referred to :-

1. (2023) 453 ITR 51 (Guj) : Keenara Industries Pvt. Ltd. v. ITO.
2. (2022) 443 ITR 49 (Bom) : Tata Communications Transformations Services Ltd. v. Asst. CIT.

For Appellant : Mr. S.Ray, Sr. Adv.

For Respondent : Mr. S.C.Mohanty, Sr. Standing Counsel
Mr. A. Kedia, Jr. Standing Counsel

JUDGMENT Date of Hearing & Judgment : 08.08.2024

ARINDAM SINHA, J.

1. Mr. Ray, learned senior advocate appears on behalf of appellant-assessee. He submits, a substantial question of law arises from impugned order dated 26th May, 2023 made by the Income Tax Appellate Tribunal (Cuttack Bench) in ITA no.29/CTK/2023, pertaining to assessment year 2015-16. The appeal has been filed in time.

2. Sub-section (2) in section 263 of Income Tax Act, 1961 mandates prescribed period, within which an order of revision can be made. The period is limited to two years from end of the financial year, in which the order sought to be revised was passed. This is a mandatory provision. There can be no extension of the period by an Act of Parliament, seeking to relax the mandate. The only way the mandate can be relaxed is by amending the provision itself.

3. He submits, facts are, the order of assessment was made on 18th December, 2017. Financial year running on date of said order was to end on 31st March, 2018. Two years from that date expired on 31st March, 2020. The order in revision was made on 18th March, 2021. As such the order in revision was not made within two years from end of the financial year, during which the assessment order was made.

4. Revenue in seeking to take advantage of purported relaxation by section 3(1)(a) in Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020 contended before the Tribunal that the order of revision was, therefore, made within the relaxed, thus extended period of time. He submits, a substantial question of law therefore arises as to whether the Legislature by a subsequent Act can cause relaxation of a mandatory provision in any prior specified Act, without amending the provision.

5. Mr. Ray relies on view taken by a Division Bench of the Gujarat High Court in **Keenara Industries Pvt. Ltd. v. ITO**, reported in **(2023) 453 ITR 51 (Guj)**,

paragraph 13.5.2. He submits, the Division Bench relied on case of **Tata Communications Transformations Services Ltd. v. Asst. CIT**, reported in **(2022) 443 ITR 49 (Bom)**. He lays emphasis on view of the Bombay High Court, quoted by the Gujarat High Court in its judgment.

6. Mr. Mohanty, learned advocate, Senior Standing Counsel assisted by Mr. Kedia, learned advocate, Junior Standing Counsel appear on behalf of revenue. Submission is, no substantial question of law arises from impugned order of the Tribunal.

7. On query from Court Mr. Ray has not been able to demonstrate that there has been vires challenge to the provision in Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020. His information is that Special Leave Petition is pending before the Supreme Court.

8. Sub-section (2) in section 263 of Income Tax Act, 1961 is reproduced below.

> *"(2). No order shall be made under sub-section (1) after the expiry of two years from the end of the financial year in which the order sought to be revised was passed."*

Relevant provision in chapter II in the Act of 2020 is reproduced below.

> *"3.(1) Where, any time-limit has been specified in, or prescribed or notified under, the specified Act which falls during the period from the 20th Day of March, 2020 to the 31st day of December, 2020, or such other date after the 31st day of December, 2020, as the Central Government may, by notification, specify in this behalf, for the completion or compliance of such action as-*
>
> *(a) Completion of any proceeding or passing of any order or issuance of any notice, intimation, notification, sanction or approval, or such other action, by whatever name called, by any authority, commission or tribunal, by whatever name called, under the provisions of the specified Act;*
>
> *xxx xxx xxx*
>
> *and where completion or compliance of such action has not been made within such time, then, the time-limit for completion or compliance of such action shall, notwithstanding anything contained in the specified Act, stand extended to the 31st day of March, 2021, or such other date after the 31st day of March, 2021, as the Central Government may, by notification, specify in this behalf:"*

We have not reproduced other clauses in section 3(1), nor the provisos thereunder.

9. In **Keenara Industries** (supra) the Gujarat High Court relied on view taken by the Bombay High Court in **Tata Communications** (supra). Mr. Ray relied on the Bombay High Court view quoted in paragraph 13.5.2 in **Keenara Industries** (supra). We reproduce below relied upon extract of the Bombay High Court view.

> *"Section 3(1) of the Relaxation Act does not provide that any notice issued under section 148 of the Act, after March 31, 2021 will relate back to the original date or that the clock is stopped on March 31, 2021 such that the provision as existing on such date will be applicable to notices issued relying on the provisions of the Relaxation Act. A plain reading of the Relaxation Act, as Mr. Mistri rightly ITA submitted, makes it clear that section 3(1) of the Relaxation Act merely extends the limitation provided in the specified Acts (including Incometax Act) for doing certain acts but such acts must be performed in*

accordance with the provisions of the specified Acts. Therefore, if there is an amendment in the specified Act, the amended provision of the specified Act would apply to such actions of the Revenue. The Delhi High Court has considered and rejected the contention of the Revenue that the notice issued after April 1, 2021 relates back to an earlier period."

It does not appear from relied upon passage extracted from **Tata Communications** (supra), the Bombay High Court said that the Legislature in relaxing provisions in specified earlier Acts, was not competent to do so. We have also not been shown that the Gujarat High Court, in its judgment, went on to say so. In the premises, the judgments are of no assistance to appellant.

10. In the special jurisdiction exercised by High Courts under section 260-A in Income Tax Act, 1961, appeals are to be admitted on there arising substantial question(s) of law from the order/judgment sought to be appealed against. On framing such question(s), the High Courts proceed to answer it or them, as a case there may be. The exercise requires interpretation of the law. Competence of the Legislature through Parliament to relax provisions in earlier specified Acts legislated by it, is outside scope of the appellate jurisdiction of the High Courts.

11. For reasons aforesaid we do not find any substantial question of law arises in the appeal. It is dismissed.

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2024 (III) ILR-CUT-42

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

MATA NO. 97 OF 2021

BANDANA MISHRA …..Appellant

V.

JYOTIRANJAN MISHRA …..Respondent

HINDU MARRIAGE ACT, 1955 – Section 25 r/w Section 19 of Family Courts Act, 1984 – Scope of interference by the High Court with the discretion exercised by the Family Court – Held, the Court had before it the parties, who had adduced evidence, including they being cross-examined in the box and the entire exercise does not appear to be in a manner perverse or not judicial – The discretion thus exercised cannot easily be interferred in appeal. (Para 13)

Case Laws Relied on and Referred to :-

1. AIR 2013 SC 2176 : K. Srinivas Rao v. D.A. Deepa.
2. AIR 2013 SC 41 : U. Shree v. U. Srinivas.
3. (2017) 14 SCC 200 : Kalyan Dey Chowdhury v. Rita Dey Chowdhury.
4. AIR 2021 SC 569 : Rajnesh v. Neha.
5. 2023 SCC Online SC 1451 : Aditi Alias Mithi v. Jitesh Sharma.
6. CO 138 of 2022 (Calcutta High Court, order dated 8th February, 2023 : Nripendra Chandra Mahanta v. Smt. Pramila Mahanta.
7. (2007) 4 SCC 511 : Samar Ghosh v. Jaya Ghosh.

8. (2014) 7 SCC 640 : Malathi Ravi v. B.V. Ravi.
9. (2024) 6 SCC 267 : Allahabad High Court Bar Association v. State of U.P.
10. (2016) 2 SCC 672 : Neon Laboratories Limited v. Medical Technologies Ltd.

For Appellant : Mr. P.K. Rath, Sr. Adv.
For Respondent : Mr. N.B. Das.

JUDGMENT Dates of Hearing : 30.04 & 20.08.2024 : Date of Judgment : 20.08.2024

ARINDAM SINHA, J.

1. Appellant was wife in the marriage dissolved by impugned judgment dated 29th November, 2021 made by the Family Court. The dissolution was on ground of cruelty and desertion. Controversy between the parties before us is quantum of permanent alimony. Mr. Rath, learned senior advocate appears on behalf of appellant and Mr. Das, learned advocate, for respondent.

2. On 30th April, 2024 Mr. Rath had drawn our attention to impugned judgment to submit, ruling on issue no.5 is to be adjudicated in the appeal as erroneous. Though the Family Court correctly appreciated that even where the husband had made out a case for divorce the wife is entitled to permanent alimony for her sustenance, as declared by the Supreme Court in **K. Srinivas Rao v. D.A. Deepa,** reported in **AIR 2013 SC 2176** and **U. Shree v. U. Srinivas**, reported in **AIR 2013 SC 41**, it is thereafter that said Court erred in saying there is no admitted evidence on record as to respondenthusband's assets, besides his salary. Without prejudice he submits, the Supreme Court in **Kalyan Dey Chowdhury v. Rita Dey Chowdhury,** reported in (**2017) 14 SCC 200** had approved permanent alimony calculated factoring in 25% of the salary. His client filed affidavit of assets in the interim maintenance proceeding, following direction of the Supreme Court in **Rajnesh v. Neha,** reported in **AIR 2021 SC 569**. She disclosed to the Court, respondent's income is Rs.1.5 lakh per month. He drew attention to order dated 26th October, 2021 made in the interim maintenance proceeding to demonstrate so. Respondent-husband did not and has not filed his affidavit.

3. Mr. Rath commented on aforesaid authorities beginning with **Rajnesh v. Neha** (supra). He drew attention to paragraph-72 and several supplementary paragraphs thereunder to submit, there were directions given, to be mandatorily followed, not complied with by respondenthusband at trial, resulting in impugned judgment. He also relied on **Aditi Alias Mithi v. Jitesh Sharma**, available at **2023 SCC Online SC 1451** paragraphs-9 and 15. He then relied upon view taken by a learned single Judge in the Calcutta High Court on **order dated 8th February, 2023** in **CO 138 of 2022** (**Nripendra Chandra Mahanta v. Smt. Pramila Mahanta**). He submitted, evidence laid before the Family Court was not considered. It is a fit case for remand. Impugned judgment be set aside in appeal with the direction.

4. Today Mr. Das submits, there should be no interference in appeal. Appellant did not stay with his client for any time longer than aggregate of four months, interrupted by her going away to her paternal house. The marriage was solemnized on 19th April, 2000. His client lost his youth. There was no issue from the marriage.

Cruelty and desertion having had been proved, appellant should not be rewarded therefor. He submits further, aggregate sum in excess of ₹6,50,000/- was paid by his client during pendency of the proceeding before the Family Court. Reasons given by the Family Court on issue no.5, to answer it by directing payment of ₹12,00,000/- as permanent alimony, do not warrant interference in appeal. His client had deposited the amount by tender to this Court, on demand draft issued in favour of appellant.

5. Section 25 in Hindu Marriage Act, 1955 gives discretion to the Court exercising jurisdiction under the Act to, inter alia, at the time of passing any decree, order that either the wife or the husband shall pay for the other's maintenance and support, such gross sum or such monthly or periodical sum for a term not exceeding life of the payee spouse. This order is to be made having regard to the payee's own income and other property if any, the income or other property of the payor spouse, conduct of the parties and other circumstances of the case as may seem to the Court to be just. Thus we see there is a great deal of discretion given to the trial Court exercising jurisdiction under the Act. This is because before said Court the parties obtain adjudication on their rival contentions, at trial. The Court also has benefit of observing conduct of the parties appearing before it.

6. In this case appellant has not challenged findings as stated in impugned judgment, of cruelty nor desertion. The marriage was solemnized on 19th April, 2000. Case of desertion made out on facts, accepted by the trial Court is that appellant deserted respondent on 1st December, 2000.

7. Spouses in a marriage have reciprocal obligations towards each other. On dissolution of the marriage, a continuing obligation on a spouse is to pay the disadvantaged spouse, maintenance, either on a periodical sum or as a gross sum being permanent alimony. The trial Court found appellant had meted out cruelty to respondent and had deserted him. In **Samar Ghosh v. Jaya Ghosh**, reported in **(2007) 4 SCC 511** the Supreme Court gave several instances, which may amount to mental cruelty. In **Malathi Ravi v. B.V. Ravi**, reported in **(2014) 7 SCC 640** the Supreme Court interpreted desertion as total repudiation of obligations of the marriage. The Supreme Court said, desertion for purpose of seeking divorce means intentional permanent forsaking and abandonment of one spouse by the other without that other's consent and without reasonable cause. In other words, the Court said, it is a total repudiation of the obligations of marriage.

8. We see that in **Rajnesh v. Neha** (supra), it was a criminal appeal arising out of claim for interim maintenance made under section 125 in Code of Criminal Procedure, 1973 that reached the Supreme Court. Guidelines were laid down in exercise of power of said Court under articles 136 and 142 in the Constitution of India, as said in paragraph 72 of the judgment. Article 136 is reproduced below.

> *"**Special leave to appeal by the Supreme Court.** -*
> *(1) Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.*

(2) Nothing in clause (1) shall apply to any judgment, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the Armed Forces.

The Supreme Court subsequently in **Allahabad High Court Bar Association v. State of U.P.**, reported in **(2024) 6 SCC 267** interpreted scope of article 142. The Court said, inter alia, the jurisdiction under article 142 can be invoked only to deal with extraordinary situations for doing complete justice between the parties before it.

9. The Family Court gave reasons for answering issue no.5 on permanent alimony. The reasons, as in paragraph-7 of impugned judgment, are reproduced below.

"*Issue No.v. Is the respondent entitled to get permanent alimony from the petitioner ?*

07. No doubt, the petitioner has already made out a case of divorce by proving desertion and mental cruelty against the respondent-wife. In the case of ***K. Srinivas Rao vs. D.A. Deepa*** *reported in* ***AIR (2013) SC 2176*** *and* ***U. Shree v. U. Srinivas*** *reported in* ***AIR (2013) SC 41,*** *it has been held that despite the fact that the husband has made out a case for divorce proving mental cruelty, the wife is entitled to permanent alimony for her sustenance. It appears from the pleadings of the respondent that she has been staying at her father's house since long. She has completed her post graduation in Anthropology. She has no independent income of her own. She depends upon her parents for her sustenance. As per her disclosure statements, she is now at the age of 45 years and her educational qualification is M.A. She is at her parental home. She has no child. She depends upon her parents for her medical treatment, if any. She has no employment or engagement. She has a vacant piece of land in her name since 1990. As per her written statements, petitioner is working as M.D. in Odisha State Seed Supply Corporation and getting Rs.1,50,000/- per month towards his salary. Pay particulars of the petitioner or his Income Tax Return has not been produced before the Court. No paper is furnished to know about his other liability and asset. There is no admitted evidence in record as to the respondent is getting good amount as rent from her building standing on her plot at Bhubaneswar. There is also no admitted evidence on record as to the petitioner has a four storeyed building at Bhubaneswar and has any other sources of income besides his salary.* ***In I.A. No.141 of 2006 arising out of MAT Case No.81 of 2006, learned Civil Judge (Sr. Divin.), Bhubaneswar has passed order on 27.10.2008 directing the opposite party-husband who is the petitioner in the case at hand to pay Rs.3,500/- per month to the respondent-wife as interim maintenance and Rs.1,500/- towards cost of the litigation.*** *As per the pleadings of the respondent, she claims Rs.75,000/- per month from the petitioner for her sustenance. Considering the economic status of both the parties, their needs, potentialities, social status, age and price index at present it would be just to fix the permanent alimony of the respondent at Rs.12,00,000/- (Rupees twelve lakhs only).*

This issue is decided accordingly." (Emphasis supplied)

10. On going through above reasons given by the Family Court we can take away from them the following:-

(i) appellant had been staying in her father's house since long;

(ii) she completed her post graduation in Anthropology;

(iii) she has no independent income of her own. She depends on her parents for her sustenance;

(iv) she has a vacant piece of land in her name since year 1990;
(v) according to her, respondent is working and getting ₹1,50,000/- per month towards his salary; and
(vi) there is no evidence regarding appellant getting good amount of rent from her property. There is also no evidence regarding particulars of respondent's income tax return and therefore his assets and liabilities.

As such, the Family Court exercising discretion, fixed permanent alimony payable to appellant at ₹12,00,000/-.

11. In the reasons given by the Family Court there is also reference to order of interim maintenance and litigation cost earlier awarded. Interim maintenance was directed at Rs.3,500/- per month. There is nothing on record to show appellant was aggrieved thereby or had challenged the same. She had been found to desert him on and from 1st December, 2000. In the circumstances, she made do with the direction, to continue to stay away from respondent till date of impugned judgment and beyond. There is no material on record to form basis of lifestyle she enjoyed in the brief period or periods she stayed with respondent. Application of **Rajnesh v. Neha** (supra) necessarily relates to interim maintenance. In this case there was no dispute regarding said direction of interim maintenance earlier made or compliance therewith during pendency of the proceeding. It must be remembered, maintenance or permanent alimony is not compensation.

12. **Kalyan Dey Chowdhury** (supra) does not come to aid of appellant because in that case the Supreme Court approved enhancement of maintenance made by the High Court in context of the facts and circumstances. The High Court had made the enhancement on review of earlier order for maintenance made in revision. During pendency of the maintenance issue in the High Court, the civil proceeding before the lower Court resulted in dissolution of the marriage, pursuant to which the husband remarried. Thus, the direction made in revision by the High Court for maintenance, subsequently enhanced by it on review, had element of discretion exercised, not interfered with by the Supreme Court. However, as aforesaid, since the husband had remarried and there was a child from the subsequent marriage, the Supreme Court reduced enhanced monthly maintenance of ₹23,000/- to ₹20,000/-.

13. In view of aforesaid, we are hard pressed to find a reason to interfere with the discretion exercised by the Family Court. The exercise does not appear to be in a manner perverse or not judicial. The Court had before it the parties, who had adduced evidence, including they being crossexamined in the box. The discretion thus exercised cannot easily be interfered with in appeal. The Supreme Court in several decisions including **Neon Laboratories Limited v. Medical Technologies Limited** reported in **(2016) 2 SCC 672** interpreted the law regarding exercise of discretion and interference therewith by the appellate Court. We reproduce below paragraph-5 from the judgment.

> *"5. This Court does not normally entertain appeals against interlocutory orders. In the case of trade marks, however, keeping in perspective the endemic delay in concluding cases/suits in India because of the exponentially increasing docket explosion,* ***temporary ad interim***

> ***injunctions are of far reaching consequences, oftentimes effectively deciding the lis and the disputes themselves.*** *Possibly for this reason "leave" has already been granted in the present appeal.* ***However, it is now well-entrenched in our jurisprudence that the appellate court should not flimsily, whimsically or lightly interfere in the exercise of discretion by a subordinate court unless such exercise is palpably perverse.*** *Perversity can pertain to the understanding of law or the appreciation of pleadings or evidence. We shall restrict ourselves to reference in Wander Ltd. v. Antox India P. Ltd. (1990 Supp SCC 727), wherein it has been adumbrated that the appellate court ought not to*
>
> *"reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion.* ***If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion".***
>
> *We shall be careful not to transgress these frontiers."* (Emphasis supplied)

14. **Aditi Alias Mithi** (supra) is interpretation by a subsequent Bench of the Supreme Court of its earlier judgment in **Rajnesh v. Neha** (supra). It is not necessary for us to say anything in addition regarding the decision except that it is inapplicable to the case. The ingredients considered in paragraph-9 of the judgment are not present here, in this case. As aforesaid, parties were together for a very brief period. There was no issue from the marriage.

15. On behalf of appellant there was reliance placed on view taken by a learned single Judge of the Calcutta High Court in **Nripendra Chandra Mahanta** (supra). We reproduce below a paragraph from the order made in the case.

> *"……Although learned counsel for the petitioner is justified in arguing that the proposition laid down in Rajnesh vs. Neha has not been observed at all in the present case, on humanitarian consideration and* ***considering that the marriage between the petitioner and the opposite party is still subsisting, it cannot be gainsaid that the petitioner is entitled to get at least some amount of ad hoc alimony from the petitioner-husband****. … …"*
>
> *(Emphasis supplied)*

Clearly, the reliance is misplaced.

16. We are not moved to interfere with the discretion exercised by the Family Court in directing permanent alimony at ₹12,00,000/-.

17. Impugned judgment is confirmed. Demand draft no.000005 dated 1st March, 2024 issued by Bank of India in favour of appellant for ₹12,00,000/- is detached from the file and handed over to Mr. Das. Respondent is at liberty to produce website copy of our judgment and request the bank to revalidate the draft since, the value received was and still is with it. The draft could not be presented for payment by reason of pendency of the appeal. On getting the revalidated draft, respondent will forthwith, within a week of revalidation, deposit same in the Family Court for obtaining execution, discharge and satisfaction of impugned judgment, hereby confirmed.

18. The appeal is dismissed.

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2024 (III) ILR-CUT-48

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

CRLA NO. 541 OF 2017

JYOCHHNA SAHOO @ JYOCHHNAMAYEE @JYOSTNA SAHOO ….Appellant

V.

STATE OF ODISHA ….Respondent

(A) CODE OF CRIMINAL PROCEDURE, 1973 – Section 397 r/w Section 401 – Whether the Court have the jurisdiction to exercise *suo moto* revisional power in absence of any appeal for enhancement of the sentence? – Held, Yes. (Para 1)

(B) INDIAN PENAL CODE, 1860 – Offence U/ss. 302/201 – Adequacy of punishment – The appellant separated the head of the one and half year old boy from the trunk and also the left hand, against whom none can at all bear any grudge for any reason whatsoever – The learned Trial Court convicted the appellant to undergo imprisonment for life and fine of ₹ 10,000/- – Whether the punishment for such brutal incident is adequate? – Held, No – Principle of law relating to adequacy of punishment discussed with reference to case laws – Court modified the sentence of imprisonment for life with a cap of 20 years. (Para 29)

Case Laws Relied on and Referred to :-

1. (1990) 2 SCC 385 : Sahab Singh & Ors. vs. State of Haryana
2. (2008) 13 SCC 767 : Swamy Shraddananda (2) v. State of Karnataka.
3. (1996) 2 SCC 175 : Ravji v. State of Rajasthan.
4. (1973) 1 SCC 20 : Jagmohan Singh v. State of U.P.
5. (1980) 2 SCC 684 : Bachan Singh v. State of Punjab.
6. (1983) 3 SCC 470 : Machhi Singh v. State of Punjab.
7. (1994) 2 SCC 220 : Dhananjoy Chatterjee v. State of West Bengal.
8. (2009) 5 SCC 740 : Rameshbhai Chandubhai Rathod v. State of Gujarat.
9. 1994 SCC (Cri) 656 : Laxman Naik v. State of Orissa.
10. (1996) 6 SCC 250 : Kamta Tiwari v. State of M.P.
11. (2017) 6 SCC 1 : Mukesh V. State (NCT) of Delhi).
12. AIR 2010 SC 361 : Dilip Premnarayan Tiwari vs. State of Maharashtra.
13. (2019) 2 SCC 311 : Viran Gyanlal Rajput v. State of Maharashtra.
14. (2019) 13 SCC 640 : Babasaheb Maruti Kamble v. State of Maharashtra.
15. (2022) 7 SCC 443 : Mohd. Firoz v. State of M.P

For Appellant : Mr. Sahasransu Sourav

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

JUDGMENT Date of Judgment : 16.08.2024

BY THE BENCH

The conviction of the Appellant under Sections 302/201 of the Indian Penal Code, 1860 (for short, the IPC) passed by the learned Additional Sessions Judge, Nayagarh vide judgment dated 29.06.2017 in S.T. Case No.76/115 of 2015/2014

having been confirmed by us by our judgment dated 26.06.2023, the present order is on the question of appropriate sentence to be imposed on her.

Be it noted that the Convict-Appellant having been convicted as aforesaid was sentenced to undergo imprisonment for life and pay a fine of Rs.10,000/-, in default, to undergo rigorous imprisonment for one month for the offence under Section 302 of IPC and to undergo rigorous imprisonment for six years and to pay a fine of Rs.10,000/-, in default, to undergo rigorous imprisonment for one month under Section 201 of IPC with further direction that the sentences shall run concurrently.

After hearing the appeal preferred by the Convict-Appellant, we did not find any infirmity much less illegality in the judgment of conviction and therefore, confirmed the same. However, as regards the sentence, we were not persuaded to take the view that the sentence so imposed by the trial Court was adequate. Therefore, despite the fact that the State had not preferred any appeal for enhancement of the sentence, having regard to the settled position of law as reflected in the judgments of the Apex Court viz., ***Sahab Singh and others vs. State of Haryana,*** reported in (1990) 2 SCC 385 and ***Swamy Shraddananda (2) v. State of Karnataka,*** reported in (2008) 13 SCC 767, we deemed it proper to exercise the revisional power under Section 397 read with Section 401 of Cr.P.C. and called upon the convict to have her say on the adequacy of sentence and as to why she should not be visited with the sentence of higher degree. As such, we issued notice to the convict-Appellant through her lawyer as also separately through the Superintendent of District Jail, Nayagarh. We also called upon the Superintendent of District Jail, Nayagarh to submit a report as to the conduct of the Appellant during the period of her incarceration. Pursuant to such notice, the convict-Appellant has submitted her submission in writing through the Superintendent. The Superintendent has also submitted the report regarding the conduct of the Appellant while in jail.

2. We heard Mr. Sahasransu Sourav, learned Counsel appointed as Amicus Curiae since none appeared on behalf of the Appellant when the matter after service of notice was listed for hearing on enhancement of sentence upon the Convict-Appellant. Mr. S.K. Nayak, learned Additional Government Advocate for the State also advanced the submission.

We heard them at length.

3. Before adverting to the contentions raised before us by learned counsel for the parties we deem it proper to keep in perspective the principle of law relating to adequacy of punishment. It is trite that imposition of appropriate punishment is *sine qua non* being the logical conclusion of a criminal trial. At this juncture we profitably refer to the following observations of the Apex Court rendered in the case of ***Ravji v. State of Rajasthan***, reported in (1996) 2 SCC 175; which runs as under:-

> *"xxxxxxx The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be*

awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should "respond to the society's cry for justice against the criminal" xxxxxxx"

In the instant case, after looking into the very nature of the crime and the manner it was committed and attempted to be kept buried; we entertained doubts as to if the punishment of imprisonment for life simpliciter would commensurate the offence as found to have been committed by the Convict-Appellant. Since the offence of murder can be visited with capital punishment, we felt proper to first focus our attention as to if the facts of the present case call for the punishment of higher degree. For this, we feel it necessary to advert to the facts and circumstances as made out from the evidence on record in constituting the offence.

4. The prosecution case is that on 27.03.2014, Monalisha Mohapatra (P.W.6) was informed by her mother Ratani Sahoo (P.W.4) over telephone that one and half year son of Monalisha, namely, Guddu @ Rabi Narayan Mohapatra, who was under the care and custody of Bartani Sahu (P.W.4) in her house at village Kodia Kahania under Sarankula Police Station was missing. Said Monalisha (P.W.6) the mother of Guddu @ Rabinarayan was then leaving at Bhubaneswar. It was also told by Bartania (P.W.4) that after having searched Guddu@ Rabinarayan, by then no clue had been found out. Receiving such news, Monalisha (P.W.6) came to the village and informed the police regarding the missing of her son Guddu.

On 28.03.2014, it was around 7 am, the family members of Monalisha (P.W.6) saw that the convict-Appellant was carrying a silver dekchi (container of wider girth and mouth being of lesser diameter). They somehow entertain suspension over such movement of the convict-Appellant. On search of that dekchi, the dead body of Gudu @ Rabinarayan was found to have been kept inside. The co-villagers and other relatives of Monalosha then apprehended the convict-Appellant and the matter was informed to the Inspector-in-Charge (IIC) of Sarankula Police Station in writing. The IIC immediately went to the spot. He collected the beheaded body of Gudu @Rabinarayan without left hand from inside that dekchi. In course of investigation, the convict-Appellant took the police and other witnesses to the village pond and showed the area where the cut head of Guddu covered with a piece of polythene had been thrown. The severed left hand of Guddu recovered at the instance of the accused from her house and it had been kept in a gunny bag being covered by a green napkin. The written report of Monalisha (P.W.6) being treated as FIR that has set the criminal law into motion.

Upon examination and analysis of the evidence let in by the prosecution, we have held the same to be sufficient to fasten the guilt of the convict-Appellant for commission of offence under section 302/201 of the IPC. Accordingly, we have confirmed the finding of guilt against the convict-Appellant as has been returned by the trial court in saying that the same is based on rock solid evidence and thus does not warrant interference.

5. It is evident that the Appellant-convict was actuated with the uncanny desire of doing away with the life of Guddu @ Rabinrayan, a boy of only one and half year old. The brutality of the act is evident from the fact that the head of the boy being separated from the trunk as also the left hand; the body had been kept in one silver container of wider girth and mouth being of lesser radius, known as 'dekchi'. The left hand of the boy had been separately kept in a gunny bag covered by a green colour napkin and the cut head of the boy being covered with a polythene had been thrown in a tank. The above detached left arm and the head of the boy were recovered at the instance of the Convict-Appellant and the beheaded body without the left arm was found in that dekchi. This very act shows extreme cruelty, dastardly act and an uncontrolled desire to kill the boy of one and half year old against whom none can at all bear any grudge for any reason whatsoever.

6. Killing a human being can be by several means, all of which may or may not amount to murder. Even in case of a murder, the means adopted by the assailant can be different. But here it's a killing of a boy of only one and half year old who can be the enemy of none. The means adopted would certainly throw light on the dominant thought process of the assailant at the relevant time and the manner as well as the means adopted to see that everything is given a quiet and decent burial. In the case at hand, from evidence, which we have found to be clear, consistent and trustworthy, it is apparent that the Convict-Appellant not only had the intention of killing the deceased boy but also to do so in the most brutal and gruesome manner possible followed by the acts in order to get rid of the complicity. Nothing else can possibly explain the act of severing the head and hand; keeping the body in a container and throwing the head in a pond as also keeping the detached hand in the house to be later on dealt with in throwing somewhere in a deserted place or keeping in any other place which so that the same would not invite the attention of anyone.

Looked at from any angle, the act is not simply brutal, but extremely grotesque and diabolical in nature. The degree of brutality and depravity of the assailant is enhanced manifold when one considers the fact that the act was committed in respect of and against a boy of only one and half year old. What a traumatic experience it would have been for the mother (P.W.6) and grandmother (P.W.4) of that boy besides others, not only at that very moment when they saw but also for the rest of their life can only be imagined. The act was enough to shock our judicial conscience leading us to believe that the punishment for imprisonment for life simpliciter would hardly be adequate or proportionate. We hold so because, though it has been held that imprisonment for life is meant to be imprisonment for the duration of the natural life yet by operation of law (Section 433 of Cr.P.C.), the convicts would be eligible to claim remission of the remaining part of their sentence after spending only 14 years or so in prison. In such event, the punishment of imprisonment for life would be curtailed to a period of 14 years or a little more than that. After giving our thoughtful and anxious consideration, we are firmly of the view that it would not only be disproportionate viz-a-viz the enormity of the crime but also be hardly any recompense for the victims as well as the society for bearing with such dastardly acts.

7. The question now posed before us is whether death penalty should be imposed on the Convict-Appellant.

8. The law relating to imposition of death penalty has been laid down in several judgments of the Apex Court including ***Jagmohan Singh v. State of U.P., reported in (1973) 1 SCC 20*****.** In the celebrated judgment delivered by the Constitution Bench in the case of ***Bachan Singh v. State of Punjab, reported in (1980) 2 SCC 684*** while upholding the constitutionality of the death penalty, the Court recast the observations of Jagmohan Singh (supra) in the following manner.

> *"164. Attuned to the legislative policy delineated in Sections 354(3) and 235(2), propositions (iv)(a) and (v)(b) in Jagmohan [(1973) 1 SCC 20 : 1973 SCC (Cri) 169 : (1973) 2 SCR 541] shall have to be recast and may be stated as below:*
>
> *"(a) The normal rule is that the offence of murder shall be punished with the sentence of life imprisonment. The court can depart from that rule and impose the sentence of death only if there are special reasons for doing so. Such reasons must be recorded in writing before imposing the death sentence.*
>
> *(b) While considering the question of sentence to be imposed for the offence of murder under Section 302 of the Penal Code, the court must have regard to every relevant circumstance relating to the crime as well as the criminal. If the court finds, but not otherwise, that the offence is of an exceptionally depraved and heinous character and constitutes, on account of its design and the manner of its execution, a source of grave danger to the society at large, the court may impose the death sentence."*

It is also held that death penalty must be inflicted only in rarest of rare cases. The above principle was further delineated in another Constitution Bench judgment in the case of ***Machhi Singh v. State of Punjab, reported in (1983) 3 SCC 470.*** The following observations of the Court would be relevant.

> *"32. The reasons why the community as a whole does not endorse the humanistic approach reflected in "death sentence-in-no-case" doctrine are not far to seek. In the first place, the very humanistic edifice is constructed on the foundation of "reverence for life" principle. When a member of the community violates this very principle by killing another member, the society may not feel itself bound by the shackles of this doctrine. Secondly, it has to be realized that every member of the community is able to live with safety without his or her own life being endangered because of the protective arm of the community and on account of the rule of law enforced by it. The very existence of the rule of law and the fear of being brought to book operates as a deterrent for those who have no scruples in killing others if it suits their ends. Every member of the community owes a debt to the community for this protection. When ingratitude is shown instead of gratitude by "killing" a member of the community which protects the murderer himself from being killed, or when the community feels that for the sake of self preservation the killer has to be killed, the community may well withdraw the protection by sanctioning the death penalty. But the community will not do so in every case. It may do so "in rarest of rare cases" when its collective conscience is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty. The community may entertain such a sentiment when the crime is viewed from the platform of the motive for, or the manner of commission of the crime, or the anti-social or abhorrent nature of the crime, such as for instance:*

I. Manner of commission of murder

33. When the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community.

For instance,

(i) when the house of the victim is set aflame with the end in view to roast him alive in the house.
(ii) when the victim is subjected to inhuman acts of torture or cruelty in order to bring about his or her death.
(iii) when the body of the victim is cut into pieces or his body is dismembered in a fiendish manner.

II. Motive for commission of murder

34. When the murder is committed for a motive which evinces total depravity and meanness. For instance when (a) a hired assassin commits murder for the sake of money or reward (b) a cold-blooded murder is committed with a deliberate design in order to inherit property or to gain control over property of a ward or a person under the control of the murderer or vis-a-vis whom the murderer is in a dominating position or in a position of trust, or (c) a murder is committed in the course for betrayal of the motherland.

III. Anti-social or socially abhorrent nature of the crime

35. (a) When murder of a member of a Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances which arouse social wrath. For instance when such a crime is committed in order to terrorize such persons and frighten them into fleeing from a place or in order to deprive them of, or make them surrender, lands or benefits conferred on them with a view to reverse past injustices and in order to restore the social balance.

36. When the crime is enormous in proportion. For instance when multiple murders say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.

V. Personality of victim of murder

37. When the victim of murder is (a) an innocent child who could not have or has not provided even an excuse, much less a provocation, for murder (b) a helpless woman or a person rendered helpless by old age or infirmity (c) when the victim is a person vis-a-vis whom the murderer is in a position of domination or trust (d) when the victim is a public figure generally loved and respected by the community for the services rendered by him and the murder is committed for political or similar reasons other than personal reasons.

38. In this background the guidelines indicated in Bachan Singh case [(1980) 2 SCC 684 : 1980 SCC (Cri) 580 : AIR 1980 SC 898 : 1980 Cri LJ 636] will have to be culled out and applied to the facts of each individual case where the question of imposing of death sentence arises. The following propositions emerge from Bachan Singh case [(1980) 2 SCC 684 : 1980 SCC (Cri) 580 : AIR 1980 SC 898 : 1980 Cri LJ 636] :

"(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.
(ii) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'.

(iii) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

(iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

39. In order to apply these guidelines inter alia the following questions may be asked and answered:

(a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?

(b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?

40. If upon taking an overall global view of all the circumstances in the light of the aforesaid proposition and taking into account the answers to the questions posed hereinabove, the circumstances of the case are such that death sentence is warranted, the court would proceed to do so."

9. In a case of murder of a young girl of about 18 years in ***Dhananjoy Chatterjee v. State of West Bengal; (1994) 2 SCC 220***, the court took note of the fact that the accused was a married man of 27 years of age, the principles stated in Bachan Singh's case and further took note of the rise of violent crimes against women in recent years and, thereafter, on consideration of the aggravating factors and mitigating circumstances, opined that:

"15. In our opinion, 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 befitting 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.

10. The Court then took note of the fact that the deceased was a school-going girl and it was the sacred duty of the Appellant, being a security guard, to ensure the safety of the inhabitants of the flats in the apartment but to gratify his list, he had raped and murdered the girl in retaliation which made the crime more heinous. It was also considered that on many occasions the victim had been teased by Dhananjoy on her way back from her school and the latest was three days before and that Dhananjoy's all these actions being complained of, the employer was arranging for his transfer and thus there was a motive and sense of revenge in his mind. Appreciating the manner in which the barbaric crime was committed on a helpless and defenceless School-going girl of 18 years, the Court came to hold that the case fell in the category of rarest of the rare cases and, accordingly, affirmed the capital punishment imposed by the High Court.

11. In fact ***in case of 'Rameshbhai Chandubhai Rathod v. State of Gujarat; (2009) 5 SCC 740*** which was a case of rape and/or murder of girl of tender age, a student of IV standard in the school by the Appellant employed as a watchman in the Apartment who was married having wife and children, their Lordships agreed for the conviction to sustain. The difference of opinion arose on the question of sentence; when the Hon'ble Judge, presiding the Bench confirmed the death sentence, the other Hon'ble Judge held that life sentence be given. The appeal in view of difference of opinion on the imposition of sentence had been referred to a three judges Bench. The decision as reported in (2011) 2 SCC, 764 has been that the case was not in the category of 'rarest of rare' cases. Accordingly, the death sentence being commuted to life, it was however directed that the life sentence must extend to the full life of the Appellant but subject to any remission or commutation at the instance of the Government for good and sufficient reason.

12. In ***Laxman Naik v. state of Orissa, 1994 SCC (Cri) 656***, the judgment begins as under:-

> *"1. The present case before us reveals a sordid story which took place sometime in the afternoon of February 17, 1990, in which the alleged sexual assault followed by brutal and merciless murder by the dastardly and monstrous act of abhorrent nature is said to have been committed by the Appellant herein who is none else but an agnate and paternal uncle of the deceased victim Nitma, a girl of the tender age of 7 years who fell a prey to his lust which sends shocking waves not only to the judicial conscience but to everyone having slightest sense of human values and particularly to the blood relations and the society at large.*

13. In Laxman Naik case, the High Court had dismissed the Appellant's appeal and confirmed the death sentence awarded to him. While discussing as regards the justifiability of the sentence, the Court referred to the decision in Bachan Singh's case and opined that there were absolutely no mitigating circumstances and, on the contrary, the facts of the case disclosed only aggravating circumstances against the Appellant. Proceeding further, the Court held thus:-

> *"The hard facts of the present case are that the Appellant Laxman is the uncle of the deceased and almost occupied the status and position that of a guardian. Consequently the victim who was aged about 7 years must have reposed complete confidence in the Appellant and while reposing such faith and confidence in the Appellant must have believed in his bona fides and it was on account of such a faith and belief that she acted upon the command of the Appellant in accompanying him under the impression that she was being taken to her village unmindful of the preplanned unholy designs of the Appellant. The victim was a totally helpless child there being no one to protect her in the desert where she was taken by the Appellant misusing her confidence to fulfill his lust. It appears that the Appellant had preplanned to commit the crime by resorting to diabolical methods and it was with that object that he took the girl to a lonely place to execute his dastardly act."*

14. After so stating, the Court, while affirming the death sentence, opined that:

> *"28. The victim of the age of Nitma could not have even ever resisted the act with which she was subjected to. 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 others, the Appellant with a view to screen 3 (1980) 2 SCC 684: 1980 SCC (Cri) 580 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 cases attracting no punishment other than the capital punishment and consequently we confirm the sentence of death imposed upon the Appellant for the offence under Section 302 of the Penal Code."

15. In case of ***Kamta Tiwari v. State of M.P (1996) 6 SCC 250***, the Appellant was convicted for the offence punishable under section 363/376/302 and 201 IPC and sentenced to death by the learned trial Judge and the same was affirmed by the High Court. In Appeal, the two-Judge Bench referred to the prepositions culled out in Machhi Singh and expressed thus:-

"8. Taking an overall view of all the facts and circumstances of the instant case in the light of the above propositions we are of the firm opinion that the sentence of death should be maintained. In vain we have searched for mitigating circumstances - but found aggravating circumstances aplenty. The evidence on record clearly establishes that the Appellant was close to the family of Parmeshwar and the deceased and her siblings used to call him 'Tiwari uncle'. Obviously her closeness with the Appellant encouraged her to go to his shop, which was near the saloon where she had gone for a haircut with her father and brother, and ask for some biscuits. The Appellant readily responded to the request by taking her to the nearby grocery shop of Budhsen and handing over a packet of biscuits apparently as a prelude to his sinister design which unfolded in her kidnapping, brutal rape and gruesome murder.- as the numerous injuries on her person testify; and the finale was the dumping of her dead body in a well When an innocent hapless girl of 7 years was subjected to such barbaric treatment by a person who was in a position of her trust his culpability assumes the proportion of extreme depravity and arouses a sense of revulsion in the mind of the common man. In fine, the motivation of the perpetrator, the vulnerability of the victim, the enormity of the crime, the execution thereof persuade us to hold that this is a 'rarest of rare cases where the sentence of death is eminently desirable not only to deter others from committing such atrocious crimes but also to give emphatic expression to society's a abhorrence of such crimes."

34. In Rajendra Pralhadrao Wasnikv. State of Maharashra, (2012) 4 SCC 37, the Appellant was awarded sentence of death by the learned trial judge which was confirmed by the High Court, for he was found guilty of the offences punishable under section 376(2)(f),377 and 302 IPC. In the said case, the prosecution had proven that the Appellant had lured a three-year old minor girl child on the pretext of buying her biscuits and then raped her and eventually, being apprehensive of being identified, killed her. In that context, while dismissing the appeal, the Court ruled thus:-

"37. When the Court draws a balance sheet of the aggravating and mitigating circumstances, for the purpose of determining whether the extreme sentence of death should be imposed upon the accused or not, the scale of justice only tilts against the accused as there is nothing but aggravating circumstances evidence from the record of the Court. In fact, one has to really struggle to find out if there were any mitigating circumstances favouring the accused.

38. Another aspect of the matter is that the minor child was helpless in the cruel hands of the accused. The accused was holding the child in a relationship of "trust-belief" and "confidence", in which capacity he took the child from the house of P.W.2. In other words, the accused, by his conduct, has belied the human relationship of trust and worthiness'. The accused left the deceased in a badly injured condition in the open fields without even clothes. This reflects the most unfortunate and abusive facet of human conduct, for which the accused has to blame no one else than his own self."

16. In the recent case of ***Mukesh V. State (NCT) of Delhi); (2017) 6 SCC 1,*** the Apex Court taking note of the proven factual; matrix of the horrendous incident found in the case, the brutal, barbaric and diabolic nature of the crime. The Court held:-

"364. It is necessary to state here that in the instant case, the brutal, barbaric and diabolic nature of the crime is evincible from the acts committed by the accused persons, viz., the assault on the informant, PW-1 with iron rod and tearing off his clothes; assaulting the informant and the deceased with hands, kicks and iron rod and robbing them of their personal belongings like debit cards, ring, informant's shoes, etc.; attacking the deceased by forcibly disrobing her and committing violent sexual assault by all the Appellants; their brutish behaviour in having anal sex with the deceased and forcing her to perform oral sex; injuries on the body of the deceased by way of bite marks (10 in number); and insertion of rod in her private parts that, inter alia, caused perforation of her intestine which caused sepsis and, ultimately, led to her death. The medical history of the prosecutrix (as proved in the record in Ex.PW-50/A and Ex. PW-50) demonstrates that the entire intestine of the prosecutrix was perforated and splayed open due to the repeated insertion of the rod and hands; and the Appellants had pulled out the internal organs of the prosecutrix in the most savage and inhuman manner that caused grave injuries which ultimately annihilated her life. As has been established, the prosecutrix sustained various bite marks which were observed on her face, lips, jaws, near ear, on the right and left breast, left upper arm, right lower limb, right inner groin, right lower thigh, left thigh lateral, left lower anterior and genitals. These acts itself demonstrate the mental perversion and inconceivable brutality as caused by the Appellants. As further proven, they threw the informant and the deceased victim on the road in a cold winter night. After throwing the informant and the deceased victim, the convicts tried to run the bus over them so that there would be no evidence against them. They made all possible efforts in destroying the evidence by, inter alia, washing the bus and burning the clothes of the deceased and after performing the gruesome act, they divided the loot among themselves.

365. As we have narrated the incident that has been corroborated by the medical evidence, oral testimony and the dying declarations, it is absolutely obvious that the accused persons had found an object for enjoyment in her and, as is evident, they were obsessed with the singular purpose sans any feeling to ravish her as they liked, treat her as they felt and, if we allow ourselves to say, the gross sadistic and beastly instinctual pleasures came to the forefront when they, after ravishing her, thought it to be just a matter of routine to throw her alongwith her friend out of the bus and crush them. The casual manner with which she was treated and the devilish manner in which they played with her identity and dignity is humanly inconceivable. It sounds like a story from a different world where humanity has been treated with irreverence. The appetite for sex, the hunger for violence, the position of the empowered and the attitude of perversity, to say the least, are bound to shock the collective conscience which knows not what to do. It is manifest that the wanton lust, the servility to absolutely unchained carnal desire and slavery to the loathsome beastility of passion ruled the mindset of the Appellants to commit a crime which can summon with immediacy "tsunami" of shock in the mind of the collective and destroy the civilized marrows of the milieu in entirety.

17. Having said so, the Court arrived at a singular conclusion that the mitigating circumstances highlighted which pertain to the strata to which they belong, the aged parents, marital status and the young children and the suffering they would go through and the calamities they would face in case of affirmation of sentence, their conduct while they are in custody and the reformative path they have chosen and their transformation and the possibility of reformation being taken together do not outweigh the aggravating circumstances. In that view of the matter, the death penalty has been confirmed being found to be the only adequate.

18. We shall now proceed to consider the contentions put forth on behalf of the Convict-Appellant in the background of the above discussion on the settled position of law.

19. Mr. Sahasransu Sourav would argue that the present case does not fall within the category of 'rarest of rare' warranting capital punishment notwithstanding the brutality of the act committed by the Convict-Appellant. He contended that the fact remains that the mitigating circumstances of the case far outweigh the aggravating circumstances; moreover, the Convict-Appellant has also suffered incarceration for more than ten years and her conduct has been such during this period as would suggest a strong possibility of her rehabilitation and reformation posing no threat to the society. He would further argue that the Convict-Appellant was having no personal gain in mind while committing the act.

20. Per contra, Mr. S.K. Nayak would argue that the very fact that the deceased boy of one and half year was murdered by Convict-Appellant in a cold blooded and brutal manner and all the attempts were made to see that nothing gets unearthed clearly exposes the acts to be dastardly which in a civilised society like ours is unheard of and even cannot appear in dreams. He would further argue that the fact that the manner in which the crime was committed i.e. beheading of the body of one and half year old and detaching his left arm and carrying head to some distance and then throwing it in the pond and keeping the detached hand separately to be disposed of later reflect extreme cruelty and depravity of the mind besides an utter disregard for life of a boy who was wholly dependent for all the time. He, therefore contended that the extreme penalty alone shall be just punishment in the facts and circumstances of the case.

21. We have taken note of the rival contentions and have carefully applied our judicial mind to the facts and circumstances of the case.

22. It has not come out in the evidence as to what was the reason for Convict-Appellant harbouring grudge against the deceased boy or his mother or grandmother. The plea taken by the Convict-Appellant is that the grandmother of the boy (P.W.4) and others had the plan to kill the boy and they having done so have falsely implicated the Convict-Appellant which has received not even any remote support from the evidence.

23. In the case of ***Dilip Premnarayan Tiwari vs. State of Maharashtra,*** reported in AIR 2010 SC 361 the Apex Court observed as follows:

"In a death sentence matter, it is not only the nature of the crime but the background of the criminal, his psychology, his social conditions and his mindset for committing the offence are also relevant."

24. The Convict-Appellant in her written statement through the Superintendent of District Jail has reiterated that she has been falsely implicated and has been the victim of a plot hatched by some persons and thus lenient view be taken. The Superintendent has reported that the Convict-Appellant has been leading normal life and maintaining discipline. All these do not fore close the possibility of the Convict-Appellant being reformed and rehabilitated.

25. These are all the mitigating circumstances, which according to us, however outweigh the aggravating circumstances of the case which we have referred to earlier paragraph-8. As such, we are unable to persuade ourselves to treat the case as "rarest of rare" so as to inflict death penalty on the Appellants.

26. What then should be adequate punishment?

27. In the case of ***Viran Gyanlal Rajput v. State of Maharashtra,*** *reported in* ***(2019) 2 SCC 311***, the Apex Court held as follows:

"26. Thus, neither the circumstances of the crime nor the circumstances of the criminal i.e. the Appellant, would go to show that the instant matter falls into the category of the rarest of rare cases, or that the sentence of life imprisonment is unquestionably foreclosed and grossly disproportionate. Therefore, in the totality of the facts and circumstances of this case, we find it fit to commute the death sentence of the Appellant to life imprisonment.

27. At the same time, we are of the opinion that a sentence of life imprisonment simpliciter would not be proportionate to the gravity of the offence committed, and would not meet the need to respond to crimes against women and children in the most stringent manner possible. Moreover, though we have noticed above that the possibility of reform of the accused is not completely precluded, we nevertheles share the concerns of the trial court and the High Court regarding the lack of remorse on behalf of the Appellant and the possibility of reoffending. In such a situation, we deem it fit to restrict the right of the Appellant to claim remission in his sentence of life imprisonment for a period of 20 years."

Similar view was taken in ***Babasaheb Maruti Kamble v.State of Maharashtra,*** *reported in* ***(2019) 13 SCC 640.*** The Apex Court in paragraph-6 has held as follows:

"6. Reverting to the issue of death penalty, the learned Senior Counsel submitted that the case did not fall under the category of the rarest of rare cases and, therefore, the capital punishment was not a desirable punishment in the instant case. We have given our serious thoughts on this aspect. After examining the matter at length, we are of the opinion that the instant case would not fall in the category of the rarest of rare cases and it would be in the interest of justice if the death sentence is commuted into life imprisonment. At the same time, we are also of the opinion that life sentence should be with a cap of 20 years' rigorous imprisonment (RI) which would mean that the Appellant shall not be entitled to make any representation for remission till he completes 20 years of RI. It is more so, keeping in view the age of the Appellant who is at present more than

60 years of age, and has no history of any other criminal activity, possibility of reform, as the learned counsel for the respondent State could not point out blameworthy conduct depicted by him in jail."

In the case of ***Mohd. Firoz v. State of M.P.***, reported in (2022) 7 SCC 443, the Apex Court held as follows:

"60. Considering the above, we, while affirming the view taken by the courts below with regard to the conviction of the Appellant for the offences charged against him, deem it proper to commute, and accordingly commute the sentence of death for the sentence of imprisonment for life, for the offence punishable under Section 302IPC. Since, Section 376-AIPC is also applicable to the facts of the case, considering the gravity and seriousness of the offence, the sentence of imprisonment for the remainder of the Appellant's natural life would have been an appropriate sentence, however, we are reminded of what Oscar Wilde has said — "The only difference between the saint and the sinner is that every saint has a past and every sinner has a future".

61. One of the basic principles of restorative justice as developed by this Court over the years, also is to give an opportunity to the offender to repair the damage caused, and to become a socially useful individual, when he is released from the jail. The maximum punishment prescribed may not always be the determinative factor for repairing the crippled psyche of the offender. Hence, while balancing the scales of retributive justice and restorative justice, we deem it appropriate to impose upon the Appellant-accused, the sentence of imprisonment for a period of twenty years instead of imprisonment for the remainder of his natural life for the offence under Section 376-AIPC. The conviction and sentence recorded by the courts below for the other offences under IPC and the POCSO Act are affirmed. It is needless to say that all the punishments imposed shall run concurrently."

28. Thus, from a conspectus of the analysis of facts of the case and the law on the subject we hold that despite the abominable and diabolical nature of the crime committed by the Appellants, the case would not fall under the category of rarest of rare so as to inflict the death penalty on the Appellant. However, life imprisonment simpliciter, according to us would also not commensurate the crime as in effect, it may be restricted to only 14 years, which in our considered view would hardly be the adequate punishment in the case in hand. The observations of the Apex Court in the case of ***Swamy Shraddananda*** (supra) are highly relevant in the context:

92. xxxxxxxxxx. If the Court's option is limited only to two punishments, one a sentence of imprisonment, for all intents and purposes, of not more than 14 years and the other death, the Court may feel tempted and find itself nudged into endorsing the death penalty. Such a course would indeed be disastrous. A far more just, reasonable and proper course would be to expand the options and to take over what, as a matter of fact, lawfully belongs to the Court i.e. the vast hiatus between 14 years' imprisonment and death. It needs to be emphasised that the Court would take recourse to the expanded option primarily because in the facts of the case, the sentence of 14 years' imprisonment would amount to no punishment at all.

29. In the facts and circumstances of the case, we are led to adopt the same reasoning. We therefore, hold that the sentence of imprisonment for life with a cap of 20 years for the case being tabled for remission before the State Sentence Review Board and further onward action would meet the ends of justice.

30. In the result, the order of sentence passed by the Trial Court is hereby modified and the Convict-Appellant is sentenced to imprisonment for life with the rider that she shall not be eligible to claim remission as per law before undergoing a minimum of 20 years of imprisonment.

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2024 (III) ILR-CUT-61

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

CRA. NO. 100 OF 1998

SESHADEV NAYAK ……Appellant

V.

STATE OF ODISHA ..……..Respondent

INDIAN EVIDENCE ACT, 1872 – Section 134 – Appreciation of testimony of solitary related witness – Held, while appreciating evidence the same has to be weighed and not counted and there is no embargo in finding an accused guilty on the sole testimony of related witness if found to be reliable. (Paras 20B – 21)

Case Laws Relied on and Referred to :-

1. AIR 1957 SC 614 : 1957 SCC OnLine SC 13 : Vadivelu Thevar & Anr. Vrs. State of Madras.
2. (2008) 15 SCC 115 : Ravi Vrs. State represented by Inspector of Police.

For Appellant : Mr. G.C. Swain.
For Respondent : Mr. S.N. Das, ASC

JUDGMENT Date of Hearing : 04.04.2024 : Date of Judgment : 20.08.2024

V. NARASINGH, J.

1. The Appellant, has called in question the judgment of conviction under Section 302 of Indian Penal Code, 1860 (for short, 'the IPC') and order of sentence dated 31.05.1997 of imprisonment for life passed by the learned Sessions Judge, Dhenkanal-Angul at Dhenkanal in S.T. Case No.97 of 1993.

2. The prosecution case in brief is that the Appellant, deceased-Nrusingh Naik and their elder brother-Bansidhar Naik and another brother lived in one complex in Bidharpur village. The deceased-Nrusingh Naik was possessing a piece of Government land in front of their house, which he was using for stacking cowdung and straw. Accused-Appellant encroached upon a portion of such land of the deceased and constructed a thatched hut over it. For which, there was a quarrel between two brothers prior to the date of occurrence and since the Appellant was threatening the deceased with dire consequence, he had been to the police station to report the matter.

3. On 08.02.1992 at about 8.30 P.M. the deceased after returning home from police station to home asked his wife Renuka Naik-informant- P.W.6 (sole eye witness to the occurrence) to serve him food. His wife (informant) asked him to tie down their bullocks in the cowshed after which she would serve him food. Both of

them went to their bari side and the informant was carrying a lantern and the deceased tied down the bullocks in the cowshed. At that time, the deceased went to bring straw for the bullocks and was followed by his wife-informant, who was holding the lantern. At that moment Appellant suddenly emerged holding one sword and coming from the opposite direction of the deceased stabbed to the belly of the deceased and the deceased fell down on the ground shouting "Marigali Marigali". The Appellant pulled out the sword from the belly of the deceased and inflicted further blows on the head as well as the hands of the deceased. Thereafter, Appellant ran away by the back side of the cowshed. The wife of the deceased (Informant-P.W.6) immediately took the injured with bleeding injuries to her lap, sat down there and cried.

4. Hearing her cry the elder brother of the deceased Bansidhar Naik-P.W.2 and others including her mother-in-law came there and she narrated the incident to them. By that time, the deceased was already unconscious. Bansidhar Naik-P.W.2 along with others took the injured in a truck to District Head Quarters Hospital, Dhenkanal and in the same night at about 4 A.M., P.W.2 returned home and informed that the injured had expired on the way to hospital.

5. On 09.02.1992 at 5.10 A.M. on getting information about the incident, the S.I. of police, Gondia police station, one Sri P.C. Biswal (P.W.9) reached the house of the deceased at 5.30 A.M. Wife of the deceased P.W.6 (Renuka Naik) verbally reported the fact of murder of her husband, which P.W.9 reduced into writing and since it revealed a cognizable case under Section 302 of IPC, he treated the same as FIR, took up investigation and sent the FIR to Gondia P.S. for registration.

6. During the investigation, the I.O. kept the spot guarded came to the police station and in the absence of O.I.C., he registered Gondia P.S. Case No.23 of 1992 (G.R. Case No. 91 of 1992) U/s.302 of IPC. Thereafter, he went to the District Headquarters Hospital, Dhenkanal and conducted inquest over the dead body in presence of witnesses and sent the same for postmortem examination.

7. After investigation, charge sheet was submitted citing the appellant as the sole accused and on the basis of the same, the accused faced trial being charged under Section 302 of IPC for causing death of his brother Nrusingh Naik.

8. To drive home the charge, the prosecution examined the following 9 (nine) witnesses;

P.W.1	Dr. Bijaya Kumar Sahu (doctor who conducted the post-mortem examination)
P.W.2	Bansidhar Naik (elder brother of the deceased)
P.W.3	Sarat Kumar Mohanty
P.W.4	Alekha Bihari Das (R.I)
P.W.5	Pradeep Kumar Sahu- witness to seizure of weapon of offence
P.W.6	Renuka Naik (wife of the deceased and sole eye witness to the occurrence)

P.W.7	Prabin Kumar Das- Investigating Officer
P.W.8	Bhabani Sankar Mishra- Investigating Officer
P.W.9	Prahallad Chandra Biswal- Investigating Officer

9. Besides above, prosecution also proved several documents which have been admitted into evidence and marked as Exts.1 to 14, out of which, Ext.4/1- FIR, Ext.1-Post-mortem examination report of deceased, Ext.8-Inquest report, Exts.10, 11, 12 the seizure lists, are of significance.

9A. Several material objects were also admitted into evidence and marked as M.Os I-IV, out of which M.O III- Katari is the weapon of offence.

9B. The statement of Bansidhar Nayak -P.W.2 recorded under Section 161 Cr.P.C. was admitted in evidence and marked as Ext.A.

10. In his examination U/s.313 Cr.P.C, the defence plea was one of complete denial and false implication.

11. P.W.1 is the Medical Officer, who conducted the post mortem of the deceased (Nrusingh Naik) on identification by police constable and the brother of the deceased Bansidhar Naik, P.W.2, found the following external injuries.

> **"xxx xxx xxx**
>
> *(1) Incised cut wound of scalp eliptical shape 3.5"x4" wide at the middle X bone deep present in the right occipito-parietal region, 1/2" behind the upper end of right pina. Undernath bone at the site of injury partially cut.*
>
> *(2) Incised cut wound of scalp, eliptical shape, 2"X1/3" wide in the middle X bone deep, present in the occipital region horizontally. The underneath bone partially cut in the line of wound.*
>
> *(3) Incised cut wound, of size 2 on length X $^{1/2}$ CM. wide in the middle with lateral end of the wound pointed and medial end 2 M.M. wide present in the left side of interior abdominal wall, 5 cm. above the umbilicus and 3 cm. lateral to mid-line. The wound directed downward and medially. A patch of omentum of size 4"X2" punched out through the wound from abdominal cavity.*
>
> *(4) Incised wound of size 5 cm.X 3 cm. present in the base of the middle and ring finger on the dorsal aspect of right hand with fracture of Ist phalanx of both fingers*
>
> *(5) Incised wound of size 1"X1/3" present on the dorsal aspect of middle of right index finger.*
>
> *(6) Incised cut wound of size 7 cmX 5 cm. Cutting the medical half of the left fore arm ½" abovethe left wrist joint. Fracture of lower end of left ulna and writst joint exposed with cut of mussle and tendon tissues.*
>
> **xxx xxx xxx"**

12. The P.W.1 further stated that the injuries were ante mortem in nature and cause of death was due to shock and haemorrhage as a combined effect of all the above ante mortem injuries which were sufficient to cause death in ordinary course of nature. And, the time of death was stated to be 12 to 24 hours from the time of post mortem examination. The post mortem report was marked as Exhibit-1 and his signature as Exhibit-1/1. From the evidence of the P.W.1 it is established that death of Nrusingh Naik was homicidal.

13. As already noted the Appellant, the deceased and P.W.2 are brothers.

14. It is borne out from the evidence of P.W.2 (elder brother of the deceased) that he, the deceased, the accused and another brother lived in the same house complex and in one mess.

P.W.2, who is the brother of the both of the deceased as well as the appellant, resiled.

P.W.3 who was cited as post occurrence witness and had reached the place of occurrence hearing the cry and wailing of the wife of the deceased- P.W.6 that the accused assaulted, also did not support the prosecution.

15. P.W.4 is the R.I., who prepared the spot map, whose evidence is not significant. P.W.5 is the witness to seizure of the alleged weapon of offence-M.O.III but did not support the case of the prosecution that the accused gave recovery of the same.

16. P.W.9 is the I.O, who carried out the major part of investigation. P.W.7 subsequently took over the charge of the investigation from the P.W.9 and conducted raids to apprehend the accused and on receipt of information from CSI, Dhenkanal that the accused surrendered, he took the accused on remand and interrogated him and it is the case of the prosecution that during such interrogation the accused caused the recovery of weapon of offence M.O.III and seizure list, who marked as Exhibit-3/1.

17. P.W.8 is the Investigating Officer, who was sent the exhibits for examination. In the F.I.R which was instituted at the instance of the wife of the deceased the appellant has been named as the sole accused.

18. The wife of the deceased, P.W.6, in her evidence has clearly and cogently narrated the gruesome of manner in which the accused-Appellant dealt repeated blows in front of her eyes, which ultimately led to the death of her husband. She has also stated that earlier the accused-Appellant had threatened to assault her husband and on the fateful day also her husband-deceased had been to the P.S. Her evidence stood the scrutiny of cross-examination.

19. It is urged by the learned counsel for the defence that the seizure witnesses have turned hostile and P.W.2, who is the elder brother of the accused as well as the deceased has not supported the prosecution. He also drew the attention of this Court to the discrepancy in recording the statement of Bansidhar Naik, marked as Exhibit A in which it has been mentioned that the accused Appellant Seshadev Nayak is the injured and the wife of the deceased- P.W.6 cradling him and holding him in her lap and referring to the same submitted that by no stretch of imagination it can be said that the prosecution has been able to establish the guilt of the accused beyond reasonable doubt.

20. The Appellant also tried to derive support from the serological report relating to the weapon of offence, which was M.O.III, not containing any blood stain

and he submitted with vehemence that since the P.W.6 is the wife of the deceased was categorically in her submission that the Appellant had used a sword and since M.O.III is a katari and the said Katrai does not contain any blood-stain, the accused has been falsely implicated because of previous enmity and also in view the statement of the Doctor, P.W.1 in cross-examination noted that only injuries No.1 and 2 could be caused by the katari.

20A. It is urged with vehemence by the learned counsel for the appellant that in view of the discrepancies as above the learned Trial Court committed grave error of judgment is relying on the solitary testimony of the eye witness -P.W.6, the most interested witness, being the wife of the deceased in holding the appellant guilty. And, in fact it is submitted that it has resulted in miscarriage of justice.

20B. Section 134 of the Evidence Act deals with number of witnesses required for the proof of any fact. It is the time-tested doctrine that, while appreciating evidence the same has to be weighed and not counted. Though it is not uncommon for the Courts to insist for corroboration more as not as a requirement of law but of prudence. That's why the legislature has stated in Section 134 of the Evidence Act that "No particular number of witnesses shall in any case be required for the proof of any fact". In this context, reference can be made to one of the earliest judgment of the Apex Court in the case of **Vadivelu Thevar and another Vrs. State of Madras reported in AIR 1957 SC 614 : 1957 SCC OnLine SC 13**.

21. The appreciation of testimony of solitary related witness came up for consideration of the Apex Court in the case of **Ravi Vrs. State represented by Inspector of Police** reported in **(2008) 15 SCC 115** and the Apex Court taking note of all the judgments has held that there is no embargo in finding an accused guilty on the sole testimony of related witness if found to be reliable.

22. Evaluating the evidence of P.W.6 in the background of pronouncement of the Apex Court as aforesaid, it is conclusively established that the accused-Appellant is the author of the crime and merely because P.W.2, who is the elder brother of the deceased did not support the prosecution, the evidentiary value of P.W.6 since she is the wife of the deceased does not get diluted in any manner.

22A. Even the doctor in his evidence had said that the injuries I and II can be caused by the Katari and the patient died due to heavy loss of blood on account of such injury.

23. The occurrence took place on 08.02.1992 and the seizure of the weapon of offence was on 06.09.1992, after the accused was taken on remand on 03.09.1992. Because of the time lag between the date of occurrence and ultimate recovery of weapon of offence (M.O.III), the same not containing any bloodstain, cannot in any way ennure to the benefit of the accused in the face of the testimony of P.W.6 and the Doctor (P.W.1). The conduct of the accused absconding also lends credence to the claim of the prosecution that he is the author of the crime.

24. Such conduct, being admissible under Section 8 of the Evidence Act, in the given circumstances cannot be lost sight of more so when the accused-Appellant and the deceased were brothers.

25. On going through evidence on record, this Court also does not find any reason to doubt the credibility of the evidence of I.O (P.W.7) relating to recovery of weapon of offence.

26. Hence, on an analysis of the evidence on record, inter alia, the statement of P.W.6 the eye witness, the conduct of the appellant, the recovery and the Medical evidence connecting M.O.III to the injury found on the deceased, this Court does not find any infirmity in the appreciation of evidence by the learned Trial Court and consequential finding of the appellant being guilty of committing offence under Section 302 of IPC for intentionally causing the murder of his brother (Nrusingh Naik) and imposition of sentence of life imprisonment.

27. The appeal accordingly, stands dismissed.

28. Since the Appellant was allowed to be enlarged on bail, he is directed to surrender forthwith to serve out the sentence. Necessary steps in this regard as provided in law shall be taken by the learned Trial Court.

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2024 (III) ILR-CUT-66

S.K. SAHOO, J & CHITTARANJAN DASH, J.

DSREF NO. 01 OF 2023

STATE OF ODISHA ….Appellant

V.

NABIN DEHURY ….Respondent

JCRLA NO. 118 OF 2023
(NABIN DEHURY V. STATE OF ODISHA)
CRLA NO. 693 OF 2024
(HEMANANDA DEHURY V. STATE OF ODISHA)

(A) CRIMINAL TRIAL ─ Offence U/s. 302/304 of IPC ─ Death Sentence ─ Duty of prosecution ─ Held, in order to make out a case for imposition of death sentence, prosecution has to discharge a very onerous burden by demonstrating the existence of aggravating circumstances and the consequential absence of mitigating circumstances. (Para 18)

(B) INDIAN PENAL CODE, 1860 ─ Offence U/ss. 302/304 ─ Offence being committed under the influence of extreme mental or emotional disturbances ─ Slow burn reaction followed by provocation also rendered to the Appellant ─ Whether these can be considered as mitigating circumstances to commit triple murder? ─ Held, Yes ─ The offence being committed under the influence of extreme mental or emotional disturbances can be taken into account as Judges should not be blood thirsty ─ The death penalty would be disproportionate, unwarranted and life imprisonment would be a more appropriate sentence. (Para 18)

(C) INDIAN PENAL CODE, 1860 — Section 34 — Ambit of Section 34 discussed with reference to case laws.

(D) WORDS & PHRASES — 'Brutal', 'Grotesque', 'Diabolical' and 'Ghastly' explained.

Case Laws Relied on and Referred to :-

1. (2017) 13 Supreme Court Cases 98 : Krishnegowda & others -Vrs.- State of Karnataka.
2. (2011) 6 Supreme Court Cases 279 : A. Shankar -Vrs.- State of Karnataka.
3. A.I.R. 2005 Supreme Court 1067 : Idrish Bhai Daudbhai -Vrs.- State of Gujarat.
4. (2018) 72 Orissa Criminal Reports 255 : 2020 SCC OnLine SC 375 : Tapan Sarkar etc. -Vrs.- State of West Bengal.
5. (2022) 2 Supreme Court Cases 545 : Jasdeep Singh @ Jassu -Vrs.- State of Punjab.
6. (1980) 2 Supreme Court Cases 684 : Bachan Singh -Vrs.- State of Punjab.
7. (1983) 3 Supreme Court Cases 470 : Machhi Singh & others -Vrs.- State of Punjab.
8. (1996) 6 Supreme Court Cases 271 : Surja Ram -Vrs.- State of Rajasthan.
9. (2016) 8 Supreme Court Cases 313 : Muthuramalingam & others -Vrs.- State.
10. (2011) 6 Supreme Court Cases 288 : Brahm Swaroop & another -Vrs.- State of U.P.
11. AIR 1975 SC 1252 : Pedda Narayana and Ors. -Vrs.- State of Andhra Pradesh.
12. AIR 1991 SC 1853 : Khujji -Vrs.- State of M.P.
13. (1998) 4 SCC 605 : George -Vrs.- State of Kerala.
14. (1998) 9 SCC 521 : Sk. Ayub -Vrs.- State of Maharashtra.
15. (2000) 4 SCC 84 : Suresh Rai -Vrs.- State of Bihar.
16. (2003) 2 SCC 518 : Amar Singh -Vrs.- Balwinder Singh.
17. (2006) 2 SCC 450 : Radha Mohan Singh -Vrs.- State of U.P.
18. AIR 2009 SC 1271 : Aqeel Ahmad -Vrs.- State of U.P.
19. (2013) 16 S.C.C. 173 : Sister Mina Lalita Baruwa -Vrs.- State of Orissa & Ors.
20. (2011) 12 Supreme Court Cases 319 : Ajay Kumar Das -Vrs.- State of Jharkhand.
21. (2004) 11 Supreme Court Cases 305 : Ramesh Singh -Vrs.- State of A.P.
22. (1944-45) 72 IA 148 : Mahbub Shah -Vrs.- King Emperor.
23. 2023 Live Law (SC) 217 : 2023 SCC OnLine SC 310 : Sundar @ Sundar Rajan -Vrs.- State of Inspector of Police.
24. (2023) 2 Supreme Court Cases 353 : Manoj & others -Vrs.- State of Madhya Pradesh.
25. (2003) 8 Supreme Court Cases 224 : State of Rajasthan -Vrs.- Kheraj Ram.
26. 2022 SCC OnLine SC 955 : Dauvaram Nirmalkar -Vrs.- State of Chhattisgarh.
27. (2009) 6 S.C.C.498 : Santosh Kumar Satishbhushan Bariyar -Vrs.- State of Maharashtra.
28. A.I.R. 1979. S.C. 916 : Rajendra Prasad -Vrs.- State of Uttar Pradesh.
29. (1997) 11 Supreme Court Cases 720 : A. Devendran -Vrs.- State of T.N.
30. (2021) 20 Supreme Court Cases 162 : Mofil Khan and another -Vrs.- State of Jharkhand.
31. (2021) 18 Supreme Court Cases 274 : Bhagchandra -Vrs.- State of Madhya Pradesh.
32. (1994) 4 Supreme Court Cases 381 : Anshad -Vrs.- State of Karnataka.
33. (2016) 8 Supreme Court Cases 313 : Muthuramalingam and others -Vrs.- State.

For Appellants : Mr. Debasis Sarangi, Amicus Curiae, Mr. Pranaya Kumar Dash.

For Respondents : Mr. Janmejaya Katikia, A.G.A. Mrs. Susamarani Sahoo, A.S.C., Ms. Gayatri Patra

JUDGMENT Date of Hearing : 30.07.2024 : Date of Judgment : 28.08.2024

BY THE BENCH

The reference under section 366 of the Code of Criminal Procedure, 1973 has been submitted to this Court by the learned Additional Sessions Judge, Kuchinda (hereinafter 'the trial Court') in S.T. Case No.25 of 2020 for confirmation of death

sentence imposed on condemned prisoner/accused Nabin Dehury (hereinafter 'the appellant Nabin Dehury') by the judgment and order dated 07.08.2023/09.08.2023 and accordingly, DSREF No.01 of 2023 has been instituted.

JCRLA No.118 of 2023 and CRLA No. 693 of 2024 have been filed by the appellant Nabin Dehury and appellant Hemananda Dehury respectively challenging the self-same judgment and order of conviction passed by the learned trial Court.

Appellant Nabin Dehury along with his son appellant Hemananda Dehury faced trial in the trial Court for commission of offence under section 302/34 of the Indian Penal Code (hereinafter 'the I.P.C.') on the accusation that on 21.10.2020 at about 2.30 p.m. in village Lapada under Mahulpali police station, they committed murder of Giridhari Sahu, Pirobati Behera and Sabitri Sahu in furtherance of their common intention.

The learned trial Court vide impugned judgment and order dated 07.08.2023/09.08.2023 found the appellants guilty under section 302/34 of I.P.C. and sentenced appellant Hemananda Dehury to undergo imprisonment for life and to pay a fine of Rs.1,00,000/- (rupees one lakh), in default, to undergo further R.I. for one year. The appellant Nabin Dehury was sentenced to death with a further direction that he be hanged by neck till he is dead and he was also directed to pay a fine of Rs.1,00,000/- (rupees one lakh), in default, to undergo further R.I. for one year.

Since the DSREF, JCRLA and CRLA 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.P-1) lodged by P.W.1 Manikya Pruseth, in short, is that the deceased Pirobati Behera was her mother, deceased Sabitri Sahu was her elder sister and deceased Giridhari Sahu was her brother-in-law (being the husband of deceased Sabitri Sahu). On 21.10.2020 at about 3.00 p.m., the deceased Giridhari, Pirobati and Sabitri proceeded to the paddy field for reaping paddy crops. After a while, P.W.1 came out of the house and found the deceased Pirobati was pressing the handle of the tube well and deceased Sabitri was collecting water in a bottle from that tube well. At that time, all on a sudden, both the appellants assaulted the deceased Pirobati by 'tangia'. Hearing the cries of the two lady deceased, P.W.1 came out to the village road and noticed that both the appellants were chasing the deceased Sabitri and dealing 'tangia' blows on her. Both the appellants were also telling loudly to have killed 'Kiramiria' (deceased Giridhari) on the way. At that time, the wife of appellant Nabin was also following the two appellants. On being frightened, P.W.1 came inside her house, bolted the door and shouted for help. Hearing her outcry, villagers came and congregated and then P.W.1 came out of her house and she along with the villagers searched for the deceased Giridhari and found his dead body was lying in the field with cut injuries. It is further stated in the F.I.R. that Sachin Sahu (P.W.3)

and Sapna Sahu (P.W.4) were the minor son and daughter of the deceased Giridhari and Sabitri respectively.

P.W.8 Kalyan Behera scribed the written report as per the version of P.W.1 which was read over and explained to her and on the written report, P.W.1 put her signature which was presented to P.W.20 Jyotchna Rani Behera, Inspector in-charge of Mahulpali police station at the spot who had arrived there on receiving telephonic communication from one unknown person regarding commission of murder of three persons at village Lapada while she was on patrolling duty.

Without waiting for the formal registration of the F.I.R. at the police station, P.W.20 commenced investigation of the case. She examined P.W.1, the informant and other witnesses and also called for the scientific team from D.F.S.L, Sambalpur to visit the spot for collection of physical clues. She conducted inquest over the three dead bodies and prepared the inquest reports. The scientific officials arrived at the scene of occurrence on the same day i.e. 21.10.2020 at about 8.15 p.m. and collected material objects from the spot. In the intervening night of 21/22.10.2020, P.W.20 dispatched all the three cadavers to S.D.H, Kuchinda for post-mortem examination. She also took the custody of both the appellants from their house and brought them to Mahulpali police station. After arrival at the police station, P.W.20 registered Mahulpali P.S. Case No.175 dated 22.10.2020 under section 302/34 of I.P.C.

During interrogation of appellant Nabin Dehury by the I.O. (P.W.20), he not only confessed his guilt but also stated to have concealed the weapon of offence i.e. 'tangia' inside a straw heap of his house and accordingly, his statement was recorded under section 27 of the Evidence Act vide Ext.P-14 in presence of two independent witnesses and thereafter, appellant Nabin Dehury led the police party and the witnesses to his house and gave recovery of 'tangia', which he had concealed, from inside the straw heap and accordingly, P.W.20 seized the same as per seizure list Ext.P-15. P.W.20 returned to the police station with the appellant Nabin Dehury and seized the wearing apparels of both the appellants under separate seizure lists. She sent them for medical examination to S.D.H., Kuchinda. The police staff also returned to the police station with the biological samples of the three deceased in sealed envelopes and their wearing apparels, which were seized by P.W.20 as per seizure list Ext.P-20. S.I. Dillip Kumar Behera of Mahulpali police station, who had taken the appellants to S.D.H., Kuchinda also returned with the biological samples of the appellants in sealed envelopes which were seized as per seizure list Ext.P-19 and then the appellants were forwarded to Court.

P.W.20 revisited the spot on 23.10.2020, prepared three spot maps where the three dead bodies were lying separately and also sent the wearing apparels of the appellants and the weapon of offence (tangia) to D.F.S.L, Sambalpur for necessary test, which were examined on the very day by the Scientific Officer & Asst. Chemical Examiner, D.F.S.L, Sambalpur. After examination, the exhibits were dried, sealed and packed properly and handed over to P.W.20, the I.O. on 24.10.2020 with instruction to send all the exhibits to the R.F.S.L., Sambalpur through Court. P.W. 20 sent requisition to Tahasildar, Bamra on 24.10.2020 for

demarcation of the spot. The documents relating to the land dispute between the parties were seized as per the seizure list Ext.P-5 on the production of Udaya Chandra Pruseth (P.W.2), which were also left in his zima. After receipt of the post mortem reports of the three deceased, on 03.11.2020 P.W.20 produced the weapon of offence (tangia) before the Medical Officer, who conducted post mortem examination to ascertain regarding possibility of the injuries sustained by the three deceased with such weapon and received the opinion on the very day in affirmative. On 09.11.2020 she also sent the material objects, the weapon of offence, the biological materials of the deceased so also that of the appellants to R.F.S.L., Sambalpur for necessary examination. She received the spot demarcation report from the Tahasildar, Bamra.

On 19.11.2020 on completion of investigation, P.W.20 submitted charge sheet against the appellants under section 302/34 of the I.P.C.

Framing of Charge:

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 appellants as aforesaid and since the appellants refuted the charge, 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 examined as many as twenty witnesses.

P.W.1 Manikya Pruseth is the sister-in-law, younger sister and daughter of the deceased persons Giridhari, Sabitri and Pirobati respectively. She is the informant of the case. She narrated the facts as the incident unfolded on the date of occurrence and supported the prosecution case.

P.W.2 Udaya Chandra Pruseth is the husband of the informant (P.W.1). He stated to have received a telephonic call from P.W.4 who informed him that the appellants have committed the murder of the three deceased. Upon receiving such information, he rushed to the village of the deceased and saw a huge gathering. He was told about the incident by P.W.1. He also stated to have seen severe cut injury on the neck of the deceased Pirobati and many cut injuries on different parts of the body of the deceased Sabitri. He was also informed by P.W.1 that the appellants were telling that they had killed the deceased Giridhari. He proceeded to the paddy field and found the dead body of the deceased Giridhari lying with marks of injuries on his head, neck and hand. He is a witness to the preparation of the inquest reports vide Exts.P-2, P-3 and P-4. He is also a witness to the seizure of the original R.O.R. and the copies of the decrees of the cases as per seizure list Ext.P-5.

P.W.3 Sachin Sahu and P.W.4 Sapna Sahu are the son and daughter of the deceased Giridhari and Sabitri respectively and they are eye witnesses to the occurrence.

P.W.5 Prafulla Kumar Nayak is a co-villager who is also an eye witness to the assault on the deceased Giridhari. He is also witness to the preparation of the inquest reports vide Exts.P-2, P-3 and P-4.

P.W.6 Dr. Satya Prakash Dora was working as the Medicine Specialist at S.D.H., Kuchinda, who on police requisition, conducted post-mortem examination over the three dead bodies of the deceased and he proved his reports vide Exts.P-7, P-8 and P-9. He examined the weapon of offence produced before him by the I.O. regarding possibility of injuries sustained by the three deceased with such weapon and gave his opinion.

P.W.7 Dibyaraj Naik is a co-villager who is a post occurrence witness, who noticed the dead bodies of Pirobati and Sabitri lying at two different places. He is a witness to the preparation of the inquest reports vide Exts.P-2, P-3 and P-4.

P.W.8 Kalyan Behera is the uncle of the deceased Giridhari who is a post occurrence witness and came to the spot on receipt of information regarding the death of the deceased and noticed the three dead bodies with injuries at three different places. He is the scribe of the written report, which was prepared as per the version of P.W.1 and the same was subsequently treated as F.I.R.

P.W.9 Gobinda Naik is a co-villager and a post occurrence witness. He came to the spot on hearing the shout and noticed three dead bodies lying at three different places. He is a witness to the preparation of the inquest reports vide Exts.P-2, P-3 and P-4. He is also a witness to the seizure of the land records and documents relating to the cases over the landed property as per seizure list Ext.P-5.

P.W.10 Bijayalaxmi Tirkey was the Scientific Officer at D.F.S.L., Sambalpur who visited the spot with her team as per the direction of the Superintendent of Police, Sambalpur. She collected blood of the three deceased persons by means of gauge clothes which were marked as A, B and C respectively and handed over same to the I.O. which were seized as per seizure list Ext.P-11. She also proved the chemical examination report vide Ext.P-13.

P.W.11 Alekha Sahu is the uncle of the informant (P.W.1) who on receipt of telephonic call from P.Ws.3 & 4 came to the spot and found three dead bodies lying at three different places with bleeding injuries. He is also a witness to the seizure of land records of the deceased Pirobati as per seizure list Ext.P-5.

P.W.12 Sanjaya Kumar Nayak is a co-villager who is a witness to the recording of the statement of appellant Nabin Dehury under section 27 of the Evidence Act and recovery of ‘tangia’ (M.O.I) at his instance, which was seized by the I.O. as per seizure list Ext.P-15.

P.W.13 Parameswar Khadia is a co-villager who is also a witness to the recording of the statement of appellant Nabin Dehury under section 27 of the Evidence Act and leading to discovery of ‘tangia’ and its seizure as per seizure list Ext.P-15.

P.W.14 Cicilia Zina Lakra was working as a constable attached to Mahulpali police station on the date of occurrence. She is a witness to the seizure of the wearing apparels of the appellants as per seizure lists Exts.P-16 and P-17.

P.W.15 Sunita Patel was posted as a constable at Mahulpali police station. She, as per the direction of the I.O., proceeded to the Court and collected the exhibits and deposited the same in R.F.S.L., Sambalpur for chemical examination.

P.W.16 Dillip Kumar Behera was working as the Sub-Inspector of Police at Mahulpali police station. He took the appellants to S.D.H., Kuchinda for collection of the biological samples of the appellants, which were accordingly collected and produced before the I.O. and seized as per seizure list Ext.P-19.

P.W.17 Jayadeb Majhi was posted as a constable attached to Mahulpali police station who took the dead bodies of three deceased to S.D.H., Kuchinda for post-mortem examination. After the post-mortem examination, the wearing apparels of the deceased along with their nail clippings, blood samples and hairs were collected by the Medical Officer and were handed over to him in three separate packets and he produced the packets before the I.O., which were seized as per the seizure list Ext.P-20.

P.W.18 Petrus Xalxo was posted as the Assistant Sub-Inspector of Police at Mahulpali police station. He is a witness to the seizure of the biological samples of the three deceased and their wearing apparels as per the seizure list Ext.P-20. He is also a witness to the seizure of biological samples of the appellants as per seizure list Ext.P-19.

P.W.19 Suchit Topno was working as a constable at Mahulpali police station who is a witness to the seizure of four sealed envelopes containing sample of blood stained earth and one blood stained cloth, on production by the Scientific Officer, D.F.S.L., Sambalpur, as per seizure list Ext.P-11.

P.W.20 Jyotchna Rani Behera was posted as the Inspector-in-Charge of Mahulpali police station and she is the investigating officer of the case.

The prosecution exhibited thirty one documents. Ext.P-1 is the F.I.R., Ext. P-2 is the inquest report of deceased Pirobati, Ext.P-3 is the inquest report of deceased Sabitri, Ext.P-4 is the inquest report of deceased Giridhari, Exts.P-5, P-11, P-15, P-16, P-17, P-19 and P-20 are the seizure lists, Ext.P-6 is the zimanama, Ext.P-7 is the post mortem report of deceased Sabitri, Ext.P-8 is the post mortem report of deceased Pirobati, Ext.P-9 is the post mortem report of deceased Giridhari, Ext.P-10 is the requisition along with opinion on query, Ext.P-12 is the spot visit report, Ext.P-13 is the Chemical Examination Report, Ext.P-14 is the statement of appellant Nabin Dehury recorded under section 27 of the Evidence Act, Ext.P-18 and Ext.P-21 are command certificates, Ext.P-22, Ext.P-23 and Ext.P-24 are the dead body challans, Ext.P-25 is the crime detail form, Ext.P-26 is the spot map, Ext.P-27 is the requisition to Tahasildar, Bamra for demarcation of the spot, Ext.P-28 is the exhibit forwarding report for the chemical examination, Ext.P-29 is the prayer made by the I.O. to the Court for dispatching the exhibits for chemical examination, Ext.P-30 is the spot demarcation report received from Tahasildar, Bamra and Ext.P-31 is the chemical examination report of R.F.S.L., Sambalpur.

The prosecution also proved seventeen material objects. M.O.I is the tangia, M.O.II is the lungi, M.O.III is the ganjee, M.O.IV is the half pant, M.O.V is the t-shirt, M.O.VI is the saree of deceased Sabitri, M.O.VII is the saree of deceased Pirobati, M.O.VIII is the lungi of deceased Giridhari, M.O.IX is the pant of deceased Giridhari, M.O.X is the T-shirt of deceased Giridhari, M.O.XI is the vest of deceased Giridhari, M.O.XII is the chapal of deceased Pirobati, M.O.XIII is the saya of deceased Sabitri, M.O.XIV is the blouse of deceased Sabitri, M.O.XV is the blood stained napkin of deceased Giridhari, M.O.XVI is the blue colour blouse of deceased Pirobati and M.O.XVII is the black colour panty of deceased Sabitri.

Defence Plea:

5. The defence plea of the appellants is one of complete denial and it is stated that the two lady deceased died coming in contact with a machine which was used to cut paddy crops and deceased Giridhari died during fighting with bullocks as the horn of bullocks pierced inside his body and due to long standing civil dispute between the parties, they have been falsely implicated. The defence did not examine any witness nor proved any document.

Findings of the Trial Court:

6. The learned trial Court after analysing the oral as well as the documentary evidence on record came to hold that the prosecution has successfully established that the three deceased persons met with homicidal death.

The evidence of P.W.1 Manikya Pruseth, the informant as an eye witness to the occurrence, was found to be quite clear, elaborate and corroborating to the prosecution case and it is held that there was no reason to cast doubt over the truthfulness in her evidence.

The evidence of P.W.3 and P.W.4, who are the two minor children of deceased Giridhari and Sabitri, as eye witnesses to the occurrence, was also accepted.

It was further held that the prosecution case on leading to discovery of weapon of offence i.e. tangia at the instance of appellant Nabin Dehury in application to section 27 of the Evidence Act is quite clear, specific and corroborative, which has been proved through the evidence of two independent witnesses i.e. P.W.12 and P.W.13 and the I.O. (P.W.20). The learned trial Court also held that the injuries sustained by the three deceased were possible by the seized weapon. It was held that the chemical examination report, which has been marked as Ext.31 without any objection from the side of the defence, immensely corroborates not only the evidence of the eye witnesses but also the prosecution case against appellant Nabin Dehury.

It was further held that there is no infirmity in the evidence of the eye witnesses and the prosecution case finds absolute corroboration from the experts examined in the case as well as scientific investigation to that effect and the Court came to the final opinion that the appellant Nabin Dehury committed murder of all the three deceased and is liable for the commission of offence under section 302 of I.P.C.

The Court further analysed the evidence on record relating to the role played by the appellant Hemananda Dehury in the commission of murder of the deceased and held that he restrained deceased Sabitri while she was going to rescue her mother (deceased Pirobati) and taking advantage of the same, the appellant Nabin dealt three to four blows on the neck and other parts of the body of the deceased Sabitri, who died at the spot and that he had never prevented or discouraged the appellant Nabin for committing such terrible crime. The appellant Hemananda joined appellant Nabin after the latter committed the murder of deceased Giridhari and he not only shared common intention with appellant Nabin, but also actively participated in the crime and therefore, he is liable for the commission of offence under section 302/34 of the I.P.C.

On the quantum of sentence, the learned trial Court held that the case against the appellant Nabin Dehury is an act of extreme brutality and the magnitude of cruelty thrust in committing the crime brought it to the category of 'rarest of rare' case and accordingly, imposed death sentence on him while imposing life imprisonment on the appellant Hemananda Dehury.

Submission of Parties:

7. Mr. Debasis Sarangi, learned Amicus Curiae appearing for the appellants being ably assisted by Mr. Pranaya Kumar Das, learned counsel for the appellant Hemananda Dehury contended that from the inception, the prosecution has tried to implicate the appellant Hemananda Dehury in the actual assault of the deceased Pirobati Behera and Sabitri Sahu. It is not mentioned in the F.I.R. that P.W.3 and P.W.4, the two minor children of the deceased Giridhari and Sabitri were the eye witnesses to the occurrence and therefore, there is every possibility of introducing those two witnesses at a later stage and tutoring them to depose against the appellants. There is doubt whether the F.I.R. was lodged at the time when it was shown to have been lodged. The role played by the appellant Hemananda Dehury as deposed to by the witnesses during trial is completely different from the F.I.R. story. He emphasised that even though as per the version of P.W.5, who is the solitary eye witness to the assault on the deceased Giridhari, it was appellant Nabin Dehury who assaulted the deceased Giridhari with a tangia and the presence of appellant Hemananda Dehury has not been deposed to at that point of time, however in the inquest report of deceased Giridhari vide Ext.P-4, in which P.W.5 is a signatory, in column no.9, it is mentioned that both the appellants Nabin Dehury and Hemananda Dehury assaulted the deceased Giridhari by 'tangia' and 'knife' which creates doubt as to whether P.W.5 is an eye witness to the assault on deceased Giridhari. Similarly P.W.5 stated to have come to the second spot after seeing the assault on deceased Giridhari where he found the dead bodies of deceased Pirobati Behera and Sabitri Sahu and he was present there when the police arrived and held inquest over the three dead bodies. In spite of that the name of P.W.5 is not mentioned in the F.I.R. as an eye witness to the assault on the deceased Giridhari. He urged that the version of the eye witnesses are full of material contradictions and P.Ws.1, 3 & 4 are related to the deceased persons and therefore, they are interested witnesses and the learned

Trial Court was not justified in placing reliance upon their evidence to convict the appellants. Reliance was placed on the decisions of the Hon'ble Supreme Court in the case of **Krishnegowda & others -Vrs.- State of Karnataka reported in (2017) 13 Supreme Court Cases 98** and **A. Shankar -Vrs.- State of Karnataka reported in (2011) 6 Supreme Court Cases 279.** It was argued that though the weapon of offence i.e. tangia was seized on 22.10.2020, but there is no evidence as to where it was kept after its seizure and in what condition and who was its custodian and therefore, no importance can be attached to the finding of blood of human origin on tangia and the learned trial Court should not have utilized the C.E. report findings against the appellants, more particularly when it was not shown to the eye witnesses for the purpose of identification. It is argued that the conviction of the appellant Hemananda Dehury with the aid of section 34 of the I.P.C. is quite unjustified inasmuch as not only the prosecution changed its initial story of the appellant Hemananda Dehury being a direct assailant of both the deceased Pirobati and Sabitri to that of only restraining deceased Sabitri when she proceeded to rescue her mother Pirobati, but also even restraining the deceased Sabitri cannot be a factor to come to the conclusion that he shared common intention with the appellant Nabin Dehury as his mere presence with the appellant Nabin Dehury in the scene of occurrence without any specific overt act or aiding or abetting the appellant Nabin Dehury cannot attract his common intention with the appellant Nabin Dehury and therefore, it is a fit case where benefit of doubt should be extended in favour of the appellant Hemananda Dehury. Reliance was placed on the decisions of the Hon'ble Supreme Court in the cases of **Idrish Bhai Daudbhai -Vrs.- State of Gujarat reported in A.I.R. 2005 Supreme Court 1067**, **Tapan Sarkar etc. -Vrs.- State of West Bengal reported in (2018) 72 Orissa Criminal Reports 255 and Jasdeep Singh @ Jassu -Vrs.- State of Punjab reported in (2022) 2 Supreme Court Cases 545.** It is argued that even if for the sake of argument, it is held that on account of property dispute, the appellant Nabin Dehury committed the murder of all the three deceased but in absence of any criminal antecedents against the appellant Nabin Dehury so also the reports which have been received from the Jail Superintendent and the Probation Officer and the medical documents relating to his psychological disorder, it cannot be said that only the death sentence is justified for him in the facts and circumstances of the case and therefore, even though this Court holds him guilty under section 302 of the I.P.C., the death sentence may be commuted to life imprisonment.

Mr. Janmejaya Katikia, learned Additional Government Advocate, being ably assisted by Mrs. Sushamarani Sahoo, learned Additional Standing Counsel and Ms. Gayatri Patra, Advocate, on the other hand, supported the impugned judgment and argued that F.I.R. is not an encyclopaedia of the entire prosecution case. When the F.I.R. was lodged promptly after the commission of three ghastly murder of near and dear ones, the state of mind of an eye witness like P.W.1, who is the informant in the case, must have been in a disturbed condition and therefore, it was not expected of her to mention all the details of what she had seen at the spot or what

she came to know from others and she was likely to commit mistakes. When the witnesses during trial have consistently deposed regarding the role played by each of the appellants and the same has not been shaken in the cross-examination except bringing some minor discrepancies and trifling contradictions, the learned trial Court cannot be said to have committed any mistake in relying upon the version of such eye witnesses. It is further argued that the evidence of the eye witnesses gets corroboration not only from the medical evidence but also there is recovery of tangia at the instance of the appellant Nabin Dehury and after examining the weapon, the doctor (P.W.6) has opined that the injuries sustained by the deceased were possible by such weapon. It is further argued that the motive behind the commission of crime is the civil dispute between the parties and the manner in which the ghastly crime was committed by the appellant Nabin Dehury and he dealt blows after blows to the deceased persons, who were defenceless and out of them, two were ladies, the imposition of death sentence on him is quite justified. Similarly, the role played by the appellant Hemananda Dehury at the second spot near the tube well in joining his father and not preventing him to assault the two lady deceased rather restraining the deceased Sabitri while she was proceeding to rescue her mother deceased Pirobati is sufficient to hold that he shared common intention with his father Nabin Dehury and therefore, the learned trial Court is quite justified in holding him guilty under section 302/34 of the I.P.C. and therefore, the appeals preferred by the appellants should be dismissed and the death sentence imposed on the appellant Nabin Dehury should be confirmed. He placed reliance in the cases of **Bachan Singh -Vrs.- State of Punjab reported in (1980) 2 Supreme Court Cases 684, Machhi Singh & others -Vrs.- State of Punjab reported in (1983) 3 Supreme Court Cases 470, Surja Ram -Vrs.- State of Rajasthan reported in (1996) 6 Supreme Court Cases 271** and **Muthuramalingam & others -Vrs.- State reported in (2016) 8 Supreme Court Cases 313**.

Whether the three deceased met with homicidal deaths?:

8. Adverting to the contentions raised by the learned counsel for the respective parties, we have to examine the materials available on record to see whether prosecution has successfully established the homicidal death of the three deceased. Apart from the inquest reports of deceased Giridhari Sahu (Ext.P-4), deceased Pirobati Behera (Ext.P-2) and Sabitri Sahu (Ext.P-3), the prosecution examined P.W.6 Dr. Satya Prakash Dora, the Medicine Specialist at S.D.H., Kuchinda, who on 22.10.2020 on police requisition conducted post mortem examination over the three dead bodies.

So far as deceased Giridhari Sahu is concerned, P.W.6 noticed the following injuries:-

> "On external examination, he found one chop wound of size 4 cm x 3 cm x 1.5 cm over the base left scapula, 1 cm lateral to mid line; one chop wound of size 4 cm x 3 cm x 1 cm on posterior base of neck at cervical vertebra at no.6 level; one chop wound of size 4 cm x 3 cm x 1 cm over left temporal lobe of head 4 cm above left ear; one chop wound of size 5 cm x 4 cm x 2 cm over left side of neck. All the above injuries were antemortem in nature.

> On internal examination, he found skull fractured at left temporal region 4 cm above left ear. The membrane lacerated at temporal region, one chop wound over brain of size 2 cm x 1 cm at temporal region, one haematoma of size 1 cm x 1 cm x 1 cm present at temporal region, bilateral lungs were intact and congested, heart was intact and filled with clotted blood, stomach intact and filled with partially digested food, large intestine were intact and filled with gas and fecal matter, liver and kidneys were intact and filled with urine.
>
> Cause of death was due to multiple chop wounds over head and neck by heavy sharp weapon and nature of death is homicidal. The post mortem report is marked as Ext.P-9."

So far as deceased Pirobati Behera is concerned, P.W.6 noticed the following injuries: -

> "On external examination, he found a stout female dead body bilateral eyes opened, mouth closed, rigor mortis had developed in all four limbs and neck muscles, one chop wound of size 6 cm x 4 cm x 4 cm on back of neck at cervical vertebra no.4 level. The above injury was antemortem in nature.
>
> On internal examination, he found the brain was intact and congested, spinal cord incised completely at cervical vertebra no.4 level, bilateral lungs intact and congested, heart intact and filled with clotted blood, stomach intact and filled with partially digested food, small intestine intact, large intestine intact and filled with gas and fecal, urinary bladder intact and filled with urine, genital organs were intact.
>
> Cause of death was due to chop wound on back of neck by heavy sharp weapon and nature of death homicidal. The post mortem report is marked as Ext.P-8."

So far as deceased Sabitri Sahu is concerned, P.W.6 noticed the following injuries: -

> "On external examination, he found a stout female dead body, bilateral eyes closed, mouth opened, rigor mortis had developed in all four limbs and neck muscles, one chopped wound of size 6 cm x 3 cm x 3 cm over right cheek one cm in front of right ear. One chopped wound of size 4 cm x 3 cm x 3 cm over left cheek, one chopped wound of size 6 cm x 3 cm x 3 cm over base of right side of neck.
>
> On internal examination, he found the skull was intact, brain and spinal cord intact, right lung intact and congested, left lung was intact and congested, heart intact and filled with clotted blood, stomach intact and filled with partial digested food, small intestine intact, large intestine filled with gas and fecal matter, liver, spleen and kidneys were intact, bladder was intact and filled with urine, genital organs were intact. All the injuries were antemortem in nature.
>
> Cause of death was due to multiple chop wound over head and neck by sharp and heavy weapon. Nature of death was homicidal. The post mortem report is marked as Ext.P-7."

The learned Amicus Curiae so also the learned counsel for the appellant did not challenge the evidence of the doctor (P.W.6) so also the findings of the post mortem reports (Exts.P-7, P-8, P-9). After perusing the evidence on record, the inquest reports (Exts.P-3, P-4 and P-5), the post mortem reports and the evidence of the doctor (P.W.6), we are of the view that the prosecution has successfully proved the death of the three deceased to be homicidal in nature.

Murder of deceased Giridhari Sahu:

9. P.W.5 Prafulla Kumar Nayak is the sole eye witness to the commission of murder of the deceased Giridhari Sahu by the appellant Nabin Dehury.

In the examination-in-chief, he has stated that on 21.10.2020 in between 2.30 p.m. to 3.00 p.m. while he had been to his cultivable land to harvest paddy crops, he noticed the appellant Nabin Dehury coming from his land towards village carrying a tangia on his shoulder and at that time deceased Giridhari Sahu was coming from the village towards his land. He further stated to have heard an unusual sound and when he turned to his back, he found the appellant Nabin giving blows after blows by means of a tangia to the deceased Giridhari. He further stated that out of fear, he took another route and reached near puja mandap and found Manikya Pruseth (P.W.1) and Sachin Sahu (P.W.3) and two to three villagers there and told them about the incident of assault on the deceased Giridhari Sahu. He also stated about the preparation of the inquest report of deceased Giridhari Sahu which has been marked as Ext.P-4.

In the cross-examination, P.W.5 has stated that he could not say how many tangia blows were given by appellant Nabin Dehury to the deceased Giridhari Sahu and on which parts of the body. He further stated that since he had not met any person on the way to Jatra mandap, he did not disclose the incident before anyone and on reaching near Jatra mandap, he found the deceased Sabitri Sahu and Pirobati Behera were lying dead.

It is the contention of Mr. Sarangi, learned Amicus Curiae that P.W.5 has not whispered anything in his evidence regarding presence of the appellant Hemananda Dehury at the spot when the appellant Nabin Dehury assaulted the deceased Giridhari Sahu. However, in the inquest report of the deceased Giridhari Sahu marked as Ext.P-4, in which he is a signatory, it is mentioned in column no.9 that the deceased Giridhari Sahu was assaulted by the appellants Nabin Dehury and Hemananda Dehury by tangia and knife and therefore, in all probability P.W.5 had got no idea as to how the deceased Giridhari Sahu died and there is every possibility of him being planted as an eye witness to the occurrence afterwards.

We are not able to accept such a contention. The purpose of inquest has been discussed in the case of **Brahm Swaroop & another -Vrs.- State of U.P. reported in (2011) 6 Supreme Court Cases 288**, wherein it is held as follows:-

> "9. The whole purpose of preparing an inquest report under Section 174 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.P.C') is to investigate into and draw up a report of the apparent cause of death, describing such wounds as may be found on the body of the deceased and stating as in what manner, or by what weapon or instrument such wounds appear to have been inflicted. For the purpose of holding the inquest it is neither necessary nor obligatory on the part of the Investigating Officer to investigate into or ascertain who were the persons responsible for the death. The object of the proceedings under Section 174 Cr.P.C. is merely to ascertain whether a person died under suspicious circumstances or met with an unnatural death and, if so, what was its apparent cause. The question regarding the details of how the deceased was assaulted or who assaulted him or under what circumstances he was assaulted is foreign to the ambit and scope of such proceedings i.e. the inquest report is not the statement of any person wherein all the names of the persons accused must be mentioned.
>
> 10. *Omissions in the inquest report are not sufficient to put the prosecution out of court*. The basic purpose of holding an inquest is to report regarding the apparent cause of

death, namely, whether it is suicidal, homicidal, accidental or by some machinery etc. It is, therefore, not necessary to enter all the details of the overt acts in the inquest report. Evidence of eyewitnesses cannot be discarded if their names do not figure in the inquest report prepared at the earliest point of time. The inquest report cannot be treated as substantive evidence but may be utilized for contradicting the witnesses of inquest. (**See Pedda Narayana and Ors.-Vrs.- State of Andhra Pradesh** : **AIR 1975 SC 1252**; **Khujji -Vrs.- State of M.P. : AIR 1991 SC 1853**; **George -Vrs.- State of Kerala : (1998) 4 SCC 605**; **Sk. Ayub -Vrs.- State of Maharashtra: (1998) 9 SCC 521**; **Suresh Rai -Vrs.- State of Bihar : (2000) 4 SCC 84**; **Amar Singh -Vrs.- Balwinder Singh : (2003) 2 SCC 518**; **Radha Mohan Singh -Vrs.- State of U.P. : (2006) 2 SCC 450**; and **Aqeel Ahmad -Vrs.- State of U.P.: AIR 2009 SC 1271**).

11. In **Radha Mohan Singh** (supra), a three judge bench of this Court held:

"11……No argument on the basis of an alleged discrepancy, overwriting, omission or contradiction in the inquest report can be entertained unless the attention of the author thereof is drawn to the said fact and he is given an opportunity to explain when he is examined as a witness in court." (Emphasis added)

12. Even where, the attention of the author of the inquest is drawn to the alleged discrepancy, overwriting, omission or contradiction in the inquest report and the author in his deposition has also admitted that through a mistake he omitted to mention the crime number in the inquest report, this Court has held that just because the author of the report had not been diligent did not mean that reliable and clinching evidence adduced by the eyewitnesses should be discarded by the Court. (Vide: **Krishna Pal (Dr.) -Vrs.- State of U.P. : (1996) 7 SCC 194**)."

It appears that P.W.2 Uday Chandra Pruseth has filled up the column no.9 of the inquest report Ext.P-4 and put his signature thereon and he is not an eye witness to any of the three murders. On receipt of phone call from P.W.4 Swapna Sahu regarding the murder of deceased Pirobati Behera and deceased Sabitri Sahu, P.W.2 came to village Lapada where he was apprised of the occurrence by his wife (P.W.1). He further stated to have heard from P.W.1 that the appellants were shouting that they had killed the deceased Giridhari Sahu and then he went to the paddy field and found the dead body of Giridhari lying there with injuries. Therefore, even though P.W.2 is a post-occurrence witness, mentioning the names of both the appellants in column no.9 to be the assailants of the deceased Giridhari by him on the basis of information supplied to him by his wife (P.W.1) cannot be ruled out particularly when he has stated that besides his wife (P.W.1), no other person had told him about the occurrence. No question has been put to P.W.2 as to how he mentioned the names of both the appellants in column no.9 of the inquest report as he was the best person to answer the same. Since P.W.5 has not made any such endorsement except signing at the end of the inquest report (Ext.P-4) and it was P.W.2 who had filled up column no.9, the same cannot be a ground to disbelieve the evidence of P.W.5 as an eye witness to the occurrence.

It is pertinent to note that though confrontation has been made to P.W.5 in the cross-examination by the learned defence counsel relating to his previous statement recorded under section 161 Cr.P.C. that he had not stated to have found the appellant Nabin Dehury giving blows after blows by means of a tangia to deceased Giridhari, but such contradiction has not been proved through the

Investigating Officer (P.W.20). In fact, in the interest of justice, when we perused the 161 Cr.P.C. statement of P.W.5 to know the correct state of affairs, we found that he had in fact stated to have seen the assault on the deceased Giridhari by the appellant Nabin Dehury with tangia repeatedly.

It is surprising as to how the learned trial Court allowed such confrontations to be made to P.W.5 by the learned defence counsel particularly when the statement under section 161 Cr.P.C. indicates P.W.5 to be an eye witness to the occurrence and that he has stated specifically about the assault on the deceased Giridhari Sahu by appellant Nabin Dehury with tangia repeatedly. The Public Prosecutor so also the learned trial Court is required to remain alert when the trial is being conducted particularly in a case of this nature. In the case of **Sister Mina Lalita Baruwa - Vrs.- State of Orissa and Ors. reported in (2013) 16 Supreme Court Cases 173**, it is held as follows:-

> "19. In criminal jurisprudence, while the offence is against the society, it is the unfortunate victim who is the actual sufferer and therefore, it is imperative for the State and the prosecution to ensure that no stone is left unturned. It is also the equal, if not more, duty and responsibility of the Court to be alive and alert in the course of trial of a criminal case and ensure that the evidence recorded in accordance with law reflect every bit of vital information placed before it. Neither the prosecution nor the Court should remain a silent spectator……"

Therefore, a trial Judge is not expected to be a mute spectator or a recording machine during trial. He has to be active and dynamic so that errors can be minimized and justice can be done to the parties concerned. He has to monitor the proceedings in the aid of justice. He has got power to put questions to the witnesses, either during chief examination or cross-examination or even during re-examination to elicit truth and check irrelevant questions to be put to the witnesses by the counsel as it is more often seen that the defence counsel adopt unnecessary lengthy cross-examination to impress the client and to play to the gallery and in that process, the valuable time of the Court is lost. Even if the Public Prosecutor is remiss or lethargic in some ways, the trial Court should control the proceedings effectively so that the ultimate objective, i.e. the truth is arrived at. Witnesses attend the Court to discharge the sacred duty of rendering aid to justice. When the Prosecutor or the defence counsel confront the previous statement of a witness to that witness which might have been recorded under section 161 Cr.P.C. or 164 Cr.P.C., it is nonetheless the duty of the Court to peruse such previous statement at the time of confrontation so that error is minimized.

Mr. Sarangi, learned Amicus Curiae argued that if P.W.5 had seen the occurrence of assault on deceased Giridhari and disclosed the same before P.W.1 and P.W.3, his name should have been mentioned in the F.I.R. as an eye witness to the occurrence as P.W.1 is the informant in the case and at least those two witnesses (P.W.1 and P.W.3) would have stated about the disclosure being made by P.W.5. According to him, the non-mention of the name of P.W.5 as an eye witness in the F.I.R. creates doubt that he has been subsequently planted as an eye witness. We are not able to accept such contention. It is rightly argued by Mr. Katikia, learned Addl.

Govt. Advocate that the F.I.R. is not an encyclopedia which must disclose all facts and details relating to the offence reported. Even if the information report does not furnish all the details, it is for the Investigating Officer to find out those details during the course of investigation and collect necessary evidence. The information disclosing commission of a cognizable offence only sets the law in motion and then it becomes the duty of the investigating machinery to collect necessary evidence and to take action in accordance with law. Omission on the part of the informant to mention the name of an eye witness in the F.I.R. cannot be a factor to hold that such witness was deposing falsehood and he has been subsequently planted as such. Similarly, the mention of a name of a person as eye witness is not a guarantee that he is a truthful witness. The learned trial Court is to assess the evidence of the witness in accordance with law and come to the conclusion whether in the factual scenario, a particular witness is a truthful one or not. It is also not expected from P.W.1 to remain in a stable mind and mention all the details in the F.I.R. including the names of eye witnesses within a short period after seeing the murder of two lady deceased who were closely related to her. P.W.1 and P.W.3 though have not stated about the disclosure being made by P.W.5 to corroborate the version of P.W.5, but the same cannot be a ground to doubt the veracity of P.W.5.

Where the statement of an eye witness is found to be reliable, trustworthy and consistent with the course of events, the conviction can be based on his sole testimony. There is no bar in basing the conviction of an accused on the testimony of a solitary witness as long as the said witness is reliable and trustworthy. Where there is a sole witness to the incident, his evidence has to be accepted with caution and after testing it on the touchstone of evidence tendered by other witnesses or evidence otherwise recorded.

After carefully considering the submission made from both the sides, we found that the version of P.W.5 is very clear, consistent and trustworthy and nothing has been brought out in the cross-examination to dislodge his testimony. Therefore, in our humble view, the learned trial Court has rightly placed reliance on his evidence.

Murder of deceased Pirobati Behera and Sabitri Sahu:

10. Three witnesses i.e. P.W.1, P.W.3 and P.W.4 have deposed about the assault on the deceased Pirobati Behera and Sabitri Sahu.

P.W.1, the informant has stated that while her mother Pirobati was pumping the tube well and her sister Sabitri was collecting water in a bottle, at that time both the appellants came there and appellant Nabin suddenly dealt a blow by means of a tangia on the neck of her mother and when her sister went to rescue her mother, appellant Hemananda restrained her sister by dragging her hairs. Appellant Nabin gave consecutively three to four blows on the neck of her mother and she died at the spot. Similarly, blows were given by means of tangia on different parts of the body of her sister by both the appellants and she also died at the spot and then both the appellants told loudly that they had killed the deceased Giridhari.

Though in the cross-examination, the learned defence counsel has tried to bring out some contradictions and accordingly, confronted the 161 Cr.P.C. statement through the Investigating Officer but such contradictions could not be proved as after perusal of the previous statement, the Investigating Officer categorically stated that there were no contradictions in the statement of P.W.1 given in Court vis-à-vis her statement recorded under section 161 Cr.P.C. In the interest of justice, we also perused the 161 Cr.P.C. statement of P.W.1 keeping side by side her evidence in Court and found that there are no such material contradictions in her evidence.

Law is well settled that if the statement before the police officer and the statement in the evidence before the Court are so inconsistent or if irreconcilable with each other that both of them cannot co-exist, it may be said that one contradicts the other. If the police record becomes suspect or unreliable on the ground that it was deliberately perfunctory or dishonest, it loses much of its value and the Court in judging the case of a particular accused has to weigh the evidence given against him in Court keeping in view the fact that the earlier statements of the witnesses as recorded by the police are tainted record and were not as great a value as it otherwise could have in weighing all the materials on record as against each individual accused. There are no materials on record that there was any kind of perfunctory investigation and in fact there are no material contradictions and we are of the view that it was neither proper on the part of the learned defence counsel to put such questions in the cross-examination which should have been objected to by the learned Public Prosecutor and the learned trial Court also should not have allowed such confrontations to be made to P.W.1 by the learned defence counsel.

Mr. Sarangi, learned Amicus Curiae contended that though in the F.I.R. as well as in the examination-in-chief, P.W.1 has stated that both the appellants assaulted the deceased Sabitri Sahu, but in the cross-examination, P.W.1 has stated that it was only appellant Nabin Dehury who assaulted the deceased Sabitri Sahu and the appellant Hemananda Dehury only restrained the deceased Sabitri when she was proceeding to rescue her mother deceased Pirobati who was assaulted first by appellant Nabin Dehury. Similarly, in the F.I.R., it is stated that both the appellants assaulted deceased Pirobati with ‘tangia’ whereas in Court, P.W.1 has stated that it was only appellant Nabin Dehury who assaulted the deceased Pirobati with tangia. According to Mr. Sarangi, such contradictions are not expected from a truthful witness, rather it suggests that P.W.1 has no idea as to who were the actual assailants of the deceased Pirobati and Sabitri and being a related witness, she implicated the appellants falsely.

We are not able to accept the contentions of the learned Amicus Curiae. The mere fact that a witness is related, the same would not by itself be sufficient to discard her evidence straightaway unless it is proved that the evidence suffers from serious infirmities which raises considerable doubt in the mind of the Court. A close relative who is a very natural witness cannot be regarded as an interested witness. Such witness would normally be most reluctant to spare the real assailants and falsely mention the name of an innocent person as the one responsible for causing

injuries to the deceased. A witness who is closely related and who could be expected to be near about the place of occurrence and could have seen the incident, cannot be held unreliable on the ground of his close relationship. Of course, it is incumbent on the part of the Court to exercise appropriate caution when appraising his evidence and to examine its probative value with reference to entire mosaic of facts appearing from the record. Even if it is found that a closely related witness has exaggerated his version which he had not stated previously to the police or even to the Magistrate in his statements recorded either under section 161 or under section 164 Cr.P.C., but the Court after examining such evidence with great care and caution has a duty to separate the grain from the chaff and to extract the truth from the mass of evidence. After separating the chaff, the Court can seek further corroboration from reliable testimony, direct or circumstantial in cases where the evidence is partly reliable and partly unreliable.

P.W.1 has no doubt stated in the F.I.R. that both the appellants assaulted the deceased Pirobati Behera by means of 'tangia'. However, in her evidence in Court, she has stated that it was only appellant Nabin Dehury who dealt blows on the neck of the deceased Pirobati by means of a tangia. F.I.R. is not considered as a substantive piece of evidence. It can only be used to corroborate or contradict the informant or as a previous statement. P.W.1 has not been confronted with the recital in the F.I.R. with respect to the assault on the deceased Pirobati, particularly with reference to the inclusion of the name of appellant Hemananda as an assailant of deceased Pirobati in the F.I.R. which has been omitted in the evidence in Court. Therefore, we cannot give much emphasis on such omission in Court relating to the assault made by the appellant Hemananda to deceased Pirobati.

As it appears from the cross-examination of P.W.1, she had seen the occurrence from a distance of 20 cubits. She specifically stated that she had read up to Class-X and since she was in shock and was trembling, she could not scribe the F.I.R. and requested P.W.8 to scribe the same.

So far as the contention of Mr. Sarangi, learned Amicus Curiae that P.W.1 could have raised hullah then and there drawing the attention of the co-villagers to come forward and rescue the two deceased persons from the assault of the appellants, we are of the humble view that the assault on both the deceased took place in quick succession and it must have taken a very little time and it was afternoon around 3 O'clock and therefore, it was not expected for most of the villagers to be on the village street. Moreover, P.W.1 has stated that after seeing the assault, out of fear, she along with P.W.3 and P.W.4 entered inside the house and closed the door, which was very natural as she might have apprehended that after killing three persons of the family, the appellants might proceed towards her house to assault her as well as P.W.3 and P.W.4, who were just aged about thirteen years and seven years respectively. P.W.1 has categorically stated that at the time of incident, no other person was present near her house. She further stated that after closing the door, they raised hullah for which the villagers came to the spot and when the villagers came, she came outside and narrated the entire incident before the villagers.

In the case of **A. Shankar** (supra), it is held as follows:-

"22. In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about the truthfulness of the witness and other witnesses also make material improvement while deposing in the court, such evidence cannot be safe to rely upon. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety.

23. The court has to form its opinion about the credibility of the witness and record a finding as to whether his deposition inspires confidence. "Exaggerations per se do not render the evidence brittle. But it can be one of the factors to test credibility of the prosecution version, when the entire evidence is put in a crucible for being tested on the touchstone of credibility." Therefore, mere marginal variations in the statements of a witness cannot be dubbed as improvements as the same may be elaborations of the statement made by the witness earlier. "*Irrelevant details which do not in any way corrode the credibility of a witness cannot be labelled as omissions or contradictions*." The omissions which amount to contradictions in material particulars, i.e., materially affect the trial or core of the prosecution's case, render the testimony of the witness liable to be discredited.

In the case of **Krishnegowda and Ors.** (supra), it is held as follows:-

"27. Generally in the criminal cases, discrepancies in the evidence of witness is bound to happen because there would be considerable gap between the date of incident and the time of deposing evidence before the Court, but if these contradictions create such serious doubt in the mind of the Court about the truthfulness of the witnesses and it appears to the Court that there is clear improvement, then it is not safe to rely on such evidence."

We are of the humble view that even if there are some minor contradictions in the evidence of P.W.1 as adduced during trial vis-à-vis what she had narrated in the F.I.R. relating to the involvement of appellant Hemananda Dehury in the assault of both the deceased Pirobati and Sabitri, but since the attention of P.W.1 has not been drawn to such parts available in the F.I.R. to explain and moreover, the evidence of P.W.1 is found to be very natural, clear and cogent, the learned trial Court has rightly placed reliance on the evidence of P.W.1.

11. P.W.3 Sachin Sahoo has stated in the examination-in-chief that while his grandmother (deceased Pirobati) was pumping the tube well and his mother (deceased Sabitri) was collecting water in a bottle to take to the field, at that time both the appellants came to that place and appellant Nabin was holding a 'tangia' and he dealt blows to deceased Pirobati and when deceased Sabitri went to protest him, appellant Hemananda Dehury restrained her by dragging her hair and appellant Nabin also assaulted the deceased Sabitri by means of a 'tangia' and at that time, appellant Nabin Dehury was telling loudly that they had also killed 'Kirmiria' (deceased Giridhari). He further stated that out of fear, his mausi (P.W.1) took him and P.W.4 inside the house and closed the door and when they raised hullah, many villagers congregated at the spot.

In the cross-examination, it has been confronted to P.W.3 and proved through the I.O. (P.W.20) that he had not made any statement that while the deceased Sabitri went to rescue the deceased Pirobati, the appellant Hemananda dragged her hair and did not allow to proceed. In fact, in the 161 Cr.P.C. statement, P.W.3 has stated that after the assault on the deceased Pirobati, while his mother (deceased Sabitri) was proceeding to rescue, appellant Hemananda restrained her. The words used 'chheki dela', is a local word which as per 'Saraswata Odia Bhasha Abhidhan' means 'atakaiba', in other words 'restrained'. Of course the manner in which the restrain was made is not mentioned in the 161 Cr.P.C. statement, which is there in the evidence in Court, but the same may be on account of non-extracting the details by the I.O. while recording the statement of the concerned witness or may be elaborately describing the occurrence in Court. P.W.3 further stated that no outsider was present when the assault took place. He specifically stated that the appellant Hemananda was not armed with any weapon and he had not assaulted anyone. However, he was assisting his father (appellant Nabin).

A peculiar suggestion has been given by the learned defence counsel to P.W.3 that his father (deceased Giridhari) died during fighting of bullocks as the horn of the bullocks pierced inside his body and that his mother (deceased Sabitri) and maternal grandmother (deceased Pirobati) died by coming in contact with harvesting machine. Neither any such suggestion has been given to P.W.1 nor has any such plea been taken in the accused statement of both the appellants.

In view of the foregoing discussions, we find P.W.3 to be a reliable and trustworthy witness and we are of the view that the learned trial Court has rightly placed reliance on his evidence.

12. P.W.4 Swapna Sahoo has stated in her examination-in-chief that while her grandmother (deceased Pirobati) was pumping the tube well and his mother (deceased Sabitri) was collecting water in a bottle, appellant Nabin Dehury came and dealt a blow on the head of deceased Pirobati by means of a 'budia', for which she fell down on the ground and then he dealt three blows on her neck. She further stated that when her mother (deceased Sabitri) went to the rescue of deceased Pirobati, appellant Hemananda @ Mantu restrained deceased Sabitri by dragging her hairs and appellant Nabin assaulted her mother (deceased Sabitri) by means of 'budia'. She further stated that she herself along with her aunt (P.W.1) and brother (P.W.3) saw the occurrence standing near their door and while she was trying to proceed to her mother (deceased Sabitri), P.W.1 restrained her and took her and P.W.3 inside the house and closed the door. She further stated that when they raised hullah, hearing the same, some villagers came to the spot.

In the cross-examination, it has been confronted to P.W.4 and proved through the I.O. (P.W.20) that she had not specifically stated in the 161 Cr.P.C. statement that appellant Nabin dealt three blows on the neck of the deceased Pirobati, the appellant Hemananda @ Mantu dragged the hair of her mother. After verification of the 161 Cr.P.C. statement of P.W.4, we found that though she had stated about the assault made by appellant Nabin Dehury on deceased Pirobati with

'tangia', but the number of blows has not been stated by her. Similarly, she has also stated in the 161 Cr.P.C. statement that appellant Hemananda @ Mantu restrained deceased Sabitri when she came forward to rescue her mother (local language used as 'chheki dela', which means 'obstructed'/'restrained'), of course the manner of restrain by holding the hairs has not been stated in the 161 Cr.P.C. statement.

P.W.4 specifically stated in the cross-examination that the appellant Hemananda was not armed with any weapon and no assault was given by appellant Hemananda and he had only restrained the deceased Sabitri. Thus, we find the evidence of P.W.4 to be clear, cogent and trustworthy and it also corroborates the evidence of P.W.1 as well as P.W.3.

In view of the discussions of the evidence of P.W.1, P.W.3 and P.W.4, we are of the view that their evidence relating to the assault on deceased Pirobati Behera and Sabitri Sahu by both the appellants are reliable and there are no such major contradictions so as to create doubts in their evidence and the learned trial Court has rightly placed reliance on their evidence.

Premeditation on the part of appellant Nabin Dehury to commit the crime:

13. It appears from the evidence on record that there was civil dispute between the parties. P.W.3 has stated that there was a long-standing dispute between his maternal uncle's family and family of the appellants relating to their landed properties. P.W.5 has also stated that there was land dispute between both the parties since long and two to three civil suits were instituted in which deceased Pirobati got the decree.

Specific details of premeditation can be established from the following facts:-

(i) The appellant carried/chose a weapon of offence which was heavy and deadly in nature and commonly carried by villagers for agricultural purposes. He carried tangia to the paddy field and assaulted the deceased Giridhari Sahu and caused multiple chop wounds on the left scapula, base of his neck at cervical vertebrae, left temporal lobe of head and left side neck.

(ii) Calculation was so imminently found in the mind of the appellant Nabin Dehury that he took the opportunity to confront Giridhari when he was alone and did not give the blow from the front, so as to render any opportunity to the deceased to have any kind of protection from the blow since the blow was given from behind. The blow was at the cervical vertebra at no.6 level i.e. posterior base of the neck. The part of the body chosen for inflicting the blows is so conspicuously decided that even a single blow would be fatal whereas the appellant Nabin Dehury has given successive blows to rule out any possibility of survival of the deceased;

(iii) After doing away with the life of a male member of the family, the evidence on record suggests that appellant Nabin Dehury walked about 700 meters to the village before committing the next two murders of deceased Pirobati Behera and Sabitri Sahu, which indicates a degree of deliberation and planning and again caught them off-guard to avoid the possibility of any defence. No sooner appellant Nabin Dehury came across deceased Pirobati Behera at the tube well point, he dealt severe tangia blows on the back of the neck at cervical vertebra No. 4 while she was quite helpless and was not in a

position to ward off the blow. Responding to such act of appellant Nabin Dehury, when her daughter deceased Sabitri Sahu rushed to her rescue, appellant Hemananda Dehury caught hold of her by her hair while appellant Nabin Dehury dealt several blows to deceased Sabitri on the right cheek, left cheek and right side of neck to end her life. This prolonged journey and the subsequent actions suggest that appellant Nabin Dehury had time to reflect, thereby potentially aggravating the nature of the offence;

(iv) Furthermore, it is established by the testimony of P.W.5 that the appellant Nabin Dehury was annoyed and wanted to kill deceased Pirobati since she had got favourable decrees in disputes relating to the ancestral property, which the appellant believed was by deceitful means and on many occasions, he was telling to kill the deceased Pirobati Behera, which proves the motive behind commission of the crime.

Therefore, we are of the view that there was premeditation on the part of appellant Nabin Dehury to commit the crime.

Declaration made by Appellant Nabin Dehury:

14. The appellant Nabin Dehury made a significant declaration immediately after committing the murders of deceased Pirobati Behera and Sabitri Sahu that he committed murder of deceased Giridhari Sahu. This declaration provides crucial insight into his state of mind and the motivations behind his actions. Not only in the F.I.R. but also in the evidence of P.W.1, P.W.3 and P.W.4, this aspect finds place. By openly admitting the crime committed, appellant Nabin Dehury confirmed his responsibility for the deaths, eliminating any ambiguity regarding the identity of the perpetrator and thereby strengthening the prosecution case. The declaration made by the appellant Nabin Dehury to have killed deceased Giridhari Sahu was only intended to take credit for the execution of his plan. Though P.W.3 and P.W.4 have stated that it was only appellant Nabin Dehury, who made such declaration but P.W.1 stated that both the appellants made such declaration.

Different persons seeing an event give varying accounts of the same. That is because the perceptiveness varies and a recount of the same incident is usually at variance to a considerable extent. Ordinarily, if several persons give the same account of an event, even with reference to minor details, the evidence is branded as parrot like and is considered to be the outcome of tutoring. Discrepancies in the matter of details pertaining to precise number of blows given by the appellant, the nature of weapon used particularly when the weapons are almost similar used to occur even in the evidence of truthful witnesses. Such variations creeped in because they are always natural differences in the mental faculty of different individuals in the matters of observation, perception and memorization of truth. These hardly constitute grounds for rejecting the evidence of the witnesses when there is consensus as to the substratum of the case.

Seizure of tangia at the instance of appellant Nabin Dehury:

15. P.W.12 is an independent witness and he has stated that appellant Nabin Dehury, while in police custody, disclosed to have concealed the tangia under a straw heap in his courtyard. The said statement was reduced to writing by the I.I.C. and signature of the appellant Nabin Dehury was obtained thereon and he along with

Parameswar Khadia (P.W.13) signed thereon as witnesses. He further stated that appellant Nabin led the police and the witnesses to his house and removed a 'tangia' from inside the straw heap which was in his inner courtyard. There was mark of blood stain on that tangia and female hair was also found from the weapon. The I.I.C. seized the same by preparing a seizure list in which he along with P.W.13 put their signatures. He further stated that the appellant Nabin Dehury also signed the seizure list. The seized 'tangia' was also identified by P.W.12 in Court and the same has been marked as M.O.I. Except giving some suggestions, nothing has been brought out in the cross-examination of P.W.12 to disbelieve his evidence.

The evidence of P.W.12 gets corroboration from the evidence of P.W.13 so also the I.O. (P.W.20) who specifically stated that on 22.10.2020 after recording the statement under section 27 of the Evidence Act vide Ext.P-14, the appellant Nabin led herself as well as the witnesses to his house and brought out the weapon of offence from the straw heap over the verandah of his house and accordingly, the seizure list vide Ext.P-15 was prepared. The weapon was also produced before the doctor (P.W.6) for obtaining his opinion regarding possibility of the injuries on the deceased by such weapon and it was sent to D.F.S.L, Sambalpur on 23.10.2020 so also to R.F.S.L., Sambalpur on 09.11.2020 through learned S.D.J.M., Kuchinda along with other material objects for chemical analysis. As per the C.E. report marked as Ext.P-31, human origin blood was found from the tangia.

Mr. Sarangi, learned Amicus Curiae argued that seizure of 'tangia' was made on 22.10.2020 and it was examined by P.W.6 on 03.11.2020. However, it was sent for chemical examination on 09.11.2020. No evidence has been adduced as to where it was kept after its seizure and therefore, no importance can be attached to the findings of human origin blood on the 'tangia'.

It was no doubt the duty of the prosecution to adduce clinching evidence that the weapon of offence after its seizure and before it was produced in Court for being sent for chemical analysis, was kept in safe custody and there was no tampering with the same. However, neither the prosecution nor the defence has put any question on this aspect to the Investigating Officer. The weapon was seized on 22.10.2020, it was produced before the Scientific Officer at D.F.S.L., Sambalpur on 23.10.2020 who examined on the same and prepared the report vide Ext.P-13 and then dried, sealed, packed all the exhibits including tangia properly and handed over to the I.O. on 24.10.2020 and then it was produced before the doctor (P.W.6) on 03.11.2020 for necessary examination and then it was produced before the Court of learned S.D.J.M., Kuchinda on 09.11.2020 for being sent to Deputy Director, R.F.S.L., Sambalpur for chemical examination and opinion. Therefore, any irregularity committed by the prosecution in bringing material on record regarding the safe custody of the exhibits including the tangia cannot be a factor to disbelieve the evidence of leading to discovery of the weapon, the opinion given by the doctor (P.W.6) so also the findings recorded in the serology report, particularly when the tangia was produced in a cardboard box covered with cloth, which was in a sealed condition and it was forwarded to R.F.S.L. with the seal of the Court.

Whether F.I.R. was lodged at the time when it was shown to have been lodged?

16. The F.I.R. (Ext.P-1) is shown to have been presented by P.W.1 on 21.10.2020 at 4.20 p.m. before I.I.C., Mahulpali police station at the spot and it was registered as Mahulpali P.S. Case No.175 dated 22.10.2020 at 1.28 a.m.

P.W.1 has stated that she presented the written report at the spot to the police after the police arrived at the spot getting information and as per her statement, the report was written by Kalyan Behera (P.W.8), who read over the contents thereof to her and finding the same to be true and correct, she put her signature in it. In the cross-examination, P.W.1 has admitted that there was no endorsement in Ext.P-1 that the contents thereof were read over and explained to her and admitting the same to be true and correct, she put her signature. She further stated that she had read up to Class-X and since she was in shock and was trembling, she could not scribe the F.I.R. and requested P.W.8 to scribe the same.

P.W.8 has stated that as per the request of P.W.1, he scribed the F.I.R. (Ext.P-1). In the cross-examination, he has stated that after scribing the F.I.R., the contents thereof were read over and explained to P.W.1 and thereafter she put her signature. He admitted not to have given any endorsement to that effect.

Mr. Sarangi, learned Amicus Curiae for the appellants submitted that according to P.W.8, while he was in his elder sister's house at Kirmira, phone call came to his sister in between 3.30 p.m. to 4.00 p.m. on 21.10.2020 intimating the death of three deceased and after about ten minutes of receipt of the phone call, they left for village Lapada in a Bolero vehicle which was at a distance of 50 kms. from village Kirmira and they reached at village Lapada at around 5.00 p.m. to 5.15 p.m. He further stated that the F.I.R. was submitted to the I.I.C. by P.W.1 at the spot. Around 5.20 p.m., P.W.1 told him that the accused persons killed the deceased Giridhari and the F.I.R. was scribed before 6.00 p.m.

It is the contention of the learned Amicus Curiae that when P.W.8 reached in between 5.00 p.m. to 5.15 p.m. and then at about 5.20 p.m., on the oral information given by P.W.1, he prepared the written report before 6.00 p.m., the endorsement given in the F.I.R. that it was received at the spot at 4.20 p.m. cannot be accepted. Therefore, the time of receipt reflected in the F.I.R. is not correct and it has been ante-timed.

The learned Additional Government Advocate has placed the evidence of the I.O. (P.W.20) who has stated that while she was on patrolling duty with the staff on 21.10.2020, at about 3.10 p.m., she received telephonic information from one unknown person regarding the commission of murder of three persons at village Lapada and accordingly, she reduced the same in writing in Mahulipali P.S. G.D. No.14 dated 21.10.2020 and proceeded to village Lapada with staff where P.W.1 presented the written report before her. She immediately took up investigation of the case and after she returned to the police station, at 1.28 a.m. on 22.10.2020, she registered the F.I.R. as Mahulpali P.S. Case No.175 dated 22.10.2020 under section 302/34 of the I.P.C. In the cross-examination, she stated to have reached at the spot

before 4.20 p.m. No further question has been put to P.W.20 regarding the timing of receipt of the written report from P.W.1. The endorsement given in the written report vide Ext.P-1 reads as follows:-

"At spot 4.20 p.m. 21.10.2020	Received the report at spot. As it reveals a cog. case u/s.302/34 I.P.C., registered a case vide Mahulpali P.S. S.D.E. No.14 and self took up investigation of the case. A copy of F.I.R. will be supplied to the complt. free of cost. Sd/- (Illegible) 21.10.2020 I.I.C., Mahulpali P.S."

P.W.20 started investigation of the case after receipt of the written report vide Ext.P-1 at the spot from P.W.1 and by that time, P.S. Case had not been registered. The three dead bodies were lying in the village Lapada and inquests were conducted and then the dead bodies were dispatched to S.D.H., Kuchinda for post-mortem examination. The three inquest reports marked as Ext.P-2, Ext.P-3 and Ext.P-4 indicates Mahulpali P.S. S.D.E. No.14 dated 21.10.2020. Similarly, the dead body challans, Exts.P-22, P-23 and P-24 also indicate the same S.D.E. No.14 dated 21.10.2020.

In our humble view, P.W.20 is quite justified in carrying out the investigation of the case on receipt of the written report at the spot without waiting for formal registration of the F.I.R. in the police station inasmuch as it was a case of triple murder and immediate action was required to be taken in holding inquest over the dead bodies and taking steps for sending the same for post-mortem examination. The place of occurrence was at a distance of 18 kms. away from Mahulpali police station as per the formal F.I.R. and if P.W.20 would have waited for the registration of the F.I.R. by sending the written report to the police station and then to carry out investigation, it would have delayed the process of investigation.

Therefore, we are of the view that the F.I.R. has not been ante-timed and it was lodged when it was shown to have been lodged.

Common intention on the part of appellant Hemananda Dehury:

17. The learned Amicus Curiae contended that the appellant Hemananda Dehury should not have been held guilty under section 302/34 of the I.P.C. on the accusation that he shared common intention with the appellant Nabin Dehury. He argued that appellant Hemananda was not there at all when the assault on the deceased Giridhari took place

According to P.W.1, both the appellants came and appellant Nabin dealt a blow by means of a tangia on the neck of deceased Pirobati and seeing this, when the deceased Sabitri went to her rescue, appellant Hemananda restrained deceased Sabitri by dragging her hair. She further stated that the appellant Nabin gave consecutive three to four blows on the neck of deceased Pirobati for which she died

at the spot and both the appellants restrained deceased Sabitri and went on giving blows by means of tangia on different parts of her body for which she died at the spot and the appellants were telling loudly that they had killed the deceased Giridhari.

In the cross-examination, P.W.1 has stated that she could not say whether appellant Hemananda was armed with any weapon but appellant Nabin Dehury was holding a tangia. She further stated that while appellant Nabin was assaulting, appellant Hemananda was holding the deceased Sabitri.

P.W.3 Sachin Sahu has stated that both the appellants came to the place where deceased Pirobati was pumping tube well and deceased Sabitri was collecting water in a bottle. He stated that appellant Nabin was holding a tangia and dealt blows to the deceased Pirobati and when deceased Sabitri went to protest appellant Nabin, appellant Hemananda Dehury restrained her by dragging her hair and appellant Nabin also assaulted deceased Sabitri by means of tangia. He further stated that appellant Nabin was telling loudly that they had killed deceased Giridhari, who is otherwise known as 'Kirmiria'.

In the cross-examination, P.W.3 has further stated that the appellant Hemananda was not armed with any weapon and no assault was also given by him but he was assisting appellant Nabin.

P.W.4 has stated that while deceased Pirobati was pumping the tube well and deceased Sabitri was pouring water in bottle, appellant Nabin Dehury came and dealt a blow on the head of deceased Pirobati by means of a budia for which the latter fell down on the ground. When the deceased Sabitri went to rescue deceased Pirobati, appellant Hemananda restrained her by dragging her hair and appellant Nabin assaulted by means of budia.

P.W.4 has stated in the cross-examination that the appellant Hemananda was not armed with any weapon and no assault was given by appellant Hemananda and he had only restrained the deceased Sabitri.

From the evidence on record, it is evident that the appellant Hemananda was not present when the assault on deceased Giridhari took place near the cultivable land. He came to the second spot which was the tube well of the village with his father appellant Nabin Dehury where the two lady deceased were collecting water. He was not armed with any weapon nor assaulted any of the two lady deceased as per the evidence of P.W.3 and P.W.4 except restraining the deceased Sabitri when she proceeded to save her mother. Though the evidence of P.W.1 in the examination-in-chief is that both the appellants gave blows by means of tangia not only to deceased Pirobati but also to deceased Sabitri, but in view of the evidence of P.W.3 and P.W.4, the same cannot be accepted. At this stage, the decisions cited by the learned Amicus Curiae needs to be discussed.

In the case of **Idrish Bhai Daudbhai** (supra), it is held that what would form a common intention is now well settled. It implies acting in concert, existence of a pre-arranged plan which is to be proved either from conduct or from circumstances or from any incriminating facts.

In the case of **Tapan Sarkar and Ors.** (supra), it is held that the strained relations in the family and giving of evasive replies, by itself, cannot be considered to be a safe and sound basis to arrive at the required inference so as to attract the principle laid down in section 34 Indian Penal Code. The inference of common intention must be based on more tangible material so as to hold all the accused-Appellants to be jointly and vicariously liable for the crime committed. It is possible that one of the accused had committed the crime but in the absence of evidence to draw an inference of common intention, none of the accused can be held liable.

In the case of **Jasdeep Singh** (supra), it is held as follows:-

"20. Section 34 Indian Penal Code creates a deeming fiction by infusing and importing a criminal act constituting an offence committed by one, into others, in pursuance to a common intention. Onus is on the prosecution to prove the common intention to the satisfaction of the court. The quality of evidence will have to be substantial, concrete, definite and clear. When a part of evidence produced by the prosecution to bring the Accused within the fold of Section 34 Indian Penal Code is disbelieved, the remaining part will have to be examined with adequate care and caution, as we are dealing with a case of vicarious liability fastened on the accused by treating him on a par with the one who actually committed the offence.

21. What is required is the proof of common intention. Thus, there may be an offence without common intention, in which case Section 34 Indian Penal Code does not get attracted.

22. It is a team effort akin to a game of football involving several positions manned by many, such as defender, mid-fielder, striker, and a keeper. A striker may hit the target, while a keeper may stop an attack. The consequence of the match, either a win or a loss, is borne by all the players, though they may have their distinct roles. A goal scored or saved may be the final act, but the result is what matters. As against the specific individuals who had impacted more, the result is shared between the players. The same logic is the foundation of Section 34 Indian Penal Code which creates shared liability on those who shared the common intention to commit the crime.

23. The intendment of Section 34 Indian Penal Code is to remove the difficulties in distinguishing the acts of individual members of a party, acting in furtherance of a common intention. There has to be a simultaneous conscious mind of the persons participating in the criminal action of bringing about a particular result. A common intention qua its existence is a question of fact and also requires an act "in furtherance of the said intention". One need not search for a concrete evidence, as it is for the court to come to a conclusion on a cumulative assessment. It is only a Rule of evidence and thus does not create any substantive offense.

24. Normally, in an offense committed physically, the presence of an accused charged under Section 34 Indian Penal Code is required, especially in a case where the act attributed to the accused is one of instigation/exhortation. However, there are exceptions, in particular, when an offence consists of diverse acts done at different times and places. Therefore, it has to be seen on a case to case basis.

25. The word "furtherance" indicates the existence of aid or assistance in producing an effect in future. Thus, it has to be construed as an advancement or promotion.

26. There may be cases where all acts, in general, would not come under the purview of Section 34 Indian Penal Code, but only those done in furtherance of the common intention having adequate connectivity. When we speak of intention, it has to be one of

> criminality with adequacy of knowledge of any existing fact necessary for the proposed offence. Such an intention is meant to assist, encourage, promote and facilitate the commission of a crime with the requisite knowledge as aforesaid.
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> 27. The existence of common intention is obviously the duty of the prosecution to prove. However, a court has to analyse and assess the evidence before implicating a person under Section 34 Indian Penal Code. A mere common intention per se may not attract Section 34 Indian Penal Code, sans an action in furtherance. There may also be cases where a person despite being an active participant in forming a common intention to commit a crime, may actually withdraw from it later. Of course, this is also one of the facts for the consideration of the court. Further, the fact that all accused charged with an offence read with Section 34 Indian Penal Code are present at the commission of the crime, without dissuading themselves or others might well be a relevant circumstance, provided a prior common intention is duly proved. Once again, this is an aspect which is required to be looked into by the court on the evidence placed before it. It may not be required on the part of the defence to specifically raise such a plea in a case where adequate evidence is available before the court."

According to Mr. Sarangi, learned Amicus Curiae, there is no evidence on record that the appellant Hemananda continued to hold the deceased Sabitri while she was being assaulted by the appellant Nabin or in other words, there is lack of clinching evidence that on account of holding the hairs, the assault on the deceased Sabitri was made possible and therefore, his mere presence at the spot or act of restraining deceased Sabitri cannot be a factor to hold him guilty with the aid of section 34 of I.P.C.

Mr. Katikia, learned counsel for the State submitted that not only the two appellants came together but they also left the place together and the appellant Hemananda never tried to restrain his father (appellant Nabin) in assaulting the two ladies and in view of the presence of appellant Hemananda at the spot, it might have given passive support or courage to the appellant Nabin to commit such crime in killing two lady deceased and therefore, the finding of the learned trial Court that the appellant Hemananda shared common intention with his father appellant Nabin is quite justified.

Learned counsel for the State relied upon the decisions of the Hon'ble Supreme Court in the cases of **Ajay Kumar Das -Vrs.- State of Jharkhand reported in (2011) 12 Supreme Court Cases 319** and **Ramesh Singh -Vrs.- State of A.P. reported in (2004) 11 Supreme Court Cases 305** to elucidate the pre-condition needed to press in section 34 I.P.C. into service.

In **Ajay Kumar Das** (supra), the Hon'ble Supreme Court relied upon the decision in the case of **Mahbub Shah -Vrs.- King Emperor : (1944-45) 72 IA 148**, wherein it was held that to invoke the aid of Section 34 I.P.C. exclusively, it must be shown that the criminal act complained against was done by one of the accused persons in furtherance of the common intention of all and if that is shown then the liability for the crime may be imposed on any one of the persons in the same manner as if the acts were done by him alone. It was further held that it is difficult, if not impossible, to procure direct evidence to prove the intention of an individual; in most cases it has to be inferred from his act or conduct or other relevant circumstances of the case.

In **Ramesh Singh** (supra), the Hon'ble Supreme Court explained the ambit of section 34 I.P.C. in the following words:

> "12. To appreciate the arguments advanced on behalf of the appellants, it is necessary to understand the object of incorporating Section 34 in the Penal Code, 1860. As a general principle in a case of criminal liability, it is the primary responsibility of the person who actually commits the offence and only that person who has committed the crime can be held guilty. By introducing Section 34 in the Penal Code, the legislature laid down the principle of joint liability in doing a criminal act. The essence of that liability is to be found in the existence of a common intention connecting the accused leading to the doing of a criminal act in furtherance of such intention. Thus, if the act is the result of a common intention then every person who did the criminal act with that common intention would be responsible for the offence committed irrespective of the share which he had in its perpetration. Section 34 I.P.C. embodies the principle of joint liability in doing the criminal act based on a common intention. Common intention essentially being a state of mind, it is very difficult to procure direct evidence to prove such intention. Therefore, in most cases, it has to be inferred from the act like, the conduct of the accused or other relevant circumstances of the case. The inference can be gathered from the manner in which the accused arrived at the scene and mounted the attack, the determination and concert with which the attack was made, and from the nature of injury caused by one or some of them. The contributory acts of the persons who are not responsible for the injury can further be inferred from the subsequent conduct after the attack. In this regard, even an illegal omission on the part of such accused can indicate the sharing of common intention. In other words, the totality of circumstances must be taken into consideration in arriving at the conclusion whether the accused had the common intention to commit an offence of which they could be convicted.
>
> xxx xxx xxx
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> 16. A-2 is the person in this case who had the grievance that the deceased prevented him from collecting the "bhajan samagri" (prayer material) for the use at the funeral of his relative. It is the case of the prosecution that all the accused persons came together to the place of incident at 11 o'clock to demand the "bhajan samagri". The fact that A-1 and A-3 who were not concerned with the need of A-2 to collect the "bhajan samagri", still came together at that time of the night i.e. at 11 p.m. shows that A-1 and A-3 were associates of A-2. After failing to get the "samagri", all the three went together presumably to the house of A-2 at 11.45 p.m. Again these three persons came to the house of the deceased which act cannot be termed as a normal act because by that time most of the people including the deceased would have been or had been sleeping. When these accused persons summoned the deceased to come out of the house, obviously they had some common intention which their second visit, timing of the visit and calling of the deceased indicates. Once the prosecution evidence tendered through P.Ws. 1 to 3 is accepted, then it is clear that when A-2 and A-3 held the hands of the deceased, they had some intention in disabling the deceased. This inference is possible to be drawn because the appellants in their statement recorded under Section 313 Cr.P.C. did not give any explanation why they held the hands of the deceased which indicates that the appellants had the knowledge that A-1 was to assault the deceased. The fact that the appellants continued to hold the deceased all along without making any effort to prevent A-1 from further attacking, in our opinion, leads to an irresistible and an inescapable conclusion that these accused persons also shared the common intention with A-1. In these circumstances, what was the intention of A-1 is clear from the nature of weapon used and the situs of the attack which were all in the area of chest, penetrating deep inside and which caused the death of the deceased. It is very difficult to accept the defence

> version that the fight either took place suddenly, or these appellants did not know that A-1 was carrying a knife, or that these appellants did not know by the nature of injuries inflicted by A-1, that he did intend to kill the deceased. At this stage, it may be useful to note that A-1 did not have any motive, apart from common intention to attack the deceased. In such circumstances, if A-1 had decided to cause the injury and A-2 who had a direct motive had decided to hold the hands of the deceased with A-3, in our opinion, clearly indicates that there was a prior concert as to the attack on the deceased. We also notice that thereafter the accused persons had all left the place of incident together which also indicates the existence of a common intention.
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> 17. Having thus independently considered the facts and circumstances in their totality and taking holistic view of the facts of this case, we are of the opinion that the two courts below are justified in coming to the conclusion that the appellants are guilty of an offence punishable under Section 302 read with Section 34 IPC."

From thorough analysis of the evidence of the witnesses and the authoritative findings in the aforesaid precedents, we find that even though there is no evidence on record that the appellant Hemananda Dehury was present when the assault on deceased Giridhari took place, but he joined his father somewhere on the way while the latter was coming to the second spot holding a blood stained tangia. He could have prevented his father not to assault the two lady deceased which he had not done. His presence with his father must have given passive support to commit the crime. He was not a mere observer at the spot, but restrained the deceased Sabitri from rescuing her mother. P.W.1 has stated that while appellant Nabin was assaulting, appellant Hemananda was holding deceased Sabitri. P.W.3 has stated that when his mother went to protest appellant Nabin, appellant Hemananda restrained her by dragging her hair and appellant Nabin also assaulted his mother. P.W.4 has also stated in similar manner like P.W.3. Three chop wounds were noticed over right cheek in front of right ear and left cheek and right side of neck of deceased Sabitri which probablises that all the assault on the front side of the head were made possible as appellant Hemananda continued to hold her hairs and restrained her movement. He left the spot with his father after commission of the crime. The contributory acts of the appellant Hemananda are no less significant. He had adequate knowledge what offence his father is likely to commit. His presence, his support, his overt act are sufficient to hold that he shared common intention with his father in the assault of the deceased Pirobati Behera and deceased Sabitri Sahu. The learned trial Court has rightly found both the appellants guilty under sections 302/34 of the I.P.C. and also sentenced appellant Hemananda Dehury to life imprisonment taking into account the fact that his role was lesser than that of his father, who directly assaulted all the three deceased by 'tangia' and caused their death.

Death Sentence on Appellant Nabin Dehury:

18. Appellant Nabin Dehury was found guilty of committing triple murder of deceased Giridhari Sahu, Pirobati Behera and Sabitri Sahu and sentenced to death with a further direction that he be hanged by neck till he is dead.

The learned trial Court after convicting the appellant although fixed a separate date for hearing to decide on the quantum of sentence, but it found to have focussed extensively on the aggravating circumstances. The reasons given by the learned trial Court for awarding the sentence of death is that the case against Nabin Dehury is an act of extreme brutality and magnitude of the cruelty thrust in committing the crime bringing it to the category of 'rarest of rare' case.

It is thus clear that the mitigating circumstances, if any in favour of the appellant, has not been taken into consideration. A mitigating circumstance is a factor that lessens the severity of an act or culpability of the accused for his action. If the mitigating circumstances outweigh the aggravating circumstances, the Judge is likely to be less aggressive in the ruling/sentencing.

As per order dated 21.06.2024, during course of argument, this Court while delving into the impugned judgment, when found that there was no endeavour on the part of the learned trial Court to find out mitigating circumstances in respect of the appellant, taking into account the observations made by the Hon'ble Supreme Court in the case of **Sundar @ Sundar Rajan -Vrs.- State of Inspector of Police reported in 2023 Live Law (SC) 217 : 2023 SCC OnLine SC 310** and also the decision rendered by the Hon'ble Supreme Court in the case of **Manoj & others - Vrs.- State of Madhya Pradesh reported in (2023) 2 Supreme Court Cases 353**, held that for a purposeful and meaningful hearing on sentence, the appellant Nabin Dehury should be afforded an opportunity inviting from him such data to be furnished in the shape of affidavits and also to direct the jail authorities to do the needful in that regard. Accordingly, we directed the Senior Superintendent, Circle Jail at Sambalpur to collect all such information on the past life of the appellant, psychological condition of the appellant and also his post-conviction conduct, obtaining reports by taking service and assistance from the Probation Officer and such other officers including a Psychologist or Jail Doctor or any Medical Officer attending the prison and since the appellant was represented by the learned Amicus Curiae, learned Additional Government Advocate was directed to furnish all such mitigating circumstances and to ensure collection of detailed information with reports on those aspects by filing affidavits through the competent person stating therein the particulars for the consideration of the Court. We also gave liberty to the appellant Nabin Dehury to file affidavit and produce any material on mitigating circumstances.

In pursuance of such order, the Senior Superintendent of Jail, Circle Jail, Sambalpur filed an affidavit wherein it is indicated that the appellant Nabin Dehury is not involved in any other case except in Mahulpali P.S. Case No.134 dated 06.11.2015 registered under section 379/34 of I.P.C., which is pending for trial. The appellant Nabin Dehury has not committed any jail offence during his confinement period. He has also annexed the reports relating to the past life period, psychological condition and post-conviction conduct of the appellant Nabin Dehury. One of such reports annexed to the affidavit is that of Regional Probation Officer, Sambalpur who after examining the neighbours of the appellant so also Sarpanch and Ward

Member indicated that the family of appellant Nabin Dehury is comprised of his wife, one daughter and two sons. The daughter is the elder one who has already got married and out of two sons, the younger one is dead and the second one is appellant Hemananda Dehury who is now in jail custody. The wife of appellant Nabin Dehury is residing at her father's place after arrest of the appellant. The statements collected indicate that prior to the imprisonment, the attitude, conduct and behaviour of appellant Nabin Dehury was very good and he was maintaining good and amicable relationship with the people of the locality and there was no adverse remark passed against him by any of the persons examined. It further came to light that the land dispute between the appellant Nabin Dehury and family of the deceased persons was one of the prime reasons for not having good relations between them. The ancestral property of the appellant Nabin Dehury was encroached by the deceased for which most of the times, the appellant was remaining upset for being deprived of his ancestral property. The deceased was teasing the appellant several times to create an unhealthy situation. The wife of appellant Nabin Dehury also expressed that due to land dispute, the appellant was not remaining in a constant state of mind and he was taking psychiatric medicine suffering from mental trauma. The medical documents from VIMSAR, Burla, Sambalpur relating to the treatment of the appellant Nabin Dehury were also forwarded with the affidavit of the Jail Superintendent, which show that he was referred to the Department of Psychiatry wherein it is indicated that there was previous medication history of five years and two months.

Law is well settled that in order to make out a case for imposition of death sentence, the prosecution undoubtedly has to discharge a very onerous burden by demonstrating the existence of aggravating circumstances and the consequential absence of mitigating circumstances. The case must fall within the category of 'rarest of rare cases' warranting imposition of death sentence. The special reasons as mentioned in section 354(3) of Cr.P.C. has put sufficient safeguard against any kind of arbitrary imposition of the extreme penalty. Unless the Court is of opinion that the nature of crime and circumstances against the offender is such that the sentence of life imprisonment would be wholly inadequate, inappropriate and against all norms of ethics, lesser punishment should ordinarily be imposed.

Let us first discuss as to what are the aggravating factors in the case. The commission of multiple murders is no doubt a significant aggravating factor. The deliberate and voluntary nature of the acts, especially following the initial murder of deceased Giridhari Sahu, demonstrates a pattern of extreme violence and a disregard for human life. According to the principles outlined by the Constitution Bench of the Hon'ble Supreme Court in the case of **Bachan Singh** (supra), the enormity of the crime and the number of victims are critical factors in determining the severity of the sentence. When the culpability assumes the proportion of extreme depravity that 'special reason' can legitimately be said to exist.

The brutal manner in which the murders were committed one after another is another aggravating factor. The use of violence not only reflects a high degree of culpability but also underscores the severity of the crimes. As noted in **State of**

Rajasthan -Vrs.- Kheraj Ram reported in (2003) 8 Supreme Court Cases 224, the heinous nature of the act and the brutality involved are significant considerations in determining the appropriate sentence, which is as follows:-

> "35. A convict hovers between life and death when the question of gravity of the offence and award of adequate sentence comes up for consideration. Mankind has shifted from the state of nature towards a civilized society and it is no longer the physical opinion of the majority that takes away the liberty of a citizen by convicting him and making him suffer a sentence of imprisonment. Award of punishment following conviction at a trial in a system wedded to the rule of law is the outcome of cool deliberation in the court room after adequate hearing is afforded to the parties, accusations are brought against the accused, the prosecuted is given an opportunity of meeting the accusations by establishing his innocence. It is the outcome of cool deliberation and the screening of the material by the informed man i.e. the Judge that leads to determination of the lis.
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> 36. The principle of proportion between crime and punishment is a principle of just deserts that serves as the foundation of every criminal sentence that is justifiable. As a principle of criminal justice, it is hardly less familiar or less important than the principle that only the guilty ought to be punished. Indeed, the requirement that punishment not be disproportionately great, which is a corollary of just desert, 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.
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> 37. The criminal law adheres in general to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct. It ordinarily allows some significant discretion to the Judge in arriving at a sentence in each case, presumably, to permit sentences that reflect more subtle considerations of culpability that are raised by the special facts of each case. Judges in essence affirm that punishment ought always to fit the crime; yet in practice sentences are determined largely by other considerations. Sometimes it is the correctional needs of the perpetrator that are offered to justify a sentence. Sometimes the desirability of keeping him out of circulation, and sometimes even the traffic results of his crime. Inevitably these considerations cause a departure from just deserts as the basis of punishment and create cases of apparent injustice that are serious and widespread.
>
> 38. Proportion between crime and punishment is a goal respected in principle, and in spite of errant notions, it remains a strong influence in the determination of sentences. The practice of punishing all serious crimes with equal severity is now unknown in civilized societies, but such a radical departure from the principle of proportionality has disappeared from the law only in recent times. Even now a single grave infraction that is thought to call for uniformly drastic measures. Anything less than a penalty of greatest severity for any serious crime is thought then to be a measure of toleration that is unwarranted and unwise. But in fact quite apart from those considerations that make punishment unjustifiable when it is out of proportion to the crime, uniformly disproportionate punishment has some very undesirable practical consequences."

The emotional and psychological impacts on the families of the deceased also constitute an aggravating factor. The murders must have caused immense suffering to the families of deceased Giridhari Sahu, Pirobati Behera, and Sabitri Sahu. Deceased Giridhari Sahu and Sabitri Sahu had two minor children i.e. P.W.3 Sachin Sahu and P.W.4 Sapna Sahu and the occurrence took place before their eyes and they witnessed the murder of their mother and maternal grandmother and they

were left orphaned. This is highlighted in **Machhi Singh** (supra), where the Court considered the impact of occurrence on the victims' families as a critical aspect of the sentencing process.

Mitigating Circumstances:

Hon'ble Supreme Court in the case of **Bachan Singh** (supra), while discussing the suggestions of Dr. Chitaley relating to mitigating circumstances, observed that the offence being committed under the influence of extreme mental or emotional disturbance can be taken into account. It was held that Judges should never be bloodthirsty.

Emotional and psychological distress:

As appears from the reports received, appellant Nabin Dehury was taking medications prior to the commission of the offence due to the teasing and bullying done by the deceased's family as mentioned by his wife. Although he was aware of his actions and its consequences, but his mental state was fuelled by annoyance, frustration and the constant reminder of the land dispute which he thought to have lost on account of fraudulent means adopted by the deceased Pirobati Behera. This context provides an understanding of his loss of mental control, which ultimately seems to have resulted in the murders. While not constituting a defence of diminished responsibility, appellant Nabin's mental health issues are a crucial mitigating factor, as acknowledged in **Dauvaram Nirmalkar -Vrs.- State of Chhattisgarh reported in 2022 SCC OnLine SC 955**, wherein it is held as follows:-

> "11. ***K.M. Nanavati*** (supra) (1962 Supp (1) SCR 567), has held that the mental background created by the previous act(s) of the deceased may be taken into consideration in ascertaining whether the subsequent act caused sudden and grave provocation for committing the offence. There can be sustained and continuous provocations over a period of time, *albeit* in such cases Exception 1 to Section 300 of the I.P.C. applies when preceding the offence, there was a last act, word or gesture in the series of incidents comprising of that conduct, amounting to sudden provocation sufficient for reactive loss of self-control. ***K.M. Nanavati*** (supra) quotes the definition of 'provocation' given by Goddard, C.J.; in ***R.*** v. ***Duffy***, as:
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> "...some act or series of acts, done by the dead man to the accused which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self- control, rendering the accused so subject to passion as to make him or her for the moment not master of his own mind...indeed, circumstances which induce a desire for revenge are inconsistent with provocation, since the conscious formulation of a desire for revenge means that the person had the time to think, to reflect, and that would negative a sudden temporary loss of self-control which is of the essence of provocation...".
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> 16. For clarity, it must be stated that the prosecution must prove the guilt of the accused, that is, it must establish all ingredients of the offence with which the accused is charged, but this burden should not be mixed with the burden on the accused of proving that the case falls within an exception. However, to discharge this burden the accused may rely upon the case of the prosecution and the evidence adduced by the prosecution in the

court. It is in this context we would refer to the case of the prosecution, which is that the deceased was addicted to alcohol and used to constantly torment, abuse and threaten the appellant. On the night of the occurrence, the deceased had consumed alcohol and had told the appellant to leave the house and if not, he would kill the appellant. There was sudden loss of self-control on account of a 'slow burn' reaction followed by the final and immediate provocation. There was temporary loss of self-control as the appellant had tried to kill himself by holding live electrical wires. Therefore, we hold that the acts of provocation on the basis of which the appellant caused the death of his brother, Dashrath Nirmalkar, were both sudden and grave and that there was loss of self-control."

'Slow burn' reaction followed by provocation rendered to the Appellant:

The constant teasing and bullying of appellant Nabin Dehury relating to the land dispute has been established through himself and the witnesses and the reports collected. This aligns with the concept of sustained provocation which can be considered a mitigating circumstance. Continuous provocations over time, lead to a final act that causes a loss of self-control and can reduce the culpability of the offender. It is too much to expect from everyone to always be calm, no matter what the provocation be. In this case, appellant Nabin's prolonged exposure to harassment and the resulting emotional distress contributed to his actions. Although specific and immediate trigger for the initial assault on deceased Giridhari is not fully established, the circumstances suggest the effect of the distress rendered by him through the constant teasing from the prolonged land dispute and his feeling of helplessness in being landless. The prison Medical Officer has also submitted that the appellant continues to take psychiatric medication though his cognitive abilities are found to be intact.

Potential for Rehabilitation:

As per the reports submitted, prior to the imprisonment, the attitude, conduct and behaviour of appellant Nabin Dehury was very good and he was maintaining good and amicable relationship with the people of the locality and there was no adverse remark passed against him by anyone. His behaviour in jail has been reported as normal and good, indicating his potential for rehabilitation. The Supreme Court in **Santosh Kumar Satishbhushan Bariyar -Vrs.- State of Maharashtra reported in (2009) 6 Supreme Court Cases 498** highlighted that the possibility of reform and rehabilitation should be a pivotal consideration, stressing that the death penalty should not be imposed if the convict shows potential for reformation.

Is it a 'rarest of rare' case?:

The Supreme Court in the case of **Bachan Singh** (supra) set forth the doctrine that the death penalty should only be imposed in the "rarest of rare" cases where the alternative option is unquestionably foreclosed. The terms 'brutal', 'grotesque', 'diabolical' and 'ghastly' have been cited through various judgments by the Supreme Court, even though they are not specifically defined in legislative texts. The literal meaning of the above terms can be held as–

(i) Brutal: Acts characterized by excessive cruelty or savagery. In a legal context, brutality implies a level of violence that is excessive and beyond what would be considered necessary to achieve the criminal objective.

(ii) Grotesque: Acts that are shockingly incongruous or out of the ordinary in a disturbing way. In legal terms, grotesque actions are those that are bizarre and evoke a sense of horror due to their abnormal nature.

(iii) Diabolical: Acts that are wicked or evil to an extreme degree. Legally, diabolical crimes are those that reflect a perverse and calculated intent to cause harm, often involving premeditation and malicious intent.

(iv) Ghastly: Acts that are horrifying or macabre. Legally, ghastly crimes are those that are gruesome and evoke a sense of revulsion due to their horrifying nature.

The actions taken by appellant Nabin Dehury were certainly heinous. He killed three individuals using a tangia, two of them were women. These acts could be described as brutal due to the violent manner of the killings. However, while the murders committed by appellant Nabin Dehury are undoubtedly heinous and premeditated, several mitigating factors go against the imposition of the death penalty. They do not constitute offences that are defined above as 'grotesque', 'diabolical' and 'ghastly'. These terms cumulatively describe an offence that is shocking and gruesome to the extent that it causes a sense of horror and indifference, shaking the core of society. As stated above, in our opinion, the nature of the murder committed by the appellant is heinous, the motive appears confined to a form of revenge, driven by annoyance and psychological distress. These acts, though cruel and ruthless, do not fully meet the threshold of being 'grotesque', 'diabolical' and 'ghastly'.

In the case of **Rajendra Prasad -Vrs.- State of Uttar Pradesh reported in A.I.R. 1979. S.C. 916**, it is held that it is a mechanistic art which counts the cadavers to sharpen the sentence oblivious of other crucial criteria shaping a dynamic, realistic policy of punishment. Three deaths are regrettable, indeed, terrible, but it is no social solution to add one more life lost to the list. It is further held that a family feud, an altercation, a sudden passion, although attended with extraordinary cruelty, young and malleable age, reasonable prospect of reformation and absence of any conclusive circumstance that the assailant is a habitual murderer or given to chronic violence are the catena of circumstances tearing on the offender call for the lesser sentence.

In the case of **A. Devendran -Vrs.- State of T.N. reported in (1997) 11 Supreme Court Cases 720**, which was a case of triple murder, it is held that the number of persons died in the incident is not the determinative factor for deciding whether the extreme penalty of death could be awarded or not.

In the case of **Manoj** (supra), in a case of triple murder, the Hon'ble Supreme Court on the sentencing of the accused held as follows:-

"253. This Court is of the opinion, that there can be no doubt that the crime committed by the three accused was brutal, and grotesque. The three defenceless victims were women of different age groups (22, 46, 76 years) who were caught off-guard and

> severely physically assaulted, resulting in their death, in the safety and comfort of their own home. To have killed three generations of women from the family of P.W.1, is without a doubt, grotesque. The manner of the offence was also vicious and pitiless - Ashlesha and Rohini, were stabbed repeatedly to their death, while Megha was shot point blank in the face. The post-mortem (Ex. P-44) reflects that the stab wounds were extensive-ranging across the bodies of the victim. The extensive bleeding at the crime scene further reflects cruel and inhumane manner of attack, against the three women. The crime in itself, could no doubt be characterised as "extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community" as defined in ***Machhi Singh***. These are the aggravating circumstances."

The Hon'ble Court however took into account the mitigating circumstances and considered the Psychological Evaluation Report, Probation Officer's Report and Prison Report including material on the conduct of each accused produced by the State and work done so also material placed by each accused before the Court and held as follows:-

> "262. The reports received from the Superintendent of Jail reflect that each of the three accused, have a record of overall good conduct in prison and display inclination to reform. It is evident that they have already, while in prison, taken steps towards bettering their lives and of those around them, which coupled with their young age unequivocally demonstrates that there is in fact, a probability of reform. On consideration of all the circumstances overall, we find that the option of life imprisonment is certainly not foreclosed.
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> 263. While there is no doubt that this case captured the attention and indignation of the society in Indore, and perhaps the State of Madhya Pradesh, as a cruel crime that raised alarm regarding safety within the community - it must be remembered that public opinion has categorically been held to be neither an objective circumstance relating to crime, nor the criminal, and the courts must exercise judicial restraint and play a balancing role.
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> 264. In view of the totality of facts and circumstances, and for the above stated reasons, this Court finds that imposition of death sentence would be unwarranted in the present case. It would be appropriate and in the overall interests of justice to commute the death sentence of all three accused, to life imprisonment for a minimum term of 25 years."

In the case of **Mofil Khan and another -Vrs.- State of Jharkhand reported in (2021) 20 Supreme Court Cases 162**, while dealing with the earlier judgment in which the petitioners were sentenced to death for commission of offence under section 302 read with section 34 of I.P.C., the Hon'ble Supreme Court held as follows:-

> "13. Taking note of the petitioners' culpability in the gruesome murders which assumed "the proportion of extreme depravity", the High Court refused to interfere with the death sentence imposed by the trial court. This Court dismissed the criminal appeal taking note of the manner in which the offence was committed against the helpless children and others and concluded that the Petitioners would be a menace and threat to harmony in the society. Putting an end to the lives of innocent minors and a physically infirm child, apart from other members of the family, in a pre-planned attack, was taken note of by this Court to hold that the case falls under the category of "rarest of the rare" cases.
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16. It is well-settled law that the possibility of reformation and rehabilitation of the convict is an important factor which has to be taken into account as a mitigating circumstance before sentencing him to death. There is a bounden duty cast on the Courts to elicit information of all the relevant factors and consider those regarding the possibility of reformation, even if the accused remains silent. A scrutiny of the judgments of the trial court, the High Court and this Court would indicate that the sentence of death is imposed by taking into account the brutality of the crime. There is no reference to the possibility of reformation of the petitioners, nor has the State procured any evidence to prove that there is no such possibility with respect to the petitioners.

17. We have examined the socio-economic background of the petitioners, the absence of any criminal antecedents, affidavits filed by their family and community members with whom they continue to share emotional ties and the certificate issued by the Jail Superintendent on their conduct during their long incarceration of 14 years. Considering all of the above, it cannot be said that there is no possibility of reformation of the petitioners, foreclosing the alternative option of a lesser sentence and making the imposition of death sentence imperative. Therefore, we convert the sentence imposed on the petitioners from death to life. However, keeping in mind the gruesome murder of the entire family of their sibling in a pre-planned manner without provocation due to a property dispute, we are of the opinion that the petitioners deserve a sentence of a period of 30 years."

In the case of **Bhagchandra -Vrs.- State of Madhya Pradesh reported in (2021) 18 Supreme Court Cases 274**, the Hon'ble Supreme Court held as follows:-

"47. In view of the settled legal position, it is our bounden duty to take into consideration the probability of the accused being reformed and rehabilitated. It is also our duty to take into consideration not only the crime but also the criminal, his state of mind and his socio-economic conditions. The deceased as well as the appellant are rustic villagers. In a property dispute, the appellant has got done away with two of his siblings and a nephew. The State has not placed on record any evidence to show that there is no possibility with respect to reformation or rehabilitation of the convict. The appellant has placed on record the affidavits of Prahalad Patel, son of appellant and Rajendra Patel, nephew of appellant and also the report of the Jail Superintendent, Central Jail, Jabalpur. The appellant comes from a rural and economically poor background. There are no criminal antecedents. The appellant cannot be said to be a hardened criminal. This is the first offence committed by the appellant, no doubt, a heinous one. The certificate issued by the Jail Superintendent shows that the conduct of the appellant during incarceration has been satisfactory. It cannot therefore be said that there is no possibility of the appellant being reformed and rehabilitated foreclosing the alternative option of a lesser sentence and making imposition of death sentence imperative.

48. We are therefore inclined to convert the sentence imposed on the appellant from death to life. However, taking into consideration the gruesome murder of two of his siblings and one nephew, we are of the view that the appellant deserves rigorous imprisonment of 30 years."

In the case of **Anshad -Vrs.- State of Karnataka reported in (1994) 4 Supreme Court Cases 381**, the Hon'ble Supreme Court held that the number of persons murdered is a consideration but that is not the only consideration for imposing death penalty unless the case falls in the category of "rarest of rare cases".

The Courts must keep in view the nature of crime, the brutality with which it was executed, the antecedents of the criminal, the weapon used etc. It is neither possible nor desirable to catalogue all such factors and they depend upon case to case.

The aggravating circumstances in this case, particularly the commission of multiple murders, the evidence of premeditation, and the brutality of the acts, point towards a severe sentence. However, the mitigating circumstances, including the psychological distress, the appellant's mental health issues, his good attitude, conduct and behaviour prior to the imprisonment, his good behaviour in jail suggest that the death penalty may be disproportionate. While appellant Nabin Dehury's mental health issues do not constitute a credible ground for complete exoneration, still it remains a crucial mitigating circumstance.

It is evident that in the judgment of the learned trial Court, there is no reference to the discussions on mitigating circumstances and possibility of reformation and rehabilitation of the appellant Nabin Dehury. In fact, there was no endeavour on the part of the learned trial Court to find out mitigating circumstances, if any in respect of appellant. Failure on the part of the learned trial Court to consider such vital aspects before imposing death sentence, added to our duty and responsibility to carefully collect such materials, to elicit information of all the relevant factors and to take into consideration not only the crime but also the criminal, the state of mind and the socio-economic conditions of the appellant keeping in view the golden principle that life imprisonment is the rule and death sentence is an exception.

In the case of **Surja Ram** (supra), on which reliance was placed by the learned State Counsel, it is held that punishment must respond to the society's cry for justice against the criminal. While considering the punishment to be given to the accused, the Court should be alive not only to the right of the criminal to be awarded just and fair punishment by administering justice tempered with such mercy as the criminal may justly deserve, but also to the rights of the victims of the crime to have the assailant appropriately punished and the society's reasonable expectation from the Court for the appropriate deterrent punishment conforming to the gravity of the offence and consistent with the public abhorrence for the heinous crime committed by the accused.

We are of the view that public opinion or the society's expectation may be to confirm the death sentence of appellant Nabin Dehury since it is a case of triple murder and two deceased were ladies, but it must be remembered that such opinion or expectation is neither an objective circumstance relating to crime, nor the criminal, and therefore, this Court must exercise judicial restraint and play a balancing role. The appellant comes from a rural and economically poor background and on account of property dispute and after losing the ancestral property in the Court battle, he had done away with the lives of three deceased. The appellant is having a criminal antecedent of a Magistrate triable offence in which trial is yet to be over and therefore, he cannot be said to be a hardened criminal. The reports furnished by Jail Superintendent in which the appellant has been lodged for more

than three and half years shows that the conduct of the appellant during incarceration has been satisfactory. It cannot, therefore, be said that there is no possibility of the appellant being reformed and rehabilitated foreclosing the alternative option of a lesser sentence and making imposition of death sentence imperative or in other words, life imprisonment would be completely inadequate and would not meet the ends of justice.

In view of the foregoing discussions and giving our anxious consideration to the facts and circumstances of the case and striking a balance between the aggravating and mitigating circumstances in the case, we are of the humble view that death penalty would be disproportionate, unwarranted and life imprisonment would be a more appropriate sentence.

Accordingly, we commute the death sentence imposed on the appellant Nabin Dehury to life imprisonment. The appellant Nabin Dehury is sentenced to life imprisonment for each of the three murders committed by him and the sentences so awarded are directed to run concurrently in view of the ratio laid down in the five-Judge Bench decision of the Hon'ble Supreme Court in case of **Muthuramalingam and others -Vrs.- State reported in (2016) 8 Supreme Court Cases 313** and it is made clear that life imprisonment awarded shall mean the remainder of his natural life, without remission/commutation under sections 432 and 433 of Code of Criminal Procedure.

Victim Compensation:

19. The learned trial Court has directed the entire fine amount of Rs.2,00,000/- (rupees two lakhs), if realized to be paid to P.W.3 Sachin Sahoo and P.W.4 Swapna Sahoo in equal proportion, which means if the appellants decide not to pay the fine amount, then they have to undergo the default sentence but the minor children of the two deceased would not get any financial benefits. The State Govt. of Odisha in exercise of powers conferred by the provision of section 357-A of Cr.P.C. has formulated the Odisha Victim Compensation Schemes, 2017 (hereafter '2017 schemes') which was amended by virtue of Odisha Victim Compensation (Amendment) Scheme, 2018 and it came into force with effect from 02.10.2018. Schedule-II of the Scheme, which was inserted as per the amended scheme of 2018, inter alia, deals with compensation for the survivors in case of crime in which death/loss of life takes place. The learned trial Court unfortunately has not passed any compensation award in terms of 2017 schemes. The minimum limit of compensation payable is Rs.5,00,000/- (rupees five lakhs) and the maximum limit of compensation payable is Rs.10,00,000/- (rupees ten lakhs) in such cases. In the factual scenario and particularly taking into account the young age of the deceased-parents of P.W.3 and P.W.4 and their future liabilities, the maximum compensation amount i.e. Rs.10,00,000/- (rupees ten lakhs), for each of the death as provided under Schedule-II is awarded i.e. in total Rs.20,00,000/- (rupees twenty lakhs) which is to be paid to P.W.3 and P.W.4 in equal proportion. So far as the death of deceased Pirobati Behera is concerned, the upper limit of compensation of Rs.10,00,000/-

(rupees ten lakhs) is also to be paid to the victims, out of which Rs.5,00,000/- (rupees five lakhs) is to be paid to P.W.1 and the balance amount of Rs.5,00,000/- is to be paid in equal proportion to P.W.3 and P.W.4. If any compensation amount has already been disbursed to any of these persons, i.e. P.W.1, P.W.3 and P.W.4, the same shall be adjusted and the D.L.S.A., Sambalpur shall take immediate steps to pay the balance amount of compensation within four weeks from today.

Conclusion:

20. In view of the foregoing discussions, CRLA No.693 of 2024, filed by the appellant Hemananda Dehury is dismissed. The conviction of the appellant Hemananda Dehury under section 302/34 of the I.P.C. and sentence imposed thereunder is upheld. So far as JCRLA No.118 of 2023 filed by appellant Nabin Dehury is concerned, his conviction under section 302/34 of the I.P.C. is upheld, however, the death sentence awarded to him is commuted to life imprisonment. The appellant Nabin Dehury is sentenced to life imprisonment for each of the three murders committed by him and the sentences so awarded shall run concurrently. It is made clear that such life imprisonment shall mean the remainder of his natural life, without remission/commutation under sections 432 and 433 of Code of Criminal Procedure. The fine amount imposed by the learned trial Court on both the appellants and the default sentence stands confirmed.

Accordingly, the death sentence reference is answered in negative.

Before parting with this case, we would like to put our deep appreciation to Mr. Debasis Sarangi, learned Amicus Curiae for the preparation and presentation of the case and assisting the Court in arriving at the decision above mentioned. This Court also appreciates the able assistance provided by Mr. Pranaya Kumar Dash, Advocate to this Court. This Court also appreciates extremely valuable assistance provided by Mr. Janmejaya Katikia, Addl. Govt. Advocate who has been ably assisted by Mrs. Sushama Rani Sahoo, learned Addl. Standing Counsel and Ms. Gayatri Patra, Advocate. The hearing fees is assessed to Rs.20,000/- (rupees twenty thousand) in toto which shall be paid to the learned Amicus Curiae Mr. Debasis Sarangi immediately.

The Trial Court records along with a copy of the judgment be sent forthwith to the Court concerned and a copy of the judgment be communicated to the D.L.S.A., Sambalpur for compliance.

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2024 (III) ILR-CUT-106

S.K. SAHOO, J & CHITTARANJAN DASH, J.

W.P(C) NO. 16222 OF 2018

PRASAR BHARATI BROADCASTING CORPORATION OF INDIA & ORS. …....Petitioners

V.

GOUTAM BALLAV MOHANTY & ORS. …….Opp.Parties

SERVICE LAW – Pay – Equal pay for equal work – The Opp.Parties have been employed as casual lighting assistants on daily wage basis – They claim equal pay as those covered under the Regularisation Scheme of 1992 and 1994 – Whether they are entitled to the benefits of equal pay as of regular employees? – Held, Yes – The Opp.Parties have been performing the same duties as regular employees since very long time; the failure to pay them equally for equal work is a violation of this fundamental principle. (Paras 9 -14)

Case Laws Relied on and Referred to :-
1. AIR 2016 SC 5176: State of Punjab and Ors. vs. Jagjit Singh and Ors.

For Petitioners : Mr. Gyanaloka Mohanty,(CGC), Sr. Panel Counsel,Union of India
For Opp.Parties : Mr. Dilip Ku Mohanty

JUDGMENT Date of Judgment: 16.08.2024

CHITTARANJAN DASH, J.

1. Heard Mr. Gyanaloka Mohanty, learned Senior Panel Counsel, Union of India (Doordarshan), appearing on behalf of the Petitioners and Mr. Dilip Ku. Mohanty, learned counsel for the Opposite Parties (No.1 and 2).

2. By means of this Writ Petition, the Petitioners seek to set aside the order of Central Administrative Tribunal (hereinafter referred to as "CAT" or "Tribunal") dated 04.05.2018 passed in O.A. No. 533 of 2015

3. The background facts of the case are that the Opposite Parties, who were the Petitioners before the Central Administrative Tribunal (CAT) in O.A. No. 533 of 2015, have been employed as casual lighting assistants on a daily wage basis. They received an initial wage of Rs. 389/- per day and later claimed entitlement to revised tariffs similar to employees awaiting regularisation. The O.Ps. highlighted that the Petitioners had issued memorandums in 2011, 2012, and 2013, which enhanced wages to Rs. 561/-, Rs. 750/-, and Rs. 840/- per day, respectively for the casuals engaged in various roles in Doordarshan Kendra on casual assignment basis awaiting regularisation under Regularisation scheme of 09.06.1992 & 17.03.1994. Despite these memorandums, the Opposite Parties continued to receive the tariff of Rs. 389 per day as per the 2006 memorandum and argued that similarly placed individuals were enjoying the benefits of the wage revisions outlined in the said memorandums. The Opposite Parties submitted representations to the Petitioners, but while their representations were pending, they filed O.A. No. 187/2015 before the CAT. The CAT directed the Petitioners to dispose of the representations with a speaking order, which the Petitioners did. However, dissatisfied with the outcome, the Opposite Parties filed O.A. No. 533 of 2015 before the CAT, challenging the decision. Upon receiving notice from the CAT, the Petitioners filed a counter affidavit. Subsequently, on 04.05.2018, the CAT issued an order directing that the wages of the Opposite Parties should be enhanced and that they should receive equal pay as those covered under the regularisation schemes of 1992 and 1994.

4. Mr. Mohanty, learned Senior Panel Counsel, Union of India (Doordarshan) submits that the learned Tribunal did not adequately recognise the differences in employment requirements, promotional avenues, and the nature of duties between regular post holders and temporary or casual workers. These distinctions are critical, as they justify variations in pay and other benefits. Mr. Mohanty highlights that the Opposite Parties, who were denied wage enhancement by the competent authority, were found ineligible for regularisation under the applicable scheme. The Opposite Parties did not challenge this denial on the grounds of arbitrariness but instead sought wage enhancement alone before the learned Tribunal. He further emphasises that, according to the guidelines, only Doordarshan Kendras are empowered to determine eligibility. In this case, the Opposite Parties were engaged only due to an interim order of this Hon'ble Court and are not comparable to other workmen. Furthermore, the Opposite Parties belong to a separate class of camera assistants, engaged on an assignment basis by the Regional News Unit (RNU), which is governed by different memorandums and directives from the Director General News. Therefore, the Opposite Parties' claim for parity with other workers is misplaced and not applicable. Mr. Mohanty, concludes his argument with the submission that considering that the posts of Lighting Assistants are under consideration for abolition and that the learned Tribunal overlooked the difference between casual workers who have incidentally worked for long periods and those engaged under the regularisation schemes of 1992 and 1994, the impugned order is incorrect and need to be set aside.

5. Mr. Mohanty, the learned counsel for the Opposite Parties, argues that the Petitioners have wrongly challenged the impugned order passed by the CAT, which held that the Opposite Parties are entitled to the same pay as casual employees awaiting regularisation under the schemes of 1992 and 1994, based on the principle of "equal pay for equal work." The CAT directed that the necessary orders be passed within eight weeks. Mr. Mohanty argues that as per the Doordarshan Manual, the Opposite Parties were engaged as Lighting Assistants specifically to assist the cameramen, without whom the cameramen cannot effectively perform their duties during shooting. The role of the Lighting Assistants is therefore integral to the shooting process, as evidenced by the manual and the fact that some Lighting Assistants engaged before the Opposite Parties were regularised in 2005 under the same schemes of 1992 and 1994. The Opposite Parties have been performing the same work as those who have been regularised, which justifies their claim for equal pay. Additionally, they have also obtained cameraman training and certification, further demonstrating their capability and the similarity of their roles to those who have been regularised. Furthermore, the learned counsel highlights that the importance of the Lighting Assistants' role is underscored by the office order dated 30.09.2022 of Prasar Bharati Doordarshan, Bhubaneswar, which attached two MTS persons to assist the cameraman and Lighting Assistants, indicating the critical nature of the Lighting Assistants' work in the field of shooting. This order, annexed as Annexure A/1, supports their contention that their work is entitled to wage parity

with those awaiting regularisation under the earlier schemes. Mr. Mohanty concludes that, the CAT's order should be upheld, as it correctly applies the principle of "equal pay for equal work" to the Opposite Parties.

6. The Petitioners were directed by this Court vide order dated 27.07.2022 to submit an affidavit detailing the nature of work performed by Cameramen and Lighting Assistants. In response, the Petitioners submitted an affidavit attaching two pages purported to be from Doordarshan manual annexed as Annexure-1 written as "Working of Doordarshan Kendra", which outline the roles of Cameraman Grade-II and Lighting Assistants in clauses 4.2.9 and 4.2.20, respectively. The aforesaid document annexed has neither been shown as manual/rule/guideline having force of law but allegedly followed in practice reflecting the differences in roles and responsibilities of Cameramen and Lighting Assistants, yet, the comparison cannot be drawn against the position of present Opposite Parties from that of casual employees awaiting regularisation.

However, in any way, it is important to emphasise that the role of the Lighting Assistant, as described in the said manual, includes assistance to cameraman in loading and unloading film cameras. This indicates a level of responsibility and involvement in the production process and the lack of clarity and detail in the Petitioners' submission undermines their argument and fails to convincingly demonstrate that the roles of the camera assistants are sufficiently distinct to justify a difference in pay. This failure to provide a clear and detailed affidavit likely weakens the Petitioners' position and raises doubts about their commitment to a thorough and fair evaluation of the roles in question.

7. Annexure-A/4, which is a memorandum dated 22.03.2013, clearly states that Lighting Assistants/Lightman, etc. are entitled to a revised pay rate of Rs. 840/- per day/per shift, effective from 04.12.2012. This memorandum also specifies that arrear payments will be made with prospective effect. Notably, this order applies to those casual employees who are awaiting regularisation under the Regularisation Schemes of 09.06.1992 and 17.03.1994. The records, as presented in the Annexure-A/5 series, reveal that O.P. No. 1 has been employed on a casual basis since 1992, and O.P. No. 2 since 1993, both in roles that include assisting cameramen and operating lights. Over the years, they have consistently been paid at revised rates whenever they were reappointed. However, in 2015, as evidenced by the Annexure-5 series, these same Opposite Parties were reappointed at a significantly lower rate of Rs. 389/- per day, despite the 2013 memorandum stipulating a rate of Rs. 840/- per day.

8. This discrepancy raises a significant issue. If the Petitioners had no objection to paying an enhanced fees in previous years, there should be no reason for the sudden reduction in pay in 2015. The past payment practices establish a precedent that suggests the Opposite Parties are entitled to the revised rates as per the 2013 memorandum. The Petitioners' failure to adhere to this precedent without providing a compelling justification can be seen as arbitrary and unfair. The inconsistency in payment practices not only undermines the credibility of the

Petitioners' argument but also suggests a potential violation of the principle of "equal pay for equal work," especially given the history of compliance with revised pay rates in previous years.

9. It is incumbent to note that the Opposite Parties, despite not being regularised, have been performing the same duties as regular employees since a very long time. The failure to pay them equally for equal work is a violation of this fundamental principle. It is emphasised that continuing casual employment for too long without regularisation would be unjust and contrary to the constitutional goals of our socialist polity. The Opposite Parties have been employed on a casual basis for over two decades, performing duties that are integral to the operations of Doordarshan. The refusal or failure to pay them the revised rates as mandated by the 2013 memorandum, constitutes a breach of the principle of "equal pay for equal work." The Petitioners' actions in this regard are inconsistent with ensuring fairness in employment practices, and their failure to adhere to the laid down principle of "equal pay for equal work" further exacerbates the injustice faced by the Opposite Parties.

10. The Apex Court in the matter of ***State of Punjab and Ors. vs. Jagjit Singh and Ors***. reported in **AIR 2016 SC 5176**, has held as follows –

> *"54. There is no room for any doubt, that the principle of 'equal pay for equal work' has emerged from an interpretation of different provisions of the Constitution. The principle has been expounded through a large number of judgments rendered by this Court, and constitutes law declared by this Court. The same is binding on all the courts in India, under Article 141 of the Constitution of India. The parameters of the principle, have been summarized by us in paragraph 42 hereinabove. The principle of 'equal pay for equal work' has also been extended to temporary employees (differently described as work-charge, daily-wage, casual, ad-hoc, contractual, and the like). The legal position, relating to temporary employees, has been summarized by us, in paragraph 44 hereinabove. The above legal position which has been repeatedly declared, is being reiterated by us, yet again. 55. In our considered view, it is fallacious to determine artificial parameters to deny fruits of labour. An employee engaged for the same work, cannot be paid less than another, who performs the same duties and responsibilities. Certainly not, in a welfare state. Such an action besides being demeaning, strikes at the very foundation of human dignity. Any one, who is compelled to work at a lesser wage, does not do so voluntarily. He does so, to provide food and shelter to his family, at the cost of his self respect and dignity, at the cost of his self worth, and at the cost of his integrity. For he knows, that his dependents would suffer immensely, if he does not accept the lesser wage. Any act, of paying less wages, as compared to others similarly situate, constitutes an act of exploitative enslavement, emerging out of a domineering position. Undoubtedly, the action is oppressive, suppressive and coercive, as it compels involuntary subjugation."*

11. The doctrine of "equal pay for equal work" has long been recognised by the Hon'ble Apex Court as a Constitutional goal, rooted in the Directive Principles of State Policy. The Court has consistently upheld this principle as a necessary measure to ensure fairness and equality in the workplace. The principle is not merely a theoretical concept; it is a vital and vigorous doctrine that has been accepted globally and has been affirmed by the Hon'ble Apex Court in numerous decisions.

12. In this landmark ruling, the Hon'ble Supreme Court held that even daily wage employees, ad-hoc appointees, casual workers, and contractual employees, who are not appointed against regular sanctioned posts, but whose services are continuously utilized by the State or its instrumentalities over a significant period, are entitled to the minimum of the regular pay scale, excluding allowances. This entitlement arises on the assumption that the work they perform is of a perennial nature and that they have served for a sufficiently long period, thereby creating an equitable right to fair compensation.

13. In the instant case, the contention raised by the Petitioners that the Opposite Parties were engaged on a casual basis as Lighting Assistants, and therefore are not entitled to the benefits of regular employees, is untenable. The Petitioners argue that since the Opposite Parties were employed on a daily wage basis and were not appointed against regular sanctioned posts, they are not entitled to the relief of equal pay as claimed in this petition. However, this argument fails to acknowledge the consistent legal principles established by the Hon'ble Supreme Court regarding the rights of employees engaged in such capacities.

The Opposite Parties have been appointed on casual basis every now and then as Lighting Assistants since 1992/1993, performing duties that are integral to the functioning of Doordarshan. The Petitioners' claim, that the Opposite Parties are not entitled to regular pay because they are casual employees, is directly contradicted by the principles laid down in Jagjit Singh (supra). The consistent and prolonged engagement of the Opposite Parties in the same work as regular employees creates an equitable right to be compensated fairly.

14. In view of the above, the Opposite Parties' claim for equal pay for equal work is well-founded, and the judgment of the Central Administrative Tribunal granting them such relief is in accordance with the law. The Petitioners are directed to comply with the directions of the CAT within a period of 1 (one) month.

The Writ Petition is accordingly dismissed with no order as to cost.

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2024 (III) ILR-CUT-111

S.K. SAHOO, J & CHITTARANJAN DASH, J.

JCRLA 9 OF 2024

PADMALOCHAN BARIK ….Appellant

V.

STATE OF ODISHA ….Respondent

(A) INDIAN PENAL CODE, 1860 – Section 84 – Legal insanity – Burden of Proof – Held, the burden of proving legal insanity lies on the Appellant, and it must be demonstrated that the mental incapacity was present at the time of the crime.

(B) CRIMINAL TRIAL ─ Benefit of unsound mind ─ Offence under Section 302 of IPC ─ The primary ground of assailing the impugned judgment in the appeal is that learned Trial Court failed to consider the plea of insanity of appellant properly ─ The plea of insanity was introduced at a later stage in the proceeding when the appellant's conduct in the court room prompted the learned Trial Court to order a medical examination to assess his mental condition as mandated U/s. 329 of Cr.P.C. ─ Whether the appellant is entitled to the benefit of unsound mind? ─ Held, No ─ The evidence provided by the prosecution did not establish a probability of legal insanity at the time of the offence ─ The assessment of legal insanity focuses on whether the individual had the requisite *mens rea* (guilty mind) when committing the offence. (Para 21)

Case Laws Relied on and Referred to :-

1. AIR 1964 SC 1563 : Dahyabhai Chhaganbhai Thakkar v. State of Gujarat.
2. 2023 LiveLaw (SC) 71 : Prakash Nayi @ Sen vs State of Goa.

For Appellant : Ms. Bhaktisudha Sahoo, Amicus Curiae.
For Respondent : Mr. Priyabatra Tripathy, Addl. Standing Counsel.

JUDGMENT Date of Judgment : 03.09.2024

CHITTARANJAN DASH, J.

1. The Appellant, namely Padmalochan Pradhan, faced the trial on the charge under Section 302 of the Indian Penal Code (in short, hereinafter referred to as "IPC") before the learned Addl. Sessions Judge, Sundargarh for committing the murder of his grandparents wherein, the learned Court found him guilty in the offence charged as above, convicted and sentenced the Appellant to undergo Rigorous Imprisonment for life and to pay a fine of ₹5,000/- (Rupees five thousand only) in default to undergo further Rigorous Imprisonment for 3 (three) months.

2. The brief facts of the case are that the incident occurred in the village of Sipokachhar, on 02.04.2016, at approximately 6 AM. The informant, who is the paternal uncle of the Appellant, was outside his house engaged in conversation with Giridhari Chhatria, when his wife, Kamala, urgently reported to him that the Appellant was assaulting both Arjun (grandfather) and Phula (grandmother) inside their residence. The informant rushed to the house and discovered Arjun's lifeless body. Phula, meanwhile, was found critically injured but still alive. Upon arriving at the scene, the informant, along with another individual named Kapil Majhi, confronted the Appellant, who confessed to the assault. The informant's report also included an allegation that his own mother had been assaulted by the Appellant. Following these revelations, the informant lodged a written complaint at the Lephripada Police Station. This report led to the registration of Lephripada PS Case No. 45 on 02.04.2016, marking the commencement of the investigation.

3. In the course of investigation, the then Officer InCharge (OIC) of Lephripada PS, Sri J. Bara (P.W.22) took immediate steps to gather evidence from

the scene of crime. He sent requisition calling upon the services of the Forensic Department (SO, DFSL) to collect physical clues from the site. He then conducted inquest over the body of deceased Arjun and prepared the inquest report (Exhibit P-1). Additionally, he seized a blood-stained dhoti (Exhibit P-16) and other physical evidence, which includes the wooden plank believed to be used in the assault. The body of Arjun was sent to the District Headquarters Hospital (DHH), Sundargarh, for post-mortem examination.

After discovering that Phula also succumbed to the injuries, the OIC visited the hospital, held inquest over the dead body of Phula and seized her clothing and biological samples. Upon his transfer, the investigation was handed over to Sub-Inspector Sri A.K. Parida (P.W.23). The SI continued the investigation by re-examining witnesses, sending the weapon of offence to doctors for further examination, and sending the seized incriminating materials to the RFSL, Sambalpur, for chemical analysis. Upon completion of the investigation, charge sheet was submitted against the Appellant to face the trial based on the prima facie evidence. The record was subsequently committed to the Court of Sessions for trial.

4. The case of the defence is that the Appellant was insane at the time of occurrence of the crime.

5. To bring home the charge, the prosecution examined 23 witnesses in all. The prosecution began with P.W.1 and P.W.7, who testified as post-occurrence witnesses and provided insight into the events immediately following the incident. P.W.2 is the informant's daughter. P.W.3, P.W.4, and P.W.5 were independent witnesses who stated that the Appellant had made an extra-judicial confession regarding the crime. P.W.6 is the informant. P.W.8 to P.W.11 provided testimony about the seizure of various items relevant to the case. P.W.12 conducted autopsy of the body of Arjun, and P.W.20 conducted autopsy of Phula. P.W.13, the son of the deceased, offered further context and evidence related to the family and the victims. P.W.14, another doctor, examined the Appellant after his arrest. P.W.15, the Appellant's mother, also contributed her observations., P.W.16, his wife, provided essential testimony about the assault and P.W.17, the informant's nephew, provided additional testimony relevant to the case. P.W.18 and P.W.19 were witnesses to the inquest process, documenting the procedures followed during the investigation. P.W.21, the SO from the DFSL, collected physical clues from the crime scene, contributing crucial forensic evidence to the case. P.W.22, the first investigating officer, and P.W.23, the second investigating officer, followed through with the investigation, gathered evidence, examined witnesses, and submitted the charge sheet.

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. Ms. Sahoo, learned Amicus Curiae, assisting the Court, contended that the trial Court failed to adequately consider the profound and debilitating mental illness from which the Appellant suffered at the time of the incident. The Appellant's history of mental health issues, diagnoses of conversion disorder, unspecified psychosis, and other severe psychiatric conditions, as documented by medical records and the treatment he received at VSS Medical College, Burla, strongly indicate that his mental state was compromised. This history is not only corroborated by the medical evidence but is also consistent with the testimonies of family members who confirmed his erratic behavior and need for continuous psychiatric medication. Ms. Sahoo further submits that despite the legal requirements for proving insanity under Section 84 of the Indian Penal Code, the cumulative evidence of his long-standing mental health issues should be sufficient to create a reasonable doubt as to his mental capacity during the commission of the crime. The Appellant's behavior, as described by witnesses, including his sudden and violent outburst, fits the pattern of an individual suffering from a severe mental breakdown, rather than a person acting with clear intent and rational understanding.

She also submits, the fact that the Appellant was undergoing psychiatric treatment before and after the incident, and his under-treatment mental condition as documented by the jail authorities, further supports the argument that his capacity to form the requisite *mens rea* was severely impaired. She concludes that the Appellant's defense rests on the argument that his profound mental illness at the time of commission of the crime should exonerate him from criminal liability, as it significantly impaired his ability to understand the nature and consequences of his actions.

8. Mr. Tripathy, learned ASC, argues that the trial Court's judgment in convicting the Appellant of the offences was well-founded and supported by substantial evidence, and that the defense's claim of legal insanity under Section 84 of the Indian Penal Code is without merit. The State emphasizes that while the Appellant may have been medically diagnosed with mental health conditions, this does not necessarily translate to legal insanity as defined by the IPC. The legal standard for insanity requires not only a mental illness but also a complete inability to understand the nature of one's actions or to recognize that they are wrong or contrary to law. The testimonies of prosecution witnesses, including those who witnessed the aftermath of the incident and observed the Appellant's behavior, suggest that the Appellant's actions were deliberate and not merely a result of an uncontrolled psychiatric episode. According to Mr. Tripathy, this is evident from the statement of P.W.15 who described how violently the Appellant attacked his grandparents and from the evidence of P.W.16, how the Appellant, after violently attacking his grandparents, started to run away and later confessed to the crime, which indicates a level of awareness and consciousness of the wrongful nature of his actions.

He further argues that the Appellant's defense did not meet the burden of proof required to establish legal insanity and the defense's reliance on the Appellant's medical history and treatment records fails to establish a direct link

between his mental condition and his inability to understand the nature of his actions during the commission of the crime. Mr. Tripathy points out that the Appellant's actions before, during, and after the crime, including his attempt to flee the scene and the subsequent concealment of evidence, suggest a level of intentionality and awareness inconsistent with the defense's claim of total mental incapacity. The Appellant's behavior aligns more with a person who, despite having a mental health condition, was still capable of understanding the consequences of his actions and thus, the Appellant's claim of legal insanity does not meet the required threshold for overturning the conviction. The evidence supports the conclusion that the Appellant, despite his medical issues, had the requisite *mens rea* to be held accountable for the offenses committed. Therefore, the State seeks the affirmation of the trial Court's judgment and the dismissal of the Appellant's appeal.

9. The testimonies of the medical officers, P.W.12 and P.W.20, provide formidable evidence that the deaths of Arjun Pradhan and Phulmati were indeed homicidal. P.W.12, who conducted the post-mortem examination on the body of Arjun Pradhan, described multiple external injuries, including severe lacerations and fractures to the skull, as well as internal injuries like brain hemorrhage. She opined that these injuries were ante-mortem and could be possible with a wooden plank produced before her by the I.O., which was later confirmed to match the wounds found on the deceased. P.W.20, who conducted the post-mortem on Phulmati, similarly found severe injuries that were consistent with a brutal attack. Both medical officers concluded that the cause of death in both cases was due to shock and hemorrhage resulting from the injuries, which were sufficient to cause death in the ordinary course of nature. This medical evidence, in absence any evidence in the contrary coupled with the testimonies of several eye witnesses who saw the immediate aftermath of the assault and the condition of the deceased, points to the conclusion that the deaths were indeed homicidal.

10. Once the nature of death is held homicidal as rightly appreciated by the learned trial Court, next come is authorship of the crime, if it can be attributed to the Appellant.

11. The prosecution's case hinges on the testimonies of those who were either present at the time of the occurrence or arrived shortly after, as well as the circumstantial evidence provided by those who interacted with the Appellant shortly before or after the incident. Among the 23 prosecution witnesses, a few crucial ones have directly or indirectly related to the Appellant.

P.W.2, the daughter of the informant and granddaughter of the deceased, provided a vivid account of the events leading up to and following the attack. She testified that she saw the Appellant standing near the body of her grandfather, Arjun Pradhan, holding a wooden plank, and later witnessed him assaulting her grandmother, Phulmati, on the leg. This testimony is significant as it places the Appellant at the scene of the crime, armed with the weapon that was later confirmed to have caused the fatal injuries.

P.W.6, the informant and son of the deceased, did not witness the assault directly but testified that upon hearing from his wife, P.W.16, that something had happened to his parents, he rushed to the scene and saw the Appellant running away from the location. When he called out to the Appellant, the latter returned and sat on the verandah, exhibiting behavior that suggested a level of guilt or involvement in the incident.

P.W.13, the son of the deceased, although not an eyewitness, provided crucial information about the relationship between the Appellant and the deceased. He mentioned the Appellant's history of mental instability and previous violent outbursts, which adds a layer of motive or predisposition for such an act. He also relayed that the informant (P.W.6) had informed him that the Appellant quarreled with his mother and grandparents on the day of the incident, which escalated into the fatal assault.

P.W.15, the Appellant's mother, is an injured witness to the incident as she was assaulted by the Appellant before he turned his aggression towards his grandparents. Her testimony describes how the Appellant violently attacked her and then his grandparents, resulting in serious injuries and fatalities. She observed the violent behavior of her son, which corroborates the testimonies given by other witnesses. Her direct experience with the Appellant's aggression, along with the detailed description of his actions, underscores the severity of his behavior. Furthermore, P.W.15's testimony indicates that there was no immediate indication of insanity during or after the incident. Although the Appellant had a history of mental health issues, P.W.15 did not report any abnormal behavior or a lack of understanding of the nature of his actions at the time of the crime. This testimony supports the argument that, despite the Appellant's medical condition, he was legally sane at the time of the offense, given the lack of evidence showing a total loss of reasoning or comprehension.

P.W.16, the wife of the informant, also directly implicated the Appellant, recounting how she saw him assaulting her mother-in-law with a lathi and then attacking her father-in-law when he tried to intervene. She further testified that when confronted, the Appellant admitted to the crime before fleeing the scene.

P.W.17, although did not witness the occurrence, saw the Appellant standing near the bodies of his grandparents and provided corroborative evidence regarding the mental state of the Appellant, which was echoed by other witnesses such as P.W.15, the mother of the Appellant.

From the evidence presented, it is clear that at least two witnesses, P.W.2 and P.W.16, directly saw the Appellant either committing the assault or standing over the victims immediately afterward, with a weapon in hand. Others, like P.W.6 and P.W.17, provided circumstantial evidence that further implicated the Appellant. The testimonies consistently point to the Appellant as the individual responsible for the deaths, with multiple witnesses observing his presence at the crime scene, his behavior before and after the incident.

12. While direct eyewitness accounts are vital, the circumstances surrounding the crime provide a broader context that strongly suggests the guilt of the Appellant. One key piece of circumstantial evidence is the behavior of the Appellant both before and after the incident. Several witnesses, including P.W.6, the informant, and P.W.16, his wife testified that the Appellant was seen running away from the scene of the crime immediately after the attack, only to return when called by the informant, which suggests a consciousness of guilt. Additionally, P.W.13 and P.W.15 highlighted the Appellant's history of violent outbursts and mental instability, which, created an environment of tension and potential for violence. The testimonies also reveal that the Appellant had previously quarreled with his mother and the deceased over his behavior, further indicating a motive. The Appellant's presence at the scene, coupled with his flight and subsequent return, as well as his earlier altercations with the victims, form a chain of circumstances that, when considered together, strongly and unequivocally point to his guilt in the crime. This circumstantial evidence, combined with the direct testimonies and medical findings, paints a sacrosanct picture attributing the Appellant as the perpetrator of the homicides.

13. To begin with, multiple witnesses, particularly P.W.2 and P.W.6, directly place the Appellant at the scene of the crime during the time of the attack. P.W.2 witnessed the Appellant standing near the body of her grandfather, Arjun Pradhan, holding a wooden plank, with her grandfather lying on the ground, bleeding from severe injuries. This is a critical observation as it not only places the Appellant at the scene but also ties him directly to the weapon used in the assault. Furthermore, P.W.16 and P.W.17 provided detailed accounts of how the Appellant was seen near the victims immediately after the attack, with P.W.16 recounting how she found the Appellant assaulting the victims, and P.W.17 witnessing the aftermath, with the Appellant standing over the bodies. These eyewitness testimonies are reinforced by the medical evidence, which aligns with the nature of the injuries inflicted on the victims, specifically injuries that could be caused by the wooden plank identified by P.W.2. The medical examination of the deceased, as conducted by P.W.8 and P.W.20, confirmed that the injuries were consistent with a blunt force object, matching the description of the weapon seen with the Appellant.

14. The Appellant's prior history of violent behavior and mental instability, as testified by P.W.15 and P.W.13, provides a psychological backdrop that explains a possible motive and the Appellant's capacity for such an act. P.W.15's testimony that the Appellant had previously assaulted her and had frequent quarrels with the deceased adds to this narrative. The fact that the Appellant fled the scene immediately after the crime, only to return when called, as mentioned by P.W.6, suggests a consciousness of guilt, further pointing to his culpability. Moreover, the Appellant's own mother, P.W.15, confirmed that she witnessed the Appellant attacking her mother-in-law and that the Appellant was known to have violent episodes due to his mental condition. This familial testimony is particularly compelling, as it comes from someone who might be expected to defend the Appellant, yet instead provides damning evidence against him.

15. In summation, the Appellant is the author of the crime is drawn from a robust combination of direct eyewitness accounts, consistent and corroborating testimonies from multiple sources, medical evidence that aligns with the described events, and the psychological profile of the Appellant, which collectively build an irrefutable case against him. The coherence of these elements, when woven together, leaves little room for doubt regarding the Appellant's guilt, thus firmly establishing him as the perpetrator of the heinous acts.

16. However, the primary ground of assailing the impugned judgment in the appeal is that the trial Court failed to properly consider the Appellant's plea of insanity. The defense of insanity under Section 84 of the IPC requires the Appellant to prove that, at the time of the commission of the act, he was suffering from a mental illness that rendered him incapable of knowing the nature of the act or understanding that what he was doing was wrong or contrary to law. In the entire gamut of case, the only piece of evidence suggesting that the Appellant suffered from a mental disorder, is indicated by his treatment at VSS College, Burla, for conditions such as conversion disorder and unspecified psychosis for which he is being prescribed medications as well.

17. It is pertinent to note that the plea of insanity was introduced at a late stage in the proceedings, surfacing only during the trial when the Appellant's behavior began to raise significant concerns. Initially, the defense did not raise any issues regarding the mental state of the Appellant prior to or during the incident. However, as the trial progressed, the Appellant's conduct in the courtroom prompted the learned trial Court to order a medical examination to assess his mental condition as mandated u/s 329 of the Code of Criminal Procedure.

18. This medical examination was not a result of any proactive claim of insanity by the defense but rather a response to the apparent abnormalities in the Appellant's conduct observed by the Court during the trial. The trial Court's decision to seek a professional evaluation vide order dated 25.04.2017 was based on the incoherence, and lack of comprehension indicated by the Appellant, which created a doubt before the Court.

19. The findings from this medical examination later became a cornerstone of the defense's strategy, as the plea of insanity was then formally invoked to argue that the Appellant was not of sound mind at the time of the crime. This plea was intended to establish that the Appellant lacked the requisite mens rea necessary to be held criminally responsible. However, the timing of this plea, coming only after the Appellant's psychiatric evaluation had been scrutinized, raised questions about its legitimacy and whether it was a genuine reflection of his mental state at the time of the offense or a strategy employed to mitigate the legal consequences of his actions. The learned trial Court has correctly tasked the trial with balancing the evidence of the Appellant's historical mental health issues with the need to establish whether those issues impaired his ability to understand the nature of his actions at the critical moment when the crime was committed.

20. Thereafter, the Court determined that the evidence provided by the prosecution did not establish a probability of legal insanity at the time of the offense. The Appellant's subsequent mental condition, as observed after his arrest, was not enough to absolve him of responsibility for the crime. The Court rejected the defense's argument of insanity, holding that the prosecution had successfully proven the Appellant's guilt with the requisite mens rea, and thus, the Appellant could not be absolved of the grave offense of murder.

21. Section 84 of the Indian Penal Code (IPC) refers to a mental condition where, at the time of committing the act, the Appellant was incapable of understanding the nature of the act or knowing that what they were doing was either wrong or contrary to law. Legal insanity requires the person to be so severely impaired by their mental illness that they are unable to distinguish right from wrong or comprehend the consequences of their actions at the precise moment of the offense. The burden of proving legal insanity lies on the Appellant, and it must be demonstrated that the mental incapacity was present at the time of the crime. The assessment of legal insanity focuses on whether the individual had the requisite mens rea (guilty mind) when committing the offense.

22. The Hon'ble Supreme Court in the matter of ***Dahyabhai Chhaganbhai Thakkar v. State of Gujarat*** reported in **AIR 1964 SC 1563** has held that:

> "7. The doctrine of burden of proof in the context of the plea of insanity may be stated in the following propositions:
>
> (1) The prosecution must prove beyond reasonable doubt that the Appellant had committed the offence with the requisite mens rea; and the burden of proving that always rests on the prosecution from the beginning to the end of the trial.
>
> (2) There is a rebuttable presumption that the Appellant was not insane, when he committed the crime, in the sense laid down by Section 84 of the Indian Penal Code: the Appellant may rebut it by placing before the Court all the relevant evidence oral, documentary or circumstantial, but the burden of proof upon him is no higher than that rests upon a party to civil proceedings.
>
> (3) Even if the Appellant was not able to establish conclusively that he was insane at the time he committed the offence, the evidence placed before the Court by the Appellant or by the prosecution may raise a reasonable doubt in the mind of the Court as regards one or more of the ingredients of the offence, including mens rea of the Appellant and in that case the Court would be entitled to acquit the Appellant on the ground that the general burden of proof resting on the prosecution was not discharged."

23. The Hon'ble Apex Court has further held in the matter of ***Prakash Nayi @ Sen vs State of Goa*** reported in **2023 LiveLaw (SC) 71**, that –

> "4. Section 84 of the IPC recognizes only an act which could not be termed as an offence. It starts with the words "nothing is an offence". The said words are a clear indication of the intendment behind this laudable provision. Such an act shall emanate from an unsound mind. Therefore, the existence of an unsound mind is a sine qua non to the applicability of the provision. A mere unsound mind per se would not suffice, and it should be to the extent of not knowing the nature of the act. Such a person is incapable of knowing the nature of the said act. Similarly,he does not stand to reason as to whether

> an act committed is either wrong or contrary to law. Needless to state, the element of incapacity emerging from an unsound mind shall be present at the time of commission.
>
> 5. The provision speaks about the act of a person of unsound mind. It is a very broad provision relatable to the incapacity, as aforesaid. The test is from the point of view of a prudent man. Therefore, a mere medical insanity cannot be said to mean unsoundness of mind. There may be a case where a person suffering from medical insanity would have committed an act, however, the test is one of legal insanity to attract the mandate of Section 84 of the IPC. There must be an inability of a person in knowing the nature of the act or to understand it to be either wrong or contrary to the law.
>
> 6. The aforesaid provision is founded on the maxim, actus non reum facit nisi mens sit rea, i.e., an act does not constitute guilt unless done with a guilty intention. It is a fundamental principle of criminal law that there has to be an element of mens rea in forming guilt with intention. A person of an unsound mind, who is incapable of knowing the consequence of an act, does not know that such an act is right or wrong. He may not even know that he has committed that act. When such is the position, he cannot be made to suffer punishment. This act cannot be termed as a mental rebellion constituting a deviant behaviour leading to a crime against society. He stands as a victim in need of help, and therefore, cannot be charged and tried for an offence. His position is that of a child not knowing either his action or the consequence of it.
>
> …
>
> 8. The burden of proof does lie on the Appellant to prove to the satisfaction of the Court that one is insane while doing the act prohibited by law. Such a burden gets discharged based on a prima facie case and reasonable materials produced on his behalf. The extent of probability is one of preponderance. This is for the reason that a person of unsound mind is not expected to prove his insanity beyond a reasonable doubt. Secondly, it is the collective responsibility of the person concerned, the Court and the prosecution to decipher the proof qua insanity by not treating it as adversarial. Though a person is presumed to be sane, once there are adequate materials available before the Court, the presumption gets discharged."

24. In the present case, the Appellant's mother, during her testimony, mentioned that the Appellant had a history of mental illness. However, no substantive evidence, such as medical records or testimonies from treating physicians prior to the incident, was produced to support this claim. The defense introduced the issue of insanity only after the commencement of the trial, and it failed to raise this issue during the initial stages of investigation, which weakens its credibility.

25. Furthermore, the medical evidence presented, including the Appellant's treatment for conversion disorder and psychosis after the incident, does not sufficiently establish that the Appellant was legally insane at the time of the offense. The crucial factor in determining the applicability of Section 84 IPC is the mental state of the Appellant at the time of the crime, not merely before or after the event. The trial Court rightly observed that the evidence did not prove that the Appellant was incapable of understanding the nature of his act when he committed the murders.

26. For instance, the Appellant's conduct during and after the crime, such as the manner of the assaults and his subsequent actions, did not demonstrate a loss of reasoning or an inability to comprehend his actions. The absence of any indication

that the Appellant was disoriented or unaware of his actions at the time of the murders further weakens the argument for legal insanity. While the Appellant may have been medically insane, suffering from recognized mental health issues, this does not automatically qualify him for the defense of legal insanity. Legal insanity requires a much narrower and specific mental incapacity at the time of the crime, which could not be established in this case. Therefore, although the Appellant's medical condition is acknowledged, it does not absolve him of criminal responsibility under the law.

27. Upon a thorough examination of the evidence on record, this Court concurs with the findings of the trial Court as well as its findings in rejecting the Appellant's plea of insanity. Conversely, the evidence on record clearly establishes that the Appellant committed the murders with full knowledge of the nature and consequences of his actions. The subsequent mental health issues observed during his incarceration do not absolve him of his responsibility for the heinous crime. Since the sentence awarded is absolutely in accordance with law, there is nothing to interfere therewith.

28. As a result, the JCRLA stands dismissed being devoid of merit.

Before parting with this case, we place on record our appreciation to the learned Amicus Curiae and the learned Addl. Standing Counsel for the assistance rendered by them in disposing the Appeal.

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2024 (III) ILR-CUT-121

K.R. MOHAPATRA, J.

W.P.(C) NO. 28680 OF 2021

ARAKHITA SAHU ……Petitioner

V.

STATE OF ODISHA & ORS. ……Opp.Parties

ORISSA FOREST ACT, 1972 – Section 56 r/w Section 25 of the Indian Evidence Act – Whether the statement made by the witnesses examined on behalf of the petitioner in the confiscation proceeding can be the basis to set aside the order of confiscation, more particularly when they were not cross examined? – Held, No – The confessional statement made before the Forest Officer is not hit by Section 25 of the Evidence Act as they are not Police Officer – The proximity of recording of the statements of the driver and labourers by the Range Officer immediately after the seizure of the vehicle rules out any distortion in it. (Paras 7-8)

Case Laws Relied on and Referred to :-

1. 2001 Crl. Law Journal 1897 : Matia Palei -v- State of Orissa.
2. 2002 (II) OLR 216 : Malatilata Samal and others -v- State of Orissa & Ors.

3. (1991) 71 CLT 151 : State of Orissa,represented through the Range Officer, Khurda Forest Range -v- Kiran Sankar Panda & Ors.

For Petitioner : Mr. Chittaranjan Pattnaik.
For Opp.Parties : Mr. Swayambhu Mishra, A.S.C.

JUDGMENT Heard & disposed of on : 30.07.2024

K.R. MOHAPATRA, J.

1. This matter is taken up through hybrid mode.

2. Judgment dated 28th January, 2021 (Annexure-5) passed in FAO No.24 of 2019 is under challenge in this writ petition, whereby learned District Judge, Mayurbhanj at Baripada dismissing the appeal filed under Section 56(2-e) of the Orissa Forest Act, 1972 (for short 'the Forest Act') confirmed the order dated 29th May, 2019 passed by the Authorized Officer-cum Assistant Conservator of Forest, Baripada Forest Division, Baripada in OR Case No.191-B of 2017-18 confiscating the vehicle of the Petitioner bearing Registration No.OD-01-V-5012 (Mahindra Bolero Pick-up Van) (for short 'offending vehicle) along with seized forest produces.

3. Mr. Pattnaik, learned counsel for the Petitioner submits that on the ill-fated day, i.e. on 24th February, 2018 at about 8.30 P.M., the Forester of Betnoti Range during his patrolling duty with staff on NH-18 near Agria Railway Crossing gave signal to the driver to stop the offending vehicle and he stopped the offending vehicle. It was alleged that on search, fresh cut Neem Logs with bark 12 pieces (i.e. 37.57 cft) and 2 (two) quintals fire-wood were found loaded on it. On being asked, the driver allegedly could not produce any permit for transportation of the same. Consequently, the Forester seized the logs and fire-wood along with the offending vehicle, arrested the driver and produced him before the Court of learned S.D.J.M., Baripada. Subsequently, confiscation proceeding under Section 56 of the Act in OR. Case No.191-B of 2017-18 was initiated. Vide judgment dated 29th May, 2019 passed by the Authorised Officer in the aforesaid confiscation proceeding, the offending vehicle along with seized articles were directed to be confiscated. Assailing the same, the Petitioner preferred FAO No. 24 of 2019, which was dismissed vide judgment dated 16th November, 2020. Being aggrieved, the Petitioner filed W.P.(C) No.34902 of 2020, which was disposed of on 14th December, 2020 with the following direction:

> *"Heard learned counsel for the parties and perused the material placed before this Court. There is no dispute to the ratio decided in the case laws referred to by learned District Judge. But, while exercising the power under Section 56 (2-e) of the Act, he is required to discuss the arguments raised with reference to the evidence led by the parties during confiscation proceeding under Section 56 of the Act in detail. It, however, appears that learned District Judge has referred to the evidence of the petitioner recorded during the confiscation proceeding. No doubt, learned District Judge is not required to repeat the discussion made by Authorized Officer in the proceeding under Section 56 of Act, but he has to discuss the contentions raised by learned counsel for the appellant in course of appeal with reference to the materials available on record and*

record his independent findings on the same. In the case at hand although learned District Judge has recorded the contentions of learned counsel for the appellant, but while disbelieving the statement of the appellant, learned District Judge ought to have assigned good reasons for the same. The reason assigned by learned District Judge appears to be not satisfactory in view of the statements of the driver as well as the helper of the vehicle, which were not discussed. They categorically stated that the Range Officer directed to bring the seized vehicle to the Range Office and at that time the vehicle was empty. The statement of the witnesses recorded during confiscation proceeding also remained unassailed. These material evidence ought to have been considered by learned District Judge while adjudicating the appeal.

In that view of the matter, the impugned order is set aside, the matter is remitted back to learned District Judge, Mayurbhanj at Baripada to adjudicate the appeal afresh with reference to the relevant materials on record, giving opportunity of hearing to the parties concerned.

With the aforesaid observation and direction, this Court, without expressing any opinion on the merits of the case of the petitioner, disposes of the writ petition."

Accordingly, the appeal was heard afresh and learned District Judge, Mayurbhanj at Baripada reiterating his earlier order confirmed the order of Authorized Officer vide judgment dated 28th January, 2021 (Annexure-5). Hence, this writ petition has been filed.

4. Mr. Pattnaik, learned counsel further submits that the offending vehicle in question was empty at the time of its seizure. The Petitioner along with driver have also stated so in their statement recorded by the Authorized Officer during adjudication of confiscation proceeding. Said statement remained unassailed as the witnesses were not cross-examined. Thus, considering the plea of the Petitioner, this Court in W.P.(C) No.34902 of 2020 directed learned District Judge, Mayurbhanj at Baripada to consider the matter afresh. Learned Appellate Court without taking note of the same reiterated his earlier order by dismissing the appeal. It is his submission that the Petitioner being the owner of the offending vehicle had no knowledge of alleged transportation of the forest produces in the offending vehicle. Further, the Petitioner has instructed his driver not to carry any contraband articles in the offending vehicle. It is stated by the driver that when the offending vehicle was parked at Betonati Bazar, the Forester asked the driver to carry his household articles free of cost but the driver refused. Thus, the offending vehicle has been falsely implicated in the forest offence. It is submitted that the offending vehicle of the Petitioner is the only source of his livelihood and it was purchased by obtaining a loan from the Bank. Hence, the Petitioner prays for setting aside the impugned judgment and to release the offending vehicle.

5. Mr. Mishra, learned Additional Standing Counsel vehemently objects to the submission made by Mr. Pattnaik, learned counsel for the Petitioner and submits that the plea taken by the Petitioner that the offending vehicle was empty at the time of its seizure, is an afterthought and is made out to wriggle out of the rigors of law. Elaborating his submission, it is contended that the Petitioner submitted his show cause reply to the notice issued in the confiscation proceeding on 5th June, 2018. In

the said written reply, the Petitioner had never alleged that the Range Officer, namely, Ghanashyam Singh, has taken his vehicle to the Range Office without any wood or log being loaded in it. It was never stated that the offending vehicle was empty. The Petitioner simply stated in his show cause reply that he had no knowledge regarding transportation of any forest produce as he had specifically instructed his driver not to transport any contraband/objectionable goods. But the driver might have on good-faith transported the fire wood. He further submits that on the date of seizure of the offending vehicle, the Forester in presence of the Range Officer recorded the statements of the driver (D.W.2) and one Guruva Singh (D.W.3) as well as Mangal Singh (D.W.4), who were working as labourers in the said offending vehicle. They unequivocally stated that on 24th February, 2018, the owner, namely, the Petitioner, instructed them to transport some Neem Logs from Dantiamuhan. Accordingly, they went to Dantiamuhan and loaded some Neem Logs and were transporting the same towards Balasore. At that time, near Railway Crossing at Betnoti, the Range Officer and other forest officials detained them and brought the vehicle along with logs to the Range Office at Betnoti. In the case of ***Matia Palei –v- State of Orissa***, reported in 2001 Crl. Law Journal 1897, it is held that the confessional statement made before the Forest Officer is not hit by Section 25 of the Evidence Act, 1972 (for short 'the Evidence Act') as the Forest Officer is not a Police Officer even though they are vested with certain powers of the Police Officer. It is also held therein that the self implicating statement made by the co-accused before the Forest Officer can be the basis of conviction. He also relied upon the case of ***Malatilata Samal and others –v- State of Orissa and others***, reported in 2002 (II) OLR 216, wherein at paragraph-8, this Court held as under:

> *"8. Mr. Panda strenuously submitted that as would be evident from the evidence, the owner had absolutely no role to play in the alleged offence and the truck therefore should not be confiscated. To appreciate the said argument a cursery glance at the Section itself would be very much necessary. Section 56(2-c), according to us, has put an embargo so far as means rea is concerned. The Section provides that in cases of confiscation of the tools or the vehicles used for the offence, it is the owner who has to prove that the same has been used without his knowledge or connivance, or the knowledge or connivance of his agent, if any, or the person in charge of the article in question. Thus, it would be clear that the knowledge and connivance, so far as Section 56(2-c) are concerned, are not confined to the owner alone, but take within their fold, the knowledge and connivance of the agent, if any, or the person in charge of the vehicle. A closer reading of the Section further reveals that it also stipulates that to escape the order of confiscation it must be further proved that each of the concerned persons had taken all reasonable any necessary precautions against use of the vehicle in question in respect of commission of Forest offence. The view expressed by us is fortified by the decision of this Court reported in 71 (1991) CLT 157 (supra)"*
>
> *(Emphasis supplied)*

He also relied upon the case of ***State of Orissa represented through the Range Officer, Khurda Forest Range –v- Kiran Sankar Panda and others***, reported in (1991) 71 CLT 151, it is held as under:

> *"4. What is more important than the difference in phraseology used in the two Acts is that so far as confiscation of any tool, rope, chain, boat, vehicle or cattle is concerned, section 56(2-c) has excluded the conception of mens rea by necessary implication, as already noted. We have said so because this section states that in case of confiscation of such articles, it is the owner who has to prove that the same had been used without his knowledge or connivance or the knowledge or connivance of his agent, if any, or the person in charge of the article in question. This would show that knowledge or connivance is assumed unless contrary is proved. The knowledge or connivance about which section 56(2-c) has spoken is not confined to the owner but takes within its fold the knowledge or connivance of - the agent, if any, or of the person in charge of the article in question. Not only this, this section further states that to escape the order of confiscation, it must be further proved that each of the concerned persons had taken all reasonable and necessary precaution against the use of the article in question in respect of the commission of the forest offence."*

He, therefore, submits that mens rea is not required to be proved to constitute an offence under the Forest Act. The owner of the vehicle or the person in-charge of the same has to prove that he had no knowledge or connivance in commission of the forest offence. It is also held therein that knowledge or connivance is assumed unless the contrary is proved. Thus, he submits that even though no cross-examination of the witnesses examined by the Petitioner was made, the same would not affect the case of the prosecution as it is a clear case of afterthought of the Petitioner to make out a story to escape the confiscation of the vehicle and goods seized. Learned Appellate Court has dealt with the matter in detail and passed the impugned order, which warrants no interference. Although it is alleged that since the driver of the offending vehicle refused to carry the household articles of the Range Officer free of cost, they were falsely implicated, but the Range Officer in his statement has categorically denied the suggestion put to him that he had any ill feeling with the owner of the vehicle. He, therefore, prays for dismissal of the writ petition.

6. Heard learned counsel for the parties. Perused the case record and the case law cited.

7. The matter has travelled to this Court earlier in W.P.(C) No.34902 of 2020, which was disposed of on 14th December, 2020 setting aside the order passed by the Appellate Authority and remitting the matter to it for fresh adjudication of the appeal taking into consideration that the witnesses examined on behalf of the Petitioner have categorically stated that the offending vehicle was empty when it was taken to the Range Office, Betnoti as per the direction of the Range Officer. It is also apparent from the record that the witnesses were not crossexamined. Thus, this Court is required to find out as to whether the statements made by the witnesses examined on behalf of the Petitioner in the confiscation proceeding can be the basis to set aside the order of confiscation, more particularly when they were not cross-examined. It is not disputed that D.Ws 2 to 4, namely, the driver and labourers of the offending vehicle, who were present at the time of seizure of the offending vehicle, have made statements before the Range Officer that on instruction of the owner, namely, the Petitioner, they were transporting Neem Logs from Dantiamuhan. It was

also stated by them that when they were transporting Neem Logs from Dantiamuhan towards Balasore, the Range Officer and other forest officials detained the vehicle at Railway crossing of Betnoti and instructed them to take the vehicle to the Range Office. In the case of *Matia Palei* (supra), this Court has categorically held that the confessional statement made before the Forest Officer is not hit by Section 25 of the Evidence Act as they are not Police Officers. It is also held therein that the statement of the co-accused can be the basis of conviction. Thus, it cannot be ruled out that the statements made by D.W.Nos. 2 to 4 before the Range Officer are redundant for confiscation of the offending vehicle.

8. It also appears from the record that the plea that the offending vehicle was empty at the time of its seizure, was not taken in the show cause reply filed by the Petitioner on 5th June, 2018 in the confiscation proceeding. For the first time, such a plea was taken while deposing in the confiscation proceeding. It is also not borne out from the record that the confessional statements of D.W. Nos.2 to 4 were made on coercion. The proximity of recording of the statements of the driver and labourers by the Range Officer immediately after the seizure of the vehicle rules out any distortion in it. From the facts and circumstances stated above, it is apparent that the witnesses became prudent at the time of making statements before the Authorized Officer in the confiscation proceeding. Thus, a possibility of distortion cannot be ruled out at that juncture, more particularly when the plea taken by the Petitioner and his witnesses was not taken in the written show cause reply.

9. True, it is that the witnesses were not cross-examined but the statement recorded during confiscation proceeding does not become sacrosanct. The Adjudicating Authority is under legal obligation to test the veracity of the unrebutted statements along with other materials and circumstances available on record to come to a definite conclusion.

10. In the instant case, learned District Judge, Mayurbhanj at Baripada while adjudicating the appeal has elaborately dealt with the matter and assigned reason as to why the unrebutted statements of the witnesses examined on behalf of the Petitioner cannot be accepted.

11. In view of the discussion made above, I find no reason to take a different view as arrived at by learned District Judge, Mayurbhanj at Baripada.

12. Accordingly, the writ petition being devoid of any merit stands dismissed, but, in the circumstances, there shall be no order as to cost.

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2024 (III) ILR-CUT-126

K.R. MOHAPATRA, J.

CMP NO.397 OF 2024

BIJAY KUMAR ….Petitioner

V.

KRUSHNA CH. MAHAPATRA & ORS. ….Opp.Parties

CODE OF CIVIL PROCEDURE, 1908 – Order IX, Rule 13 r/w Order 1, Rule 10 (2), Order XXII, Rule 10 and Section 146 – Whether a petition for intervention filed by a *Lis Pendens* purchaser in a proceeding under Order IX, Rule 13 of C.P.C. to set aside the *ex parte* decree against his vendor is maintainable? – Held, Yes – The *Lis Pendens* purchaser having interest in the subject matter of dispute is a proper party to the proceeding under Order IX, Rule 13 of C.P.C.

Case Laws Relied on and Referred to :-

1. (2004) 2 SCC 601 : Raj Kumar -v- Sardari Lal & Ors.
2. 2015 (I) ILR CUT 835 : pendranath Samantasinghar & Anr. -v- Bikash Chandra Mohapatra & Anr.

For Petitioner : Mr. Amit Prasad Bose
For Opp.Parties : Mr. Banshidhar Baug

JUDGMENT Heard & disposed of on : 21.08.2024

K.R. MOHAPATRA, J.

1. This matter is taken up through hybrid mode.

2. Order dated 12th March, 2024 (Annexure-1) passed in CMA No.563 of 2012 is under challenge in this CMP, whereby learned Civil Judge, (Senior Division), Bhubaneswar allowed an application filed by the Opposite Party No.3 under Order I Rule 10(2) and Order XXII Rule 10 read with Section 146 CPC.

3. Mr. Bose, learned counsel for the Petitioner submits that CS No.1132 of 2009 was filed by the Plaintiff-Petitioner to declare him as the absolute owner of the suit property. A prayer was also made to declare the sale deed executed by his father late Rama Chandra Mahapatra in favour of Krushna Chandra Mahapatra to be null and void, not binding on him and along with other consequential reliefs. In the said suit, Krushna Chandra Mahapatra was set ex parte and the suit was decreed. Subsequently, said Krushna Chandra Mahapatra filed CMA No.563 of 2012 under Order IX Rule 13 CPC to set aside the *ex parte* decree. During pendency of the CMA, Opposite Party No.3 filed an application under Order I Rule 10 (2) and Order XXII Rule 10 read with Section 146 CPC to be impleaded as a party to the proceeding under Order IX Rule 13 CPC. The said application was allowed vide order dated 12th March, 2024 (Annexure-1). Assailing the same, the present CMP has been filed.

3.1. It is his submission that after the suit was decreed *ex parte*, Krushna Chandra Mahapatra sold the entire suit property to Opposite Party No.3 by virtue of RSD dated 28th June, 2012. On the basis of such sale, the Opposite Party No.3 filed an application for intervention. When said Krushna Chandra Mahapatra, namely, his vender is prosecuting the CMA diligently, there was no necessity to implead the vendee/*lis pendens* purchaser as a party to the proceeding under Order IX Rule 13 CPC. He drew attention of this Court to the objection filed by Krushna Chandra Mahapatra, wherein at para-5, he has categorically stated that he is honestly and

diligently prosecuting the case. It is also stated in the objection that said Krushna Chandra Mahapatra has already adduced oral as well as documentary evidence by examining himself as O.P.W.1 and the evidence from his side (Krushana Chandra Mahapatra) has already been closed. Thus, at this stage, impleadment of a *lis pendens* purchaser is nothing but to protract the litigation. Although, it is alleged that after filing of the petition under Order IX Rule 13 CPC, Krushna Chandra Mahapatra colluded with the Plaintiff, namely, the Petitioner in this CMP, but, there is no material to that effect. On the other hand, materials available on record clearly disclose that Krushna Chandra Mahapatra is prosecuting the litigation diligently. He, therefore, submits that there is no necessity to implead said *lis pendens* purchaser as a party to the proceeding under Order IX Rule 13 CPC, which will create further complications.

4. Mr. Baug, learned counsel for the contesting Opposite Party No.3 vehemently objects to the same. It is his submission that late Rama Chandra Mahapatra during his lifetime, had purchased the suit land from one Anjan Kumar Ghosh vide RSD dated 13th September, 1995. Said Rama Chandra Mahapatra sold the suit property vide RSD No.13097 dated 26th December, 2005 to Krushna Chandra Mahapatra (Petitioner in CMA). In the plaint, in CS No.1132 of 2009, the Plaintiff-Petitioner provided wrong address of Krushna Chandra Mahapatra. As such, summons could not be served on him and he was unaware of the litigation, i.e., CS No.1132 of 2009. Said Krushna Chandra Mahapatra was also unaware of the *ex parte* decree dated 19th May, 2019. Being ignorant about the *ex parte* decree, Krushna Chandra Mahapatra sold the suit property to Opposite Party No.3 by virtue of RSD dated 28th June, 2012 and delivered possession. One Santilata Mahapatra, the sister of the Petitioner and Opposite Party No.1 had filed CS No.57 of 2012 in the Court of learned Civil Judge, (Senior Division), Udala for partition of the property at Udala. Relief was also sought to declare the sale deed executed by Rama Chandra Mahapatra in favour of Krushna Chandra Mahapatra as well as the sale deed executed by Krushna Chandra Mahapatra in favour of Opposite Party No.3 to be null and void. In the said suit, the present Petitioner was arrayed as Defendant No.5, Krushna Chandra Mahapatra was arrayed as Defendant No.7 and Opposite Party No.3 was arrayed as Defendant No.10. Opposite Party No.3-Defendant No.10 was set *ex parte* in the said suit. However, learned trial Court held both the sale deeds, i.e., one by Rama Chandra Mahapatra to Krushna Chandra Mahapatra and the other by Krushna Chandra Mahapatra to Opposite Party No.3 to be valid and also held that valid title passed to the Opposite Party No.3 by virtue of the sale deed executed by Krushna Chandra Mahapatra. As Krushna Chandra Mahapatra colluded with the Petitioner (Plaintiff in the CS No.1132 of 2009) in the proceeding under Order IX Rule 13 CPC, the Opposite Party No.3 filed an application under Order I Rule 10(2), Order XXII Rule 10 read with Section 146 CPC to be impleaded as a party to the suit to protect his interest in the suit property.

4.1. It is his submission that a *lis pendens* purchaser is also entitled to maintain a petition under Order IX Rule 13 CPC to set aside *ex parte* decree passed against his

vendor even when he is not a party to the suit. In support of his submission, he relied upon the case of ***Raj Kumar -v- Sardari Lal and others***, reported in ***(2004) 2 SCC 601***, wherein discussing the scope of Section 146 CPC, Order XXII Rule 10 CPC and Order I Rule 10 CPC, Hon'ble Supreme Court held as under:

> *"15. We hold that a lis pendens transferee, though not brought on record under Order 22 Rule 10 CPC, is entitled to move an application under Order 9 Rule 13 CPC to set aside a decree passed against his transferor, the defendant in the suit."*

5. In the instant case, the transferor, namely, Krushna Chandra Mahapatra was set *ex parte* in CS No.1132 of 2009. Thus, in the proceeding to set aside the *ex parte* decree in the said suit, the Petitioner is a proper party and has a right to be impleaded, more particularly when, there is a collusion between the Petitioner, the Plaintiff and Krushna Chandra Mahapatra, his vender. To buttress his contention, Mr. Baug, learned counsel for the Opposite Party No.3 drew attention of this Court to the deposition of Bijay Kumar in the proceeding under Order IX Rule 13 CPC. Said Bijay Kumar was examined as O.P.W.1 in the CMA. Krushna Chandra Mahapatra, the Petitioner in the CMA declined to cross-examine said Bijay Kumar. Although, Krushna Chandra Mahapatra filed the objection to the petition for intervention of the Opposite Party No.3, but, he did not whisper a single word that he is protecting the interest of his vendee, namely, Opposite Party No.3. He only stated in his objection that he is prosecuting the proceeding under Order IX Rule 13 CPC diligently and honestly. Thus, it can be safely concluded that there is collusion between his vender and the Plaintiff. Thus, learned trial Court has committed no error in impleading the present Opposite Party No.3 as a party to the proceeding under Order IX Rule 13 CPC.

6. Mr. Baug, learned counsel for Opposite Party No.3 also relied upon the ratio in the case of ***Upendranath Samantasinghar and another -v- Bikash Chandra Mohapatra and another***, reported in ***2015 (I) ILR CUT 835***, wherein at para-14 and 15, this Court relying upon the case of ***Raj Kumar*** (Supra), held as under:

> *"14. Section 141 of the Code predicates that the procedure provided in CPC with regard to suit would be followed as far as can be made applicable in all proceedings in any court of civil jurisdiction. The explanation thereto clarifies that the expression "proceedings" would include one under Order 9 and Section 141 of the Code. A proceeding under Order 9 Rule 9 of the Code would thus come within the ambit of Section 52 of the T.P. Act and Order 22 Rule 10 CPC.*
>
> *15. Section 146 conceives of furtherance of proceedings by or against representatives of any person claiming under his title and would have application unless excluded by any provision of the Code or by any law for the time being in force. This salutary provision thus recognizes a substantive right in favour of a representative of any person involved in any proceeding as contemplated to pursue the same on his/her behalf. A conjoint reading of Section 146 and Order 22 Rule 10 thus recognizes the right of a representative of a person claiming under him, amongst others by virtue of assignment, creation or devolution of any interest during the pendency of a suit or proceeding in any court of civil jurisdiction to continue with it on his behalf. Such a right is therefore fundamental and intrinsic for such a representative claiming under the person concerned."*

6.1. It is further submitted that after being impleaded as party, the Opposite Party No.3 was allowed to cross examine the Plaintiff, namely, Bijay Kumar. But, he did not adduce evidence in the matter. CMA filed under Order IX Rule 13 CPC is at present posted for argument. He, therefore, submits that the impugned order under Annexure-1 warrants no interference.

7. Heard learned counsel for the parties.

8. Perused the materials as well as case laws cited by the respective parties in support of their case.

9. The question that requires consideration in this CMP as to whether a petition for intervention filed by a *lis pendens* purchaser in a proceeding under Order IX Rule 13 CPC to set aside the *ex parte* decree against his vendor is maintainable or not. Law is well settled in the case of ***Raj Kumar*** (supra) that a *lis pendens* purchaser can also maintain a proceeding under Order IX Rule 13 CPC to set aside the decree passed against his transferor. In the instant case, the suit was decreed *ex parte* against the transferor namely, Krushna Chandra Mahapatra. He was also impleaded as Defendant No.1 in the suit, i.e., CS No.1132 of 2009 filed by the present Petitioner. In the sale deed, executed by Krushna Chandra Mahapatra in favour of Opposite Party No.3, there was no whisper with regard to the pendency of the civil suit or *ex parte* decree passed therein. It may be so as the transferor of the Opposite Party No.3, namely, Krushna Chandra Mahapatra had alleged in the petition under Order IX Rule 13 CPC that he was not served with summons in the suit. Thus, it appears that the Opposite Party No.3 the *lis pendens* purchaser had no occasion to know about the filing of CS No. 1132 of 2009 or the *ex parte* decree passed therein. In the meantime, in CS No.57 of 2012 filed by the sister of his vendor, namely, Santilata Mahapatra, the sale deed executed in favour of Krushna Chandra Mahapatra by Rama Chandra Mahapatra and the sale deed executed by Krushna Chandra Mahapatra in favour of the Opposite Party No.3 has been held to be valid and it is also held that valid title passed to Opposite Party No.3 by virtue of the aforesaid sale deeds. It is also admitted by Krushna Chandra Mahapatra that Opposite Party No.3 has been delivered with possession over the suit property pursuant to the sale in its favour and it is in possession over the suit property.

10. Mr. Bose, learned counsel for the Petitioner, however, submits that the matter arising out of CS No.57 of 2012 at present is pending before RSA No.103 of 2024. The judgment and decree passed in CS No.57 of 2012, in which it is held that Opposite Party No.3 has a valid title over the suit property has not been disturbed or varied till date. Thus, Opposite Party No.3 has a subsisting interest over the subject matter of dispute. Materials available on record suggest that the interest of the Opposite Party No.3, *lis pendens* purchaser is not being protected by his vendor, namely, Krushna Chandra Mahapatra, who is the Petitioner in the petition under Order IX Rule 13 CPC.

11. Krushna Chandra Mahapatra, the vendor of the Opposite Party No.3 does not challenge the impugned order under Annexure1. It is the Plaintiff, who is Opp.

Party No.1 in the proceeding under Order IX Rule 13 CPC has challenged the order impleading the Opposite Party No.3 as party to the said proceeding. It is not understood as to how the present Petitioner, who is Opposite Party No.1 in the CMA, is prejudiced by the impugned order.

12. This Court finds that Opposite Party No.3, having interest in the subject matter of dispute, is a proper party to the proceeding under Order IX Rule 13 CPC.

13. It is submitted by Mr. Baug, learned counsel for the Opposite Party No.3 that the said proceeding is at present posted for argument.

14. Taking into consideration the matter in its entirety, I find no infirmity in the impugned order under Annexure-1.

15. Accordingly, this CMP, being devoid of any merit, stands dismissed. In the circumstances, there shall be no order as to costs.

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2024 (III) ILR-CUT-131

B.P. ROUTRAY, J.

W.P.(C) NO. 39505 OF 2023

PATUARI PADHAN ….Petitioner

V.

HARIBANDHU PADHAN & ORS. ….Opp.Parties

ORISSA GRAMA PANCHAYATS ACT, 1964 ─ Section 25(W) ─ The petitioner in his evidence stated about non-possession of any other asset or having nil amount in his bank account ─ Both the Courts below have stated that such statement of petitioner is not believable ─ This presumption taken by both the Courts is without any supporting material ─ Whether the finding of Courts against the petitioner that he has suppressed material is sustainable? ─ Held, No ─ The presumption taken by both the Courts being unsupported by *prima facie* material and against denial of petitioner in his evidence does not permit the Courts to draw such conclusion. (Para 12)

Case Laws Relied on and Referred to :-

1. (2014) 14 SCC 162 : Kisan Shankar Kathore vrs. Arun Dattatray Sawant & Ors.
2. AIR 2024 SC 2121 : Kariho Kri and Nuney Tayang & Anr.

For Petitioner : Mr.Himanshu Mishra.
For Opp.Parties : Mr. Amit Kumar Nath.

JUDGMENT Date of Judgment : 16.08.2024

B.P. ROUTRAY, J.

1. The judgment of the learned Civil Judge declaring the election of the Petitioner as void under Section 25(w) of the Gram Panchayat Act (in short 'OGP Act'), which is confirmed in the appeal by the learned District Judge, is challenged in the present writ application.

2. Heard Mr.Mishra, learned counsel for the Petitioner and Mr.Nath, learned counsel for Opposite Party No.1. Opposite Parties No. 2 and 3 did not enter appearance despite sufficiency of service of notice on them.

3. Opposite Party No.1, namely, Haribandhu Padhan filed Election Petition No.1 of 2022 in the court of the learned Civil Judge (Jr.Division), Rampur for declaring the election of the Petitioner to the office of Sarpanch of Sahala Grama Panchayat as void inter alia on the ground that, he has suppressed the material facts in his affidavit. The learned trial court in course of adjudication framed seven issues, which are as follows:

> (i) Whether the election petition is maintainable in the eye of law?
>
> (ii) Whether O.P.Nos.1 & 3 adopted corrupt practices in the 2022 Sahala Gram Panchayat Election by bribing voters?
>
> (iii) Whether O.P.No.1 has submitted an incomplete affidavit in his nomination paper?
>
> (iv) Whether O.P.No.2 is a disqualified candidate by reason of having more than one living spouse at the time of the elections?
>
> (v) Whether the election of O.P.No.1 as the duly elected Sarpanch of Sahala Grama Panchayat is liable to be declared void under Section 39 O.G.P.Act?
>
> (vi) Is there a cause of action to institute this petition?
>
> (vii) To what reliefs is the petitioner entitled?

4. All the issues except Issue No.3, 5, 6 & 7 are answered in negative. As seen from the above, Issue No.5, 6 & 7 are dependent on the finding of Issue No.3 and issue No.3 is answered against the elected candidate. Issue No.3 speaks that whether present Petitioner (elected candidate) has filed incomplete affidavit during his nomination for the office of Sarpanch.

5. The affidavit submitted by the present Petitioner has been marked as Ext.4 before the trial court. According to the opinion of the trial court, the Petitioner did not mention his bank account number in IDBI, Dunguripali and the amount deposited therein. It is also concluded by the trial court that the Petitioner has failed to disclose the bank details of his spouse and dependents.

6. Perusal of copy of Ext.4 reveals that at Clause 3(A), the Petitioner has disclosed having possessed one Swift Desire Car of approximate value of Rs. 3,00,000/- and 100 grams of gold ornaments having approximate value of Rs.5,00,000/-. At Clause 3(D), he has disclosed of having one bank account in IDBI, Dunguripali without having any deposited amount therein. Further according to the Petitioner, he did not have any bank account in the name of his spouse and dependents. But this is disbelieved by the learned trial court as well as the appellate court that it cannot be presumed that the Petitioner or his spouse did not have any amount in the bank considering their status.

7. So far as evidence is concerned, the election Petitioner and the present Petitioner both were examined as P.W.1 and D.W.1 respectively and except them, no other witness were examined from either side.

8. Now coming to Issue No.3 as per the facts stated above, the point falls for determination is, whether the Petitioner has suppressed the substantial information with regard to his assets including bank account in his affidavit?

9. Section 25(w), which was inserted by way of Amendment in 2021, requires that the candidate has to furnish an affidavit containing particulars of his criminal antecedents, assets, liabilities and educational qualification at the time of filing of nomination and further, if the candidate gives false information or conceals any information in his nomination paper or the affidavit, he shall be punishable with imprisonment and fine.

10. In ***Kisan Shankar Kathore vrs. Arun Dattatray Sawant and others, (2014) 14 SCC 162***, it is held that non-disclosure of facts would not be a material lapse unless it is a substantial lapse or suppression of substantial information. In ***Kariho Kri and Nuney Tayang and another, AIR 2024 SC 2121***, it is observed that, non-disclosure of each and every assets owned by a candidate would not amount to a defect, much less a defect of substantial character and it is not necessary to declare every item of immovable property that he or his dependent family members owned, unless the same is of such value has to constitute a sizeable asset in itself and require to be disclosed. Paragraph 44 of the said judgment reads as follows:

> *"**44.** Though it has been strenuously contended before us that the voter's 'right to know' is absolute and a candidate contesting the election must be forthright about all his particulars, we are not inclined to accept the blanket proposition that a candidate is required to lay his life out threadbare for examination by the electorate. His 'right to privacy' would still survive as regards matters which are of no concern to the voter or are irrelevant to his candidature for public office. In that respect, non-disclosure of each and every asset owned by a candidate would not amount to a defect, much less, a defect of a substantial character. It is not necessary that a candidate declare every item of movable property that he or his dependent family members owns, such as, clothing, shoes, crockery, stationery and furniture, etc., unless the same is of such value as to constitute a sizeable asset in itself or reflect upon his candidature, in terms of his lifestyle,and require to be disclosed. Every case would have to turn on its own peculiarities and there can be no hard and fast or straitjacketed rule as to when the non-disclosure of a particular movable asset by a candidate would amount to a defect of a substantial character. For example, a candidate and his family who own several high-priced watches, which would aggregate to a huge figure in terms of monetary value, would obviously have to disclose the same as they constitute an asset of high value and also reflect upon his lavish lifestyle. Suppression of the same would constitute 'undue influence' upon the voter as that relevant information about the candidate is being kept away from the voter. However, if a candidate and his family members each own a simple watch, which is not highly priced, suppression of the value of such watches may not amount to a defect at all. Each case would, therefore, have to be judged on its own facts."*

11. In the case at hand, looking to the materials brought on record with regard to suppression of material fact by the Petitioner in his affidavit, it is seen that P.W.1 in his evidence has stated about having one motorcycle by the present Petitioner except the car he disclosed in his affidavit. Nothing more has been brought on record

regarding suppression of facts or assets by the Petitioner (elected candidate). No document has been produced with regard to any amount kept in the bank account of the Petitioner against his disclosure made in the affidavit nor in respect of his spouse. There is absolutely no material of substantial nature brought in evidence against the disclosure of the Petitioner made in the affidavit under Ext.4. The election Petitioner has not taken any step either to examine the bank authority or any other witness to establish his contention with regard to possession of assets by the elected candidate beyond the disclosure given in the affidavit. Only one motorcycle being stated in the evidence of P.W.1 and undisputed by D.W.1, would not attract substantial suppression of assets. This Petitioner as D.W.1 has specifically answered the question of election Petitioner that he did not have any amount in his account at the time of filing of nomination. This has not been rebutted in evidence or by production of materials from the side of the election Petitioner.

12. Despite this specific denial of the elected candidate in his evidence about non-possession of any other asset or having nil amount in his bank account, both the trial court and appellate court have stated that such statement of the Petitioner is not believable. This presumption taken by both the courts is without any supporting material and it needs to be mentioned here that without any basis for presuming of having any amount in the bank account, the conclusion of the courts based on the presumptions are completely erroneous. This is the main foundation of forming opinion by both the courts regarding suppression of material facts by the Petitioner in his affidavit under Ext.4. As stated above, the presumption taken by both the courts being unsupported by prima facie material and against specific denial of the Petitioner in his evidence does not permit the courts to draw the conclusion against him that he has suppressed material facts.

13. The Petitioner is an elected candidate who has been elected to the office of Sarpanch with the support of the people. He has secured votes in his favour for election to the office of Sarpancha of Sahala Grama Panchayat. Unless the suppression of substantial character or of sizeable asset by the Petitioner is brought on record, he should not be thrown out of his elected office in such process of disqualification for small things.

14. For the reasons stated above, as both the courts have concluded based on presumptions to disqualify the Petitioner from the office, this Court comes to the opinion that the judgments of both the Courts are suffering from errors. Accordingly, the judgments of the trial court as well as the appellate court under Annexure 5 & 1 are set aside. The Petitioner is restored to the office of Sarpanch of Sahala Grama Panchayat.

15. Certified copies of evidences as produced by Mr.Mishra in course of hearing are kept on record.

16. The writ petition is disposed of as allowed.

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2024 (III) ILR-CUT-135

B.P. ROUTRAY, J.

W.P.(C) NO. 27920 OF 2023 WITH BATCH

(W.P.(C) NOS. 23087, 23088, 23089, 23090, 23738, 25907, 25911, 25913, 25918, 25922, 25930, 25940, 27922, 27923, 27924, 27926, 27927, 28123, 28125, 28127, 28128, 28131, 28133, 28137, 28138, 28140, 30889, 30892, 31664, 32307, 32313, 32317, 32319, 32491, 32492, 32509, 32511, 33022, 35375, 35376, 35379, 35380, 35382, 35384, 35385, 35387, 37577, 37578, 37580, 37581, 37582, 37583, 37584, 37585, 37586, 37587, 37588 & 39886 OF 2023, 155, 159, 161 & 3397 OF 2024)

HEMANTA NAIK ……Petitioner

V.

STATE OF ODISHA (REVENUE & D.M.DEPT) & ANR. ……Opp.Parties

ODISHA LAND REFORMS ACT, 1960 – Section 22 – Whether the provisions contained in Section 22 of the Act are exempted for homestead lands situated in urban areas? – Held, No – Mere inclusion of the land in an urban area would not exclude applicability of provisions of the OLR Act – The competent Revenue Authority has to give enquiry report in each case regarding usability of the land in question for other than the agricultural purpose. (Para 18)

Case Laws Relied on and Referred to :-

1. (Vol.XLIII) CLT 681 (DB) : Mahurilal Agarwalla v. Dusasan Sahu & Ors.
2. 1991 (1) OLR 46 : Srimati Madanbati Lath v. S.D.O., Sadar, Sambalpur & Ors.
3. (1999) 3 SCC 231 : Om Prakash Agarwal & Ors.v. Batara Behera & Ors.
4. 2022 (III) ILR-CUT-338 : Harful Agrawal v. Tamal Behera & Ors.

For Petitioner(s) : Mr. Pabitra Ku. Nayak, Mr. Subrat Ku. Das, Mr. K.A.Guru, Mr. S.Sourav, Mr. A.C. Samal.

For Opp.Parties : Mr. S. Ghose, A.G.A.

JUDGMENT Date of Judgment : 23.08.2024

B.P.ROUTRAY, J.

1. The common issues involved in all the writ petitions are that, whether the provisions contained in Section 22 of the Odisha Land Reforms Act, 1960 are exempted for homestead lands situated in urban areas? And secondly, whether the notification issued by the Planning Authority dated 14th July, 1972 and other subsequent notifications issued by the Municipal Corporation to include the properties in the Municipal area would itself be sufficient to exclude the properties from the purview of the provisions of the OLR Act in terms of Section 73(c).

2. Admittedly, the properties involved in each writ petition have been recorded as homestead land and coming within Sambalpur Municipal Corporation area.

3. The Petitioners have presented their respective deed of transfer before the registering authority which was rejected for want of written permission in terms of Section 22(1) of the OLR Act. The appeals preferred against such impugned orders of the registering authority have also been dismissed.

4. The facts in the leading case, i.e. WP(C) No.27920 of 2023 are to the effect that, the Petitioner, who is a member of Scheduled Tribe community, executed the deed of sale in favour of a person belonging to Non-ST category and presented the same before the Registering Authority, Sambalpur, who refused to register the same for want of written permission by order dated 30th May, 2023. Against said order of the Registering Authority the Petitioner preferred appeal. The Appellate Authority rejected the appeal vide impugned order dated 16th August, 2023 under Annexure-5.

5. Section 22 of the OLR Act reads as follows:-

"**22. Restriction on alienation of land by Scheduled Tribes –**

(1). Any transfer of holding or part thereof by a raiyat, belonging to a Scheduled Tribes shall be void except where it is in favour of –

(a) a person belong to a Scheduled Tribe; or
(b) a person not belong to a Scheduled Tribe when such transfer is made with the previous permission in writing of the Revenue Officer:

Provided that in case of a transfer by sale, the Revenue Officer shall not grant such permission unless he is satisfied that a purchaser belonging to a Scheduled Tribe willing to pay the market price for the land is not available, and in case of a gift unless he is satisfied about the *bona fides* thereof.

(2) The State Government may, having regard to the law and custom applicable to any area prior to the date of commencement of this Act by notification, direct that the restrictions provided in Sub-section (1) shall not apply to lands situated in such area or belonging to any particular tribe throughout the State or in any part of it.

(3) Except with the written permission of the Revenue Officer, no such holding shall be sold in execution of a decree to any person not belong to a Scheduled Tribe.

(4) Notwithstanding anything contained in any other law for the time being in force, where any document required to be registered under the provisions of Clause (a) to Clause (e) of Sub-section (1) of Section 17 of the Registration Act, 1908, (16 of 1908) purports to effect transfer for a holding or part thereof by a raiyat belonging to a Scheduled Tribe, in favour of a person not belonging to a Scheduled Tribe, no Registering Officer appointed under that Act shall register any such documents, unless such documents is accompanied by the written permission of the Revenue Officer for such transfer.

(5) The provisions contained in Sub-section (1) to (4) shall apply *mutatis mutandis*, to the transfer of a holding or part thereof a raiyat belong to the Scheduled Caste.

(6) xxxxxxxx."

6. Further, Section 73 prescribes as follows;

"**73. Act not to apply to certain lands –** Nothing contained in this Act, shall apply-

(a) xxxxxxxxx
(b) xxxxxxxxxx
(c) to any area which the Government may, from time to time by notification in the *Official Gazette* specify as being reserved for urban, non-agricultural or industrial development or for any other specific purposes; and
(d) xxxxxxxxxx."

7. It is submitted on behalf of the Petitioners that, the provisions in the OLR Act are intended to deal with agricultural land and homestead connected therewith.

Said provisions are not intended to deal with urban homestead lands unconnected to agricultural purposes. All the lands in question which fall under the urban area are thus exempted from the restrictions imposed for transfer. A further challenge is raised by the Petitioners questioning the power of registering authority to refuse the registration by adjudicating like a Revenue Authority.

8. Countering such submissions of the Petitioners, it is contended by the State counsel that homestead lands situated in urban area are not completely excluded from agricultural purpose and it is a question of fact whether they are ancillary or incidental to agriculture. By way of issuance of notification relating to Master Plan by the Housing and Urban Development Department and extension of municipal area of Sambalpur town would not *per se* satisfy the exemption from application of the provisions of the OLR Act. According to learned State counsel, in absence of any specific notification under the OLR Act to exempt application of the provisions thereof, mere inclusion of the lands in urban area does not deny application of the provisions of the OLR Act requiring permission from competent authority for transfer of land.

9. On the backdrop of such rival submissions, it is necessary to have a glance to the definitions of 'Land' and 'Homestead'. Section 2(14) of the OLR Act defines that 'land' means land of different class used or capable of being used for agriculture purpose and includes homestead. Section 2(12) speaks that 'homestead' means any land whether or not recorded as such, ordinarily used as a house site ancillary or incidental to agriculture.

10. The definition of 'land' under the OLR Act was interpreted in the case of ***Mahurilal Agarwalla v. Dusasan Sahu and Others, (Vol.XLIII) CLT 681 (DB)***. Said decision in ***Mahurilal*** case was relating to Orissa House Rent Control Act and involved the issue of interpretation of the provisions of the OLR Act relating to definition of 'land' and 'homestead'. The Division Bench of this court have held that, when the State Legislature aware of the existence of the Land Reforms Act and its ambit thought of an urban ceiling law, it is patently clear that the Land Reforms Act did not intend to deal with urban homestead (unless it was used or capable of being used for agricultural purposes). The relevant observations read as follows:-

> "As we have already indicated, the disputed property is a house within the Talcher Municipal area and Mr. Patnaik for opposite parties 1 to 5 has stated that the property has been assigned holding no.135. In the absence of records of the House Rent Control proceeding, where this fact is stated to have been indicated, we are not in a position to verify the correctness of Mr. Patnaik's statement. There is. However, no scope for doubt that the disputed property is a house situated within the town of Talcher and would not come within the definition of 'land' unless it is established that the same is "homestead ordinarily used as a house site, ancillary or incidental to agriculture". According to the petitioner, the house had been tenanted out to him for several years by late Hrudaya Chandra and he has been in occupation of the property ever since then. That being so, there is no room for the contention that the disputed house is a homestead within the meaning of section 2(12) of the Act. It would follow that the house is not 'land' within the definition of section 2(14) and the Revenue Officer had no jurisdiction to deal with

the property in the ceiling fixation proceeding and treat the same as surplus for the purposes of ceiling in the hands of Soubhagya. The determination by the Revenue Officer is thus without jurisdiction and consequently it is a nullity. That decision cannot affect rights of parties. The restriction imposed on transfer by the Act does not operate in respect of such property and, therefore, the Revenue Officer has no competency to render a decision which would adversely affect ownership of the property.

We find support for this conclusion from the fact that the Orissa State Legislature was a party to the resolution in terms of Article 252(1) of the Constitution consenting to Parliament enacting a law on urban ceiling. In term of such resolutions by eleven State Legislatures, the Urban Land (Ceiling and Regulation) Act, 33 of 1976, was enacted providing for ceiling limits in respect of vacant homestead lands in urban holdings. It is true that the Central Act does not extend to Talcher town at present, but that is of no consequence in the matter of finding out the legislative intention. The Orissa State Legislature was competent to enact a law on the same line as Central Act 33 of 1976 and when it was thought appropriate that a law of uniform application throughout the country would be more convenient, Parliament was authorized to make the law. When the State Legislature, aware of the existence of the Land Reforms Act and its ambit thought of an urban ceiling law, it is patently clear that the Land Reforms Act did not intend to deal with urban homestead (unless it was used or capable of being used for agricultural purposes)."

11. In the case of ***Srimati Madanbati Lath v. S.D.O., Sadar, Sambalpur and Others, 1991 (1) OLR 46,*** which is relating to the applicability of the provisions of the OLR Act in respect of urban land, the Division Bench of this court have held as follows:-

"Therefore, the holding i.e. the land contemplated by Section 22, shall either be land used or capable of being used for agricultural purposes or homestead or ordinarily used as house-site, ancillary or incidental to agriculture. Unless the disputed land comes within the definition of 'homestead' or 'land' as defined in Clauses (12) and (14), Section 22 would not be attracted. There is no finding in any of the orders that the disputed property was either being used or capable of being used for agricultural purposes or was land ordinarily used as a house-site, ancillary or incidental to agriculture. This was a jurisdictional fact conferring authority on the Revenue Officer to apply Section 23 in the absence of any finding. No doubt it is true that opp. party No. 4 had made an application Under Section 22 seeking permission but that does not bind the transferee. The application may have been misconceived, may not have been made under proper instructions and guidance. Therefore, it obligated the Revenue Officer under the Act to initially record that finding as a foundation on which the edifice of Section 23 could be built and directions issued. Unless the disputed property satisfied the definition of 'land' the Revenue Officer does not get jurisdiction to proceed further. Therefore, rightly it was observed in **Bhanuganga's** case (supra) that where lands are located in the urban area it is for the Revenue Officer to establish the link and, therefore, this Court (in its judgment to which one of us (R. C. Patnaik, J.) is a party) observed that mere situation of a land within the municipal area or that the land has potentiality of being used as homestead or for commercial purposes not relevant considerations for determination of the question. Vainly did we seek for the appropriate finding in the judgments of the Courts below. Since the law was not clear, perhaps appropriate evidence has not been led. We, therefore, remit the matter to the Sub-Divisional Officer, Sambalpur, for disposal of the proceeding afresh. It shall be open to the parties to lead evidence, if they are so advised. We, therefore, quash Annexures-1, 2 and 4, i.e. the decisions of the

original, appellate and revisional authorities, and remit the matter to the S.D.O., Sambilpur, for disposal of the proceeding in accordance with law after giving the parties an opportunity of hearing. The original proceeding be disposed of within a period of four months from the date of receipt of the order."

12. Hon'ble Supreme Court in the case of ***Om Prakash Agarwal and Others v. Batara Behera and Others, (1999) 3 SCC 231*** had the occasion to interpret the definition of 'land' as per Section 2(14) of the OLR Act and have observed as follows:-

"2. Mr. G.L. Sanghi, the learned Senior Counsel appearing for the appellants contended that the very purpose of the Orissa Land Reforms Act being a progressive legislation relating to agrarian and land tenures, the said Act cannot have any application to the land which is a part of the master plan of a City and, therefore, the High Court committed error in applying the provisions of the Land Reforms Act to the case in hand. Mr. Sanghi further contended that in the absence of any materials to indicate that the vendors of the sale deeds belong to the Scheduled Castes the embargo contained under Section 22 of the Act will not apply and, therefore, the application under Section 23 of the Act was not tenable. Mr. Sanghi also submitted that in view of Section 73(c) of the Land Reforms Act and in view of the fact that the area comes within a master plan thereby necessarily reserved as an urban area, the Act cannot have any application. The learned senior counsel for the respondents on the other hand contended that the definition of 'Land' in Section 2(14) is wide enough to include the lands within the municipal area provided the same is used for agricultural purposes or is capable of being used for agricultural purposes and in that view of the matter the High Court rightly remitted the matter to the Sub-Divisional Officer for re-consideration.

3. In view of the rival submissions at the Bar the first question that arises for consideration is whether the land as defined in Section 2(14) of the Act and which is either being used or capable of being used for agricultural purposes within the municipal area, does come under the purview of the Orissa Land Reforms Act. The Act, no doubt, is a measure relating to agrarian reforms and land tenures and abolition of intermediary interest but there is no provision in the Act which excludes such agricultural lands merely because they are situated in an Urban Agglomerations. The Act applies to all land which is either used or capable of being used for agricultural purposes irrespective of whether it is situated within a municipal area or in villages. The very object of the legislation being an agrarian reform, the object will be frustrated if agricultural lands within the municipal area are excluded from the purview of the Act. In this view of the matter we have no hesitation to come to the conclusion that the Act applies to all lands which is used or capable of being used for agricultural purposes irrespective of the fact wherever the said land is situated and the conclusion of the High Court on this score is unassailable. The first submission of Mr. Sanghi is, therefore, devoid of any force. So far as the question that the vendors do not belong to Scheduled Castes is concerned, it appears that the Sub-Divisional Officer on the basis of materials produced before him came to a positive conclusion that the vendors of the sale deeds belong to Scheduled Castes which is confirmed by the record of right. This conclusion of the Sub-Divisional Officer had not been assailed before the Appellate Authority, as is apparent from paragraph 2 of the Appellate judgment. Since the finding of the Sub- Divisional Officer on the question whether the vendors of the sale deeds belong to Schedule Castes or not had not been assailed before the Appellate Authority, the said finding has become final and cannot be permitted to be re-agitated again. Rightly, therefore, the High Court did not consider the said question and in our considered opinion, that question cannot be re-opened now.

> 4. So far as the third submission of Mr. Sanghi is concerned, we do not have an iota of material on record to establish that the area in question has been reserved for urbanisation by a notification issued in the Official Gazette of the Government within the ambit of Section 73(c) of the Act so that the Act cannot have any application. In the absence of such material it is difficult for us to sustain the said submission of Mr. Sanghi, learned Senior Counsel appearing for the appellants."

13. A Division Bench of this court in a recent decision, i.e., ***Harful Agrawal v. Tamal Behera and Others, 2022 (III) ILR-CUT-338,*** had the occasion of dealing with a same question that, whether prior permission in terms of Section 22 is required for homestead land within an urban area. The Division Bench after dealing with several decisions including the case of ***Om Prakash Agarwal*** (supra) have held that there is no escape from applicability of Section 22 and 23 of the OLR Act to the land in question. The relevant observation at para 21 of the said decision reads as follows:-

> "21. Since the law in the question is governed by the decision in **Omprakash Agarwal** (supra), the Court has no hesitation in holding that in the present case there is no escape from the applicability of Sections 22 and 23 of the OLR Act to the land in question. This is irrespective of the fact that the learned Single Judge may not have been correct in observing that the entire Titilagarh area would be a scheduled area. The fact remains that Sections 22 and 23 of the OLR Act do apply to the land in question and inasmuch as prior permission was not obtained at the time of execution of the sale deed in favour of the Appellant, it was unsustainable in law. For the aforementioned reasons, the Court finds no ground to interfere with the impugned judgment of the learned Single Judge. The appeal is dismissed. The interim order passed earlier stands vacated."

14. In the light of the principles propounded in the afore-cited cases it is now required to examine the cases at hand on the factual aspect.

15. It is true that all such lands in question are fall within the urban area of Sambalpur Municipal Corporation and no dispute has been raised regarding the same. So far as the status of lands concerned, they are recorded as homestead. It is stated on behalf of the Petitioners that the lands are neither being used for agricultural purpose nor ancillary to agriculture. This is disputed in the counter affidavit by the State Authorities stating that they are just converted homestead category of lands and never used for residential purpose. None of the Petitioners has stated about existence of any residential house on the respective lands nor have specified the adjoining area thereof used as residential houses. It is true that all such lands are covered by the notification of Housing and Urban Development Department for their inclusion in Sambalpur Municipal Corporation area. As explained in the case of ***Om Prakash Agarwal*** (supra), the OLR Act applies to all the lands which are either used or capable of being used for agricultural purposes irrespective of whether they are situated within the municipal area or in villages. The decision of the Hon'ble Supreme Court in ***Om Prakash Agarwal*** would obviously prevail over the decision of this court in ***Mahurilal's*** case (supra). Likewise the decisions in ***Madanbati*** and ***Harful's*** case (supra) do speak the propositions that the land contemplated by Section 22 shall be the land used or capable of being used for

agricultural purposes. Here, for the lands in question, there is no specific finding of the competent authority regarding usability of the same other than agricultural purpose. It is mentioned in the impugned order of the registering authority that there is no house over the plots in question.

16. It is seen that a reference was made to the Revenue and Disaster Management Department of Government of Odisha by the Collectors regarding applicability of the OLR Act to urban areas, particularly Section 22. The Government in Revenue and Disaster Management Department in letter dated 21st December, 2012 (Annexure-A/3) have clarified that, in absence of any definition of the expression 'ancillary or incidental to agriculture', the same remains as a question of fact and since this is a jurisdictional fact conferring authority on revenue officer, he is to establish the link, i.e. to show that such lands are connected to agriculture.

Present lands in question, except being recorded as homestead in the RoR, are not disclosing anything else to show that the same are for purely residential purposes and not capable of being used as agricultural lands. None of the cases do reveal any enquiry report of the Revenue Authority to satisfy the fact that the lands are not capable of being used for agricultural purpose anymore. So, in absence of any report from the Revenue Authority, it is difficult on the part of this court to opine anything regarding no more usability of the land for agricultural purpose or ancillary to it. Thus while holding that mere inclusion of the land in an urban area or within Sambalpur Municipal Corporation area would not exclude applicability of provisions of the OLR Act, particularly Section 22, this court directs the competent Revenue Authority to give a fact finding enquiry report in each case regarding usability of the land in question for other than the agricultural purpose.

17. So far as the challenge of the Petitioners with regard to authority to adjudicate of the registering officer is concerned, this court is of the opinion that the registering authority is empowered under Section 22(4) of the OLR Act to refuse registration of the document without written permission of the Revenue Officer and the registering authority acquires the authority to enter into and see the reasons for refusal. It needs to be mentioned here that, if the authority has the entitlement to enter upon the question to refuse after verification of facts, then he acquires the jurisdiction to decide. The registering authority has been authorized to verify the state of facts existing, i.e. whether the document is supported with written permission of the competent authority. So his decision to deny or refuse cannot be said as without jurisdiction. When the Legislature has conferred the authority upon the registering officer to determine whether the facts are satisfying for registering the document, then he definitely acquires the jurisdiction by finding the facts to proceed further in performing the statutory task. Thus, the arguments led by the Petitioners to dispute the jurisdictional authority of the registering officer to adjudicate and refuse registration for want of permission, are all without any substance. Such objections raised by the Petitioners are thus rejected.

18. In the result this court disposes of all the writ petitions granting liberty to each Petitioner to approach the competent Revenue Authority, i.e. concerned Tahasildar to give his opinion on the usability of the land and in such event the concerned Tahasildar is directed to give his opinion in respect of each specific land of respective Petitioners regarding its usability for agricultural purpose any more in the present scenario, within a period of 60 days from the date of application. Depending upon the opinion of the Revenue Authority, the Petitioners are at liberty to approach the registering officer again.

19. All the writ petitions are disposed of accordingly.

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2024 (III) ILR-CUT-142

B.P. ROUTRAY, J.

W.P(C) NO. 10091 OF 2024

KRIDAY REALTY PVT. LTD. & ANR. ……Petitioners

V.

STATE OF ODISHA & ORS ……Opp.Parties

ODISHA SURVEY AND SETTLEMENT ACT, 1958 – Section 15 – Revisional power – Whether the revisional authority has the power and jurisdiction to correct land record which is wrongly prepared due to the mistake on the part of settlement authorities? – Held, Yes – The authority exercising the revisional power U/s. 15 of the Act has very wide Jurisdiction.

For Petitioners : Mr. M.Kanungo, Sr. Adv.

For Opp. Parties : Mr. K.K.Das, ASC, Mr. D.Mohapatra, (O.P.No.5).

JUDGMENT Date of Judgment : 03.09.2024

B.P. ROUTRAY, J.

1. Heard Mr.Kanungo, learned Senior Counsel for the Petitioners and Mr.Mohapatra, learned counsel for Opposite Party No.5 as well as Mr.Das, learned counsel for the State-Opposite Parties.

2. Mr. Das, learned Additional Standing Counsel for the State submits that Opposite Party No.3 has filed his counter today through e-filing.

3. The petitioners in this writ petition have prayed for quashing of order dated 9th February 2024 (Annexure-2) passed by the Additional Commissioner, Bhubaneswar in OSS Case No.826/ 2023.

4. The Petitioners are Real Estate Developers who have been allowed to develop the land on PPP Mode. Bhubaneswar Development Authority, who allotted the land for development to the present Petitioners, preferred the revision case before the Additional Commissioner impleading Petitioner No.1 as Opposite Party

No.5. The entire dispute is regarding recording of the land in Hal Plot No.97 extending Ac.1.016 dec corresponding to Sabik Plot No.87/1264 in Government Rakhit Khata No.2075 having Kisam Jungle.

5. The admitted fact remains that in the Sabik ROR, it was recorded as Puratana Patita and while preparing the hal records, such extent of the land measuring Ac.1.016 dec. has been recorded in Jungle Kisam.

6. The learned Commissioner in the impugned order under Annexure2 has though agreed that RoR of the land in question has been prepared wrongly with an apparent error committed by the Settlement Authority during last settlement operation shifting southern boundary line of Hal Plot No.97, thereby mismatching the Hal-Sabik comparison of maps. Despite holding so, the Commissioner has denied to correct the Kisam of the land holding that even if for wrong recording of the land in Jungle Kisam, prior approval of Government of India in the Ministry of Environment and Forest is mandatory and therefore, refused to correct the Kisam.

7. Perusal of the hal ROR under Annexure-1 admittedly reveals recording of the Kisam as Jungle in respect of Plot No.97. The real dispute involved here is that, the land in question was never in Jungle Kisam, but by wrong shifting of boundary line of the plot in the map, some Jungle Kisam lands were included. It is submitted on behalf of the Petitioners and Opposite Party No.6 that, if the boundary line in the map would be corrected, all those Jungle Kisam lands will be excluded. It is seen from the counter filed by Opposite Party No.7, i.e. The Forest Department, they have admitted regarding mismatch in the preparation of boundary line in the Hal map of Plot No.97. Paragraph 5 and 6 of their counter are reproduced below:

> "5. That the deponent respectfully submits that Sabik Plot No.87/1264 & No.87/1263 of Village-Sankarpur, P.S-Chandaka recorded in Sabik Khata No.421 corresponds to series of Hal plot with Gocher classification recorded in Hal Khata No.2075 (Rakhit Khata). But on super imposition of Hal & Sabik map, it reveals that Sabik Plot No.87/1264 with an area of Ac.7.990 corresponds to several Hal plots including plot No.97(P) with an area of Ac.1.016 classified as Jungle, recorded in "Jungle Bibhag" Khata No.2076. But Hal plot No.97(P) as per Hal map does not tally with the Hal Sabik & Sabik Hal plot index co-relation. So, as it appears there is a mis-match in preparation of boundary line of Hal plot No.97, Hal Khata No.2076 which corresponds to Sabik plot No.87 (P) of Mouza-Sankarpur.
>
> 6. That on verification in the field, it is seen that the Forest Deptt. is not in possession over the schedule area of Ac.1.016 of plot No.97(p) having no forest growth. The Settlement Officer, Major Settlement, Cuttack is the competent authority to offer his views in the matter of change of boundary line in the Hal map if required which has been communicated to the Under Secretary, Board of Revenue, Odisha, Cuttack vide this office letter No.8159 dated 07.11.2023."

8. Opposite Party No.5 in their counter supports the case of the Petitioners of course.

9. Opposite Party No.3 in his counter has stated that the Settlement Officer is not the competent authority to correct the map and ROR after final publication of the same.

10. In such view of the matter, the question arises that, when it is admitted that the boundary line has been wrongly drawn in the map to include some portion of the Jungle Kisam lands, can the Revenue Authorities under the provisions of Odisha Survey and Settlement Act rectify the same?

11. Section 15 of the OSS Act, which gives the revisional power to the Board of Revenue, stipulates as follows:

> "**15. Revision by Board of Revenue** – The Board of Revenue may in any case direct-
>
> (a) of its own motion the revision of any record-of-rights, or any portion of a record-of rights, at any time after the date of final publication under Section 12-B but not so to affect any order passed by a Civil Court under Section 42.
>
> (b) on application made within one year from the date of final publication under Section 12-B the revision of record-of-rights or any portion thereof whether within the said period of one year or thereafter but not so as to affect any order passed by a Civil Court under Section 42.
>
> Provided that no such direction shall be made until reasonable opportunity has been given to the parties concerned to appear and be heard in the matter."

12. It is no more *res integra* that the authority exercising the revision power under Section 15 of the Act to correct the record of rights has very wide jurisdiction. A land record which is wrongly prepared due to the mistake on the part of settlement authorities can undoubtedly be corrected by exercising the power under Section 15. In the instant case, it is not that the land allotted to the BDA and subsequently given to the Petitioners were the forest lands. But the fact remains that the area, due to change of the boundary line, is including some forest lands. So, if the boundary line is corrected in terms of the Sabik map, then it will exclude the forest lands. So, the question of changing of Kisam of Jungle (forest) would not arise in respect of the land.

13. As it is found from the report of the Tahasildar, mentioned in the impugned order, he has clearly stated that there is mismatch in Hal-Sabik map. The relevant portion is reproduced below:

> "Hal Plot No.97 stands recorded in Khata No.2076 (Jungle Bibhag) classified as jungle which corresponds to sabik Plot No. 87 of Sabik Khata No. 424, but doesn't corresponds to Sabik Plot No. 87/1264 or 87/1263 of Mouza-Sankarpur. The Hal Plot No. 97(p) towards Southern side measuring an area of Ac.1.016 is under exclusive possession of BDA which has been leased out to M/s.Kriday Reality Pvt. Ltd for Housing Project. Further, on verification, it is seen that Sabik-Hal and Hal-Sabik co-relation in corresponds to Sabik Plot No.87/1264 and 87/1263 of MouzaSankarpur as per plot Index does not tally with the Hal Sabik superimposition of maps leading to mismatch in preparation of the South side boundary wall of Hal Plot No. 97. It may be stated here that Sabik Plot No. 87/1264 and 87/1263 stands recorded in Settlement ROR No. 423 (Rakhita Anabadi) which is classified as Gochara. As such, the Southern side boundary line of Hal Plot No. 97 need to be corrected to the extent so as to tally with Sabik Map plot No.87."

Further, the Collector in his para-wise report has stated before the Commissioner that while preparing the map in respect of Plot No.97 some area/portion of Sabik Plot No. 87 has been mistakenly added to Hal Plot No. 97.

14. Therefore, it becomes clear from the record as well as the counter of the Opposite Parties that a mistake has been incorporated while preparing the map to include some parts of forest land and therefore, if the map is corrected, such forest lands would be excluded from plot no.97 in terms of the Sabik plot. Undoubtedly, the power to correct the record of settlement is vested with the revisional authority in terms of Section 15 of the OSS Act and therefore, the authority under Section 15 has the power to correct the record if any mistake is found in preparation of the same because once a case is made out to invoke the revisional power, the authority is bound to exercise the power. So, the finding of the revisional authority that permission of Ministry of Environment and Forest is required for correction of the Kisam, is found an error on record. It is true that the power vested by the provisions of the statute on an authority cannot be construed to divest the power from same authority, and the authority is duty-bound to exercise his power within his limits. Here, it is held that the Commissioner has the power under Section 15 of the OSS Act to correct the records whenever he finds a mistake in preparation of the same by the Settlement Authorities and he cannot leave his hands free on the guise of permission from another authority. Accordingly, the Revenue Authorities are directed to correct the map in respect of Hal Plot No.97 as per the mistakes pointed out by the concerned authorities, within a period of two months from today. The impugned order is set aside to this extent.

15. The writ petition is disposed of as allowed.

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2024 (III) ILR-CUT-145

Dr. S.K. PANIGRAHI, J.

W.P.(C) NO. 24941 OF 2011

YAKUB ALI SHA & ORS. .....Petitioners

V.

UNION OF INDIA & ORS. .....Opp.Parties

(A) SERVICE MATTER – Clause 2 of minutes of meeting of the Board of Directors dt. 20.08.1984 – Clause 5 of the agreement dt. 13.04.1987 – Petitioners were employees of Artificial Limbs Manufacturing Corporation of India (ALIMCO) – Consequent upon formation of Swami Vivekananda National Institute of Rehabilitation Training & Research (SVNIRTAR), Olatpur, Cuttack, the petitioners were transferred to it with protection of all service and monetary benefits – Petitioners were not allowed the pay scale and the revisions thereof.

(B) Whether O.Ps acted arbitrarily in not allowing the pay hike of the Petitioners – Held, No – There is no violation of Art-14 of the Constitution of India – There is no violation of the principle of equal pay for equal work – No procedural irregularity or discrimination in the impugned pay revision. (Paras 14,15 & 17)

For Petitioners : Mr. Sidheswar Mallick

For Opp.Parties : Mr. Amitabh Pradhan, CGC

JUDGMENT Date of Hearing: 14.05.2024 : Date of Judgment: 16.08.2024

Dr. S.K. PANIGRAHI, J.

1. The Petitioners challenge the purported inaction on the part of the Opposite Parties in not fixing their pay in the higher scale as they were earlier drawing while working under ALIMCO (NIPOT) on their transfer and absorption in Swami Vivekananda National Institute of Rehabilitation Training & Research, (SVNIRTAR), Olatpur, in the district of Cuttack.

I. FACTUAL MATRIX OF THE CASE:

2. The brief facts of the case are as follows:

(i) Prior to formation of SVNIRTAR, the organization was initially named as Central Institute of Prosthetic & Orthotic Training (CIPOT). Thereafter it was named as NIPOT and at present renamed as SVNIRTAR. The organization was a subsidiary unit of ALIMCO and NIPOT and was enjoying the same benefits.

(ii) The petitioners were the employees of National Institute of Prosthetic and Orthotic Training (NIPOT); under the administrative control of Artificial Limbs Manufacturing Corporation of India (ALIMCO). NIPOT was subsequently renamed as SVNIRTAR. Consequent upon the formation of SVNIRTAR, all the employees of NIPOT were transferred to SVNIRTAR with protection of all service and monetary benefits. The petitioner however alleges that the opposite parties have not extended all the benefits in violation of the agreement, the minutes of discussion of the Board of Directors' Meeting and the memorandum of settlement.

(iii) For better administration of NIPOT, the Board of Directors of ALIMCO decided to transfer all the assets and liabilities of ALIMCO relating to their activities in the name of NIPOT to SVNIRTAR. In pursuance of such decision, SVNIRTAR was registered under the Societies Registration Act, 1860, under Delhi Administration vide Resolution No. S/14-278 dated 22.02.1984 and the institute was declared as an Autonomous Body.

(iv) On 20.07.1984, a meeting of the Governing Council of SVNIRTAR was convened, during which a decision was made to assume control of all assets and liabilities previously managed under the name of NIPOT with effect from 01.04.1984. Accordingly, ALIMCO entered into an agreement with SVNIRTAR on 13.04.1987 with regard to such transfer with effect from 01.04.1984 and in respect of the service conditions of the employees, administration and other requirements.

(v) After formation of SVNIRTAR and transfer of the services of the petitioners to SVNIRTAR with effect from 01.04.1984; an agreement was made between the employees of ALIMCO and the Management of ALIMCO on 12.12.1986 concerning revision of pay scales of the employees. In pursuance of such agreement, the scale of pay of the employees of ALIMCO was revised on 12.12.1986 giving retrospective effect from 01.08.1983. In the memorandum of settlement/agreement, it was agreed by the Management of ALIMCO in paragraph-14(e) that management will make all efforts to arrange funds for making payment of arrears before 16.03.1987 and accordingly payments of arrear were made to the employees of ALIMCO.

(vi) After the transfer of the petitioners to the services of SVNIRTAR, they were not allowed the pay scale and the revisions thereof as they were enjoying under the employment of ALIMCO.

(vii) The petitioners approached this Court by filing O.J.C. No.3536/1995 with a prayer to allow them the corresponding revise scale of pay and other consequential benefits equal to the pay scale of the employees of ALIMCO with effect from 01.08.1983. The writ petition was disposed of on 24.11.2009 with a direction to the opposite parties to extend the benefit within a period of four months from the date of communication of the order. However, after the orders of this Court the petitioners were allowed the pay scale and revision thereof equal to the employees of ALIMCO only for the period from 01.08.1983 to 31.03.1984. However, from 01.04.1984 they have been paid lower scale without protecting their pay as they were getting from the employment of ALIMCO.

(viii) The petitioners therefore submitted several representations for allowing them the pay scale as they were enjoying under ALIMCO after their transfer to SVNIRTAR with effect from 01.04.1984. After much persuasion, the opposite party No.1 in his letter dated 06.05.2011 asked the opposite party No.3 to furnish the information regarding fixation of pay of the employees of ALIMCO-NIPOT on their transfer to SVNIRTAR with effect from 01.04.1984.

(ix) In reply, the opposite party No.3, in his letter dated 24.05.2011, submitted all the requirements including the copy of rule under which the petitioners are entitled for protection of pay. The opposite party No.3 in the said letter submitted the details of calculation of financial implication calculated up to 31.03.2011 in respect of all the employees of ALIMCO on their transfer to SVNIRTAR but ultimately no action was taken. Hence, the present Writ Petition.

II. SUBMISSIONS ON BEHALF OF THE PETITIONERS:

3. Learned counsel for the Petitioners earnestly made the following submissions in support of his contentions:

(i) Prior to bifurcation of SVNIRTAR, the present petitioners were working under the management of ALIMCO till 31.03.1984. The bifurcation of SVNIRTAR took effect from 01.04.1984. Accordingly the petitioners are entitled to the benefit of revision of pay scales as has been done in case of the employees of the ALIMCO w.e.f. 01.08.1983. The petitioners are entitled the scale of pay and all other benefits which they were getting under ALIMCO after their transfer and absorption under SVNIRTAR in terms of the clause-2 of the minutes of meeting of the Board of Directors and Clause- 5 of the agreement.

(ii) In terms of the minutes of Board of Directors meeting and the agreement, the petitioners are entitled to get the same benefits including pay scales as they were getting under ALIMCO. Under Clause-2 of the minutes of the meeting held on 20.08.1984 of the Governing Council of SVNIRTAR, it was stipulated as follows:-

"Transfer of Personnel of ALIMCO (NIPOT) to SVNIRTAR, the Executive Council approved the following terms and conditions:

a) The service of the workman shall not be interrupted by such transfer;
b) The terms and conditions of service applicable to the workman after such transfer will not in any way be less favourable to the workman than those applicable to him immediately before the transfer,"

(iii) Further it was stipulated in the agreement dated 13.04.1987 under Clause-5 of the agreement that:

"That the services of the employees of NIPOT have been transferred as from 01.04.1984 to SVNIRTAR and all liabilities relating to such employees of NIPOT whether accruing before the date of transfer or thereafter including liability for salaries, wages, bonus,

provident fund, gratuity, earned leave salary or on any account whatsoever including liability arising as a result of the decision in any proceedings instituted by or against ALIMCO and/or NIPOT, shall be the liability of SVNIRTAR and will be met by SVNIRTAR to the exclusion of ALIMCO."

(iv) After constitution and formation of SVNIRTAR, their services were transferred from the management of ALIMCO/NIPOT to the services of SVNIRTAR with assurance to protect all the benefits as they were enjoying under ALIMCO. However, the scale of pay, as they were getting under ALIMCO, has not been protected and the petitioners have been paid lesser scale of pay.

(v) Their services were transferred to SVNIRTAR in the interest of administration. On such transfer they were assured protection of all benefits including the scale of pay. The petitioners are, therefore, entitled to get all the benefits equal to the benefits extended to the employees of ALIMCO

(vi) SVNIRTAR and ALIMCO are controlled and guided by the opposite parties Nos.1 and 2 and the employees of both the organizations are doing, equal work and there is no justification to deny the petitioners to have equal pay to that of the employees of ALIMCO which they were receiving prior to 01.04.1984 and as such they are entitled to get the same benefits in the present organization i.e. the opposite party No.3 like that employees of the ALIMCO.

(vii) Similar writ petitions were filed by the co-employees of the petitioners claiming similar benefits relying upon same set up documents. One of such writ petition in W.P. (C) No.25246/2011 was disposed of by this Court vide order dated 15.4.2017 with the following orders. Relevant portion of the order is quoted below:-

"In such view of the matter, since the facts are being admitted by the opposite parties in the counter affidavit, this court is of the considered view that instead of keeping the matter pending, the writ petition stands disposed of granting liberty to the opposite parties to take a decision pursuant to the recommendation made by opposite party No.3 vide Annexure7 dated 24.05.2011, as early as possible, preferable within a period of three months from the date of communication of this order."

(viii) Pursuant to the orders of this Court, Opposite Party No.3 issued an order on 29.07.2018, rejecting the petitioners' claim without addressing the agreement signed or the memorandum of settlement reached between the organizations during the transfer and absorption of the petitioners under SVNIRTAR. The opposite party No.3 took the plea that the petitioners have been allowed the benefits under Central Pay Commission and therefore their claim for BPE Scale is not admissible.

(ix) While transferring and absorbing the petitioners under SVNIRTAR; it was agreed that the terms and conditions applicable to workmen. After such transfer will not in any way be less favorable to the workman than those applicable to him before the transfer. Under Clause-V of the agreement, it was stipulated that all liabilities relating to such employees of NIPOT whether accruing before the date of transfer or, thereafter, including liability for salary, wages etc. shall be the liability of SVNIRTAR and will be met by SVNIRTAR. The transfer was effected with effect from 01.04.1984. The petitioners are, therefore, entitled the benefit they were getting during their previous organization on 31.03.1984. The Opp. Parties cannot deny such benefits to the petitioners on the plea that they have been allowed some other benefits i.e. the benefits under Central Pay Commission. The benefits under Central Pay Commission is less favourable, while under agreement it was agreed upon that the terms and conditions of service applicable to the workman after such transfer will not in any way be less favourable. The impugned order rejecting the claim of the petitioners is, therefore, not sustainable in law and liable to be set aside.

III. SUBMISSIONS ON BEHALF OF THE OPPOSITE PARTIES:

4. Learned counsel for the Opposite Parties earnestly made the following submissions in support of his contentions:

(i). SVNIRTAR is not a Government of India undertaking as stated. It is an autonomous Institution under the Ministry of Social Justice & Empowerment, Government of India rendering services to the Persons with Disabilities besides imparting training and carrying out research activities in the field of rehabilitation of Persons With Disabilities

(ii). Opp.Party 3 ("SVNIRTAR") formerly known as NIPOT was a subsidiary training unit of Artificial Limbs Manufacturing Corporation of India (ALIMCO), a public Sector Undertaking under the Ministry of Social Justice and Empowerment, Government of India. It was separated from ALIMCO with effect from 01.4.1984 after registering it as a Society under Societies Registration Act, 1860. As the central Govt. pay scales were followed by ALIMCO, employees of NIPOT were also paid the same which continued after separation too as Central Govt. rules and regulations are followed by SVNIRTAR in absence of its own rules and regulations.

(iii). In the year 1986, an agreement (annexure-3 to the petition) was signed between Management of ALIMCO and its Employees Union for implementation of BPE pay scale which was introduced for Public Sector Undertakings with effect from 01.08.1983. But there was a clause in the agreement that the said revision of pay scales would be applicable to only those employees who were on the roll of ALIMCO as on the date of agreement i.e. 12.12.1986. Accordingly, the employees of SVNIRTAR were not paid the said revised pay scale which was given to the employees of ALIMCO.

(iv). Aggrieved by the decision, the petitioners filed a Writ Petition before this Court vide OJC No.3536 of 1995. After hearing, this Court directed vide order No.26 dated 24.11.2009 that the petitioners be paid BPE Scale for the period from 1.8.1983 to 31.3.1984 during which they were under the control of ALIMCO. Accordingly, the petitioners were paid BPE pay scale for the period from 1.8.1983 to 31.3.1984. From 1.4.1984, they are continuing in their pay scale that they were getting earlier. Their pay has not been fixed with effect from 1.4.1984. As such the Opposite Parties have not committed any illegality in not fixing their pay and extending the said benefits with effect from 1.4.1984 violating any agreement.

(v). Since the petitioners were not paid the aforesaid revised pay scale as per clause 13 of the agreement, they filed a Writ Petition before this Court vide OJC No.3536/1995. After hearing the case, this Court vide order dated 24.11.2009 directed that the petitioner employees be paid the revised pay scale for the period from 01.8.1983 to 31.3.1984 during which they were working under ALIMCO. Accordingly, the petitioners have been paid the revised pay scales for the period from 1-8-1983 to 313-1984.

(vi). ALIMCO was following Central Government pay scales, petitioners were also getting the same pay scale prior to formation of SVNIRTAR and separation

from ALIMCO. After separation and formation of SVNIRTAR also they continued to get the same pay scale.

(vii). As per order of the Court, they were paid the BPE pay scales at par with the employees of ALIMCO for the period from 1.8.1983 to 31.3.1984 during which they were governed under ALIMCO; a Public Sector Undertaking company. As SVNIRTAR had already been separated from ALIMCO with effect from 01.04.1984 and was made an autonomous body, the said BPE pay scale which is applicable to the public sector undertakings only, cannot be extended to the petitioners. As such, they were continued in the same pay scale that they were getting earlier. Thus, their allegation made under paragraph 11 that they were paid lower pay scale with effect from 1.4.1984 is incorrect.

(viii). However, protection of their pay with effect from 1.4.1984 is under examination of the Ministry as per rules and laws for which clarification had been asked for by the Ministry vide letter dated 6.5.2011 and required clarification furnished by the Opp. Party No.3 vide letter dated 24.5.2011.

(ix). Though SVNIRTAR and ALIMCO are controlled and guided by Opposite Party Nos.1 and 2, their status is not the same because when SVNIRTAR is an autonomous body imparting training, carrying out research activities in the field of rehabilitation of persons with disabilities besides rendering services to the disabilities; ALIMCO is a Public Sector Undertaking, manufacturing artificial limbs, aids & appliances for the persons with disabilities besides carrying out research activities in the field. Thus, it is incorrect to state that the employees of both the organizations are performing the same function.

(x). The petitioners were getting Government of India pay scale and are also continuing as such till date. As per order of this Court, they were paid the said BPE pay scales for the period from 1.8.1983 to 31.3.1984 during which they were governed under ALIMCO, a Public Sector Undertaking company. Thereafter, the said higher pay scale of BPE had ceased to be in operation at SVNIRTAR as it became a registered society of Government of India with effect from 1.4.1984 and it followed Government of India pay scales hitherto instead of BPE pay scale which was applicable to public sector undertakings only and not to the autonomous bodies. Therefore, the petitioners were allowed to continue in the old pay scales of Central Govt. which they were getting earlier. As the said higher pay scale of BPE is no more in existence with SVNIRTAR, it is not possible to pay them the same at par with the employees of ALIMCO with effect from 01.04.1984. Thus, the petitioners are not entitled for the same benefits like the employees of ALIMCO a Public Sector Undertaking.

IV. COURT'S REASONING AND ANALYSIS:

5. I have heard the rival contentions of the Parties and perused the materials placed on record.

6. There is no doubt that the pay revision had been framed by the Opp. Party/ALIMCO keeping their present workforce in mind. Strength of the staff was

going to be reduced substantially due to the restructuring of the institutions and the reduction in the staff was to result in reduction in the burden of salary and establishment expenditure. With the aforestated intention, which had been clearly revealed in the Scheme. In the agreement dated 12.12.1986 it is clearly stipulated in Clause 13 that:

> *"This agreement shall apply to all the permanent employees who are on the rolls of the Company on the date of agreement but shall not cover the officers of Administrative, Managerial and Engineering cadre."*

7. ALIMCO floated this agreement only after the separation of SVNIRTAR from ALIMCO in 1984. The petitioner had argued that on 20.07.1984, a meeting of the Governing Council of SVNIRTAR was convened, during which a decision was made to assume control of all assets and liabilities previously managed under the name of NIPOT with effect from 01.04.1984. Accordingly, ALIMCO entered into an agreement with SVNIRTAR on 13.04.1987 with regard to such transfer with effect from 01.04.1984 and in respect of the service conditions of the employees, administration and other requirements.

8. It must be kept in mind that even though the agreement was signed later than the impugned pay revision dated 12.12.1986; the cutoff date for transfer of assets and liabilities had already been fixed on 01.04.1984 when the impugned order did not exist. The pay revision applied retrospectively from 1983 will also not help the cause of the petitioners.

9. It is undisputed that the employees of SVNIRTAR were granted the substantial benefit of Central Pay, and this benefit was extended in conjunction with the provision of the same salary and benefits they were receiving at ALIMCO.

10. Typically, retrospective salary increases are granted to individuals who were in service at the relevant time or who retired under normal circumstances. Following the restructuring, the employees of SVNIRTAR no longer maintained any connection with ALIMCO or its procedures. In this context, it is important to recognize that the restructuring marked a formal and complete severance of ties between the employees of SVNIRTAR and ALIMCO. Consequently, any claims for retrospective benefits that may have been applicable under ALIMCO's policies or procedures would not extend to the employees of SVNIRTAR/ as they no longer fell under ALIMCO's administrative framework.

11. Moreover, any attempt to assert entitlement to benefits or procedures previously governed by ALIMCO after the restructuring would be inconsistent with the legal and operational separation that occurred. Therefore, the rights and entitlements of SVNIRTAR employees must be considered independently, in accordance with the new organizational structure and the policies specific to SVNIRTAR especially during post-restructuring.

12. In light of the organizational changes and the cessation of their employment relationship with ALIMCO, these former employees are no longer entitled to claim

or seek adjustments to their previous salary structures. The restructuring signifies a clear departure from the institution's prior administrative and financial obligations, thereby nullifying any rights the former employees might have had under the original ALIMCO framework.

13. Furthermore, any request for redetermination of salary postrestructuring would be legally untenable, as these individuals no longer fall within the purview of ALIMCO's employment policies. Their entitlements, if any, must be evaluated based on the terms and conditions applicable to their new employment status, independent of their past association with ALIMCO.

14. I do not agree with the submission made on behalf of the employees that action of the employers in not allowing the pay hike to the employees in pursuance of the Notification is discriminatory in nature. The employees who were transferred to SVNIRTAR under the Scheme form a separate class of employees who were given certain benefits, which are not given to petitioners. If they all form a separate class, by no stretch of imagination, it can be said that all employees of ALIMCO and SVNIRTAR, are similarly situated. Thus, in my opinion, there is no violation of Article 14 of the Constitution of India in the instant case.

15. Similarly, there is no violation of the principle of equal pay for equal work. True, that those who went with SVNIRTAR under the Scheme did the same work which was being done by those who retired in normal course, but one cannot forget the fact that they ceased to be under the same organization umbrella after the separation. In the circumstances, I do not accept the said submission also.

16. This Court is also of the view that an employer can fix salary for its employees and I do not agree with the submission that the Notification was not issued properly or legally against the interests of the Petitioners.

V. CONCLUSION:

17. Based on the aforementioned analysis of both factual and legal aspects, this Court concludes that there has been no procedural irregularity or discrimination in the impugned pay revision.

18. In light of the facts and circumstances of the present case, this Court finds no merit in the current petition. The Petitioners have not succeeded in establishing grounds for interference with the impugned order.

19. The Writ Petition is, accordingly, dismissed.

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2024 (III) ILR-CUT-153

Dr. S.K. PANIGRAHI, J.

W.P(C) NO. 35503 OF 2023

KAUSHALYA SHARMA .....Petitioner

V.

THE CHIEF SECY. & CHIEF DEVELOPMENT COMMISSIONER (G.A & P.G. DEPT), GOVT. OF ODISHA & ORS. .....Opp.Parties

(A) CHIEF MINISTER'S RELIEF FUND (CMRF) GUIDELINES, 2018 ─ Petition for compensation for the death of the husband of the petitioner due to medical negligence, misdiagnosis, and lack of treatment at Acharya Harihar Regional Cancer Centre, and S.C.B. Medical College & Hospital in Cuttack ─ O.Ps submitted about no medical negligence.

(B) ESTABLISHMENT OF MEDICAL NEGLIGENCE ─ Deviation from normal practice is not necessarily evidence of negligence. In order to establish liability on that basis, it must be shown (1) that there is a usual and normal practice; (2) that the defendant has not adopted it; and (3) that the course in fact adopted is one no professional man of ordinary skill would have taken had he been acting with ordinary care. (Para 7)

(C) Determining cases of medical negligence presents a significant challenge for courts and presiding judges, primarily due to the complexity of the medical facts involved ─ Medical negligence cases often require a deep understanding of intricate medical procedures, standards of care, and the nuances of clinical judgment ─ Judges, who may not have medical expertise, must rely on expert testimonies to interpret these specialized aspects, making it essential to evaluate the credibility and reliability of these experts ─ The task of dissecting complex medical evidence and distinguishing between acceptable and negligent care demands a high level of scrutiny and understanding, which can be daunting without a medical background. (Para 13)

(D) Intricate nature of medical knowledge in negligence cases adds another layer of difficulty ─ Medical professionals employ specialized techniques and make decisions based on evolving clinical data, which can vary widely among practitioners ─ Assessing whether a deviation from standard care constitutes negligence involves not only understanding these standards but also evaluating if the deviation had a direct and significant impact on the patient's outcome ─ This process requires the court to navigate through a labyrinth of medical information, often presented in highly technical language, which can be overwhelming and lead to potential misinterpretations. (Para 14)

(E) Judiciary must carefully balance the expert opinions, ensuring that the medical facts are accurately represented, and that justice is served in a manner that upholds both the legal and medical standards. (Para 16)

(F) Court must ensure that every aspect of the alleged negligence is thoroughly examined ─ The Court's responsibility extends beyond delivering justice to the aggrieved parties; it also encompasses upholding the integrity of medical practices and reinforcing accountability within the healthcare system ─ Such cases must be addressed with both sensitivity and rigor to prevent future incidents and to preserve public confidence in medical institutions. (Para 17)

(G) CONSTITUTION OF COMMITTEE ─ Expert committee comprising of three members, who shall be tasked with determining the validity and implications of the imputations presented herein ─ Compensation amount by the CMRF Office shall be resolved upon the establishment of the committee's opinion – Writ Petition allowed. (Paras 18 & 21)

Case Laws Relied on and Referred to :-
1. [1968] 118 New LJ 469 : Hucks v. Cole.
2. (2005) 6 SCC 1 : Jacob Mathew v. State of Punjab.
3. [1985] 1 All ER 635 (HL) : Maynard v. West Midlands Regional Health Authority.
4. [1995] SLT 2131 : Hunter v. Hanley.

For Petitioners : Ms. Bhaktisudha Sahoo
For Opp.Parties : Mr. G.R. Mohapatra, Dr. Sachidananda Patnaik

JUDGMENT Date of Hearing : 17.05.2024 : Date of Judgment : 16.08.2024

Dr. S.K. PANIGRAHI, J.

1. The Petitioner, by way of this petition, requests compensation for the death of her husband, alleging medical negligence, misdiagnosis, and lack of treatment at Acharya Harihar Regional Cancer Centre, and S.C.B. Medical College & Hospital in Cuttack. Additionally, she cites the rejection of the CMRF application and the non-allocation of funds for medical treatment, notwithstanding a thorough inquiry by the Tahasildar which confirmed the authenticity and urgent need for such funds, resulting in insufficient and inadequate treatment at private hospitals and consequently leading to her husband's untimely death.

I. FACTUAL MATRIX OF THE CASE:

2. The brief facts of the case are as follows:

(i) The petitioner's husband, Late Murarilal Sharma, was a Cancer patient, suffering from Cancer of the tonsils as well as the lymph nodes. Eventually, Murarilal Sharma developed difficulty in swallowing, inflammation of the tonsils and throat, and a swollen Left Cervical Lymph Node and consulted the Pulmonary Department of SCB Medical College & Hospital, Cuttack (hereinafter "SCB") on 23.03.2020.

(ii) The doctors at the Pulmonary Department of SCB, first diagnosed it as Tuberculosis on the basis of a past history of TB of her husband. The pulmonary department of the SCB Medical Hospital started DOTS treatment on 23.03.2020, even though the confirmatory CBNAAT test was negative.

(iii) Murarilal continued the TB treatment for about a month, but there was aggravation in the growth in the tonsils as well as lesions in the mouth, due to reaction of the strong DOTS drugs. Therefore, they decided to consult the Acharya Harihar Regional Cancer Centre, Cuttack (hereinafter "AHRCC") for further treatment. The patient was examined by the Head and Neck Oncology department of the AHRCC on 15.04.2020 and referred to its Cytology Department for FNAC & Scrape test of the tonsils and the lymph node.

(iv) The said tests showed that the patient suffered from Squamous Cell Carcinoma i.e. cancer of the tonsils and lymph node. The Cytology Dept. of the AHRCC then advised the patient to ask the Head and Neck Oncology Department of AHRCC to conduct the Biopsy, but the doctors at the said Head and Neck Oncology Department of AHRCC did not conduct the Biopsy.

(v) Instead of conducting the Biopsy test themselves, they referred the matter to the ENT department of SCB Medical College, for Biopsy of the Tonsils, on 17.04.2020. The Petitioner and her husband consulted the ENT department of SCB Medical College on 18.04.2020, which also was not willing to conduct the Biopsy and referred to the Pulmonary Department of SCB Medical Hospital.

(vi) The Pulmonary department of SCB, on 20.04.2020, again recommended to AHRCC to conduct Excisional Biopsy of the lymph node under local anaesthesia or Punch Biopsy by the AHRCC.

(vii) The Petitioner's husband then again reverted back to the AHRCC on 23.04.2020, but the Professor, Head and Neck Oncology Department did not conduct the Biopsy and did not proceed with the treatment for Cancer. Conversely, he advised to continue with treatment for Tuberculosis.

(viii) Since the condition of the patient was fast deteriorating, due to metastasis of the Cancer from the tonsils to the lymph nodes and the palate and other areas of the body, the Petitioner had to consult a very renowned and only non-government Cancer hospital of Cuttack that is the Panda Medical Centre, Kesharpur, Bepari Sahi, Buxi Bazar, Cuttack, Registered No. 101/01, headed by one of the most renowned Cancer Specialist and Doctors of India, Dr Krupasindhu Panda, and had to initiate treatment for Cancer immediately at this Hospital.

(ix) On the advice of Dr. Kripasindu Panda, of the said hospital, another confirmatory Cancer Diagnostic Test was conducted by Dr. Gauri Shankar Acharya, renowned Pathologist, which confirmed the diagnosis that the patient Sri. Murari Lal Sharma is suffering from Squamous Cell Carcinoma of the tonsils, Palette and the lymph node. The said slides of FNAC Test were also reviewed by the renowned Oncology Pathologist Dr. Rabi Narayan Mallik of PATHOLAB and he too confirmed that her husband was suffering from Cancer. Ergo, the patient was advised Chemotherapy followed by Radiotherapy; an expensive line of treatment.

(x) Meanwhile, the Petitioner through her relative, gave a Petition before the C.D.M.O., Cuttack complaining lack of treatment at Acharya Harihar Regional Cancer Centre despite inordinate delay and prayer for financial assistance for treatment of destitute patient, and praying for sanction / arrangement for financial

assistance under the Government treatment fund or the Biju Swasthya Yojana, or any other scheme. The Petitioner or her husband also did not have any BSKY (Biju Swasthya Kalyan Yojana) Card at that time. CDMO asked the Petitioner to apply for reimbursement of money under the Chief Minister Relief Fund scheme.

(xi) Therefore, the Petitioner decided to apply for Chief Minister's Relief Fund which was certified by the Doctor of the hospital, who stated that the amount of expenditure is Rs. 80,000 (Rupees Eighty thousand only) and this Application was recommended by Shri Subhash Singh, Rajya Sabha MP.

(xii) However. when they approached the Collector, Cuttack's office for application, the office advised that since the expenditure has been more than Rs.30,000 and the Collector's sanction limit is only up to Rs.30,000, this application has to be made directly to the Chief Minister's Relief Fund at Bhubaneswar.

(xiii) Thereafter, they sent the application dated 20.08.2020 to the Additional Secretary to the Hon'ble Chief Minister at the Lok Seva Bhavan, Bhubaneswar by speed-post on 31.8.2020, with all bills and documents which was duly delivered on 02.09.2020. Upon receipt of the application, the CMRF office directed the Collector and District Magistrate of Cuttack to initiate an inquiry into the matter. The purpose of the inquiry was to assess the authenticity of the patient's identity, the ailment in question, and related circumstances, given that the hospital where the patient received treatment, namely Panda Medical Centre, was not on the empanelled list. Thereafter, the Collector, Cuttack vide Letter No.3420 dated 15.10.2020 directed the Tahasildar, Cuttack Sadar to cause an enquiry into the matter and send an action taken report to him immediately for further action.

(xiv) The Tahasildar, Cuttack Sadar directed the Revenue Inspector, Sadar 1 to enquire into the matter and upon such enquiry the said R.I. vide Letter No. 2861 dated 6.1.2021 submitted his enquiry report fully confirming about the disease of Cancer of her husband and certifying that the Petitioner and her family have spent about Rs.1,20,000/- for his treatment till that day. i.e. December, 2020.

(xv) The Tahasildar, Cuttack Sadar, forwarded this enquiry report of the R.I. to the collector, Cuttack vide the Letter No. 304, dated 15.1.2021. The Collector, Cuttack vide his Letter No. 375 dated 21.02.2021 forwarded the aforesaid Enquiry Report and CMRF Application to the Special Secretary to GA & PG Department, Odisha Bhubaneswar along with relevant documents and recommended the case for sanction and financial assistance in favour of her husband.

(xvi) However, the CMRF Office later in their reply to their RTI Application stated that there we no bills or documents with the Application and thus the application was rejected on the above grounds. Thereafter, there was no communication from the CMRF, Office Bhubaneswar. Since no funds or financial assistance was received under the CMRF, treatment of her husband could not be done properly and he passed away on the 10.08.2021.

(xvii) The fate of the Petitioner's CMRF Application was never communicated to them. In a reply to an Application under the RTI, the Petitioner came to know that the Under Secretary to Government G.A. & P.G. Department had, vide Letter No. 7744 dated 09.03.2021, directed the Joint Secretary to Government, Odisha State Treatment Fund, Health & F.W. Department for Sanction of financial assistance out of the OSTF/CMRF. However, no funds were sanctioned.

(xviii) The Petitioner came to learn from a reply to an RTI Application, as recorded in the Note Sheet regarding "Financial Assistance in favour of patients undergoing treatment in various private hospitals" and relating to the aforesaid Letter No. 7744 dated 09.03.2021 of the Under Secretary to Government, G.A. & P.G. Department, which Note Sheet has been signed by the Asst. Section Officer on 16.04.2021 that their CMRF Application has been rejected on the grounds of "Non-referral hospital & non-submission of bills by the applicant".

II. SUBMISSIONS ON BEHALF OF THE PETITIONER:

3. Learned counsel for the Petitioner earnestly made the following submissions in support of his contentions:

(i) Due to the misdiagnosis and incorrect treatment of cancer as tuberculosis by SCB Medical College & Hospital, and the subsequent prolonged treatment for tuberculosis, the patient's cancer condition worsened, leading to metastasis.

(ii) The doctors at the said Head and Neck Oncology Department of AHRCC avoided to conduct the Biopsy, though it is fully equipped and competent to conduct the Biopsy test. Instead of conducting the Biopsy test themselves, they referred the matter to the ENT department of SCB Medical College, for Biopsy of the Tonsils, on 17.04.2020.

(iii) The patient reverted to the ENT Dept. of SCBMCH on 20.04.2020 which also advised the patient to revert to AHPGIC and request them to conduct Punch Biopsy, for which no GA is necessary.

(iv) Thereafter, the Patient again reverted to the AHPGIC on 20.04.2020, and reported about the observations of the E.N.T. Department & Pulmonary Dept. of the SCBMCH, which is recorded in the Outdoor Ticket on 20.04.2020.

(v) This continuous and exhausting effort of seeking assistance from various authorities resulted in a deterioration of the patient's condition, ultimately preventing him from receiving adequate treatment.

(vi) In regards to the compensation against the expenditure of treatment of the patient, it is submitted that the Petitioner had submitted all bills relating to the medical expenditure, chemotherapy and other drugs with the application to the CMRF, Office Bhubaneswar, which they had themselves forwarded to the Collector too, and when the Petitioner applied for copies of documents from the Collector under RTI, he also issued copies of the bills which they received form CMRF Office, Bhubaneswar. This proves that the allegations of non-submission of bills with the CMRF application are false.

(vii) The Petitioner has preferred a Representation titled as "Representation for Compensation for death of husband due to medical negligence, misdiagnosis, lack of treatment at Acharya Harihar Regional Cancer Centre, rejection of CMRF Application and non-grant of funds for medical treatment resulting in insufficient and inadequate treatment in private hospitals leading to his death." before the O.P.s on 09.05.2022, claiming compensation.

(viii) In response to the aforesaid Representation of the Petitioner, the G.A. & P.G. Dept., Govt. of Odisha referred the said Representation to the Health & Family Welfare Department, Govt. of Odisha, vide Letter No. 16641 dated 18.06.2022,with a copy endorsed to the Petitioner. Since then though a year has elapsed there is no

further news or reply from the Government.

(ix) The rejection of the said CMRF Application is illegal, unwarranted and wrong because of the following reasons: a. The CMRF Guidelines, 2018, Para-2.5 (ii) states that - "However, patients undergoing treatment or treated in hospitals other than those empanelled by Health & Family Welfare Department may also be considered for assistance out of CMRF if the hospital is of National Repute."

(x) Since, Panda Medical Centre was not empanelled, the CMRF Office at Bhubaneswar directed the Collector to cause an inquiry as stated above and the Tahasildar and R.I.'s Enquiry Report as aforesaid established and certified the credentials and genuineness about the hospital, the patient and the ailment and the misery the patient was suffering from and the treatment and its cost. After such an Enquiry and its Report, it was not open for the CMRF to have rejected the Application.

(xi) The Application was recommended by a Member of Parliament, i.e., Mr. Subhash Singh, who has personally seen and verified the condition of the patient, which is enough evidence.

(xii) In the said CMRF Guidelines, 2018, annexed herewith, it is stated in Para 4 that:

"4.1 The Chief Minister may relax any or all of the above criteria in exceptional circumstances & to the best of his judgment.

4.2 The Chief Minister can sanction any amount, in favour of any person / persons for any purpose on humanitarian grounds and welfare of the weaker sections including minorities."

Therefore, this was a fit case for relaxation of the criteria in favour of the Petitioner's husband for his treatment.

(xix) The Patient had no other alternative for treatment after the AHRCC, Cuttack did not treat the patient, and he was fast deteriorating and the Cancer was spreading all over, but to approach a private Cancer Doctor in Cuttack. There is no other Cancer Hospital in Cuttack and the one at Pratapnagari, viz. HCG Panda Cancer Hospital, Telengapentha, Cuttack is on the National Highway about 25 KM away, and beyond the reach for poor persons like the Petitioner to approach especially during Covid Lockdowns with a Cancer patient in a private vehicle. They did not have the resources for the treatment and commutation by private taxi during the Covid Lockdown. As there were stringent COVID restrictions at that particular time viz., April, 2020 onwards, and movement around the city and outside was strictly restricted, therefore the Petitioner with her husband had to travel by taxi to the hospital Panda Medical Centre at Bepari Sahi, Buxi Bazar, Cuttack from their residence at CDA, Markatnagar, Cuttack several times for medical examination, treatment, Chemotherapy, and post-Chemotherapy complications, like fall in WBC count, diarrhea, low immunity etc, which involved lots of expenditure. They had to borrow money from relatives and friends for treatment and incidental and ancillary expenses which however was inadequate for treatment.

(xx) Had the Application not been in order or no bills would have been attached, the Under Secretary to Government, G.A. & P.G. Department had vide Letter No.7744 dated 09.03.2021 would not have directed the Joint Secretary to Government,

Odisha State Treatment Fund, Health & F.W. Department for Sanction of financial assistance out of the OSTF/CMRF.

(xxi) The treating doctor had himself testified to the expenditure and the Hospital expenses including his fees.

(xxii) The Collector, Cuttack vide his Letter No. 375 dated 21.02.2021 forwarded the aforesaid Enquiry Report and CMRF Application to the Special Secretary to GA and PG Department, Odisha Bhubaneswar along with relevant documents and recommended the case for sanction and financial assistance in favour of her husband. This Application had been forwarded of the CMRF Office, Bhubaneswar, to which the Petitioner had applied, and the said Office asked the Collector to cause an Enquiry. Therefore all through all documents were part of the Application.

(xxiii) Presuming, but not admitting, that in case the Bills or documents were lost or misplaced during the transit of the Application from and to various offices in Cuttack and Bhubaneswar, the CMRF Office should have immediately intimated the Petitioner to furnish the Bills and documents again. It could not have rejected.

(xxiv) Therefore, the rejection of the CMRF Application was illegal and wrong. It was perfunctorily rejected on frivolous and baseless grounds. It resulted in lack of treatment and consequential death of the Petitioner's husband.

III. SUBMISSIONS ON BEHALF OF THE OPPOSITE PARTIES:

4. *Per contra*, learned counsel for the Opp. Parties earnestly made the following submissions in support of his contentions:

(i) The petition is not maintainable in the present form and the allegations therein are baseless, vague and untenable. The averments are stoutly denied unless any of the same is specifically admitted.

(ii) As per the records of the AHPGIC Mr. Muralilal Sharma, the Petitioner's husband came to the outdoor of AHPGIC on different dates for treatment and investigation during 15.04.2020 and 28.04.2020.

(iii) On being referred from SCBMCH, the Patient was presented to AHPGIC on 15.04.2020 and was evaluated by the Head & Neck Oncology Department.

(iv) As per protocol, a biopsy report was required as conclusive evidence and hence, the Patient was referred to ENT Department of SCBMCH on 17.04.2020. But, instead of going for biopsy the Patient again visited AHPGIC on 18.04.2020 and it was planned for biopsy from the lymph node under GA. But the Patient did not turn up.

(v) A Committee consisting members (Administrative Officer, of three Medical Superintendent and the Dean, & Principal) was constituted by the AHPGIC to go through the case records of the treatment and investigation conducted at AHPGIC for the patient Mr. Sharma. The Committee, after meticulously going through the records and documents and investigations done at AHPGIC, submitted its report on 21.07.2022 to the Director, AHPGIC and arrived at the conclusion that “no delay or negligence has been made for treatment of Sri MuraliLal Sharma.”

(vi) On going through the Petition, it is revealed that her husband has undergone treatment at both Govt. Hospitals, where treatment done is free of cost and Private hospital where treatment is on payment basis. It is further submitted that there is no lapse in the treatment of Mr. Sharma in AHPGIC.

(vii) Upon review of the medical and treatment records, it has been established that the petitioner's husband, Sri Muralilal Sharma, who has a documented history of Pulmonary Tuberculosis from 25 years ago, was clinically diagnosed by the Pulmonary Medicine Department at SCB Medical College & Hospital, Cuttack as a case of Extra-Pulmonary Tuberculosis affecting the left cervical lymph nodes. This diagnosis was confirmed through Fine Needle Aspiration Cytology (FNAC), as noted in the outpatient department (OPD) ticket dated 23.03.2020. Pursuant to this clinical diagnosis, the patient was referred for Anti-Tubercular treatment on 25.03.2020 by the Pulmonary Medicine Department at SCBMCH, Cuttack. According to the records available on the Nikshay Government Portal, the patient commenced Anti-Tubercular Therapy (ATT) on 25.03.2020 at Tulasipur Police Hospital and continued the treatment until 22.04.2020, after which he was lost to follow-up.

(viii) Subsequently, the patient/petitioner's husband attended AHRCC, Cuttack on 15.04.2020 with the complaints of inability to swallow and increased salivation and a suspected growth on left tonsil was noted. He was advised for scrape cytology and lymph node evaluation. On the same day, scrape cytology from left tonsillar growth could not be done as patient was non- cooperative. However, left upper cervical lymph node aspiration was done which revealed features of metastatic poorly differentiated carcinoma (?squamous) of the left upper cervical lymph node.

(ix) On being referred and advised by the AHRCC, Cuttack, the patient was examined in the ENT OPD of SCBMCH, Cuttack on 18.04.2020 and was advised for surgical biopsy of the left tonsillar proliferative growth. Since, patient was not fit for surgical biopsy of the same as mentioned in the OPD Ticket of AIRCC, Cuttack, he was advised exeisional biopsy of the left cervical lymph node.

(x) On 23.04.2020, the patient was advised at AHRCC Cuttack for lymph node biopsy under local anesthesia as Pulmonary Medicine did not give clearance for general anesthesia. However, the patient did not turn up for the same.

(xi) As regard to CBNAT test report being negative, it is not out of place to submit that CBNAT NEGATIVE does not exclude Tuberculosis as the sensitivity of CBNAAT for extra-pulmonary Tuberculosis is only 27 percent. Co-existence of Tuberculosis along with Malignancy is possible. As Tuberculosis is treatable disease, patient should not be left without treatment with anti-tubercular therapy.

(xii) A committee of expert consisting of Prof & HOD, Medicine, Surgery, Respiratory Medicine, ENT and Endocrine Surgery was constituted by the office of this deponent seeking their expert opinion in respect of the treatment given to the patient and the alleged negligence committed if any. In this connection, the Committee, after meticulously going through the available medical records substantiated the facts with medical literatures submitted its report on 19.12.2023 to the office of this deponent and held that no medical negligence has been committed on the part of their hospital in treating the patient namely Sri Muralilal Sharma.

IV. ANALYSIS OF THE COURT:

5. I have heard the submission of both the sides and perused the materials placed on record.

6. This is clearly a case of alleged medical negligence, a matter of profound seriousness given the involvement of two major medical institutions of the State. Medical negligence cases demand rigorous scrutiny due to their potential impact on patient safety and healthcare standards. When such cases arise, they not only question the competence and conduct of medical professionals but also reflect on the broader healthcare system's adherence to established standards of care.

7. I have heard the submission of both the sides and perused the materials placed on record. This is clearly a case of alleged medical negligence, a matter of profound seriousness given the involvement of two major medical institutions of the State. Medical negligence cases demand rigorous scrutiny due to their potential impact on patient safety and healthcare standards. When such cases arise, they not only question the competence and conduct of medical professionals but also reflect on the broader healthcare system's adherence to established standards of care. However, it must be kept in mind that deviation from normal practice is not necessarily evidence of negligence. In order to establish liability on that basis, it must be shown (1) that there is a usual and normal practice; (2) that the defendant has not adopted it; and (3) that the course in fact adopted is one no professional man of ordinary skill would have taken had he been acting with ordinary care.

8. Abovesaid three tests have also been stated as determinative of negligence in professional practice by Charlesworth & Percy in their celebrated work on Negligence. In the opinion of Lord Denning, as expressed in ***Hucks v. Cole,***[1] a medical practitioner was not to be held liable simply because things went wrong from mischance or misadventure or through an error of judgment in choosing one reasonable course of treatment in preference of another. A medical practitioner would be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field.

9. The Supreme Court in ***Jacob Mathew v. State of Punjab***[2] has observed that, given the complexity and high stakes in medical negligence cases, it is crucial to tread lightly. The court must exercise extreme caution when determining liability, ensuring that judgments are based on clear evidence of negligence rather than assumptions. Therefore, each case should be approached with a balanced and meticulous evaluation of the facts, respecting the challenges and uncertainties inherent in medical practice. The relevant excerpt is produced hereinbelow:

> "No sensible professional would intentionally commit an act or omission which would result in loss or injury to the patient as the professional reputation of the person is at stake. A single failure may cost him dear in his career. Even in civil jurisdiction, the rule of res ipsa loquitur is not of universal application and has to be applied with extreme care and caution to the cases of professional negligence and in particular that of the doctors. Else it would be counter productive. Simply because a patient has not favourably responded to a treatment given by a physician or a surgery has failed, the doctor cannot be held liable per se by applying the doctrine of res ipsa loquitur."

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1. [1968] 118 New LJ 469 **2**. (2005) 6 SCC 1

10. In the context of the case it is relevant to refer to the decision of House of ***Lords in Maynard v. West Midlands Regional Health Authority,***[3] a five judge bench definitively settled the legal principle by determining that it is insufficient to merely demonstrate that a competent body of professional opinion views the defendant's decision as reasonable or correct. This holds if there is also an equally competent body of professional opinion that supports the decision as erroneous under the circumstances. Furthermore, it is insufficient to argue that subsequent events indicate the prognosis and later diagnosis was unnecessary if, at the time the decision to operate was made, it was reasonable and aligned with what a responsible body of medical opinion would have deemed appropriate.

11. The Apex Court in ***Jacob Mathew*** (supra) cited the speech of Lord Scarman who recorded the leading speech with which other four Lords agreed quoted the following words of ***Lord President (Clyde) in Hunter v. Hanley***[4] that:

> "In the realm of diagnosis and treatment there is ample scope for genuine difference of opinion and one man clearly is not negligent merely because his conclusion differs from that of other professional men. The true test for establishing negligence in diagnosis or treatment on the part of a doctor is whether he has been proved to be guilty of such failure as no doctor of ordinary skill would be guilty of if acting with ordinary care". Lord Scarman added: "a doctor who professes to exercise a special skill must exercise the ordinary skill of his speciality. Differences of opinion and practice exist, and will always exist, in the medical as in other professions. There is seldom any one answer exclusive of all others to problems of professional judgment. A court may prefer one body of opinion to the other, but that is no basis for a conclusion of negligence." His Lordship further added "that a judge's 'preference' for one body of distinguished professional opinion to another also professionally distinguished is not sufficient to establish negligence in a practitioner whose actions have received the seal of approval of those whose opinions, truthfully expressed, honestly held, were not preferred."

12. But it is not enough for a party to have a piece of paper from, say, an independent doctor which appears to support their claim or their defence. The doctor must be able to provide competent, credible and independent evidence which can assist the Court. These requirements, and the dangers posed by experts who fail to meet them.

13. From the aforementioned discussion, it is clear that determining cases of medical negligence presents a significant challenge for courts and presiding judges, primarily due to the complexity of the medical facts involved. Medical negligence cases often require a deep understanding of intricate medical procedures, standards of care, and the nuances of clinical judgment. Judges, who may not have medical expertise, must rely on expert testimonies to interpret these specialized aspects, making it essential to evaluate the credibility and reliability of these experts. The task of dissecting complex medical evidence and distinguishing between acceptable and negligent care demands a high level of scrutiny and understanding, which can be daunting without a medical background.

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3. [1985] 1 All ER 635 (HL) **4.** [1955] SLT 2131

14. Furthermore, the intricate nature of medical knowledge in negligence cases adds another layer of difficulty. Medical professionals employ specialized techniques and make decisions based on evolving clinical data, which can vary widely among practitioners. Assessing whether a deviation from standard care constitutes negligence involves not only understanding these standards but also evaluating if the deviation had a direct and significant impact on the patient's outcome. This process requires the court to navigate through a labyrinth of medical information, often presented in highly technical language, which can be overwhelming and lead to potential misinterpretations.

15. Thus, it is insufficient for a party to merely possess documentation, such as a report from an independent doctor that ostensibly supports their claim or defense. The medical expert must be capable of offering competent, credible, and independent testimony that can aid the Court in its deliberations. These requirements underscore the importance of reliable expert evidence and the risks associated with relying on experts who do not meet these standards, as such testimony may mislead the Court and undermine the integrity of the judicial process.

16. Consequently, the role of medical experts in these cases becomes crucial, as their input guides the court through the complexities of medical procedures and standards. Despite their expertise, translating this specialized knowledge into clear, understandable terms for the court and jury remains a challenging endeavor. The judiciary must carefully balance the expert opinions, ensuring that the medical facts are accurately represented and that justice is served in a manner that upholds both the legal and medical standards.

17. In light of the foregoing, and considering the involvement of prominent medical institutions in Odisha, which underscores the gravity of the situation by highlighting systemic issues potentially impacting a large number of patients, it is imperative that the Court approaches these matters with the utmost diligence. The Court must ensure that every aspect of the alleged negligence is thoroughly examined. The Court's responsibility extends beyond delivering justice to the aggrieved parties; it also encompasses upholding the integrity of medical practices and reinforcing accountability within the healthcare system. Such cases must be addressed with both sensitivity and rigor to prevent future incidents and to preserve public confidence in medical institutions.

V. CONCLUSION:

18. Considering the facts and circumstances of the present case, this Court holds the view that the matter should first be referred to an expert committee comprising of three members, who shall be tasked with determining the validity and implications of the imputations presented herein.

19. The Director of Health Services is hereby ordered to establish and participate in a three-member committee, including medical experts from neutral third parties, for the thorough examination of the case at hand.

20. This committee shall be responsible for thoroughly examining the factual accuracy of the arguments presented by both parties. In the context of medical negligence, the committee's role is crucial in ensuring that all claims and defenses are supported by concrete evidence and adhere to establish medical standards. Their assessment will provide an informed and impartial foundation upon which the Court can base its decisions, ensuring that the case is resolved with a clear understanding of the facts and in a manner that upholds the principles of justice and accountability within the healthcare sector.

21. The issue concerning the rejection of the compensation amount by the CMRF Office shall be resolved upon the establishment of the committee's opinion.

22. The Writ Petition is, accordingly, allowed.

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2024 (III) ILR-CUT-164

MISS. SAVITRI RATHO, J.

BLAPL NO. 4219 OF 2024

HRUSIKESH BEHERA .....Petitioner

V.

STATE OF ODISHA .....Opp.Party

AND

BLAPL NO. 6322 OF 2024
(ROHIT KUMAR SINGH V. STATE OF ODISHA)
&
BLAPL NO. 6444 OF 2024
(DAMODAR MALLICK @ DAMODAR MALLIK V. STATE OF ODISHA)

(A) NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985 ─ Section 37 ─ Grant of Bail ─ The petitioners are involved U/ss. 21(C)/29 of the N.D.P.S. Act arising out of Patnagrah P.S. Case No. 317 of 2023 corresponding to G.R. Case No. 44 of 2023 pending in the file of the Addl. Sessions Judge-cum-Special Judge, Patnagarh ─ Bail Petitions were rejected in the Court below.

(B) STATUTORY PROVISIONS ─ While considering an application for bail of an accused who is in custody in connection with an offence under Section 19, Section 24, Section 27A and also for offences involving commercial quantity, in addition to the provisions under Section ─ 439 of the Cr.P.C., the provisions of Section 37 of the N.D.P.S. Act have to be kept in mind. (Para 13)

(C) The term 'reasonable grounds' mentioned in reference to *State of Kerala & Ors. Vs. Rajesh & Ors. reported as (2020) 12 SCC 122* ─ "reasonable grounds" means something more than *prima facie* grounds. It contemplates substantial probable causes for believing that

the accused is not guilty of the alleged offence ─ The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. (Para 14)

(D) PAUCITY OF INCRIMINATING MATERIAL – Twin requirements U/s. 37 of the N.D.P.S. Act are satisfied – Prayer for bail allowed subject to verification that the petitioners do not have any antecedents under the N.D.P.S. Act or are involved in any case where the allegations involve illegal/unauthorised selling or transportation of cough syrup.
(Para 18)

Case Laws Relied on and Referred to :-

1. AIR 2020 SC 3255: Hira Singh vs. State of Himachal Pradesh
2. (2020) 12 SCC 122: State of Kerala & Ors. vs. Rajesh & Ors
3. 2022 Live Law (SC) 613: NCB vs. Mohit Aggarwal
4. 2021 (II) OLR CUT 655: Manoj Kumar Bhuyan and others vs. State of Orissa

For Petitioner : Mr. Manoranjan Mishra, Mr. Suryakanta Dwibedi, Mr. K.K.Sarangi
For Opp.Party: Ms. Samapika Mishra, ASC.

JUDGMENT Date of Judgment: 09.08.2024

MISS. SAVITRI RATHO, J.

These applications have been filed under Section 439 of Cr.P.C. in connection with Patnagarh P.S. Case No. 317 of 2023 corresponding to Special G.R. Case No. 44 of 2023 pending in the Court of the learned Addl. Sessions Judge -cum-Special Judge, Patnagarh registered for commission of offences punishable under Sections 21(C)/29 of the N.D.P.S. Act.

2. Charge sheet dated 07.06.2024 has been filed in this case for commission of offences punishable under Sections 21(C)/29 of the N.D.P.S. Act against the present petitioners and co-accused Anirudha Meher.

3. The prayer for bail of the petitioner- Hrusikesh Behera has been rejected on 25.04.2024 by the learned Additional Sessions Judge, Patnagarh.

4. The earlier application BLAPL No. 36 of 2024 filed by the petitioner Rohit Kumar Singh had been dismissed by me on 09.01.2024 granting liberty to the petitioner to move for bail afresh after completion of the investigation. Thereafter, the petitioner has moved the learned Court below for bail again and the prayer has been rejected by the learned Special Judge, Patnagarh on 19.06.2024.

5. The earlier application BLAPL No. 38 of 2024 filed by the petitioner Damodar Mallick @ Damodar Mallik had been dismissed by me on 09.01.2024 granting liberty to the petitioner to move for bail afresh after completion of the investigation. Thereafter, the petitioner has moved the learned Court below for bail again and the prayer has been rejected by the learned Special Judge, Patnagarh on 19.06.2024.

6. These applications were listed before me alongwith BLAPL No. 6620 of 2024 filed by co-accused Anirudha Meher. BLAPL No. 6620 of 2024 was withdrawn by the learned counsel while these applications were heard together as they arise out of the same FIR and judgment was reserved.

PROSECUTION ALLEGATIONS

7. The prosecution allegations in brief is that on 11.12.2023, at 02.00 p.m., O.I.C. of Patnagarh Police Station received information that one Anirudha Meher of Bindhanpathar Police Station Patnagarh is transporting Corex Cough syrup in his bike and will transport the same to Belpada side. After receipt the information the S.I. of Patnagarh P.S. along with the staff were proceeded to the spot for verification of veracity information. Then, they rushed to the spot along with witnesses and after reaching at Bindhanpadar Chowk at about 3.00 p.m. and verified the information. Then, they concealed themselves near Bindhanpathar. At about 3.30 p.m. they noticed that one Honda CB Shine bike having Registration No. OR-03-H-6277 was coming from Bindhanpathar village being driven by Anirudha Meher with one big plastic bag behind him. Suspecting to have illegal transportation of corex cough syrup they managed to detain him on the main road. After completing all the formalities they searched his bag in the presence of an Executive Magistrate and found three nos. of cardboard cartoon containing Tuscorex bottle and each bottle contain 100 m.l. capacity having Codeine Phosphate of 10 mg. in each bottle. One card board cartoon have 100 nos. of sealed Tuscorex bottle and three card board cartoons contain total of 300 nos. of Tuscorex bottles, in total nos. of 200 nos. of company sealed contraband Tuscorex cough syrup containing codenine Phosphate and tripolidine Hydrochloride Syrup having Batch no. TBHW1094 and 100 nos. of company sealed contraband Tuscorex cough syrup containing codeine Phosphate and Tripolidine Bydrochloride syrup having batch no. TBHW1047 having similar logo, sticker. All total 30,000 M.L. (30 kgs.) mixture contained Codeine Phosphate in 300 sealed Tuscorex Cough Syrup bottles was recovered. During further interrogation, Anirudha Meher disclosed that he had procured the above contraband Tuscorex cough syrup from Damodar Mallik of Hatisalpada and Rohit Kumar Singh of Chatiapali and they were selling it illegally to different drug peddlers for their personal gain. T5his information was recorded under Section – 67 of the N.D.P.S. Act. So the cough syrup was seized alongwith the Honda CB Shine bike bearing Registration No. OR-03-H-6277 from Anirudha Meher, seizure list was prepared and he was arrested and forwarded to Court on 12.12.2023. On 12.12.2023, the houses of Damodar Mallik in Hatisalpada and Rohit Kumar Singh in Chatiapali were raided and they were apprehended. Nothing incriminating appears to have been seized from them but their statements were recorded under Section 161 Cr.P.C. where they have confessed their guilt. Damodar Mallik specifically stated that he used to place orders for cough syrup by calling up 7328856724 and they would give the cough syrup to Anirudha Meher for selling to drug peddlers. They were arrested and forwarded to Court on the same day. The I.O. searched the house of Anirudha Meher but did not find any Corex cough syrup bottles. The I.O. again revisited the

spot, examined the complainant and other witnesses. He was transferred, so he handed over investigation to the I.I.C., Patnagarh Police Station on 09.02.2024. Damodar Mallik (his name has been mentioned as Damodar Naik) has been examined again on 20.04.2024 by the IIC and after going through the CDR and SDR, it was ascertained that mobile no. 8637255902 belongs to Hrusikesh Behera of Bardapada, Attapur of Baleswar District and a number of calls had been made to the said number by Damodar Mallik from the number 7328856734. Hruskesh Behera was apprehended on 23.04.2024 at Soro, Baleswar and his confessional statement was recorded. He stated that he was working in Parhi Distributor and used to take orders from different person who would call him and he and the owner Amitav Parhi would supply cough syrup through courier. 300 bottles of cough syrup have been sent DTDC courier to Damodar Mallik in December and before that Tuscorex cough syrup has been sent to him 4 to 5 times. His mobile with SIM 7328856734 was seized from him alongwith his Aadhaar card e owner Amitav Parhi would was arrested and forwarded to Court on 24.04.2024.

SUBMISSIONS ON BEHALF OF THE PETITIONERS

Hrusikesh Behera. Petitioner in BLAPL No. 4219 of 2024

8. Mr. Manoranjan Mishra, learned counsel for the petitioner – Hrusikesh Behera has submitted that the petitioner has not been named in the FIR which has been registered under Sections 21(C)/29 of the N.D.P.S. Act on 11.12.2023 against three persons. He is employed as a salesman in Parhi Distributors and acts as per the direction of the proprietor – Amitav Parhi. Except the statements of the co-accused Damodar Mallik, who was arrested on the basis of the statement of the co accused Anirudha Meher from whom the cough syrup was allegedly seized and his own confession before the police that he used to send cough syrup to the co accused on receiving their call, there is no other material to implicate him. He has further submitted that he is in custody since 24.04.2024 and investigation in the case so far as the petitioner is concerned, is complete. As he does not have any criminal antecedents and considering the quantity of cough syrup seized, Section – 37 of the N.D.P.S. Act will not be attracted, for which he should be released on bail.

Rohit Kumar Singh. Petitioner in BLAPL No. 6322 of 2024

9. Mr. Suryakanta Dwibedi, learned counsel for the petitioner has submitted that the petitioner is in custody since 11.12.2023 and the basis of his implication is statement of coaccused, Anirudha Meher and his own confession before the police. Nothing incriminating has been seized from his possession. He has also submitted that the prosecution has alleged that he has four criminal antecedents (1) Bolangir Town P.S. Case No.153 of 2010, (2) Bolangir Two P.S. Case No.03 of 2012, (3) Bolangir Town P.S. Case No.503 of 2018 and (4) Bolangir Town P.S. Case No.382 of 2023, but he has been acquitted in (1) Bolangir Town P.S. Case No.153 of 2010 and (2) Bolangir Town P.S. Case No.03 of 2012. That apart, none of these cases are under the N.D.P.S. Act. Hence Section 37 of the N.D.P.S. Act will not be a bar for

considering his prayer for bail. He has further submitted that investigation in the case so far as the petitioner is concerned, is complete.

Damodar Mallick @ Damodar Mallik . Petitioner in BLAPL No. 6444 of 2024

10. Mr. K.K. Sarangi, learned counsel for the petitioner has submitted that the petitioner is in custody since 12.12.2023 and the basis of his implication is statement of co-accused, Anirudha Meher and his own confession before the police there are no other materials connecting him with the said offence and nothing incriminating has been seized from him. As he does not have any criminal antecedents under the NDPS Act, Section 37 of the N.D.P.S. Act will not be a bar for considering his prayer for bail. He has further submitted that it is alleged that he is alleged to have a number of criminal antecedents, but none of them involve any offence under the N.D.P.S. Act. He has finally submitted that as investigation in the case so far as the petitioner is concerned, is complete, he may be released on bail.

SUBMISSIONS OF THE STATE COUNSEL

11. Ms. S. Mishra, learned Additional Standing Counsel for the State has submitted that the petitioner Hrusikesh Behera works in Parhi Distributors which is a wholeseller of medicine including cough syrup. The CDR records of the mobile numbers of the petitioners Hrusikesh Behera and Damodar Mallik reveal that Damodar Mallik has contacted petitioner Hrusikesh repeatedly from his mobile number 7328856724. As per their confessions, the petitioner Hrusikesh Behera used to send the cough syrup to petitioner Damodar Mallik through courier on receiving a call from him and he has done this on a number of occasions and he had sent 300 bottles to him in December, 2023, which have been seized in this case from co-accused Anirudha Meher. As the cough syrup contained codeine and total weight of the cough syrup is 30 kgs. it will come within commercial quantity as per the decision of the Supreme Court in the case of ***Hira Singh vs. State of Himachal Pradesh :2020 SCC Online SC 382: AIR 2020 SC 3255***, for which the restriction under Section 37 of the N.D.P.S. Act will be attracted . She has finally submitted that investigation has been kept open further investigation and arrest of co-accused Amitav Parhi, for which the petitioners should not be released on bail.

CRIMINAL ANTECEDENTS

12. The reports of I.I.C Patnagarh Police Station regarding criminal antecedents of the petitioners are available in the case diary.

Petitioner Hrusikesh Behera is reported to have no criminal antecedents.

Petitioner Rohit Kumar Singh, is reported to be involved in the following cases:

(i) Bolangir Town P.S. Case No.153 of 2010 under Sections 307,379, 34 of IPC.
(ii) Bolangir Two P.S. Case No. 03 of 2012 under Sections 147, 148, 149, 307, 323, 341, 506 of IPC.
(iii) Bolangir Town P.S. Case No.503 of 2018 under Sections 294, 341,506,34 of IPC.

(iv) Bolangir Town P.S. Case No.382 of 2023 under Sections 457, 380, 411, 34 of IPC.

Petitioner Damodar Mallick @ Damodar Mallik is reported to be accused in the following cases:

(i) Bolangir Town P.S. Case No.268 of 2016 under Sections 294, 323, 341, 506,34 of IPC.
(ii) Bolangir Two P.S. Case No.150 of 2018 under Section 3 of OPG Act.
(iii) Bolangir Town P.S. Case No.370 of 2018 under Sections 294, 307, 323, 341, 506, 34 of IPC.
(iv) Tusura P.S. Case No.16 of 2016 under Sections 147, 149, 294, 323, 341,506 of IPC.

STATUTORY PROVISIONs

13. While considering an application for bail of an accused who is in custody in connection with an offence under Section 19, Section 24, Section 27A and also for offences involving commercial quantity, in addition to the provisions under Section –439 of the Cr.P.C, the provisions of Section 37 of the N.D.P.S. Act have to be kept in mind. Section 37 of the N.D.P.S. Act reads as under: - "

"37. Offences to be cognizable and non-bailable.-

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)-

(a) every offence punishable under this Act shall be cognizable;
(b) no person accused of an offence punishable for [offences under section 19 or section 24 or section 27A and also for offences involving commercial quantity] shall be released on bail or on his own bond unless-

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and
(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail. (2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force, on granting of bail."

CASE LAW

14. In the case of ***State of Kerala & Ors. vs. Rajesh & Ors.*** reported as ***(2020) 12 SCC 122***, the Supreme Court discussed the requirement of Section 37 and the meaning of the term '*reasonable grounds*'. Relevant portion of the judgment is extracted below : -

"19. The scheme of Section 37 reveals that the exercise of power to grant bail is not only subject to the limitations contained under Section 439 CrPC, but is also subject to the limitation placed by Section 37 which commences with non obstante clause. The operative part of the said section is in the negative form prescribing the enlargement of bail to any person accused of commission of an offence under the Act, unless twin conditions are satisfied. The first condition is that the prosecution must be given an opportunity to oppose the application; and the second, is that the court must be satisfied that there are reasonable grounds for believing that he is not guilty of such offence. If either of these two conditions is not satisfied, the ban for granting bail operates.

20. The expression "reasonable grounds" means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. In the case on hand, the High Court seems to have completely overlooked the underlying object of Section 37 that in addition to the limitations provided under the CrPC, or any other law for the time being in force, regulating the grant of bail, its liberal approach in the matter of bail under the NDPS Act is indeed uncalled for." (emphasis supplied)

In the case of ***NCB vs. Mohit Aggarwal : 2022 SCC Online SC 891 : 2022 LiveLaw (SC) 613***, the Supreme Court, while cancelling the bail granted to the accused who had been granted bail by the High Court on the ground that the confessional statements recorded under Section 67 of the NDPS Act was the only material available against him, has held as follows:

"16. Coming back to the facts of the instant case, the learned Single Judge of the High Court cannot be faulted for holding that the appellant-NCB could not have relied on the confessional statements of the respondent and the other co-accused recorded under Section 67 of the NDPS Act in the light of law laid down by a Three Judges Bench of this Court in Tofan Singh (supra), wherein as per the majority decision, a confessional statement recorded under Section 67 of the NDPS Act has been held to be inadmissible in the trial of an offence under the NDPS Act. Therefore, the admissions made by the respondent while in custody to the effect that he had illegally traded in narcotic drugs, will have to be kept aside. However, this was not the only material that the appellant-NCB had relied on to oppose the bail application filed by the respondent. The appellant-NCB had specifically stated that it was the disclosures made by the respondent that had led the NCB team to arrive at and raid the godown of the co-accused, Promod Jaipuria which resulted in the recovery of a large haul of different psychotropic substances in the form of tablets, injections and syrups. Counsel for the appellant-NCB had also pointed out that it was the respondent who had disclosed the address and location of the co-accused, Promod Jaipuria who was arrested later on and the CDR details of the mobile phones of all co-accused including the respondent herein showed that they were in touch with each other.

17*. Even dehors the confessional statement of the respondent and the other co-accused recorded under Section 67 of the NDPS Act, which were subsequently retracted by them, the other circumstantial evidence brought on record by the appellant-NCB ought to have dissuaded the High Court from exercising its discretion in favour of the respondent and concluding that there were reasonable grounds to justify that he was not guilty of such an offence under the NDPS Act. We are not persuaded by the submission made by learned counsel for the respondent and the observation made in the impugned order that since nothing was found from the possession of the respondent, he is not guilty of the offence for which he has been charged. Such an assumption would be premature at this stage."*

15. In the case of ***Hira Singh*** (supra), it has been held by the Supreme Court that in case of seizure of narcotics drugs or psychotropic substances mixed with one or more neutral substance(s), the quantity of neutral substance(s) is not to be excluded and to be taken into consideration along with actual content by weight of the offending drug, while determining the "*small or commercial quantity*" of the

Narcotics Drugs or Psychotropic Substances. After referring to various provisions of the N.D.P.S. Act and the notifications issued in that regard by the Government of India, the Hon'ble Supreme Court has observed as under :-

> "*8.4. Even considering the definition of "manufacture", "manufactured drug" and the "preparation" conjointly, the total weight of such "manufactured drug" or "preparation", including the neutral material is required to be considered while determining small quantity or commercial quantity. If it is interpreted in such a manner, then and then only, the objects and purpose of NDPS Act would be achieved. Any other intention to defeat the object and purpose of enactment of NDPS Act viz. to Act is deterrent".*

In the case of ***Tofan Singh vs. State of Tamil Nadu*** : the following questions had been referred to the larger Bench :

> *"1. Whether an officer "empowered under Section 42 of the NDPS Act" and/or "the officer empowered under Section 53 of the NDPS Act" are "Police Officers" and therefore statements recorded by such officers would be hit by Section 25 of the Evidence Act; and*
>
> *2. What is the extent, nature, purpose and scope of the power conferred under Section 67 of the NDPS Act available to and exercisable by an officer under section 42 thereof, and whether power under Section 67 is a power to record confession capable of being used as substantive evidence to convict an accused?".*

The Court answered the reference in paragraph 155, which is extracted below :

> *"155.We answer the reference by stating:*
>
> *(i) That the officers who are invested with powers under section 53 of the NDPS Act are "police officers" within the meaning of section 25 of the Evidence Act, as a result of which any confessional statement made to them would be barred under the provisions of section 25 of the Evidence Act, and cannot be taken into account in order to convict an accused under the NDPS Act.*
>
> *(ii) That a statement recorded under section 67 of the NDPS Act cannot be used as a confessional statement in the trial of an offence under the NDPS Act"……*

16. In the case of ***Manoj Kumar Bhuyan and others vs. State of Orissa : (2021) 83 OCR 619 ; 2021 (II) OLR CUT 655***, where the petitioners had been chargsheeted for commission of offences punishable under Section – 21(c) and 29 of the N.D.P.S. Act as huge quantity of Eskuf cough syrup containing codeine had been recovered from them / at their instance, while considering their prayer for bail, I had expressed my anguish at the lackadaisical investigation , observing as follows :

> *"Here is a case, where a case under Section 21 (c) and 29 of the NDPS Act was registered against the four petitioners as 3500 bottles of Eskuf cough syrup allegedly containing codeine were recovered from them, which they allegedly confessed was being taken for drugging purpose. In view of the large quantity of the cough syrup seized, it was the duty of the prosecution to conclude the investigation without leaving any loose ends or lacuna. But although almost one year has elapsed since the case was registered and charge sheet is stated to be filed, neither the chemical analysis report nor any materials in support of the allegation that the petitioners were indulging in sale of the cough syrup for drugging purpose other than recording a confession of two lines that they are guilty, has been produced before this Court.*
>
> This appears to be a similar case.

In another case, I had expressed my dissatisfaction that in some Police Stations in the State of Odisha, relating to cases of recovery of illegal and unauthorised selling of cough syrup containing codeine or cough syrup laced / mixed with tablets to make it more potent, the cases are not registered under the N.D.P.S. Act , but under the I.P.C

17. I have heard the learned the learned counsel and gone through the case diary. As per the allegations and the confessions of the accused persons, the cough syrup seized from the co-accused Anirudha Meher has been supplied to him from the stock of Parhi Distributors- a medicine wholeseller. But there is no material collected by the police to connect the present petitioners with the main accused - Anirudha Meher other than their confessions and SDR and CDR records of their mobile phones that petitioner Damodar Mallik used to call up petitioner Hrusikesh Behera on his mobile number on a number of occasions to place orders for cough syrup, which petitioner Hrusikesh used to send to him through courier. No other material has been collected by the police to connect the petitioners with the cough syrup recovered from the co accused Anirudha Meher. Unfortunately, there has been no effort / investigation by the police to verify if the batch numbers of the cough syrup bottles which have been seized from the possession of accused Anirudha Meher match with the batch numbers of the cough syrup received by Parhi Distributors - the medicine wholeseller from the manufacturer or if any cough syrup has been sent to petitioner Damodar Mallik through courier. In fact from the case diary it is apparent that the petitioner Hrusikesh Behera has been arrested from his house and only his phone and Aadhaar card have been seized from him. The I.O. has apparently not gone to the courier office or the premises of Parhi Distributor, the medicine wholeseller, for the purpose of investigation. There is therefore no material in the case diary to connect the cough syrup which has been seized from the co accused Anirudha Meher with the petitioners.

As noted earlier, from the reports of the IIC Patanagarh available in the case diary, it is apparent that petitioner Hrusikesh Behera does not have any criminal antecedents and the cases in which petitioners Damodar Mallick @ Damodar Mallik and Rohit Kumar Singh are involved do not involve any offence under the N.D.P.S. Act.

18. As per the decision rendered in the case of ***Hira Singh***, the cough syrup seized in this case comes under the category of commercial quantity and the only incriminating material presently available against them is confession of the co-accused and their own confession before the police, in view of the decision in ***Tofan Singh*** (supra) regarding value of the statement of an accused recorded under Section 67 of the N.D.P.S. Act, and since the petitioners do not have any criminal antecedents under the N.D.P.S., I am constrained to observe that the twin requirements under Section 37 of the N.D.P.S. Act are satisfied, for which the petitioners have made out a case for grant of bail The prayers for bail of the petitioners is accordingly allowed but subject to verification that that they do nothave any antecedents under the N.D.P.S. Act or are involved in any case where the allegations involve illegal/unauthorised selling or transportation of cough syrup.

19. The petitioners - **Hrusikesh Behera** petitioner in BLAPL No. 4219 of 2024, **Rohit Kumar Singh** petitioner in BLAPL No. 6322 of 2024 and **Damodar Mallick @ Damodar Mallik** petitioner in BLAPL No. 6444 of 2024, shall be released on bail on such terms and conditions as may be fixed by the learned Court below in seisin over the matter subject to verification of the their criminal antecedents as described in the previous paragraph, including the following conditions:

(i) They shall not indulge in any criminal activity.

(ii) They shall not try to tamper with evidence or influence prosecution witnesses.

(iii) They will co-operate with further investigation and report before the Patnagarh Police Station once a week, preferably on a Sunday between 5.00 p.m. to 7.00 p.m. for a period of four months and thereafter once a month, preferably on the first Sunday between 4.00 p.m. to 6.00 p.m. till conclusion of the trial.

20. The prosecution will be at liberty to file application(s) for cancellation of bail or recall of this order, in case any other incriminating material is discovered to connect the petitioners with the seized cough syrup or they are involvement in a case under the NDPS Act.

21. It is made clear that the observations in this judgment have been made for the purpose of deciding the bail applications on basis of the materials available in the case diary produced before this Court and shall not be taken as an expression of opinion on the merits of the case. Therefore, the trial court should proceed with the trial without being influenced by any of the findings or observations made in this judgment.

22. Copy of this order be handed over to Ms. S. Mishra, learned Additional Standing Counsel for onward transmission to the I.I.C., Patnagarh Police Station.

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2024 (III) ILR-CUT-173

MISS. SAVITRI RATHO, J.

BLAPL NO. 2344 OF 2024

GOURANGA BIBHAR .....Petitioner

V.

STATE OF ODISHA .....Opp.Party

CODE OF CRIMINAL PROCEDURE, 1973 ─ Sections 439 & 173(2) ─ The earlier bail application was rejected with liberty to move bail afresh after completion of investigation ─ On account of seizure of documents during enquiry by the officer of the Vigilance Directorate, the I.O. could not seize all the documents and could not file preliminary charge-sheet stating that the investigation of the case is kept open for collection of material evidence ─ Effect of ─ Held, investigation should not be kept open indefinitely ─ This is neither in the interest of accused nor the Prosecution ─ So the I.O. should take expeditious steps for collecting

whatever materials (documents or relevant extracts) the prosecution wants to rely on, and complete the investigation – The Court is inclined to allow bail of the petitioner. (Paras 12-14)

Case Laws Relied on and Referred to :-

1. 2024 INSC 197 : Dablu Kujur vrs. The State of Jharkhand :
2. (1980)3 SCC 152 : Satya Narain Musadi & Ors. vs. State of Bihar
3. (2007) SCC 770 : Dinesh Dalmia vs. CBI

For Petitioner : Mr. Prashanta Kumar Nayak.

For Opp. Party : Mr. S.S. Mohapatra, A.S.C.

JUDGMENT Date of Judgment: 31.08.2024

MISS. SAVITRI RATHO, J.

This is an application under Section 439 of Cr.P.C. filed in connection with Kantabanji P.S. Case No. 245 of 2023 corresponding to G.R. Case No. 374 of 2023 pending in the court of the learned J.M.F.C., Kantabanji for commission of offence punishable under Section 409 of the I.P.C.

2. The earlier application BLAPL No. 10728 of 2023 filed by the petitioner had been dismissed on 30.11.2023 by this Court granting him liberty to move for bail afresh after completion of investigation

3. Thereafter, the petitioner has moved the learned Court below for bail and the prayer has been rejected by the learned Addl. Sessions Judge, Kantabanji on 31.01.2024.

4. The prosecution allegation in brief as per the FIR dated 22.08.2023 lodged by the Executive Officer of NAC, Kantabanji is that while the petitioner who was working as Head Assistant and I/C Cashier of NAC Kantabanji, he misappropriated government funds to the tune of Rs.37,42,339/- and the same is reflected in Local Fund Audit Report for the year 2021-22. When the informant joined, the petitioner was unable to give accounts regarding receipt of money and deposit in the official account, so he removed him from his duty. But he was not handing over charge for which charge was taken from him on 19.11.2022.

5. Charge sheet dated 18.12.2023 has been submitted against the petitioner for commission of offence under Sections 417, 420, 409 of the IPC, keeping the case open for further investigation.

6. I have heard Mr. P.K. Nayak, learned counsel for the petitioner and Mr. S.S. Mohapatra, learned Additional Standing Counsel and perused the case diary.

7. Mr. Prashanta Kumar Nayak, learned counsel for the petitioner has submitted that on account of COVID-19 pandemic proper account could not be maintained for which it has been shown in the audit that Rs.49,623,520.46 could not be accounted for by the petitioner. The money had been used for different works of the NAC. In order to show his bonafides, the petitioner after obtaining loan from the

SBI had deposited Rs.6,06,400/- with the NAC, and during pendency of the case, his brother has taken a hand loan and Rs.5,00,000/- has been deposited in the Court of the learned J.M.F.C., Kantabanji in connection with this case. He has further submitted that the petitioner is in custody since 23.08.2023 and since he is in custody, he is unable to deposit on account for further amount. He submitted that after he is released on bail, he will participate in the disciplinary proceeding which has been initiated against him and account for the amount which he is alleged to have misappropriated, which he is unable to do so as he is in custody. He will co-operate with further investigation.

8. Mr. S.S.Mohapatra, learned Addl. Standing Counsel for the State has submitted that in view of the huge quantity of money which has been misappropriated by the petitioner and as further investigation is continuing, he does not deserve to be granted bail.

9. Preliminary chargesheet dated 18.12.2023 had been filed in the case against the petitioner under Sections 417, 420, 409 of IPC keeping investigation open against him. A portion from the brief, facts of the case from the chargesheet is extracted below:

> *"On investigation it is ascertained that, the accused was appointed as Assistant and now he is promoted to the rank of Head clerk. During the incumbency he was the in-charge of establishment section and also the in charge of Cashier of NAC Kantabanji in the period of 2019-20 and 2021 and was handling of cashier Book, Accountant cash Book, daily collection Register, stock Register etc. everyday collection cash of different heads have been made in the N.A.C. Kantabanji for planning approval fee, building cess, development fee, development plan, water tax, tender paper cost, cost of stall paper has been assigned to receive the said amount from the public. The collect amount of Rs.37,42,339/- (Thirty seven lakh Forty two thousand three hundred thirty nine) only has not deposited in the bank account of NAC Kantabanji and misappropriated the said amount. Further during investigation I have sent letter to the E.O. NAC Kantabanji to provide me the copy of appointment letter/ all detail bio data and service particulars of the accuse Gouranga Bibhar but till date the office has not provided the details, in spite of my several reminders. It is also come to light that before registration of this case, one Vigilance enquiry was going on against accuse Gouranga Bibhar. The vigilance department has taken all the documents relating to the misappropriation and cheating made by the accuse Gouranga Bibhar in collection of tax money from the beneficiaries. They have taken the Cashier cash book, Money Receipt Book, Stock Register, Issue register and other documents from the office of NAC Kantabanji. Hence after the collection of those documents other action will be taken. Received instructions from SP Balangir that, the case will attract Sec. 417, 420 IPC in addition to Sec. 409 IPC. Received orders vide No. 15641/SR Dt. 18.12.2023 from SP Balangir for submission of Charge Sheet U/s 417/420/409 IPC in this case followed with compliance to the instructions imparted in the S. note*
>
> *Under the above fact and circumstances, there is sufficient evidence well made out U/s. 417/420/409 IPC against accused Gouranga Bibhar (40) S/o Late Bhaskar Bibhar Vill. Chheliapada, Ward No. 4 P.S. Khariar Dist. Nuapada, I submitted Preliminarily Charge Sheet vide Kantabanji PS.F.F. No. 245 dt. 18.12.2023 U/s. 417/420/409 IPC keeping investigation as open against him to stand his trial in the court of law."*
>
> *(emphasis supplied)*

10. Mr. Mohapatra, learned Additional Standing Counsel, pursuant to order of the Court, has produced the instruction dated 29.08.2024 of the IIC, Kantabanji Police Station regarding further investigation in the case. It is stated therein as follows:

> *"With reference to the subject cited above, I am to intimate you that, in the instant case prior to regd. of this case one vigilance enquiry vide Sambalpur Vigilance file enquiry vide File No. 24 dtd. 06.06.2023 has been conducted. The enquiring officer DSP Vigilance Pulasti Chhatria Bolangir unit had taken charge of the original cash Book of NAC Kantabanji for the year 2020-2021, 2021-2022, original Daily Collection Register of NAC Kantabanji for the year 2019-2020, 2020-2021, 2021-2022 and 2022-2023, original stock register for misc. receive, Original Vending Zone register of NAC Kantabanji, original stock register for misc. receive, Original Vending Zone register of NAC Kantabanji, original tender refund register of NAC Kantabanji, 02 nos of personnel file of the accused Gouranga Bibhar and 07 nos of money receipt of NAC Kantabanji for their verification and enquiry. After verification of enquiry of the above said file a Criminal Case vide Sambalpur Vigilance P.S. Case No. 16 dtd. 09.06.2023 U/s 13(2)/ 13(1)(a) P.C Act/ R.W. Sec. 409 IPC has been initiated against the petitioner regarding misappropriation of govt. money. As the register and the money receipt of the NAC Kantabanji are tagged in the vigilance case for their investigation, hence the same documents could not be obtained. However the details of register and M.R. Books which are taken charge by the enquiring officer are enclosed. There is no other material except the Audit report and statement of witnesses to prove the misappropriation of the money by the accused. The investigation of the case is kept open for collection of materials evidence in order to strengthen the prosecution." (emphasis supplied)*

11. The Supreme Court in the case of ***Dablu Kujur vrs. The State of Jharkhand : 2024 INSC 197***, dismissed the prayer for bail as the trial was at its fag end. But while doing so, dealt exhaustively with the provisions of Section 173 (2) of the Cr.P.C. as well as the related provisions regarding investigation, further investigation and the materials which should form part of the chargesheet. The paragraphs relevant for the purpose of this bail application are extracted below :

> *"7. The Police Report submitted by the police under Section 173(2) being very important piece of document from the view point of the prosecution, the defence and the court, we deem it necessary to elaborately deal with the various aspects involved in the said provision. For the reasons stated hereinafter, we are of the opinion that it is incumbent on the part of the Investigating Officer to strictly comply with the requirements of the said provisions, as noncompliance thereof gives rise to many legal issues in the court of law."*
>
> *xxxxx*
>
> *"15. The issues with regard to the compliance of Section 173(2) Cr.P.C., may also arise, when the investigating officer submits Police Report only qua some of the persons accused named in the FIR, keeping open the investigation qua the other persons-accused, or when all the documents as required under Section 173(5) are not submitted. In such a situation, the question that is often posed before the court is whether such a Police Report could be said to have been submitted in compliance with sub-section (2) of Section 173 Cr.P.C. 17. In this regard, it may be noted that in **Satya Narain Musadi & Ors. vs. State of Bihar : (1980)3 SCC 152** , this Court has observed that statutory requirement of the report under Section 173(2) would be complied with if various details*

prescribed therein are included in the report. The report is complete if it is accompanied with all the documents and statements of witnesses as required by Section 175(5). In ***Dinesh Dalmia vs. CBI : (2007) SCC 770*** *, however, it has been held that even if all the documents are not filed, by reason thereof the submission of the chargesheet itself would not be vitiated in law. Such issues often arise when the accused would make his claim for default bail under Section 167(2) of Cr.P.C. and contend that all the documents having not been submitted as required under Section 173(5), or the investigation qua some of the persons having been kept open while submitting Police Report under Section 173(2), the requirements under Section 173(2) could not be said to have been complied with. In this regard, this Court recently held in case of* ***CBI vs. Kapil Wadhwan & Anr. (Criminal Appeal No. 391 of 2024 (@ SLP (Crl) No. 11775 of 2023)*** *that: -*

"Once from the material produced along with the chargesheet, the court is satisfied about the commission of an offence and takes cognizance of the offence allegedly committed by the accused, it is immaterial whether the further investigation in terms of Section 173(8) is pending or not. The pendency of the further investigation qua the other accused or for production of some documents not available at the time of filing of chargesheet would neither vitiate the chargesheet, nor would it entitle the accused to claim right to get default bail on the ground that the chargesheet was an incomplete chargesheet or that the chargesheet was not filed in terms of Section 173(2) of Cr.P.C."

16. The above referred discussion has been necessitated for highlighting the significance of the compliance of requirements of the provisions contained in Section 173(2) of Cr.P.C.

17. Ergo, having regard to the provisions contained in Section 173 it is hereby directed that the Report of police officer on the completion of investigation shall contain the following: -

i. A report in the form prescribed by the State Government stating-
(a) the names of the parties;
(b) the nature of the information;
(c) the names of the persons who appear to be acquainted with the circumstances of the case;
(d) whether any offence appears to have been committed and, if so, by whom;
(e) whether the accused has been arrested;
(f) whether he has been released on his bond and, if so, whether with or without sureties;
(g) whether he has been forwarded in custody under section 170.
(h) Whether the report of medical examination of the woman has been attached where investigation relates to an offence under [sections 376, 376A, 376AB, 376B, 376C, 376D, 376DA, 376DB] or section 376E of the Indian Penal Code (45 of 1860)"

ii. If upon the completion of investigation, there is no sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate, the Police officer in charge shall clearly state in the Report about the compliance of Section 169 Cr.P.C.

iii. When the report in respect of a case to which Section 170 applies, the police officer shall forward to the Magistrate along with the report, all the documents or relevant extracts thereof on which the prosecution proposes to rely other than those already sent to the Magistrate during investigation; and the statements recorded under Section 161 of all the persons whom the prosecution proposes to examine as its witnesses.

iv. In case of further investigation, the Police officer in charge shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed and shall also comply with the details mentioned in the above sub para (i) to (iii)."

12. In the present case, it is apparent that on account of seizure of documents during enquiry by the officer of the Vigilance Directorate, the I.O. could not seize all the documents and filed preliminary chargesheet stating that "The investigation of the case is kept open for collection of materials evidence in order to strengthen the prosecution." Thereafter, during further investigation, the details of register and M.R. Books which are taken charge by the enquiring officer of the Vigilance Directorate have been collected. But investigation should not be kept open indefinitely. This is neither in the interest of the accused or the prosecution. So the I.O. should take expeditious steps for collecting whatever materials (documents or relevant extracts) the prosecution wants to rely on, and complete the investigation.

13. The amount of public money the petitioner is alleged to have misappropriated is not a small amount. But after considering the submission of the learned counsel for the petitioner that the petitioner has deposited Rs.5 lakhs in the learned Court below and that once he is released he will account for the misappropriated amount, participate in the disciplinary proceeding and also co-operate with investigation, I am inclined to allow the prayer for bail of the petitioner.

14. The petitioner- Gouranga Bibhar shall be released on bail on such terms and conditions as may be fixed by the learned Court below in seisin over the matter, including the following conditions:

(i) He shall not commit any offence while on bail.

(ii) He shall not try to influence the witnesses or tamper with evidence while on bail.

(iii) He shall co-operate with the investigation and appear before the Investigating Officer as and when required for the purpose of investigation.

(iv) He shall abide with the undertaking given in this Court.

(v) He shall appear personally in the trial Court on each date fixed for trial unless his appearance is dispensed with by the learned trial Court.

Violation of any condition will entail cancellation of bail/recall of this order.

15. The amount of Rs.5 lakhs deposited on behalf of the petitioner in the court below be kept in fixed deposit till completion of the trial and will be subject to the decision of the learned trial Court.

16. The BLAPL is accordingly disposed of.

17. A Copy of this order be supplied to Mr. S.S. Mohapatra, learned Addl. Standing Counsle for onward transmission to the IIC, Kantabanji Police Station.

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2024 (III) ILR-CUT-178

R.K. PATTANAIK, J.

CRLMC NO. 2257 OF 2023

DAYANIDHI DEHURY ….Petitioner

V.

STATE OF ODISHA ….Opp.Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – The petitioner was charge-sheeted for offence punishable U/ss. 336 & 304-A of IPC – The petitioner was holding the post of Assistant Executive Engineer – As per order of superior authority he opened two sluice gates of Hirakud Dam after taking precaution of blow-siren not once but thrice, which was ignored by the deceased students – There was no specific role attributed to petitioner as per any protocol – Whether the alleged criminal liability against the petitioner sustainable? – Held, No – In absence of clear protocol guidelines to follow by the petitioner who rather inspected the Dam and performed in a manner normally expected from him, cannot be said grossly rash or negligent in order to invite the criminal action. (Para 8-10)

Case Laws Relied on and Referred to :-

1. AIR 1979 SC 1848 : Syed Akbar Vrs, State of Karnataka.
2. ILR 3 All 776 : Empress Vrs. Idu Beg.
3. AIR 1972 SC 685 : S.N. Hussain Vrs. State
4. AIR 1980 SC 845: Rattan Singh Vrs. State
5. (2000) 7 SCC 72: Mohammed Aynuddin Vrs. State
6. AIR 1965 SC 1616: Kurban Rangawalla Vrs. State
7. AIR 1968 SC 829: Suleman Vrs. State
8. AIR 1972 SC 1150: Ambalal Vrs. State

For Petitioner : Mr. D.P. Dhal, Sr. Adv., Mr. Anshuman Ray
For Opp. Party : Mr. J.P. Patra, ASC.

JUDGMENT Date of Judgment : 21.05.2024

R.K. PATTANAIK, J.

1. Instant petition under Section 482 Cr.P.C. is filed by the petitioner challenging the order of framing of charge dated 19th April, 2011 (Annexure-6) and the proceeding in connection with G.R. Case No.145 of 1998 qua him pending in the file of learned S.D.J.M., Sambalpur on the grounds inter alia that such initiation of criminal prosecution against him is ex-facie illegal, hence, in the interest of justice, deserves intervention of this Court in exercise of its inherent power.

2. The facts in brief are as follows. A plain paper FIR was lodged with respect to an incident dated 30th January, 1998, during which, on account of release of water in the Hirakud Dam with opening of two sluice gates, seven students of the UCE, Burla, while taking bath in the river bed at a ghat slipped away and died with the allegation that there has been gross negligence on the part of the petitioner and others on duty. In fact, the report was drawn at the behest of the IIC, Burla P.S., subsequent to which, investigation was held leading to the filing of chargesheet against the accused persons for offences punishable under Section(s) 336 and 304-A IPC. Later to the submission of the chargesheet, the learned court below took cognizance of the offences and thereafter, framed the charge by order dated 19th April, 2011. In other words, the learned S.D.J.M., Sambalpur considering the chargesheet and connected materials was of the view that a prima facie case under the alleged offences to have been made out against the petitioner. The contention of

the petitioner is that there is no negligence, inasmuch as, release of the water from the dam was preceded by blowing siren which was ignored by the deceased students. Considering the claim of the petitioner and the criminal proceeding in respect of a co-accused, namely, Ramakanta Mallik having been quashed by order dated 5th April, 2023 in CRLMC No.3534 of 2011, the Court is to examine, whether, the charge vis-a-vis the petitioner and for that matter, the criminal proceeding against him needs any interference of similar kind.

3. Heard Mr. Dhal, learned Senior Advocate appearing for the petitioner assisted by Mr. Anshuman Ray, Advocate and Mr. Patra, learned Additional Standing Counsel for the State.

4. Mr. Dhal, learned Senior Advocate for the petitioner would submit that the petitioner is equally not negligent and the unfortunate incident took place despite precaution being taken with the blow of siren not once but thrice but the students, who were found to be under the influence of alcohol could not return back to the shore of the ghat. It is further submitted that as per statement of the Gauge Reader of Left Still Way Control Room, who was along with another official while attending duty experienced increase in water level and accordingly, informed the Work Sarkar, who noted it down in the register and as the water level of 630 ft. being the maximum capacity the reservoir can store during non-monsoon period, the work Sarkar informed higher authority also, during which, the petitioner, who was posted as Assistant Executive Engineer reached at the spot at around 7.30 AM and personally inspected the water level and similarly, took note of the level of water in the dam and after discussion among the officials, instruction was issued to all the operational staff to get ready to open the sluice gates. The contention of Mr. Dhal, learned Senior Advocate is that due process was followed all along and on the intimation of the Work Sarkar, the Crane Operator opened the Gate No.37 and thereafter, the second gate was opened at about 2.00 PM. Referring to the statement of the Gauge Reader and other materials on record, Mr. Dhal would submit that proper course of action was taken and therefore, there was no rash or negligence act, which is attributed to the petitioner, who in course of duty, discharged the responsibility as per the protocol. Advancing an argument that there has been no serious breach of duty but opening of the gates was after duty deliberation and it was on the orders of the senior officials and as care and caution was taken before the water was released into the dam by blowing siren, ignored by the students, no case much less justifying a criminal action is made out against him and hence, like the co-accused, the entire proceeding is required to be quashed.

5. On the contrary, Mr. Patra, learned ASC for the State submits that adequate measures were not taken by the petitioner, who like others was casual without being aware of the serious consequences to follow, allowed the gates of the dam to open, which ultimately caused death of seven students of the UCE, Burla. It is further submitted by Mr. Patra, learned ASC that considering the materials on record in its entirety and the circumstances under which the mishap happened, the petitioner, as a

Govt. official on duty, was expected to discharge the responsibility in such manner to avoid any causality. It is also contended that the petitioner cannot be exempted from criminal liability for the rashness and negligence in view of the fact that the gates were suddenly opened, as a result of which, innocent lives were lost, hence, the order of framing of charge vide Annexure-6 against him is in accordance with law and therefore, the criminal action should not be interfered with leaving all the aspects agitated at present to be examined and taken cognizance of during trial.

6. The criminal prosecution vis-a-vis the co-accused, namely, Ramakanta Mallik stands quashed by the Court's order dated 5th April, 2023 (Annexure-7) in CRLMC No.3534 of 2011 with the conclusion that absence of additional precaution beyond protocol cannot be a ground to fasten the criminal liability, hence, no case of gross negligence is made out. The Court in absence of any serious breach in protocol required to be followed since not revealed in the chargesheet and for not taking additional measures, like public announcement, prior intimation to the local police etc. when the said accused discharged duty in a routine manner along with the operational staff was inclined to quash the order of cognizance against him. In the case at hand, the question is, the petitioner having played a part, whether to be held responsible for any such gross negligence so as to allow the criminal prosecution against him to continue with the charge framed in the meantime?

7. In order to make out a case under Sections 336 IPC, the essential ingredients for the said offence are, namely: (i) the accused did some act;(ii) did such act rashly or negligently; and (iii) the act endangered human life or personal safety of others. An act to be such an offence, if there is rashness or negligence on the part of the accused. The consequence of the act which is to endanger human life or affect personal safety of others for the conduct being rash or negligent is *sine qua non*. With respect to Section 304A IPC, any rash or negligence act, which does not amount to culpable homicide becomes an offence for causing death by such an act. In other words, Section 304A IPC carves out a specific offence where death is caused by doing rash or negligent act which is not an offence of culpable homicide defined under Section 299 IPC or murder under Section 300 IPC. The offence under Section 304A IPC is attracted, where there is no intention to cause death and no knowledge that the act done would in all probability cause death. So to say, the said offence is outside the purview of Section(s) 299 and 300 IPC and contemplates cases where there is absence of intention or knowledge. It is well settled law that in criminal cases, because of the rules of burden of proof, presumption of innocence and proof beyond reasonable doubt, the doctrine of *res ipsa loquitur* can only be applied as an aid in the evaluation of evidence, an application of the general method of inferring one or more facts in issue from the circumstances proved by evidence as held in **Syed Akbar Vrs. State of Karnataka AIR 1979 SC 1848**. It would be profitable to quote the relevant excerpt of the ancient decision in the case of **Empress Vrs. Idu Beg ILR 3 All 776** which is to the effect that criminal rashness consists in hazarding a dangerous or wanton act with the knowledge that it is so and that it may cause injury but without intention to cause injury, or knowledge that it

will probably cause. The criminality lies in running the risk of doing such an act with recklessness or indifference as to the consequences; criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury, either to the public generally or to an individual, in particular, which, having regard to all the circumstances out of which the charge has arisen, it was imperative duty of the accused person to have adopted. (Ref: **S.N. Hussain Vrs. State AIR 1972 SC 685**).

8. In **Rattan Singh Vrs. State AIR 1980 SC 845**, the Apex Court held that rashness and negligence are relative concepts, not abstractions and in applying the law under Section 304A IPC, it is fair to invoke the rule of *res ipsa loquitur* with due care and having regard to the frequency in the accident cases involving vehicles. In **Mohammed Aynuddin Vrs. State (2000) 7 SCC 72**, it is held by the Supreme Court that a rash act is primarily an overhasty act, which is opposed to a deliberate action; still a rash act can be a deliberate act in the sense that it was done without care and caution; hence, culpable rashness lies in doing an act recklessly being indifferent to the consequences. Likewise, in **Kurban Rangawalla Vrs. State AIR 1965 SC 1616** and in catena of other decisions including **Suleman Vrs. State AIR 1968 SC 829** and **Ambalal Vrs. State AIR 1972 SC 1150**, the Apex Court had the occasion to consider the cause and effect to attract the offence under Section 304A IPC and observed that death must be a direct result of rash and negligent act of the accused and the act must be sufficient cause without the intervention of another act of negligence and it must be the *causa causans*; it is not enough that it may have been the *causa* sine qua non and where death is not the direct result of rash and negligence act and was not a proximate and sufficient cause without the intervention of another act of negligence, the accused must be acquitted of the charge under Section 304A IPC. So, therefore, there must be a direct nexus between the death of the person and rash and negligent act of the accused in order to invite criminal action under Section 304A IPC.

9. In the case at hand, the petitioner was on duty as on official and was a party to the inspection at the spot and finally, with the orders of the senior officials, the gates of the dam were opened. The inspection at the dam commenced in the morning and routinely continued till the afternoon, when the sluice gates were ordered to be opened. As earlier mentioned, eight of the students of UCE, Burla had gone into the river to take bath and in the meantime, the water was released in the dam but except one of them, others could not make it to return to the shore. On perusal of the chargesheet and connected police papers, the Court finds that siren was blown but the students apparently ignored the same. Before release of water into the dam, the water level was inspected from time to time and a decision to open the gates was taken when it reached a particular height. The petitioner as an official had been to the spot and also inspected the water level and later on with a decision, considering the need for release of the water, the gates were opened. The chargesheet does not suggest monitoring of water level in the dam not to have been done at all. Rather, the evidence is on record to show that regular monitoring was held when the water

level increased. So, therefore, it cannot be said that there was lack of due diligence on the part of the petitioner, who like the co-accused, did whatever possible and on the orders received, it led to the release of water. As to what was the protocol at the time of opening of gates is again not revealed from the chargesheet. In other words, what protocol the Dam Authority normally follow is not discernable from the chargesheet. If at all the protocol demands any additional precautionary measures besides blowing siren is not borne out of record. Any specific procedure with protocol in place whether to have been followed by the petitioner? In fact, the role of the petitioner is not specifically indicated in the chargesheet to justify a criminal action. One has to be held criminally liable provided there is gross lapse on his part, while discharging the responsibility. The rashness or negligence is to be outlined vis-à-vis the accused against whom the charge is levied. In the present case, there was unprecedented rainfall in the upper catchment of the reservoir and hence, precautionary measure was absolutely needed to protect the dam. But, at the same time, release of water into the dam in a routine business when allowed to happen with siren being blown, in absence of any protocol in place with clear indication regarding the role and responsibility of a particular accused and merely for the reason that he was required to take additional precaution beyond such protocol, in the humble view of the Court, cannot be a ground to fasten the criminal liability on him. The siren was blown thrice and it could be heard by all and one of the students, in response to it, informed the deceased students about the same and he could manage to reach the ghat shore in time. The fact that the deceased students where under the influence of alcohol is made to appear from the Chemical Examination Reports (Annexure-4 series). All the students were made aware of the siren as told to them by one of the survivors, which was followed by steady rise in water level but as ill-luck would have it, they failed to respond in time ignoring the siren under the impression that it was of any nearby factory or under the impression that such release was unlikely to happen during the odd season or being overwhelmed by the turn of events oblivious of the imminent danger to befall. Even the deceased students could have made it had they immediately responded to the siren as the water was knee dip initially and had a steady rise but the response was late, which proved to be fatal.

10. To allege criminality against the petitioner, who at the relevant point of time, was holding the post of Assistant Executive Engineer, without any specific role being attributed to him as per any protocol, would be unjustified. It is reiterated that for not taking additional precaution beyond routine and regular protocol, it would not be proper to allege serious breach in duty so as to fasten the culpability against the petitioner. Keeping in view the legal position discussed herein before and in absence of clear protocol guidelines to follow by the petitioner, who, rather, inspected the dam and performed in a manner normally expected from him cannot said to be grossly rash or negligent in order to invite the criminal action. Hence, having said that, the conclusion of the Court is that the order of framing of charge dated 19th April, 2011 under Annexure-6 and the criminal proceeding against the petitioner shall have to be quashed.

11. Hence, it is ordered.

12. In the result, the petition under Section 482 Cr.P.C. filed by the petitioner stands allowed. As a consequence whereof, the impugned order of framing of charge dated 19th April, 2011 (Annexure-6) and the proceeding in connection with G.R. Case No.145 of 1998 qua the petitioner pending in the file of learned S.D.J.M., Sambalpur is hereby quashed.

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2024 (III) ILR-CUT-184

SASHIKANTA MISHRA, J.

W.P. (C) NO. 5838 OF 2024

ASHIS KUMAR DEBTA ….Petitioner

V.

STATE OF ODISHA & ORS. ….Opp.Parties

(A) ODISHA ACCOUNTANT-CUM-DATA ENTRY OPERATOR (METHOD OF RECRUITMENT AND CONDITIONS OF SERVICE) RULES, 2024 – Rule 10, Sub Rule 5, Clause (b) – Petitioner has completed five years of continuous service as Gram Rojgar Sevak (GRS) – After completion of five years of service, he claims absorption as Accountant-cum-Data Entry Operator as provided under the Proviso of Rule 10 – The Authority/Opp.Parties denied such absorption as per Rule 10(5)(b), i.e, due to pendency of vigilance case against the petitioner – Whether clause 5(b) of Rule 10 is applicable against the absorption of the petitioner?– Held, No – Reason indicated. (Paras 12,13 &14)

(B) INTERPRETATION OF STATUTES – Proviso – Intention and effect – Discussed with reference to case laws. (Paras 10 &11)

(C) MOULDING OF RELIEF – Whether the Court can mould the relief even such relief has not been claimed by the parties? – Held, Yes. (Para 15)

Case Laws Relied on and Referred to :-

1. AIR 1961 SC 1596 : Shah Bhojraj Kuverji Oil Mills & Ginning Factory vs. Subhash Ch. Yograj Sinha
2. AIR 1966 SC 12: Kedarnath Jute Manufacturing Co. Ltd. vs. Commercial Tax Officer
3. (1987) 2 SCC 469 : Mackinnon Mackenzie & Co. Ltd. v. Audrey D Costa
4. 2004 1 SCC 574 : Haryana State Cooperative Land Development Bank Ltd. vs. Haryana State Cooperative Land Development Bank Employees Union.

For Petitioner : Mr. H.S. Mishra

For Opp.Parties : Mr. S.N. Patanaik, A.G.A

JUDGMENT Date of Judgment: 09.07.2024

SASHIKANTA MISHRA, J.

The Petitioner has filed this Writ Petition seeking a direction to the Opposite Parties to consider his case for promotion if he is otherwise eligible to the post of Accountant-cum-Data Entry Operator.

2. The brief facts of the case are that the Petitioner being appointed as Gram Rojgar Sevak (GRS) on 02.4.2013 under Gudelpali Gram Panchayat in the district of Bargarh has been working as such since then. The Government of Odisha in Panchayati Raj Department has recently framed a Rules called the Odisha Accountant-cum-Data Entry Operator (Method of Recruitment and Conditions of Service) Rules, 2024, which came into force on 27.2.2024. As per Rule 4 of the said Rules, 70% of the cadre strength is to be filled up by way of direct recruitment and 30% by means of selection of the eligible GRS engaged under MGNREGS Scheme. Further, Rule 10 provides as a one time measure by way of relaxation of the provisions of the Rules, that the GRS who have completed 5 years of continuous service on the date of commencement of the Rules shall be absorbed on regular basis subject to fulfillment of other conditions and relaxation of upper age limit.

3. It is the case of the Petitioner that having completed five years of continuous service, he is eligible to be absorbed on regular basis against the vacant post of Accountant-cum-Data Entry Operator. However, he apprehends that his case would not be considered as a false vigilance case has been foisted against him purportedly on the direction of the Lokayuta, Odisha. As such, his case may not be considered by taking recourse to Clause (b) of Sub-rule (5) of Rule 10 of the 2024 Rules which provides for vigilance and criminal clearance as an eligibility condition. He has, therefore approached this Court in the present Writ Petition with the following prayer;

> *"The Petitioner, above named, therefore prayed that in the facts and circumstances of the case stated above, this Hon'ble Court may graciously be pleased to issue notice to the Opposite Parties, directing them to show cause as to why the Writ Petition shall not be allowed.*
>
> *And if the Opposite Parties fail to show cause and/or cause shown found to be insufficient in law as well as in the facts and circumstances of the case, the Hon'ble Court may please to allow this Writ Petition directing the Opp. Parties to consider the case of the Petitioner for promotion if he is otherwise eligible with his experience ignoring the pendency of Sambalpur Vigilance P.S. Case No.45/2021 till the conclusion of trial of the said case as per law laid down in W.P.(C) No.20342 of 2021 decided on 8.9.2023 by issuance of appropriate writ or writs particularly a writ of Mandamus."*

4. Counter affidavit has been filed by the StateOpposite Party No.1. It is stated that 2024 Rules were framed being approved by the cabinet to facilitate better, effective and timely regulation of official transactions, proper management, documentation of record and financial management of various schemes at grassroot level/Gram Panchayat level. As per the said rules, 30% of the sanctioned posts of Accountant-cum-Data Entry Operator shall be filled up by absorbing the eligible

GRS following the procedure prescribed in Rule 10. As per Rule 10(5)(b) Vigilance and Criminal Case Clearance Report is a mandatory provision to define the eligibility of a GRS for his further selection to the post. Hence, pendency of a vigilance case against the Petitioner after duly being charge sheeted by the vigilance authorities will result in loss of eligibility for his selection to the post. After finalization of vigilance case, the Petitioner will be definitely eligible for selection only if he is not found guilty by the vigilance Court.

5. Heard Mr. H.S.Mishra, learned counsel for the Petitioner and Mr. S.N.Patanaik, learned Addl. Government Advocate for the State.

6. Mr. Mishra argues that the vigilance case was foisted against the Petitioner falsely. He has not been held guilty in the said case as yet. He would further argue that mere pendency of a criminal case cannot be a bar for consideration of the Petitioner for absorption on regular basis as he has not been held guilty as yet. It would therefore, be opposed to the fundamental principles of criminal jurisprudence. Mr. Mishra also argues that the language employed in Clause (b) of Sub-rule (5) of Rule 10 is too vague and non-specific to be acted upon. Therefore, according to him, the petitioner's right of consideration cannot be taken away.

7. Mr. S.N.Patanaik, on the other hand, would argue that the procedure for filling up the post lays down certain eligibility conditions, one of which is Vigilance and Criminal clearance report. Since the Petitioner has admittedly a vigilance case pending against him, his case cannot be considered in view of the provision under Rule 10(5)(b).

8. After hearing learned counsel for the parties, this Court deems it proper to first refer to the relevant Rules i.e. Rule-10, which reads as under;

> *"10. Procedure for filling up of vacancies by way of Selection:-*
>
> *(1) A panel list of all eligible GRS shall be maintained at the District level (Zilla Parishad) basing upon their date of engagement. Candidates equal to vacancies arising in a year against 30% of the sanctioned strength of the Cadre shall be allowed to appear for recruitment through the Commission. In case suitable candidates are not available, the post shall remain vacant to be treated as carry forward vacancy for the next year.*
>
> *Provided that as a one time measure, by way of relaxing the provisions of this Rule, those GRS who have completed 5 (five) Years of continuous service on the date of commencement of this Rule, shall be absorbed on regular basis against vacant posts of Accountant-cum-Data Entry Operators subject to fulfillment of other conditions of service and relaxation of upper age limit, if required. Subsequent vacant posts created in the cadre of Acct-cum-DEO shall be filled up as per the provisions prescribed in the Rules.*
>
> *(2) The Schedule and Syllabus for the selection of the eligible GRS to Acct-cum-DEO shall be as decided by the PR&DW Department, however the recruitment shall be conducted by the Commission.*
>
> *(3) A maximum of three chances shall be allowed to the GRS to pass the recruitment test.*
>
> *(4) The Recruitment test may be held once each Year, preferably during the month of December.*

(5) In order to be eligible for selection, the Selection Board constituted under Rule 11 for the purpose shall consider:

(a) Satisfactory performance report of preceding 5 Years to be issued by the CDO-cum-Executive Officer on the recommendation of the BDO concerned.

(b) Vigilance and Criminal clearance report."

9. A bare reading of the Rules would suggest that ordinarily 30% of the sanctioned strength in the cadre shall be filled up by way of selection from the eligible GRS. However, as per the proviso to Sub-rule (1), as a one time measure, provision for absorption on regular basis of those GRS who have completed five years of continuous service has been made by way of relaxing the provisions of the Rules. This carves out an exception to the normal procedure i.e., by way of selection.

10. What is the intent and effect of a proviso is fairly well-settled by different pronouncements of the Supreme Court. In the case of ***Shah Bhojraj Kuverji Oil Mills and Ginning Factory vs. Subhash Ch. Yograj Sinha***[1], it was held as follows;

"As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment, and ordinarily, a proviso is not interpreted as stating a general rule."

Thus, proviso is an exception to the main enactment. It has been held that normal function of a proviso is to except something out of the enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment. Reference in this regard may be had to the Judgment of the Supreme Court in the case of ***Kedarnath Jute Manufacturing Co. Ltd. vs. Commercial Tax Officer***[2]**.**

However, normally a proviso does not travel beyond the provision to which it is a proviso as held in the case of ***Mackinnon Mackenzie & Co. Ltd. v. Audrey D Costa***[3]**.**

11. Thus, a proviso to a particular provision of a statute only impresses the field which is covered by the main provision. It carves out an exception to the main provision to which it has been enacted as a proviso and to no other as well held in the case of ***Haryana State Cooperative Land Development Bank Ltd. vs. Haryana State Cooperative Land Development Bank Employees Union;***[4]**.**

12. It would now be proper to examine the statutory provision keeping the settled position of law as referred to above in the perspective.

As is evident, Rule 10 lays down the procedure for filing of vacancies by way of selection. Rule 4 provides that not less than 70% of the cadre strength shall be filled up by way of direct recruitment and not more than 30% of the cadre strength shall be filled up means of selection of the eligible GRS engaged under MGNREGS Scheme. Coming back to Rule 10, Rules (1)(2)(3)(4) and (5) relate to

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1. AIR 1961 SC 1596 **2.** AIR 1966 SC 12
3. (1987) 2 SCC 469 **4.** 2004 1 SCC 574

the procedure to be followed for selection of eligible GRS for the post of Accountant-cum-Data Entry Operator. The proviso to Sub-rule (1) however carves out an exception for those GRS who have completed 5 years of continuous service on the date of commencement of this Rule. The proviso speaks of 'absorption' and not 'selection'. This is the most significant distinction. Such absorption has been made subject to fulfillment of 'other conditions of service' and 'relaxation of upper age limit if required.' The proviso thereafter goes on to state in clear and unambiguous terms that 'subsequent vacant posts' created in the cadre shall be filled up as per the provisions prescribed in the rules. Plainly understood, this means that while filing up of the post of Accountant-cum-Data Entry Operator is ordinarily to be done by way of selection of eligible GRS, the State also deemed it proper to provide for another avenue for filling up the post from amongst the existing GRS, who have completed 5 years of continuous service by way of 'absorption'. Obviously, absorption cannot be equated with selection. That apart, the proviso itself makes it clear that the procedure laid down in the rules shall be applied only for those vacancies that arise after the one time measure of absorption is over. The use of the words 'subsequent vacant posts' can have no other meaning. Thus, in order to be eligible for absorption the GRS must have completed five years of continuous service as such. Though it is stated that such absorption shall be subject to fulfillment of other conditions of service but the same has not been clarified adequately. It would however suffice for the present purpose to note that in so far as the absorption on regular basis of an existing GRS is concerned, the rules would have no application.

13. Coming to the facts of the present case, the Petitioner having completed 5 years of continuous service can be considered for absorption on regular basis subject to fulfillment of other service conditions and relaxation of age. Obviously, the procedure prescribed for selection to the post cannot be applied to his case. As such, reference to Clause (b) of Sub-rule (5) of Rule 10 by the State appears to be misconceived. To reiterate, had it been a case of selection the afore quoted provision would have had direct application, but not so in case of absorption in view of the reasons spelt out hereinbefore.

14. Thus, from what has been narrated hereinbefore, this Court finds that if the Petitioner is found to have completed five years of continuous service as on the date of coming into force of the Rules, i.e. 27.2.2024, then he is entitled to be considered for absorption on regular basis to the post of Accountant-cum-Data Entry Operator subject to fulfillment of other service conditions and relaxation of age, if required.

15. Be it noted that the petitioner has claimed promotion to the post in question. But there is no provision in the Rules for filling up the post by promotion. As already stated, the post can be filled up from the 30% quota of GRS only by way of one-time absorption and/or selection thereafter. Nevertheless, the main relief claimed being for consideration of the petitioner's case for the post, the relief can always be moulded appropriately in the ends of justice.

16. For the foregoing reasons therefore, the Writ Petition is allowed. The Opposite Party authorities are directed to consider the case of the Petitioner for absorption on regular basis to the post of Accountant-cum-Data Entry Operator strictly in terms of the proviso to Sub-rule (1) of Rule 10 of 2024 Rules without any further delay.

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2024 (III) ILR-CUT-189

SASHIKANTA MISHRA, J.

W.P.(C) NO. 22077 OF 2012

NIRANJAN SATAPATHY …..Petitioner

V.

UTKAL UNIVERSITY & ORS. …..Opp.Parties

(A) SERVICE LAW – Odisha Government Press (Industrial Employees Classification, Recruitment, Promotion of Service and Appeal) Rules, 1978 – The petitioner seeks a direction to the Opposite Party authorities to promote him as Junior Production Officer w.e.f. 28.02.2014 – Opposite Parties Nos. 1,2 & 3 through their counter affidavit denied it – Petitioner through his rejoinder alleged that 1978 Rules cannot be made applicable since admittedly there is no post of Head Reader in the University (Utkal) from its inception – Petitioner and O.P. No. 4 have retired from service in the meantime.

(B) Whether the non-consideration of petitioner's case for promotion is as per law? – Held, No – If the Rules require that the post of Head Reader must exist in between the post of Senior Proof Reader and Junior Production Officer, such post ought to have been created by the authorities. (Para 10)

– Not having created such a post in the first place, the authorities must themselves be held guilty of violating the statutory mandate. (Para 10)

– This would be seriously discriminatory being in violation of the principles of equality enshrined under Article 14 of the Constitution of India. (Para 10)

(C) Held, the authorities should first notionally appoint the petitioner as Reader in-charge and thereafter as Junior Production Officer so as to treat his last pay drawn in such scale – His pension and pensionary benefits should be reworked and revised accordingly. (Para 14)

For Petitioner : Mr. S.P. Mohanty.

For Opp.Parties : Mr. D. Mohapatra.

JUDGMENT Date of Judgment : 07.08.2024

SASHIKANTA MISHRA, J.

1. The petitioner in the present writ application seeks a direction to the Opposite Party authorities to promote him as Junior Production Officer w.e.f. 28.02.2014 after quashing the orders issued in favour of the present Opposite Party No.4 vide Annexures 8,9 and 10.

2. The facts, in a nutshell, are that the petitioner joined as Copy Holder on 31.08.1978 in the Utkal University press after undergoing due selection process. He was promoted to the post of Reviser in 1998, Junior Proof Reader in 2000 and Senior Proof Reader on 06.05.2006. It is his claim that the next higher post of Junior Production Officer is to be filled up by way of promotion from incumbents holding the post of Senior Proof Reader, Machine Foreman and Section Holder with matriculation technical trade and 10 years of experience. Apprehending that he may be ignored while considering promotion to the post of Junior Production Officer, the petitioner submitted a representation to the University authorities. In the Departmental Promotion Committee (DPC), held on 27.12.2011, the case of the petitioner was considered along with one Pramod Kumar Mohapatra, Machine Foreman, and the Opposite Party No.4, Section Holder. Said Pramod Kumar Mohapatra was recommended for promotion to the post of Junior Production Officer. Consequent upon his retirement with effect from 31.03.2012, the Opposite Party no.4 was directed to take over charge of Junior Production Officer from him. The petitioner being more than two years senior to the Opposite Party No.4 submitted representation to the authorities requesting for considering his case while objecting to the above action of the authorities. Another DPC was constituted on 28.02.2014 wherein Opposite Party No.4 was granted regular promotion to the post of Junior Production Officer. Significantly, he joined and retired on the same day. As such, the petitioner's case was not considered. It is stated that the petitioner entered into the Feeder Grade on 06.05.2006 whereas the Opposite Party No.4 entered such grade on 19.11.2008. Therefore, promotion granted to a rank junior, according to the petitioner is bad in law.

3. Counter affidavit has been filed by the University (Opposite Party Nos. 1,2 and 3). It is stated that the petitioner is not entitled to promotion to the post of Junior Production Officer but his case was also considered by the DPC, held on 28.02.2014, which decided to recommend the name of Opposite Party No.4 for promotion. It is further stated that the University follows the Odisha Government Press (Industrial Employees Classification, Recruitment, Promotion of Service and Appeal) Rules, 1978 (for short, 1978, Rules) for the employees working in the printing press managed by it. The hierarchy of posts of promotional cadre mentioned in schedule B of the Rules specify that Section Holder (composing), Section Holder (mono), Section Holder (lino), Head Reader and Machine Foreman are eligible to get promotion to the post of Junior Production Officer. The Opposite Party No.4 was holding the feeder cadre post of Section Holder and was therefore, eligible whereas

the petitioner, despite being Senior to Opposite Party No.4, was holding the post of Senior Proof Reader which is not one of the feeder cadre posts. As such, his case was rightly not considered.

4. The petitioner has filed a rejoinder reiterating the fact that he having joined on 06.05.2006 as Senior Proof Reader is senior to Opposite Party No.4 who joined in the feeder cadre post of Section Holder on 19.11.2008. It is further alleged that the DPC was held on 28.02.2014, which was the date of retirement of Opposite Party No.4 and he was given promotion on the same day. The 1978 Rules cannot be made applicable since admittedly there is no post of Head Reader available in the University from it's inception. Moreover, the Rules mandate that promotion is to be granted on the basis of merit and suitability with due regard to seniority.

5. Heard Mr. S.P. Mohanty, learned counsel for the petitioner and D.N. Mohapatra learned counsel for the Opposite Party University.

6. Mr. Mohanty would argue that in the absence of the post of Head Reader in the University, as admitted by it, it is not open to the authorities to take the plea that the petitioner not having occupied such post is not eligible for promotion. Mr. Mohanty further argues that the petitioner is admittedly senior to the Opposite Party No.4 by more than two years and was drawing higher salary and therefore, his case could not have been ignored. Mr. Mohanty concludes his argument by submitting that the manner in which the DPC was constituted and its meeting held, on the date of retirement of Opposite Party No.4 and his name was recommended and he also joined in the promotional post for one day, only goes to show the arbitrary exercise of power by the authorities evidently to grant the benefit of promotion to him.

7. Mr. D.N.Mohapatra, learned counsel appearing for the university, on the other hand would argue that the authorities cannot bypass the statutory rules in any manner. There are different channels of promotion to the post of Junior Production Officer such as Section Holder (composing), Section Holder (Mono), Section Holder (Lino), Head Reader and Machine Foreman, etc. There is no direct channel of promotion to the post of Junior Production Officer from the post of Senior Proof Reader. For such an incumbent, the next promotional post is Head Reader. Since the Petitioner had not occupied the feeder level Post of Head Reader, his case was rightly not considered.

8. Before examining the merits of the rival contentions, this Court at the outset takes note of the fact that both the petitioner as well as the Opposite Party No.4 have retired from service in the meantime. Be that as it may, this Court finds that the facts as averred in the writ application relating to initial appointment and subsequent promotion availed by the petitioner are not disputed. It is also not disputed that the petitioner was promoted to the post of Senior Proof Reader on 06.05.2006 in the pay-scale of Rs.5,200 to 20,200/- with grade pay Rs. 2,800/-. From the representation dated 09.10.2012, copy of which has been enclosed as Annexure-7 to the writ application, it is evident that the scale of pay of Section Holder is also Rs.

5,200 to Rs. 20,200/- with grade pay of Rs. 2,800/-. Significantly, this has not been disputed by the Opposite Parties in the counter or in the affidavit on 02.03.2024. In other words, the scale of pay of Senior Proof Reader and Section Holder is identical. This is also borne out from the particulars of all the posts as given in the Schedule-B. Admittedly, Opposite Party No.4 while working as Senior Compositor was promoted to the post of Section Holder on 19.11.2008 (copy enclosed as Annexure - 7). Therefore, as on the date of consideration of employees for promotion to the post of Junior Production Officer the petitioner was undoubtedly senior to Opposite Party No.4 but then it has been contended on behalf of the university that in so far as Section Holder is concerned, the next higher post is Junior Production Officer but in so far as Senior Proof reader is concerned, the next higher post is Head Reader. Reference to Schedule B of 1978 Rules also depicts the above.

9. If such is the case then how could the case of the petitioner be considered by the DPC, scheduled to be held on 27.12.2011. In the counter affidavit filed by the University, it has been stated under paragraph 3 that the petitioner is not entitled to such promotion nor comes within the zone of consideration but however, his case was also considered by the DPC. This Court is unable to comprehend this self-contradictory averment. In the DPC, held on 28.02.2014, the post of Senior Proof Reader has been replaced by Head Reader. Most surprisingly, in reply to a query posed by the petitioner under the RTI Act, the University has clearly admitted that there is no substantive post of Head Reader in the University press since its setup. It cannot obviously be presumed that the DPC was not aware of the non-existence of the post of Head Reader in the University Press. Such being the factual Scenario, it does not at all stand to reason as to how the post of Head Reader could be included among the different feeder cadre posts in the proceedings of the DPC meeting held on 28.02.2014.

10. This Court is conscious of the fact that the statutory hierarchy cannot be bypassed but then it is for the authorities to ensure that the statutory hierarchy exists in the first place and is maintained. In other words, if the Rules require that the post of Head Reader must exist in between the post of Senior Proof Reader and Junior Production Officer, such a post ought to have been created by the authorities. Not having created such a post in the first place, the authorities must themselves be held guilty of violating the statutory mandate. This has led to a peculiar situation inasmuch as between the employees drawing identical scales of pay though holding different posts, all except one category i.e. the post of Senior Proof Reader would be entitled to further promotion to the post of Junior Production Officer. This would be seriously discriminatory being in violation of the principles of equality enshrined under Article 14 of the Constitution of India. To amplify, a person like the petitioner would have no further promotional avenue only because of the inaction of the authorities in creating the post of Head Reader resulting in his stagnation while his rank juniors would march ahead of him. This is exactly what has happened in the present case. The arguments advanced by the authorities to justify non consideration of the petitioner’s case for promotion is therefore, entirely untenable.

11. Reference to the 1978 Rules, particularly to Schedule B thereof reflects a different picture and further demolishes the stand of the Opp. Parties that not having not occupied the Head Reader Post, the petitioner is not entitled to be promoted as Junior Production Officer (JPO). Sl. No. 3 relates to the Trade 'Proof Reading' and mentions different posts under it such as, Copy holder, Revisor, Junior Reader and Senior Reader, Reader in-charge in Branch Press and Head Reader. The pay scale of Senior Reader and Reader incharge is identical being Rs. 370-550/- Most significantly, it is mentioned in the column titled 'Brief description of job' as under:

> *"The post of Reader-in-Charge is a post of supervisor. In the branch presses the Reader in charge is to supervise all the trades while doing the proof reading work. Even he has to do some clerical and managerial work. A senior reader may opt to work as a Reader-in-charge of branch press. A successful reader in charge may be considered for the post of Assistant Overseer. At head-quarters the duties attended to by Reader in charge are the same as those attached to Machine Foreman and he for practical purposes does the work of Machine Foreman."* *(Emphasis Supplied)*

So, had the petitioner been given the option of working as Reader in-charge, he would have straightaway been eligible to be considered for the post of Assistant Overseer (Junior Production Officer) even without having to be first promoted to the post of Head Reader. It is evident that this aspect has not been considered at all by the authorities. As a result, a rank junior like the Opp. Party No.4 was allowed to steal a march over the petitioner for no fault of his own. It is further evident that notwithstanding the absence of the post of Head Reader in the establishment, the petitioner could still have been promoted as Junior Production Officer by simply allowing him to function as Reader in-charge, a post equal in payscale to the post already held by him, i.e. Senior Reader. The stand taken by the opp. Parties to justify their action cannot, therefore, be countenanced.

12. Another aspect that strikes at the Court's judicial conscience is the apparent haste shown by the authorities in granting promotion to Opposite Party No.4, ignoring the seniority of the petitioner. As narrated hereinbefore, holding of the DPC meeting, recommendation of Opposite Party No.4 for promotion, his joining and retirement all occurred on the same day, i.e. 28.02.2014. Though there is no law prohibiting such a course of action yet given the circumstances narrated above, it does tell its own story. This Court is therefore, left with no doubt that the matter relating to promotion was dealt with by the authorities concerned in the most slipshod and arbitrary manner, which cannot be countenanced in law.

13. Now, since both the petitioner as well as Opposite Party No.4 have retired on attaining the age of superannuation, the question that falls for consideration is, what relief can be granted in the case. This Court has, in no uncertain terms, held that the action of the Opposite Party authorities in not considering the case of the petitioner for promotion and by granting such benefit to his rank junior i.e. Opposite Party No.4, is discriminatory and arbitrary. However, fact remains that Opposite Party No.4 has retired way back on 28.02.2014. It would therefore be iniquitous to reopen the case at this belated stage, rather the ends of justice would be best served

if the petitioner, who has also retired in the meantime, is at least notionally granted the benefit of promotional scale of pay thereafter i.e. from 02.03.2014 till the date of his retirement and his last pay be fixed accordingly for the purpose of calculating his pension and pensionary benefits.

14. Thus, from a conspectus of the analysis of facts and law made before, this Court is of the considered view that the authorities should first notionally appoint the petitioner as Reader in-charge and thereafter as Junior Production officer so as to treat his last pay drawn in such scale. His pension and pensionary benefits should be reworked and revised accordingly. Since the petitioner has also retired in 2014, necessary orders shall be passed in this regard by the opp. Party authorities as early as possible, preferably within two months from the date of production of certified copy of this order by the petitioner.

15. The writ application is disposed of accordingly.

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2024 (III) ILR-CUT-194

ADITYA KUMAR MOHAPATRA, J.

ABLAPL NO.7446 OF 2024

ASHOK KUMAR PATTANAIK & ORS. .....Petitioners

V.

STATE OF ODISHA .....Opp.Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 438 r/w Section 18 of the SC & ST (PoA) Act, 1989 – Whether there is an absolute bar to grant anticipatory bail in light of the provisions contained in Section 18 of the SC & ST (PoA) Act, 1989? – Held, No – In spite of the statutory bar to grant anticipatory bail, a Constitutional Court is not debarred from exercising it's jurisdiction to grant relief where on judicial scrutiny the Court comes to a conclusion that a case has been registered malafidely and where no *prima facie* case is made out.

(Para 20)

Case Laws Relied on and Referred to :-

1. 2018 (6) SCC 454 : Dr. Subhash Kashinath Mahajan v. State of Maharashtra & Ors.
2. 1995 (3) SCC 221 : State of M.P. Vs. Ram Kishore Balothia.
3. 2012 (8) SCC 795 : Vilas Pandurang Pawar Vs. State of Maharashtra.
4. 2014 (15) SCC 521 : Shakuntla Devi Vs. Baljinder Singh.
5. 2014 (4) SCC 453 : Hema Mishra Vs. State of U.P.
6. 2009 (4) SCC 437 : Lal Kamalendra Pratap Singh Vs. State of U.P.
7. 2020 (4) SCC 761 : Union of India Vs. State of Maharashtra.
8. AIR 2020 SC 5584 : Hitesh Verma Vs. The State of Uttarakhand & Ors.
9. 2008 (8) SCC 435 : Swaran Singh & Ors. v. State through Standing Counsel & Ors.
10. CRLMC No.2636 of 2021 : Ajay Pattanaik @ Ajaya Kumar Pattanayak & Anr. Vs. State of Odisha & Anr.
11. CRM No.42685/2021 (O&M) : Bhagawant Singh Randhawa & Anr. Vs. State of Punjab.

12. 2021 (I) OLR (SC) 85: Hitesh Verma vs. State of Uttarakhand & Anr.
13. 2016 (63) OCR 134 : Bata @ Bata Krushna Moharana Vs. State of Odisha & Manjulata Mallick.

For Petitioners : Mr. A.K. Mohanty, Sr. Adv. with Mr. Dipak Kumar Dey.
For Opp.Party : Mr. Samaresh Jena, ASC.

ORDER Date of Order : 30.07.2024

ADITYA KUMAR MOHAPATRA, J.

1. This matter is taken up through Hybrid mode.

2. The Petitioners, who are the Senior Executives & Accountant of MSP Sponge Iron Ltd. have approached this court by filing the present application under section 438 of the Cr.P.C. seeking anticipatory bail in connection with Keonjhar Sadar P.S. Case No. 399 of 2024 corresponding to Special Case No. 30 of 2024, pending in the court of learned Special Judge, Keonjhar for alleged commission of offences under the Sections 341/323/294/506/34 of the I.P.C. read with Section 3(1)(r)(s) of the SC & ST (Prevention of Atrocities) Act, 1989.

3. The prosecution case as unfolded from a reading of the FIR, in brief, is that one Sanjay Munda, Sarpanch of Gobardhan Gram Panchayat, lodged an FIR on 30.06.2024 before the Keonjhar Sadar P.S. inter alia alleging that on 26.06.2024, he had been to MSP factory for submitting an application with a request to the company management for undertaking plantation project, in view of the alleged pollution caused by the said industry. However, on his arrival nobody wanted to speak to him on the subject. Since, the Informant did not get any positive response, he went to the chamber of the present Petitioner No.1 who was working as Senior General Manager, HR of the company. On his arrival in the chamber of Petitioner No.1, the Informant detected that some workers of the industry were arguing with the Petitioner No.1 in the context of the problems faced by them. The workers as well as the Informant were driven out of the chamber of Petitioner No.1.

4. The Informant has further stated that after coming out of the chamber of the Petitioner No.1, he came to learn about the problems faced by the workers and that the Informant told the officers present that the demand of the workers are justified and that is why the management is doing such wrong. He has further stated that in response to his request, the three Petitioners and other HR officers manhandled the Informant and abused him in filthy language including calling him by his caste name. It was further alleged that the Petitioner No.2 threatened the Informant by saying that if he ever comes to Keonjhar, then he will be killed by engaging professional hooligans.

5. Heard Shri Ashok Mohanty, learned Senior Counsel appearing for the Petitioners, and Mr. Samaresh Jena, learned Additional Standing Counsel representing the State-Opposite Party. Perused the materials on record.

6. Mr. Mohanty, learned Senior Counsel appearing on behalf of the Petitioners at the outset submitted that the FIR lodged by the informant contains false and

vexatious allegations against the present Petitioners. He further alleged that the Informant happens to be the Sarpanch of Gobardhan G.P. and that the industry, where the Petitioners are working is situated in Kuanrikala G.P. Mr. Mohanty, learned Senior Counsel appearing for the Petitioners, countering the allegations made in the FIR, submitted that the Informant along with his followers forcibly entered into the factory premises by assaulting the security personnel deployed at the entry gate at about 10:40 a.m. on 26.06.2024. Thereafter, they entered into the HR Department and abused the Petitioner No.1 and the other officers present there. The Petitioners, who are senior executives of the company, were kept in confinement for almost 3 to 4 hours by obstructing their passage out of the premises and the informant, along with his supporters, made a demand of additional employment commitment. It was further alleged that the Informant and his followers terrorized the officers present and warned them of dire consequences in the event their demands were not fulfilled.

7. Mr. Mohanty, learned Senior Counsel for the Petitioners contended that initially the Petitioner No.1 lodged an FIR with the Keonjhar Sadar P.S. on 29.06.2024, which was registered as Keonjhar Sadar P.S. Case No. 398 of 2024 against the Informant and his followers, inter alia alleging that the Informant trespassed into the office premises of the Petitioners and threatened the officers present there. It was further contended that as a counter blast to the aforementioned FIR filed by Petitioner No.1, the Informant has lodged this false case against the Petitioners which had been registered as Keonjhar Sadar P.S. Case No.399 of 2024. He further emphatically argued that the Informant is trying to misuse the provisions contained in the SC&ST (PoA) Act, 1989 and in doing so, the informant has also resorted to abusing the process of law so as to put pressure on the Petitioners to accept the demands of the informant.

8. Mr. Mohanty learned Senior Counsel appearing on behalf of the Petitioners, further contented that the Informant along with his supporters again entered into the factory premises on 29.06.2024 at about 6:00 a.m. and closed the entrance of the factory site, thereby restraining the Shift-A workers from getting out and the Shift-B workers from entering into the premises of the factory. The said problem was resolved only after the intervention of the Keonjhar Sadar Police Station. An FIR has also been lodged in the aforesaid context, which has been registered as Keonjhar Sadar P.S. Case No.407 of 2024 against the Informant.

9. Learned senior counsel appearing for the Petitioners at this juncture submitted that the Petitioners' industry has been functioning with the consent and permission granted by the Pollution Control Authority and there has been no violation of any pollution control laws. He further submitted that the Informant, who is a local Sarpanch is trying to blackmail and pressurize the management of the industry with a motive to force the industry's management to concede to the Informant's unlawful demands.

10. As far as the commission of offence punishable under the SC & ST (PoA) Act, 1989 is concerned, learned senior counsel appearing for the Petitioners submitted that no prima facie case is made out against the Petitioners for violation of any of the provisions of the aforesaid SC & ST (PoA) Act, 1989. It was further contended by the learned senior counsel appearing for the Petitioners that, the Petitioners are all responsible Sr. Executives of the company and have been discharging their duties sincerely and with utmost diligence. Therefore, there exists no apprehension that the Petitioners will ever abscond from justice. Furthermore, it was submitted that the Petitioners being responsible citizens will fully corporate with the investigating agency and also participate in the trial.

11. Learned counsel for the State on the other hand objected to the release of the Petitioners on anticipatory bail. He further contended that on the basis of the allegations made in the FIR, a case is well made out against the present Petitioners, which is punishable under the provisions of the SC & ST (PoA) Act, 1989. Further, drawing attention of this Court to the Section 18 of the SC & ST (PoA) Act, 1989, the learned counsel for the State submitted that there exists a bar under the aforesaid section with regard to entertaining a pre-arrest bail under section 438 of the Cr.P.C. In such view of the matter, learned Additional Standing Counsel submitted that since the present anticipatory bail application is not maintainable in the first place, the question of granting anticipatory bail to the present Petitioners does not arise. On such grounds learned Additional Standing Counsel submitted that the Petitioners be directed to surrender before the court below and move a regular bail application under section 439 of the Cr.P.C.

12. In reply to the contention raised by the learned Additional Standing Counsel appearing for the State with regard to nonmaintainability of the anticipatory bail applications under the Section 18 of the SC & ST (PoA) Act, 1989, Mr. Mohanty, learned Senior Council for the Petitioners argued that for Section 18 to be applicable, a case has to be first made out against the Petitioners under Section 3 of the said Act. In the present matter, it was argued that no case is made out under Section 3 of the aforementioned SC & ST (PoA) Act, 1989. He further contended that the alleged incident had taken place within the confines of the chambers of the Petitioner No.1, which cannot be described as a public place. Therefore, learned senior counsel appearing for the Petitioners submitted that the alleged occurrence has not taken place in public view, if at all the same has happened. In the course of his argument, learned senior counsel appearing for the Petitioners contended that the law is well settled by a catena of judgments of the Hon'ble Supreme Court to the effect that, where no prima facie case is made out for commission of an offence under Section 3 of the SC & ST (PoA) Act, 1989, the bar contained in Section 18 of the said Act will not be applicable to the facts of such case. He further substantiated his point by referring to the allegations made in the FIR and submitting that no part of the occurrence, as described in the FIR, had taken place in public view.

13. To analyze the position with regard to the applicability of the bar under Section 18 of the SC & ST (PoA) Act, 1989, this Court, at this juncture, deems it proper to refer to the judgments relied upon by the learned senior counsel for the Petitioners. In Dr. Subhash Kashinath Mahajan v. State of Maharashtra and others reported in 2018 (6) SCC 454, the Hon'ble Supreme Court was considering several questions pertaining to the 1989 Act, including the question as to whether there is an absolute bar to the grant of anticipatory bail in light of the provisions contained in Section 18 of the SC & ST (PoA) Act, 1989. Section 18 of the aforesaid 1989 Act provides as follows;

> *"18. Section 438 of Cr.P.C. not to apply to the persons committing an offence under the Act-nothing in the Section 438 of Cr.P.C. shall apply in relation to any case involving the arrest of any person on an acquisition of having committed an offence under this Act."*

While answering the aforesaid question, the Hon'ble Supreme Court has taken note of the judgments of the Hon'ble Supreme Court in State of M.P. Vs. Ram Kishna Balothia reported in 1995 (3) SCC 221, wherein it had been held that Section 18 of the SC & ST (PoA) Act, 1989 is not violative of Articles 14 and 21 of the Constitution of India. When referring to the Balothia's case (supra), it has been observed in Para-47 of the judgment that,

> *"it cannot be read as being applicable to those who were falsely implicated for extraneous reasons and have not committed the offence on prima facie independent scrutiny. Access to justice, being a fundamental right, grain has to be separated from the chaff by an independent mechanism. Liberty of one citizen cannot be placed at the whim of another. The law has to protect the innocent and punish the guilty. Thus considered, exclusion has to be applied to genuine cases and not to false ones. This will help in achieving the object of the law."*

In the very same judgment they have gone on to hold that there is no quarrel with regard to the proposition laid down in Balothia's case (supra) i.e. persons committing offence under the atrocities act ought not be granted anticipatory bail in the same manner in which the anticipatory bail is granted in other cases with offences punishable with similar sentence.

14. In the above-noted Dr. Subhash Kashinath Mahajan's case, the Hon'ble Supreme Court has also referred to the judgment in Vilas Pandurang Pawar Vs. State of Maharashtra reported in 2012 (8) SCC 795 and Shakuntla Devi Vs. Baljinder Singh reported in 2014 (15) SCC 521. The aforesaid two judgments have laid down that there is no absolute bar to grant anticipatory bail if no prima facie case is made out, despite upholding the validity of the Section 18 of the SC & ST (PoA) Act, 1989.

15. The Hon'ble Supreme Court has also referred to the judgment in Hema Mishra Vs. State of U.P. reported in 2014 (4) SCC 453. In the said judgment it has been expressly laid down that in spite of the statutory bar against grant of anticipatory bail, a Constitutional Court is not debarred from exercising its

jurisdiction to grant relief. Further, referring to the judgment in Lal Kamalendra Pratap Singh Vs. State of U.P. reported in 2009 (4) SCC 437, it has been held that interim bail can be granted even in such cases where the accused is not actually arrested.

16. The issue with regard to grant of anticipatory bail in the face of the bar contained in Section 18 of the SC & ST (PoA) Act, 1989, the Hon'ble Supreme Court has summarized the position in Dr. Subhash Kashinath Mahajan's case (supra) in paragraphs 56 and 57 of the judgment. It has been held that there can be no dispute with regard to the proposition that merely on the allegation by any individual belonging to any caste, when such allegation is clearly a motivated and false one, the same cannot be treated as enough to deprive a person of his personal liberty without an independent scrutiny. Thus, exclusion of the provision for anticipatory bail cannot possibly, by any reasonable interpretation, be treated as applicable where no case is made out or allegations are patently false or motivated. In Para-57 of the judgment, it has been finally held that exclusion of Section 438 Cr.P.C. applies when a prima facie case of commission of offence under the SC & ST (PoA) Act, 1989 is made out. On the other hand, if it can be shown that the allegations are prima facie false or motivated, such exclusion will not apply. Similarly in Para-65 of the judgment, the Hon'ble Supreme Court has held that exclusion of provisions of anticipatory bail will not apply when no prima facie case is made out or the case is patently false or mala fide. Further, it has been observed that the above may have to be determined by the Court concerned on perusal of the facts and circumstances of the case at hand, in exercise of its judicial discretion. In the concluding Paragraph-79 of Dr. Subhash Kashinath Mahajan's case (supra), the Hon'ble Supreme Court in Para-79.2 has observed as follows:

> *"79.2. There is no absolute bar against grant of anticipatory bail in cases under the Atrocities Act if no prima facie case is made out or where on judicial scrutiny the complaint is found to be prima facie mala fide. We approve the view taken and approach of the Gujarat High Court in Pankaj D. Suthar & N.T. Desai and clarify the judgments of this Court in Balothia and Manju Devi."*

17. The judgment of the Hon'ble Supreme Court in Dr. Subhash Kashinath Mahajan's case (supra) has also been followed in the subsequent judgments of the Hon'ble Supreme Court in Union of India Vs. State of Maharashtra, reported in 2020 (4) SCC 761 in the said judgment, a three-Judge Bench of Hon'ble Supreme Court by reiterating the settled position of law have held that it is the consistent view of the Hon'ble Supreme Court that if prima facie case has not been made out attracting the provisions of SC & ST (PoA) Act, 1989, in that case, the bar created under Section 18 of the SC & ST (PoA) Act, 1989 on the grant of anticipatory bail is not attracted and to decide whether an accused is entitled for bail under Section 438 of Cr.P.C., in case no prima facie case is made out or under Section 439 of Cr.P.C. is the discretion of the Court. In the said judgment, it has also been held that if a person, who is proceeded against under the SC & ST (PoA) Act, 1989 apprehends false implication and harassment, he is at liberty to approach the High Court for

quashing of FIR under Section 482 of Cr.P.C. in accordance with law. In Paragraph-39 of the judgment in Union of India's case (supra), the Hon'ble Supreme Court while considering the validity of directions contained in Para-79.3 & 79.4 have come to the following conclusion which has been indicated in Para-70 of the said judgment;

> *"we are of the considered opinion that Directions 79.3 & 79.4 issued by this Court deserves to be and are hereby recalled and consequently we hold that Direction 79.5 also vanishes. However, the direction contained in Para-79.2 remains intact, thereby protecting the power of the Court to grant of anticipatory bail in deserving cases involving Atrocities Act, that no pima facie case is made out or where on judicial scrutiny the complaint is found tobe prima facie malafide."*

18. In Hitesh Verma Vs. The State of Uttarakhand and others reported in AIR 2020 SC 5584, the Hon'ble Supreme Court was considering the ingredient of the provisions, i.e., insult or intimidation in any place within public view. The question therefore was what is to be regarded as "place in public view". In answering the said question, the Hon'ble Supreme Court has referred to the judgment in Swaran Singh and Ors. v. State through Standing Counsel and Ors., reported in 2008 (8) SCC 435. Referring to the Swaran Singh's case (supra), the Hon'ble Supreme Court has drawn a distinction between the expression "public place" & "in any place within public view". Thus, it was held that if an offence is committed outside the building, i.e., in a lawn outside a house and the lawn can be seen by someone from the road or lane outside the boundary wall, then the lawn would certainly be a place within the public view. On the contrary, if the remark is made inside the building, but some members of the public are there (not merely relatives or friends) then it could not be an offence since it is not in the public view. The relevant paragraph of the judgment, i.e., Para80 is reproduced below:

> *"It has been alleged in the FIR that Vinod Nagar, the first informant, was insulted by Appellants 2 and 3 (by calling him a "chamar") when he stood near the car which was parked at the gate of the premises. In our opinion, this was certainly a place within public view, since the gate of a house is certainly a place within public view. It could have been a different matter had the alleged offence been committed inside a building, and also was not in the public view. However, if the offence is committed outside the building e.g. in a lawn outside a house, and the lawn can be seen by someone from the road or lane outside the boundary wall, the lawn would certainly be a place within the public view. Also, even if the remark is made inside a building, but some members of the public are there (not merely relatives or friends) then also it would be an offence since it is in the public view. We must, therefore, not confuse the expression "place within public view" with the expression "public place". A place can be a private place but yet within the public view. On the other hand, a public place would ordinarily mean a place which is owned or leased by the Government or the municipality (or other local body) or gaon sabha or an instrumentality of the State, and not by private persons or private bodies."*

19. Finally, learned Senior Counsel appearing for the Petitioners referred to the judgment of this Court in Ajay Pattanaik @ Ajaya Kumar Pattanayak and Anr. Vs. State of Odisha and Anr. decided in CRLMC No.2636 of 2021 vide order dated 01.03.2023. On a scrutiny of the aforesaid judgment, this Court observed that the

learned Coordinate Bench was deciding an application under Section 482 of Cr.P.C. with a prayer to quash the order of cognizance dated 13th April, 2021. The stand of the Petitioner in that case was that no case is being made out on a plain reading of the FIR under Section 3(1)(r)(s) and 3(2)(va) of SC & ST (PoA) Act, 1989. However, the learned Court below had taken cognizance mechanically. On an analysis of the judgments in Bhagawant Singh Randhawa and Anr. Vs. State of Punjab bearing CRM No. 42685 of 2021 (O&M), as well as the judgement of the Hon'ble Apex Court in Hitesh Verma vs. State of Uttarakhand and Another reported in 2021 (I) OLR (SC) 85 and, a judgement of this court in Bata @ Bata Krushna Moharana Vs. State of Odisha and Manjulata mallick reported in 2016 (63) OCR 134, the Coordinate Bench has come to a conclusion that no offence under the SC & ST (PoA) Act, 1989 is made out against the present Petitioner. Resultantly, the order taking cognizance of offence under the provisions of the SC & ST (PoA) Act, 1989 was quashed.

20. In view of the analysis of the legal position, as has been laid down by the Hon'ble Supreme Court, this Court is of the considered view that the judgment of the Hon'ble Supreme Court in Dr. Subhash Kashinath mahajan's case (supra) has laid down the law succinctly and that the said judgment still holds the field, with the modification that the directions contained in Para-79.3, 79.4, 79.5 have been recalled by the subsequent Bench of the Hon'ble Supreme Court in Union of India's case (supra). However, the direction contained in Para-79.2, with regard to maintainability of an anticipatory bail application, applies in the following contingencies;

i. Where no prima facie case is made out;

ii. Where upon a scrutiny the Court comes to a conclusion that a case has been registered malafidely.

21. Keeping in view the aforesaid settled principle of law, this Court has to examine the facts of the present case. As per the FIR allegation, it is the admitted case that the occurrence took place inside the chamber of the Petitioner No.1, who is the General Manager of HR of MSP Company. Admittedly, the chamber is a confined place with restricted access. Therefore, the same cannot be construed by any scope of imagination to be a place in public view. Following the principle laid down in Swaran Singh's case (supra), this Court is of the view that prima facie no case is made out under the SC & ST (PoA) Act, 1989, as such this Court has no hesitation in arriving at a conclusion that the present anticipatory bail application in the attending circumstances, at the instance of the present Petitioners, is very well maintainable in law.

22. Considering the allegations made in the FIR and the offence alleged, further, taking note of the seriousness and gravity of such allegations and the maximum period of punishment prescribed, this Court is inclined to exercise the power conferred upon it under Section 438 of Cr.P.C. Accordingly, it is directed that the Petitioners shall be released on anticipatory bail by the Arresting Officer in the event

of their arrest, subject to such terms and conditions as deemed just and proper by such Arresting Officer.

23. With the aforesaid observations/directions, the ABLAPL stands disposed of.

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2024 (III) ILR-CUT-202

ADITYA KUMAR MOHAPATRA, J.

CRLMC NO. 3450 OF 2024

DEBENDRA KUMAR JAIN @ DEBENDRA JAIN .....Petitioner

V.

STATE OF ODISHA .....Opp.Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 311 – The application filed by the petitioner U/s. 311 of the Code was rejected by the learned Trial Court only on the ground of delay – Whether the order is sustainable in law? – Held, No – The law makers have not incorporated any time limit in Section 311 of the Code except the fact that the said application is to be made during any stage of Trial, while conferring the discretionary power U/s. 311 of Cr.P.C. upon the Courts conducting Trial – The discretionary power U/s. 311 of Cr.P.C. can only be exercised subject to the condition that such evidence must be essential to the just decision of the case. (Paras 10-13)

Case Laws Relied on and Referred to :-

1. 2023 (I) OLR- 948 : Rudra Narayan Sahu v. State of Odisha

For Petitioner : M/s. Pratap Kumar Nayak, D. Mohapatra

For Opp. Party : Mr. Debasish Nayak, A.G.A.

JUDGMENT Date of Hearing & Judgment : 19.09.2024

A.K. MOHAPATRA, J.

1. On the oral prayer made by the learned counsel for the Petitioner, he is permitted to correct the cause title of the Criminal Miscellaneous Case.

Accordingly, the corrected copy of the cause title of the Criminal Miscellaneous Case be uploaded by tomorrow.

2. Heard learned counsel appearing for the Petitioner as well as learned Additional Government Advocate appearing for the State-Opposite Party. Perused the application as well as the documents annexed thereto.

3. The present application has been filed by the Petitioner by invoking the inherent power of this Court under Section 482 of Cr.P.C. with a specific prayer to quash the order dated 22.08.2024 passed by the learned Additional Sessions Judge, Nuapada in S.C. Case No.105/16 of 2003.

4. On perusal of the impugned order dated 22.08.2024, it appears that the accused-Petitioner filed an application before the learned trial court under Section 311 of the Cr.P.C. to recall P.W.19 for further cross-examination, as the said prosecution witness could not be examined by the accused earlier.

5. Learned counsel for the Petitioner, at the outset, submitted that although the case is of the year 2003, however, further proceeding in the matter was stayed by this Court at the instance of some of the co-accused persons who had earlier approached this Court, and as a result the trial could not take place for several years. Finally, when the trial was resumed in the year 2022, the Petitioner moved an application to recall the P.W.19 for further cross examination by defence, who had already been examined earlier. He further contended that earlier when the P.W.19 was being examined by the court, an application was submitted by the Petitioner, at the time of his cross examination, thereunder seeking time to cross-examine P.W.19. The said application was, however, rejected arbitrarily. Thereafter, the matter was carried to this Court.

6. Learned counsel for the Petitioner further submitted that after the trial was recommenced, the Petitioner moved an application under Section 311 of Cr.P.C. on the ground that P.W.19 is a material witness and non-examination of said witness would cause serious prejudice to the accused Petitioner. Learned trial court, vide order dated 22.08.2024, while considering the application of the Petitioner under Section 311 of Cr.P.C. has observed that the time petition of the Petitioner was earlier heard and rejected. The Learned Trial Court has also specifically mentioned in the said order dated 22.08.2024 that while opportunity to cross-examine was given to the Petitioner, the P.W.19, Prahallad Rai Gupta, was examined but his cross-examination was closed with a remark 'NIL'. Learned counsel for the Petitioner further submitted that only ground for rejection of his application under Section 311 of Cr.P.C. is delay in making such application.

7. On perusal of the impugned order dated 22.08.2024, it appears that no further ground has been shown in the impugned rejection order except the ground of delay in making such application under Section 311 of Cr.P.C.

8. In the aforesaid context, learned counsel for the Petitioner referred to the judgment of this Court in ***Rudra Narayan Sahu v. State of Odisha***, reported in ***2023 (I) OLR- 948***. In the above noted reported case, an application was made under Section 311 of Cr.P.C. after expiry of more than 26 years. Such application of the Petitioner having been rejected on the ground of delay, the Petitioner in the reported case approached this Court by filing an application under Section 482 of the Cr.P.C. The learned coordinate Bench, while allowing the section 482 application of the accused Petitioner, directed the court below to pass necessary orders for recall of the witness for further cross-examination subject to certain terms and conditions.

9. Learned Additional Government Advocate appearing for the State-Opposite Party, on the other hand, opposed the prayer made by the learned counsel for the

Petitioner. He further contended that P.W.19 in the present case was initially examined and cross-examined almost more than two decades ago. Therefore, the present application under Section 311 of Cr.P.C., which has been filed after expiry of a period of almost two decades, is not entertainable in law. He further submitted that the present application under Section 311 of Cr.P.C. at the instance of the accused Petitioner is nothing but an attempt to prolong the trial unnecessarily. On such grounds, learned counsel for the State submitted that the impugned order rejecting the application of the Petitioner under Section 311 of Cr.P.C. does not call for any interference by this Court at this stage. Accordingly, the Learned Additional Government Advocate appearing for the State-Opposite Party contended that the application filed by the Petitioner under Section 482 of Cr.P.C. is devoid of merit and, as such, the same should be dismissed.

10. Having heard the learned counsels appearing for the respective parties and on a careful examination of the materials on record, this Court is of the considered view that only question that is required to be determined in the present application is as to whether the rejection of the application of the Petitioner under Section 311 of Cr.P.C., vide order dated 22.08.2024, only on the ground of delay, is sustainable in law or not? While answering the aforesaid question, this Court is required to be keep in mind the fundamental principles of criminal jurisprudence which flows from the constitution itself, i.e. every accused is entitled to a free and fair trial. In the criminal justice system, delay alone cannot be the sole ground to curtail the fundamental right of the accused to get a free and fair trial. Moreover, it is the fundamental proposition of the criminal jurisprudence that more serious the crime, the higher is the standard of proof required to establish the said crime and, the right to a fair trial, as guaranteed under Article 21 of the Constitution of India, is fundamental to the criminal justice system.

11. With regard to the Section 311 of the Cr.P.C., it is observed that the said section has been incorporated in the statute thereby conferring a valuable right upon the court to recall any witness at any stage of the proceeding with the only rider being that such evidence must be essential for the just decision of the case.

12. On a careful analysis of the provision contained in Section 311 of Cr.P.C., this Court is of the considered view that the law makers were aware of the factum of delay. However, consciously the law makers have not incorporated any time limit, except the fact that the said application is to be made during any stage of the trial, while conferring the discretionary power under Section 311 of Cr.P.C. upon the courts conducting trial. Thus, it can be concluded that the discretionary power under Section 311 of Cr.P.C. can only be exercised subject to the condition that such evidence must be essential to the just decision of the case.

13. Therefore, the court conducting trial, before exercising such discretionary power, is required to arrive at a conclusion that the evidence that has been left out is material and essential for the just decision of the case. So far the words "essential for just decision of the case" is concerned, no straight jacket formula can be

recommended to determine as to whether the evidence in question is essential for a just decision of the case, since the determination of what is 'essential' would vary from one case to the other. Therefore, it has been left to the wisdom of the court in seisin over the matter to decide as to what is essential for just decision of the case in the factual background of that particular case. In the present context, it is important that the court below, while conducting a trial, should ensure that the accused must get a free and fair trial, which is a guarantee under Article 21 of the Constitution of India to every citizen. Therefore, while considering an application under Section 311 of Cr.P.C., no other factor should weigh in the minds of the court other than the factors indicated hereinabove.

14. In the light of the aforesaid discussion, as well as keeping in view the factual background of the present case, this Court is of the view that the impugned order dated 22.08.2024, wherein the application of the present petitioner under Section 311 of Cr.P.C. has been rejected, is unsustainable in law as the same has been passed by taking into consideration only the ground of delay not the parameters as provided under Section 311 of the Cr.P.C.

15. In such view of the matter, this Court has no hesitation in setting aside the impugned order dated 22.08.2024. Accordingly, the same is hereby set aside. Further, the matter is remanded back to the court in seisin over the matter with a further direction to provide an opportunity to the Petitioner to submit a questionnaire to be asked to the P.W.19. In such eventuality, if the court in seisin over the matter is convinced that the questions contained in the questionnaire are essential for a just decision of the case, then the trial court should not hesitate to exercise its discretion conferred under Section 311 of Cr.P.C. However, in doing so, the only condition that is being put by this Court is that the entire exercise is to be carried out within a period of four weeks. Further, in the event the P.W.19 is recalled, then the trial court shall do well to fix a particular date on which the P.W.19 shall be cross-examined and shall be discharged.

16. Further, considering the fact that the case is of the year 2003, this Court directs the trial court to make every endeavour to conclude the trial as expeditiously as possible. The Petitioner is directed to cooperate for an early conclusion of the trial.

17. With the aforesaid observation and direction, the CRLMC is allowed.

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2024 (III) ILR-CUT-205

MURAHARI SRI RAMAN, J.

W.P.(C) NO.14936 OF 2023

MADHUCHHANDA SAHOO & ORS. ….Petitioners

V.

ODISHA STATE HEALTH & FAMILY WELFARE SOCIETY, GOVT. OF ODISHA & ORS. ….Opp.Parties

WALK-IN-INTERVIEW – *Mala fides* in the process of selection – The petitioners challenged the selection of O.Ps No.3 to 8 for the post of Microbiologist pursuant to Advertisement No. 02 of 2023 dt. 28.02.2023 issued by the Mission Director, National Health Mission (O.P. No.8) – Allegations of *mala fide* and biasness in conducting the interview – Whether O.P. No.2 acted as such? – Held, No – The petitioners have taken part in the selection process without any demur or protest – They cannot question the same after being declared unsuccessful. (Para 9.5)

Writ Petition dismissed – Reference made to different decisions of Supreme Court of India.

Case Laws Relied on and Referred to :-

1. (2010) 3 SCC 104 = (2010) 2 SCR 256 : Ramesh Kumar Vrs. High Court of Delhi
2. (2002) 4 SCC 160 : First Land Acquisition Collector Vrs. Nirodhi Prakash Gangoli
3. (2003) 2 SCC 132 : Jasvinder Singh Vrs. State of J&K
4. (1974) 4 SCC 3 : E.P. Royappa Vrs. State of T.N.
5. AIR 1982 SC 65 : Sukhwinder Pal Bipan Kumar Vrs. State of Punjab,
6. AIR 1987 SC 294 : Shivajirao Nilangekar Patil Vrs. Dr. Mahesh Madhav Gosavi
7. AIR 1977 SC 567 = (1977) 2 SCR 198 : Tara Chand Khatri Vrs. Municipal Corpn.of Delhi
8. AIR 1996 SC 326 = 1995 Supp.4 SCR 1 : J.N. Banavalikar Vrs. Municipal Corpn.of Delhi
9. (2020) 3 SCC 86 : Rajneesh Khajuria Vrs. Wockhardt Limited
10. 1992 Supp (1) SCC 222 = (1991) 2 SCR 1 : State of Bihar Vrs. P.P. Sharma
11. (2000) 5 SCC 630 : Prabodh Sagar Vrs. Punjab State Electricity Board
12. AIR 1993 SC 763 = (1992) Supp. (2) SCR 368 : M. Sankaranarayanan, IAS Vrs. State of Karnataka
13. (1994) 6 SCC 98 = (1994) Supp. (2) SCR 772 : N.K. Singh Vrs. Union of India
14. 1995 Suppl (2) SCC 151 : State of UP Vrs. Dr. V.N. Prasad
15. (1997) 6 SCC 169 : Arvind Dattatraya Dhande Vrs. State of Maharashtra
16. (1999) 2 SCC 193 : Utkal University Vrs. Dr. Nrusingha Charan Sarangi
17. (2000) 7 SCC 719 : Kiran Gupta Vrs. State of U.P.,
18. (2000) 8 SCC 262 : Netai Bag Vrs. State of W.B.,
19. (2001) 2 SCC 330 = (2000) Supp. (5) SCR 200 : State of Punjab Vrs. V.K. Khanna
20. (2001) 5 SCC 323 : Samant Vrs. Bombay Stock Exchange
21. (2007) 9 SCC 768 = (2007) 2 SCR 363 : HMT Ltd. Vrs. Mudappa
22. (2003) 4 SCC 739 = (2003) 2 SCR 908 : State of A.P. Vrs. Goverdhanlal Pitti
23. (2005) 8 SCC 760 = (2005) Supp. (4) SCR 317 : Union of India Vrs. Ashok Kumar
24. (2012) 9 SCR 690 = (2013) 1 SCC 524 : Ratnagiri Gas and Power Private Limited Vrs. RDS Projects Ltd.
25. (1997) 9 SCC 151 = (1996) Supp. (6) SCR 255 : All India State Bank Officers" Federation Vrs. Union of India
26. AIR 2003 SC 1344 = (2003) 2 SCR 1085 : Federation of Railway Officers Association Vrs. Union of India
27. (2024) 3 SCR 1141 : State of Gujarat Vrs. Paresh Nathalal Chauhan
28. AIR 1994 SC 141 = (1993) Supp (3) SCR 434 : Anzar Ahmed Vrs. State of Bihar
29. (2011) 9 SCR 1 = (2011) 7 SCC 397 : Union of India Vrs. Arulmozhi Iniarasu
30. (2010) 3 SCC 104 = (2010) 2 SCR 256 : Ramesh Kumar Vrs. High Court of Delhi
31. (2023) 3 SCR 714 = AIR 2023 SC 2014 : Tajvir Singh Sodhi Vrs. State of Jammu and Kashmir

For Petitioners : M/s. Dr. Jitendra Kumar Lenka, Pratap Kumar Behera & Laxmikanta Tripathy.

For Opp.Parties : Mr. Saswata Patnaik, A.G.A ,
M/s. Bibhu Prasad Tripathy & Narayan Barik.
M/s. Susanta Kumar Dash, Ananga Kumar Otta, Swetlana Das & Pragyant Harichandan.

JUDGMENT Date of Hearing : 29.07.2024 : Date of Judgment : 11.09.2024

MURAHARI SRI RAMAN, J.

The eight numbers petitioners claiming to have qualification of M.Sc. in Microbiology/Applied Microbiology discipline, filed the writ petition challenging selection of the opposite party Nos.3 to 8 for the post of Microbiologist pursuant to Advertisement No. 02 of 2023 (Annexure-3), dated 28.02.2023 issued by the Mission Director, National Health Mission, the opposite party No.2, with the following prayer(s):

> *"The petitioner therefore, most humbly prays that Your Lordship would be graciously pleased to issue rule Nisi calling upon the opposite parties to show cause as to why the entire selection to the post of Microbiologist pursuant to Advertisement No.2 of 2023 dated 28.02.2023 at Annexure-3 shall not be quashed.*
>
> *And further pleased to quash the Advertisement at Annexure-3 dated 28.02.2023 in not giving any marks by the selection committee for academic performance and direct the opposite party No.2 to issue fresh advertisement by giving weightage/marks to academic performance in addition to marks in the Walk-in-Interview.*
>
> *And issue any other writ/writs or direction/ directions as would be necessary in the interest of justice;*
>
> *And if the Opposite Parties fail to show cause or sufficient cause, the rule be made absolute.*
>
> *And for this act of kindness, the Petitioner shall as in duty bound ever pray."*

Facts:

2. Facts, as adumbrated by the writ petitioners, reveal that having secured more than 50% marks in the M.Sc. (Microbiology/Applied Microbiology) with postqualification experience in Clinical Laboratory Services for more than one year, appeared in the walk-ininterview.

2.1. Conditions *inter alia* in the Advertisement No.2 of 2023 dated 28.02.2023 ("Advertisement", for short) provided that the candidates securing 50% and more marks in the Final Panel Merit List would be kept in the Panel with the validity of one year from the date of approval and the result of walk-in-interview would be published in the official website of the National Health Mission.

2.2. It is alleged by the petitioners that no detailed selection criteria have been specified with allocation of marks towards interview and career assessment. It is the grievance of the petitioners that there was lack of transparency and it is at the time when certain candidates were called for verification of documents, they could come to know that the results were not published in the webportal.

2.3. It is affirmed by the petitioners at paragraph 13 of the writ petition as follows:

> *"That, without publishing the result of walk-in-interview and how much total marks fixed in the interview etc. intimation to the candidates for verification of certificates for appointment to the post of Microbiologist is illegal, arbitrary and as such the entire selection is vitiated and as such the same is liable to be quashed. As on today (08.05.2023) till 1 P.M. the result of the Microbiologist pursuant to Advertisement No. 2 of 2023 dated 28.02.2023 has not been uploaded in the website of NHM."*

2.4. It is further asserted at paragraph 16 of the writ petition that,

> *"Even though, the petitioners are more meritorious and have done well in the interview, they were not issued verification letter as has been given to one Sangeet Sagar Sahoo for the post of Microbiologist pursuant to Advertisement No.2 of 2023. The Petitioners apprehend that the authority without publishing the result and calling the members of the selection board to change the mark in the interview so that candidates according to their choice will get appointment which is illegal and as such the entire selection and consequential appointment is liable to be quashed."*

2.5. With the above backdrop of facts the petitioners being apprehensive of *mala fides* in the process of selection approached this Court by way of filing the instant writ petition.

Counter affidavit of the opposite party No.2:

3. The averments of the petitioners have been strongly opposed by the opposite party No.2 by filing counteraffidavit. It not only refuted allegation of *mala fides* but also asserted that transparency in the process of selection was adhered to. It is contended that the writ petition is sheer abuse of judicial process.

3.1. Explaining the method adopted for selection process in the walk-in-interview, the opposite party No.2 submitted that the position of Microbiologist is an essential position in National Health Mission under Odisha State Health & Family Wealfare Society, Government of Odisha in Department of Health and Family Welfare (for brevity, "NHM"), as they are supposed to provide technical support to the District Public Health Laboratories being strengthened under Integrated Disease Surveillance Programme. It also provides facilitation for lower level laboratories ensuring that laboratory investigations are promptly undertaken when diseases of public health concerns are reported/suspected. During pandemic (COVID-19) the State established viral diagnostic laboratories in each and every district with Real-Time Reverse Transcription-Polymerase Chain (RT-PCR) and installed other high end equipments. To make the viral diagnostic laboratory effectively function, the filling up of post of Microbiologist has become highly essential. Besides COVID-19 test, other viral diagnosis, like detection of Influenza Virus (Swine Flu), Dengue, Scrub Typhus, Leptospirosis, Anthrax *etc.*, are being carried out in the RT-PCR laboratories. Currently under the Prime Minister-Ayushman Bharat Health Infrastructure Mission (PM-ABHIM) Scheme, Block Public Health Laboratories and Integrated Public Health Laboratories are proposed to be established at each Block

level as well as the District level. So the role of Microbiologist is to monitor, supervise and impart the hand-holding support to the lower level laboratories along with the validation of the test and to undertake quality assurance activities. Thus, the filling up of the vacant position of Microbiologist is highly essential during the present post-pandemic period.

3.2. It has further been submitted that for the recruitment of contractual position in NHM at State level, the eligibility criteria for the said position is considered and recommended by a Committee of Experts as per the requirement of the said position. The recommendation of the said Committee is placed before the Mission Director for approval. After obtaining the approval of present deponent, the Advertisement for filling up of the vacant position is published. For the purpose of undertaking walk-in-interview, a Scrutiny Committee is constituted for verification of certificates of the candidates registering their names for the said interview. After certificate verification of the candidates by the Scrutiny Committee, the eligible candidates appear for the interview and the candidates who have secured 50% and more marks in the Final Panel Merit List are kept in the Panel which would remain valid for one year from the date of approval by the present opposite party. From amongst the said list, the candidates from the top of the merit list against the number of vacancies as per requirement are called for document verification. After such document verification the result of the walk-ininterview is published and simultaneously offer letters are issued to the selected candidates.

3.3. In the instant case, eligibility criteria inter alia for Microbiologist was recommended by a Committee of Experts. The meeting of the said Committee was held on 21.10.2022 at Mission Directorate, NHM. The recommendation of the Committee on the eligibility criteria for the post of Microbiologist along with other posts was approved by the present opposite party.

3.4. With such finalized eligibility criteria and selection procedure, advertisement for recruitment was published vide Advertisement No. 02 of 2023, dated 28.02.2023 for conducting walk-in-interview for the contractual engagement of different posts including the post of Microbiologist. For the post of Microbiologist, the date of Registration and conduct of walk-in-interview was fixed to 17.03.2023.

3.5. The eligibility criteria qua Microbiologist has been fixed as follows:

Sl. No.	Name of the post	Upper age limit as on dated 01.02.2023	No. of vacancy (ies)	Remuneration (in Rs.) performance incentive (P.I) and other allowances as admissible	Date of registration/ interview	Eligibility criteria

03	Micro bilogist	Up to 67 years for MBBS Doctors and upto 45 years for others.	40	Rs.45,875/- + PI	17.03.2023	Qualification: The candidate must have passed MBBS Degree along with Post Graduate Degree / Diploma in Microbiology. or Virology or Pathology or other laboratory sciences from an Institution recognized by National Medical Commission (NMC). S/he must have valid registration from the Odisha Council of Medical Registration. OR Qualification: The candidate must have passed MBBS Degree from an Institution recognized by National Medical Commission (NMC). S/he must registration have from valid the Odisha Council of Medical Registration. Experience: S/he must have 01 year of lab experience diagnostic services in for Epidemic Prone Diseases. OR Qualification: The candidate must have passed M.Sc. in Medical Microbiology from recognized a University/ Institution Experience: S/he must have 01 year of post experience qualification In Clinical Laboratory Services. OR Qualification: The candidate must have passed M.Sc. Microbiology recognized from in a University/ Institution. Experience: S/he must have 01 year of post qualification experience in Clinical Labrotary Services.

3.6. The candidate, fulfilling such eligibility criteria, was to face the walk-in-interview. In the selection criteria there was no provision of awarding marks on the basis of career assessment. The marks secured by the candidate in the interview are taken into consideration since the method of selection is "walk-in-interview". For the position of Microbiologist, 233 numbers of candidates registered their names, whose certificates were verified by the Scrutiny Committee constituted for the purpose. Out of the eligible candidates, 139 candidates appeared interview before

the Interview Board on 17.03.2023 and also on 18.03.2023, as was extended for one more day in view of Clause-I of the General information and Instructions appended to the Advertisement, which reads thus:

> *"Candidates fulfilling the eligibility criteria may appear for registration in between 10.00 AM to 12 Noon and consequently for interview if eligible, on the date as mentioned against the post. No registration will be allowed in any case after scheduled date and time of registration. After short listing basing on the required eligibility criteria, the candidates will be required to stay back for interview. If the number of candidates registered and shortlisted will be high, then the interview will be continued for other date/s, which will be notified to the candidates on the date of registration."*

3.7. As there were good numbers of candidates, the interview could not be completed on one day and the same got extended to one day more. As per the selection criteria as mentioned in the advertisement, the candidates who secured 50% and more marks were required to be kept in the Final Panel Merit List with validation of one year from the date of its approval.

3.8. In the Advertisement, the number of vacancy position of the Microbiologist was published as 40. As per requirement, 40 numbers of candidates from the top order of the merit list, i.e., from Serial Nos. 1 to 40 were invited for document verification on 08.05.2023 and 09.05.2023. Out of such 40 number of candidates, 39 candidates could appear for document verification within the specified period and were found eligible for being issued offer letters to join as Microbiologist.

3.9. Against the remaining one number of vacancy, which was required to be filled up as per publication made, the candidate placed at the next serial number, i.e., Sl. No. 41 as per the merit list, was to be called for document verification and the same process would have continued until the required vacancies are filled up. After document verification and finding required number of eligible selected candidates, the select merit list of such 40 candidates was going to be published in the official website of NHM, Odisha for intimation of general public and simultaneously offer letters were to be issued to such candidates for joining in the said post.

3.10. However, on 11.05.2023 this Court in the instant writ petition directed to maintain status quo as a result of which the publication of result in the webportal could not be made. But after appearance before this Court on subsequent date on being issued with notice in the matter, this Court was pleased to modify the interim order on 18.05.2023 and directed that "8 posts of Microbiologists pursuant to Advertisement No.02 of 2023 dated 28.02.2023 at Annexure-3 shall not be filled up till the next date. Further it is made clear that any appointment be made pursuant to Advertisement No.02 of 2023, dated 28.02.2023 at Annexure-3 shall be subject to final outcome of the present writ application."

4. Since this Court directed for maintaining status quo by virtue of the interim Order dated 11.05.2023 in consideration of I.A. No.6896 of 2023 filed in the instant writ petition, the appointment to the post of Microbiologist pursuant to Advertisement No. 02 of 2023 dated 28.02.2023 could not be made possible. On

consent of the counsel for the parties, the present matter is taken up for final disposal at the stage of admission.

4.1. Accordingly, this Court heard Dr. Jitendra Kumar Lenka, Advocate assisted by Sri Laxmikanta Tripathy, Advocate; Ms. Saswata Patnaik, learned Additional Government Advocate; Sri Bibhu Prasad Tripathy, learned Advocate for the opposite party No.2; and Sri Susanta Kumar Dash, learned Advocate assisted by Sri Prabin Das, learned Advocate for the opposite party Nos.3 to 8. Hearing being concluded on 29.07.2024, the matter stood reserved for preparation and delivery of Judgment/Order.

Rival contentions and submissions:

5. Dr. Jitendra Kumar Lenka, learned Advocate appearing for the petitioner submitted that in the Advertisement intending to conduct walk-in-interview, did not provide criteria for selection for the post of Microbiologist and no qualifying marks were allocated for interview and career assessment. Harping on Clause-X of the Advertisement it has been submitted that the candidates securing 50% marks and more in Final Panel Merit List would be kept in the panel with validity of one year. Stemming on the decision rendered in Ramesh Kumar Vrs. High Court of Delhi, (2010) 3 SCC 104 = (2010) 2 SCR 256, Dr. Jitendra Kumar Lenka, learned Advocate vehemently contended that in absence of details being provided in the said Advertisement (Annexure-3), the selection for the post of Microbiologist based on 50% marks and more secured in the interview alone is illegal.

5.1. Laying emphasis on Clause-XIII of the Advertisement specifying "The result of walk-in-interview will be published in the official website of NHM", he contested the decision of selection of candidates in the said interview and submitted that non-publication of the result of such interview and issuing intimation to the candidates for verification of certificates for appointment on the post of Microbiologist would lead to conceive that the action of the opposite party No.2 is not only tainted with mala fides but also arbitrary.

5.2. Praying to quash the appointment as a result of walk-ininterview conducted in response to the Advertisement Dr. Jitendra Kumar Lenka, learned Advocate submitted that the Authority without publishing the result and calling the members of the Selection Board to change the marks in the interview so that candidates according to their choice could get appointment on extraneous consideration is not only illegal but also renders the entire selection and consequential appointment invalid and as such, the selection is liable to be quashed.

6. Sri Bibhu Prasad Tripathy, learned Advocate for the opposite party No.2 has submitted with all humility that transparency at all levels of selection process has been maintained. The writ petitioners have been apprehensive of the mala fides in selecting favoured candidates and they have not discharged their onus in establishing attack on the Selection Committee as well as the opposite party No.2. It is trite that alleging mala fides though easy, but to lay proof is difficult. It is urged that as the

appropriate authorities in their personal capacities are not arraigned as parties to the present proceeding, this Court may require to desist from entertaining the writ petition.

6.1. He submitted that in the counter-affidavit the opposite party No.2 has explained the procedure followed in selecting eligible candidates having merit for the post of Microbiologist.

6.2. As regards non-publication of result of the walk-ininterview, referring to arguments advanced by Dr. Jitendra Kumar Lenka, learned Advocate as reflected in the Order dated 27.06.2024 in the instant writ petition by this Court that "though specific averment has been made in paragraph 13 of the writ petition that results were not published as on the date of filing of this writ petition, i.e., 08.05.2023 till 1.00 PM, there is no response from the side of the opposite party No.2 even though counter-affidavit was filed on 16.05.2023", Sri Bibhu Prasad Tripathy, learned advocate for the opposite party No.2 has drawn the attention during the course of hearing to the affidavit dated 10.07.2024. He submitted that as per Clause-XIII of the General Information and Instructions appended to the Advertisement after verification of documents and finding of required numbers of eligible selected candidates, on 25.05.2023 results have been hosted in the web-portal after modification of interim Order on 18.05.2023. No timelimit was prescribed in the Advertisement for publication of results and such publication has been made after modification of interim order with respect to 32 candidates reserving 8 candidates. The recruitment for the post of Microbiologist being conducted in fair, transparent and just manner following the guidelines as set out in the Meeting dated 21.10.2022. For the said reason as alleged by the petitioners, the entire process of selection could not be said to be vitiated in absence of any material as to mala fides.

7. Ms. Saswata Patnaik, learned Additional Government Advocate for the opposite party No.1 and Sri Susanta Kumar Dash, learned Advocate for the opposite party Nos.3 to 8 supported the arguments put forth by Sri Bibhu Prasad Tripathy, learned Advocate for the opposite party No.2. All the counsel argued for vacation of interim Order of status quo and pressed for dismissal of the writ petition, as more than a year has already been elapsed since publication of the results of 32 successful candidates.

Analysis and discussion:

8. This Court at the outset would wish to make the observation that the petitioners have made scurrilous attack of on the opposite party No.2 and the Selection Committee on the ground of mala fides, which is apparent from the contents of rejoinder affidavit. The rejoinder affidavit filed by the petitioners containing such allegation is quoted hereunder:

> *"That, as per Advertisement at Annexure-3 Clause-XIII it has been clearly mentioned the result of the walk-in interview will be published in the Official Website. Without publishing the same calling the candidates for certificate verification for appointment proves that selection was made illegally on extraneous consideration and as such the same quashed."*

8.1. Clause-XIII in the Advertisement stands thus:

"The result of the walk-in-interview will be published in the official website of NHM."

8.2. It has been explained by way of Additional Affidavit dated 10.07.2024 that,

*"4. ***as per the selection criteria as mentioned in Clause-X of the General information and Instructions of the Advertisement, the candidates who have secured 50% and more marks as per the selection procedure, have been kept in the Panel Merit List with validation of one year from the date of approval of such merit list. The number of vacancy position of the said post had been advertised as 40 and accordingly as per requirement, 40 numbers of candidates from the top of the merit list from Serial No. 1 to 40 were called for document verification on 08.05.2023 and 09.05.2023. The said list of 40 candidates for appearing document verification was placed in the Notice Board of Mission Directorate, NHM. Out of such 40 number of candidates, 39 candidates have appeared for document verification within the stipulated period and have been found eligible for being issued offer letters to join in the said post. Against the remaining one (l) number of vacancy required to be filled up, as per provision, the candidate placed at next serial number, i.e., Sl. No. 41 as per the merit list is to be called for document verification and the same process shall be continued until the required vacancies are filled up. Further, as per Clause-XIII of the General information and Instructions of the Advertisement, after document verification and finding of required number of fully eligible selected candidates, the select merit list of such 40 candidates is to be published in the official website of NHM, Odisha for intimation of general public and simultaneously offer letters are to be issued to such candidates for joining in the said post.*

5. However, in the meantime, Hon"ble High Court vide Order dated 11.05.2023 in W.P.(C) No. 14936 of 2023 has directed to maintain status quo with regard to appointment to the post of Microbiologist pursuant to advertisement No.2 of 2023 dated 28.02.2023 at Annexure-3. Accordingly, status quo on the process of recruitment for the post of Microbiologist was maintained at the level of document verification of selected candidates against required vacancy.

On 18.05.2023, the Hon"ble High Court has modified the Order and passed following order:

*'****

4. Considering such submission, interim order dated 11.05.2023 is modified to the extent that 8 posts of Microbiologist pursuant to advertisement No. 2 of 2023 dated 28.02.2023 at Annexure-3 shall not be filed up till the next date. Further, it is made clear that any appointment be made pursuant to Advertisement No.2 of 2023 dated 28.02.2023 at Annexure-3 shall also be subject to the final outcome of the present writ application.

5. This Court expects that the appointment as Advertisement No.2 of 2023 dated 28.02.2023 at Annexure-3 shall be made strictly in terms of the schemes.'

That after the Order dated 18.05.2023 of the Hon'ble High Court the office of the Mission Director, NHM has kept said 8 posts of Microbiologist vacant and since, Clause-XIII of the General Information and Instructions of the Advertisement states that the result of Walk-inInterview will be published in the official website of NHM, accordingly, the results of 32 candidates for the remaining 32 posts have been published on 25.05.2023 in the official website of NHM. *The selected candidates have been given offer letters to join in the said posts as per the above mentioned Order dated 18.05.2023 of the Hon'ble Court. The recruitment for the post of Microbiologist is being*

conducted in fair, transparent and just manner following the rules and norms of the OSH & FW Society."

8.3. The note-sheet dated 25.05.2023 at Annexure-B/2 as enclosed to aforesaid Affidavit dated 10.07.2024 depicts as follows:

"This is regarding publication of result of Microbiologist (Advertisement No.02/2023. The list of selected candidates is placed at page No.378-377/c for kind perusal. The same may be published in the official website of NHM, Odisha.

If approved, notes as above, the file may kindly be endorsed to IT section for further action at their end."

8.4. Under the aforesaid precinct, the results of the walk-ininterview being published, this Court does not perceive any mala fide or showing favouritism on the part of the opposite party No.2.

8.5. Where an allegation of mala fides is raised, heavy burden of establishing existence of such mala fides is on the person who alleges it. It is easy to make allegations of mala fides but equally difficult to prove the same. [First Land Acquisition Collector Vrs. Nirodhi Prakash Gangoli, (2002) 4 SCC 160; Jasvinder Singh Vrs. State of J&K, (2003) 2 SCC 132]. The factual details enumerated by the opposite parties do not go suggest that selection of particular candidate has been made for hostile discrimination on account of existence of personal bias or mala fides.

8.6. It is well settled by catena of judgments of the Supreme Court of India, namely in E.P. Royappa Vrs. State of T.N., (1974) 4 SCC 3, the Constitution Bench has made it unequivocal as under:

"92. Secondly, we must not also ***overlook that the burden of establishing mala fides is very heavy on the person who alleges it. The allegations of mala fides are often more easily made than proved, and the very seriousness of such allegations demands proof of a high order of credibility.*** *Here the petitioner, who was himself once the Chief Secretary, has flung a series of charges of oblique conduct against the Chief Minister. That is in itself a rather extraordinary and unusual occurrence and if these charges are true, they are bound to shake the confidence of the people in the political custodians of power in the State, and therefore, the anxiety of the Court should be all the greater to insist on a high degree of proof. In this context it may be noted that top administrators are often required to do acts which affect others adversely but which are necessary in the execution of their duties.* ***These acts may lend themselves to misconstruction and suspicion as to the bona fides of their author when the full facts and surrounding circumstances are not known. The Court would, therefore, be slow to draw dubious inferences from incomplete facts placed before it by a party, particularly when the imputations are grave and they are made against the holder of an office which has a high responsibility in the administration.*** *Such is the judicial perspective in evaluating charge of unworthy conduct against ministers and other high authorities, not because of any special status which they are supposed to enjoy, nor because they are highly placed in social life or administrative set up— these considerations are wholly irrelevant in judicial approach— but because otherwise, functioning effectively would become difficult in a democracy. It is from this standpoint that we must assess the merits of the allegations of mala fides made by the petitioner against the second respondent."*

8.7. The Supreme Court, in Sukhwinder Pal Bipan Kumar Vrs. State of Punjab, AIR 1982 SC 65; and Shivajirao Nilangekar Patil Vrs. Dr. Mahesh Madhav Gosavi, AIR 1987 SC 294, has made identical observations.

8.8. The issue of malus animus was considered in Tara Chand Khatri Vrs. Municipal Corporation of Delhi, AIR 1977 SC 567 = (1977) 2 SCR 198, wherein the Supreme Court has held that the High Court would be justified in refusing to carry on investigation into the allegation of mala fides, if necessary particulars of the charge making out a prima facie case are not given in the writ petition and burden of establishing mala fides lies very heavily on the person who alleges it and there must be sufficient material to establish malus animus.

8.9. In J.N. Banavalikar Vrs. Municipal Corporation of Delhi, AIR 1996 SC 326 = 1995 Supp.4 SCR 1 it has been observed as follows:

> *"If the administration of a public body or a Government takes a decision which can be demonstrated as lacking in reasonableness and fair-play or tainted with mala fide or arbitrariness, such administrative action even if made by a competent authority, offends the pervasive protection under Article 14 of the Constitution of India against mala fide and arbitrariness in the Governmental action and action of the public bodies, in our view, the appellant would be entitled to ask for quashing the impugned action of his removal from the post of Medical Superintendent* ***if it can be demonstrated to the satisfaction of the Court that such action had been taken without any reasonable basis*** *and not being informed by administrative exigency but merely on the caprice and ipse dixit of the concerned authority or being actuated by mala fide intention.*
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> ***
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> The contention of the appellant that in order to accommodate a junior doctor as Medical Superintendent in I.D. Hospital, Dr. Patnaik had been moved out from the said hospital to replace the appellant as Medical Superintendent of RBTB Hospital, is not only vague but lacks in particulars forming the foundation of such contention. **Further, in the absence of impleadment of the junior doctor who is alleged to have been favoured by the course of action leading to removal of the appellant and the person who had allegedly passed mala fide order in order to favour such junior doctor, any contention of mala fide action in fact i.e. malice in fact should not be countenanced by the court."**

8.10. In Rajneesh Khajuria Vrs. Wockhardt Limited, (2020) 3 SCC 86 while drawing distinction between malice in law and malice in fact, has held malice in law could be inferred from doing a wrongful act intentionally without any just cause or excuse or without there being reasonable relationship to the purpose of exercise of statutory power. On the other hand, malice in fact can be inferred only if there is personal bias or oblique motive behind an administrative action.

8.11. In State of Bihar Vrs. P.P. Sharma, 1992 Supp (1) SCC 222 = (1991) 2 SCR 1, mala fide has been succinctly expounded by the Hon"ble Supreme Court of India as (extracted from SCC):

> *"50. Mala fides means want of good faith, personal bias, grudge, oblique or improper motive or ulterior purpose. The administrative action must be said to be done in good faith, if it is in fact done honestly, whether it is done negligently or not. An act done*

honestly is deemed to have been done in good faith. An administrative authority must, therefore, act in a bona fide manner and should never act for an improper motive or ulterior purposes or contrary to the requirements of the statute, or the basis of the circumstances contemplated by law, or improperly exercised discretion to achieve some ulterior purpose. The determination of a plea of mala fide involves two questions, namely:

(i) whether there is a personal bias or an oblique motive, and
(ii) whether the administrative action is contrary to the objects, requirements and conditions of a valid exercise of administrative power.

51. The action taken must, therefore, be proved to have been made mala fide for such considerations. Mere assertion or a vague or bald statement is not sufficient. It must be demonstrated either by admitted or proved facts and circumstances obtainable in a given case. If it is established that the action has been taken mala fide for any such considerations or by fraud on power or colourable exercise of power, it cannot be allowed to stand.

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59. Malice in law could be inferred from doing of wrongful act intentionally without any just cause or excuse or without there being reasonable relation to the purpose of the exercise of statutory power. Malice in law is not established from the omission to consider some documents said to be relevant to the accused. Equally reporting the commission of a crime to the Station House Officer, cannot be held to be a colourable exercise of power with bad faith or fraud on power. It may be honest and bona fide exercise of power. There are no grounds made out or shown to us that the first information report was not lodged in good faith. State of Haryana Vrs. Ch. Bhajan Lal, 1992 Supp. (1) SCC 335 = JT 1990 (4) SC 650 is an authority for the proposition that existence of deep seated political vendetta is not a ground to quash the FIR. ***Therein despite the attempt by the respondent to prove by affidavit evidence corroborated by documents of the mala fides and even on facts as alleged no offence was committed, this Court declined to go into those allegations and relegated the dispute for investigation.*** *Unhesitatingly I hold that the findings of the High Court that FIR gets vitiated by the mala fides of the Administrator and the chargesheets are the results of the mala fides of the informant or investigator, to say the least, is fantastic and obvious gross error of law."*

8.12. In yet another Judgment reported as *Prabodh Sagar Vrs. Punjab State Electricity Board, (2000) 5 SCC 630* it was held that:

*"*** Incidentally, be it noted that the expression "mala fide" is not meaningless jargon and it has its proper connotation.* ***Malice or mala fides can only be appreciated from the records of the case in the facts of each case. There cannot possibly be any set guidelines in regard to the proof of mala fides.*** *Mala fides, where it is alleged, depends upon its own facts and circumstances. *** There must be factual support pertaining to the allegations of mala fides, unfortunately there is none.* ***Mere user of the word "mala fide" by the petitioner would not by itself make the petition entertainable. The Court must scan the factual aspect and come to its own conclusion, i.e., exactly what the High Court has done and that is the reason why the narration has been noted in this judgment in extenso.*******"*

8.13. In *M. Sankaranarayanan, IAS Vrs. State of Karnataka, AIR 1993 SC 763 = (1992) Supp. (2) SCR 368*, it has been observed that the Court may "draw a reasonable inference of mala fide from the facts pleaded and established. But such

inference must be based on factual matrix and such factual matrix cannot remain in the realm of insinuation, surmise or conjecture."

8.14. In *N.K. Singh Vrs. Union of India, (1994) 6 SCC 98 = (1994) Supp. (2) SCR 772*, the Supreme Court has held that "the inference of mala fides should be drawn by reading in between the lines and taking into account the attendant circumstances." There has to be very strong and convincing evidence to establish the allegations of mala fides specifically alleged in the petition as the same cannot merely be presumed. The presumption is in favour of the bona fides of the order unless contradicted by acceptable material. [Vide, *State of UP Vrs. Dr. V.N. Prasad, 1995 Suppl (2) SCC 151; Arvind Dattatraya Dhande Vrs. State of Maharashtra, (1997) 6 SCC 169; Utkal University Vrs. Dr. Nrusingha Charan Sarangi, (1999) 2 SCC 193; Kiran Gupta Vrs. State of U.P., (2000) 7 SCC 719; and Netai Bag Vrs. State of W.B., (2000) 8 SCC 262*].

8.15. In *State of Punjab Vrs. V.K. Khanna, (2001) 2 SCC 330 = (2000) Supp. (5) SCR 200,* the Apex Court examined the issue of bias and mala fide, observing as under:

> *"Whereas fairness is synonymous with reasonableness4 bias stands included within the attributes and broader purview of the word „malice" which in common acceptance means and implies 'spite' or 'ill will'. One redeeming feature in the matter of attributing bias or malice and is now well settled that mere general statements will not be sufficient for the purpose of indication of ill will. There must be cogent evidence available on record to come to the conclusion as to whether in fact, there was existing a bias or a mala fide move which results in the miscarriage of justice. *** In almost all legal inquiries, 'intention as distinguished from motive is the all important factor' and in common parlance a malicious act stands equated with an intentional act without just cause or excuse.*"

8.16. Similar view has been reiterated in *Samant Vrs. Bombay Stock Exchange, (2001) 5 SCC 323.*

8.17. In a Judgment reported as *HMT Ltd. Vrs. Mudappa, (2007) 9 SCC 768 = (2007) 2 SCR 363,* quoting from earlier judgment *in State of A.P. Vrs. Goverdhanlal Pitti, (2003) 4 SCC 739 = (2003) 2 SCR 908*, it was held that „legal malice" or „malice in law" means „something done without lawful excuse". It is an act done wrongfully and wilfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite. The Court held as under:

> *"24. The Court also explained the concept of legal mala fide. By referring to Words and Phrases Legally Defined, 3rd Edn., London Butterworths, 1989 the Court stated: (Goverdhanlal case, (2003) 4 SCC 739, SCC p. 744, para 12)*
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> *12. The legal meaning of malice is „ill will or spite towards a party and any indirect or improper motive in taking an action". This is sometimes described as „malice in fact". „Legal malice" or „malice in law" means „something done without lawful excuse". In other words, „it is an act done wrongfully and wilfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite. It is a deliberate act in disregard of the rights of others." It was observed that where malice was attributed to*

the State, it could not be a case of malice in fact, or personal ill-will or spite on the part of the State. It could only be malice in law i.e. legal mala fide. The State, if it wishes to acquire land, could exercise its power bona fide for statutory purpose and for none other. It was observed that it was only because of the decree passed in favour of the owner that the proceedings for acquisition were necessary and hence, notification was issued. Such an action could not be held mala fide."

8.18. In *Union of India Vrs. Ashok Kumar, (2005) 8 SCC 760 = (2005) Supp. (4) SCR 317* it has been held that,

"Doubtless, he who seeks to invalidate or nullify any act or order must establish the charge of bad faith, an abuse or a misuse by the authority of its powers. While the indirect motive or purpose, or bad faith or personal ill will is not to be held established except on clear proof thereof, it is obviously difficult to establish the state of a man"s mind, for that is what the employee has to establish in this case, though this may sometimes be done. The difficulty is not lessened when one has to establish that a person apparently acting on the legitimate exercise of power has, in fact, been acting mala fide in the sense of pursuing an illegitimate aim. ***It is not the law that mala fides in the sense of improper motive should be established only by direct evidence. But it must be discernible from the order impugned or must be shown from the established surrounding factors which preceded the order.*** *If bad faith would vitiate the order, the same can, in our opinion, be deduced as a reasonable and inescapable inference from proved facts. (S. Pratap Singh Vrs. State of Punjab, (1964) 4 SCR 733 = AIR 1964 SC 72).* ***It cannot be overlooked that the burden of establishing mala fides is very heavy on the person who alleges it. The allegations of mala fides are often more easily made than proved, and the very seriousness of such allegations demands proof of a high order of credibility.*** *As noted by this Court in E.P. Royappa Vrs. State of T.N., (1974) 4 SCC 3 = AIR 1974 SC 555 courts would be slow to draw dubious inferences from incomplete facts placed before them by a party, particularly when the imputations are grave and they are made against the holder of an office which has a high responsibility in the administration. (See Indian Rly. Construction Co. Ltd. Vrs. Ajay Kumar, (2003) 4 SCC 579)."*

8.19. In another Judgment reported as *Ratnagiri Gas and Power Private Limited Vrs. RDS Projects Limited, (2012) 9 SCR 690 = (2013) 1 SCC 524*, the Hon"ble Supreme Court held that when allegations of mala fides are made, the persons against whom the same are levelled need to be impleaded as parties to the proceedings to enable them to answer the charge. A judicial pronouncement declaring an action to be mala fide is a serious indictment of the person concerned that can lead to adverse civil consequences against him. The Court held as under:

"27. There is yet another aspect which cannot be ignored. As and when allegations of mala fides are made, the persons against whom the same are levelled need to be impleaded as parties to the proceedings to enable them to answer the charge. ***In the absence of the person concerned as a party in his/her individual capacity it will neither be fair nor proper to record a finding that malice in fact had vitiated the action taken by the authority concerned. It is important to remember that a judicial pronouncement declaring an action to be mala fide is a serious indictment of the person concerned that can lead to adverse civil consequences against him.*** *Courts have, therefore, to be slow in drawing conclusions when it comes to holding allegations of mala fides to be proved and only in cases where based on the material placed before*

the Court or facts that are admitted leading to inevitable inferences supporting the charge of mala fides that the Court should record a finding in the process ensuring that while it does so, it also hears the person who was likely to be affected by such a finding."

8.20. The Hon"ble Supreme Court of India in All India State Bank Officers" *Federation Vrs. Union of India, (1997) 9 SCC 151 = (1996) Supp. (6) SCR 255* observed as follows:

"21. In view of the aforesaid explanation of the respondent-Bank, which we see no reason to disbelieve, it is clear that the petitioners have made baseless and reckless allegations of mala fides. Respondents 4 and 5 obviously had no direct or indirect role to play either in the formulation of the policy or in the memorandum being placed as a table item to be taken up for consideration in the meeting held on 07.03.1989. The modification was approved by the Chairman and all the Directors who were present in the meeting of the Board. For an allegation of mala fide to succeed it must be conclusively shown that Respondents 4 and 5 wielded influence over all the members of the Board who were present in the said meeting. No such allegation has been made. The decision to modify the promotion policy was taken by a competent authority, namely, the Central Board in a duly constituted meeting held on 07.03.1989 and we are unable to accept that this change in the policy was brought about solely with a view to help Respondents 4 and 5.

22. There is yet another reason why this contention of the petitioners must fail. ***It is now settled law that the person against whom mala fides are alleged must be made a party to the proceeding.*** *The allegation that the policy was amended with a view to benefit Respondents 4 and 5 would amount to the petitioners contending that the Board of Directors of the Bank sought to favour Respondents 4 and 5 and, therefore, agreed to the proposal put before it. Neither the Chairman nor the Directors, who were present in the said meeting, have been impleaded as respondents. This being so the petitioners cannot be allowed to raise the allegations of mala fides, which allegations, in fact, are without merit."*

8.21. In *Federation of Railway Officers Association Vrs. Union of India, AIR 2003 SC 1344 = (2003) 2 SCR 1085*, it has been held as under:

"That allegations regarding mala fides cannot be vaguely made and it must be specified and clear. In this context, the concerned Minister who is stated to be involved in the formation of new Zone at Hazipur is not made a party who can meet the allegations."

8.22. Therefore, essentially in *Federation of Railway Officers Association Vrs. Union of India, AIR 2003 SC 1344 = (2003) 2 SCR 1085*, the Hon"ble Supreme Court has held that the allegation of mala fide has to be specifically made and the person against whom such allegations are made has to be impleaded and in his absence such allegations cannot be taken into consideration.

8.23. The Hon"ble Supreme Court of India in the case of *State of Gujarat Vrs. Paresh Nathalal Chauhan, (2024) 3 SCR 1141*, explained "good faith" in the following manner:

"8. A good faith clause, explained in the vocabulary of the rights and duties regime, can be said to be a provision of immunity to a statutory functionary. Such provisions are in recognition of public interest in protecting a statutory functionary against prosecution

or legal proceedings. This immunity is limited. It is confined to acts done honestly and in furtherance of achieving the statutory purpose and objective. Section 3(22) of the General Clauses Act, 1897 best explains „good faith" as an act done honestly, whether it is done negligently or not. Good faith clauses in statutes providing immunity against suits, prosecution or other legal proceedings against officials exercising statutory power are therefore limited by their very nature, that far, and no further. The scope and ambit of good faith has been explained in a number of decisions of this Court [See Goondla Venkateswarlu Vrs. State of A.P., (2008) 9 SCC 613, paras 22 and 23; Army Headquarters Vrs. CBI, (2012) 6 SCC 228, paras 69-78], which need not be elaborated herein again.

9. A good faith clause in a statute will therefore be a defense. If successfully pleaded, it not only legitimises the action but also protects the statutory functionary from any legal action. If a statutory functionary invokes the defence of good faith in a suit, prosecution or other legal proceedings initiated against him, it is for the court or a judicial body to consider, adjudicate, and determine whether the claim that the action was done in good faith is made out or not. Such a scrutiny, enquiry, or examination is done only in a proceeding against the statutory functionary. This Court has held that the scrutiny whether the act is done in good faith or not would depend upon the facts and circumstances of each case. [Army Headquarters Vrs. CBI, (2012) 6 SCC 228, paras 76-78]"

8.24. Scanning through the facts pleaded it is manifest from paragraph 16 of the writ petition that "the petitioners apprehend that the authority without publishing the result and calling the members of the Selection Board to change the mark in the interview so that candidates according to their choice will get appointment which is illegal". Without bringing on record material particulars, the petitioners appeared to be apprehensive of lack of one year post-qualification experience as they have put forth at paragraph 17 of the writ petition that "Out of 40 selected candidates, many candidates did not have one year of post-qualification experience in Clinical Laboratory Services". By way of rejoinder affidavit the petitioners have made wild allegation that "as per Advertisement at Annexure-3 Clause-XIII it has been clearly mentioned the result of the walk-in-interview will be published in the Official Website. Without publishing the same calling the candidates for certificate verification for appointment proves that selection was made illegally".

8.25. The aforesaid facts do not prove the mala fide or deliberate attempt on the part of the opposite parties to accommodate their favoured candidates. The petitioners did not choose to implead any of such selected candidates nor could they specify the alleged shortfall with regard to the experience in Clinical Laboratory Services. On the contrary, Sri Bibhu Prasad Tripathy, learned Advocate for the opposite party No.2 has explained the manner of publication of result hosting on the web-portal. He has also taken this Court to the documents forming part of the writ petition to indicate that the Selection Committee have taken pains to scrutinise post-qualification experience of one year in Clinical Laboratory Services. The petitioners under a misconceived fact that the result would not be published in the website have approached this Court. The opposite parties have proffered explanation by way of

counter-affidavit as also additional affidavit that they have, in fact, published the result after modification of interim order of this Court.

8.26. Minute scrutiny of averments it transpires that the petitioners merely attacked the conduct of the opposite parties without bringing on record specific instance. The petitioners while making scurrilous attack on the authorities appears to have deliberately ignored to array them as party in person. The allegation that the action of opposite party No.2 is tainted is scurrilous one against the authority who required positions to be filled up with the desired qualification. It is noteworthy that there is no time specified in the Advertisement for publication of results in the website. Without laying down any factual foundation whatsoever and having failed to put forth material particulars the petitioners have failed to substantiate the allegation.

9. It is next ground of the petitioners to attack the selection process of eligible candidates that since assessment of academic performance was not undertaken by the opposite party No.2, the entire process of selection becomes vulnerable in view of *Anzar Ahmed Vrs. State of Bihar, AIR 1994 SC 141 = (1993) Supp (3) SCR 434*. In the said reported case, it was the fact that "The applicants appeared for interview before two Boards presided by two members of the Commission. The selection was made on the basis of marks given for viva voce and for academic performance. 100 marks were allotted for viva voce test and 100 marks for academic performance". On consideration of such factual aspect, the Hon"ble Supreme Court of India observed that,

> *"*** As regards* ***the allocation of marks for viva voce and academic performance for the impugned selection*** *it has been pointed out before us by the learned counsel .appearing for the Commission that in the Counter Affidavit filed on behalf of the Commission before the High Court it was categorically* ***stated that in all cases where the recommendation is made only on the basis of interview conducted by the Commission and no written qualifying examination is conducted, it has always been the practice of the Commission to fix 50% marks for academic achievement/educational qualifications and 50% marks for interview/viva voce and only in cases where written examination is also conducted by the Commission for screening the candidates, 100 marks are reserved for performance of the candidates in such qualifying examination and 20 marks are reserved for interview/viva voce. ******
> *This shows that the consistent practice that has been followed by the Commission when selection is made* ***on the basis of interview only*** *is to allocate 50% marks for academic achievement and 50% marks for interview. ****
>
> ***In the instant case, we find that the State Government in its letter dated September 20, 1990 has clearly stated that selection should be made on the basis of interview. On the basis of this letter the Commission could have made the selection wholly on the basis of marks obtained at the interview. But in accordance with the past practice,*** *the Commission has made the selection on the basis of interview while keeping in view the academic performance and with that end in view the Commission has allocated 50% marks for academic performance and 50% marks for interview. It cannot be held that the said procedure adopted by the Commission suffers from the vice of arbitrariness. By*

> *giving equal weight to academic performance the Commission has rather reduced the possibility of arbitrariness."*

9.1. Such being the distinctive feature in Anzar Ahmed case (supra), the decision upon which the petitioner placed heavy reliance, has no application to the present factsituation. At this juncture, it may be apt to have reference to *Union of India Vrs. Arulmozhi Iniarasu, (2011) 9 SCR 1 = (2011) 7 SCC 397* wherein it has been made explicitly clear that observations of Courts are neither to be read as Euclid‟s theorems nor as provisions of Statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Disposal of cases by blindly placing reliance on a decision is not proper because one additional or different fact may make a world of difference between conclusions in two cases.

9.2. The decision of the Hon‟ble Supreme Court of India rendered in *Ramesh Kumar Vrs. High Court of Delhi, (2010) 3 SCC 104 = (2010) 2 SCR 256* laying down that "in case no procedure is prescribed by the rules and there is no other impediment in law, the competent authority while laying down the norms of selection may prescribe for the tests and further specify the minimum bench marks for written test as well as for viva voce", is distinguishable on facts. Clause-X of General Information and Instructions of the Advertisement under Annexure-3 to the writ petition unambiguously prescribes that "The candidates securing 50% and more marks in Final Panel Merit List shall be kept in the Panel with the validity of 01 year from the date of its approval. The Panel for above position shall also remain valid for similar post/in other programmes under NHM ambit with same educational qualification and same remuneration, as will be decided by the Society." Such condition finds support from the decision taken by an Expert Body in their Meeting held on 21.10.2022 (Annexure-A/2 to the counter affidavit), which is much prior to publication of Advertisement dated 28.02.2023. In the said Meeting, selection procedure for Microbiologist was laid down to the following effect:

> *"The Final Merit List shall be prepared as per the marks secured in interview. The candidates securing 50% and more marks in Final Merit List shall be kept in the Panel with the validity of 01 year from the date of its approval."*

9.3. Thus, the apprehension of the petitioners is without comprehension. Since the selection for the position of "Microbiologist" was decided to be conducted by way of walk-in-interview, the selection procedure decided in the Meeting of the Expert Body held on 21.10.2022 cannot be said to be arbitrary, particularly so when the petitioners claimed to have participated in the walk-in interview with eyes open and having got acquainted with the terms of Advertisement.

9.4. Sri Susanta Kumar Dash, learned counsel appearing for the interveners, who were allowed by this Court to join as the opposite party Nos.3 to 8 in the instant proceeding, pressed into service the principle laid down in *Tajvir Singh Sodhi Vrs. State of Jammu and Kashmir, (2023) 3 SCR 714 = AIR 2023 SC 2014* for appreciating the scope of this Court to interfere with the cases of present nature. The

following observations made in the said case would throw light to repel the contentions of the petitioners herein (extracted hereunder from SCR):

> *"Selection Process for Public Employment: Interference by Courts:*
>
> *12. Before proceeding further, it is necessary to preface our judgment with the view that Courts in India generally avoid interfering in the selection process of public employment, recognising the importance of maintaining the autonomy and integrity of the selection process.* ***The Courts recognise that the process of selection involves a high degree of expertise and discretion and that it is not appropriate for Courts to substitute their judgment for that of a selection committee. It would be indeed, treading on thin ice for us if we were to venture into reviewing the decision of experts who form a part of a selection board.*** *The law on the scope and extent of judicial review of a selection process and results thereof, may be understood on consideration of the following case law:*
>
> *i) In Dalpat Abasaheb Solunke Vrs. Dr. B.S. Mahajan, AIR 1990 SC 434, this Court clarified the scope of judicial review of a selection process, in the following words:*
>
> *'9. *** It is needless to emphasise that it is not the function of the Court to hear appeals over the decisions of the selection committees and to scrutinise the relative merits of the candidates. Whether the candidate is fit for a particular post or not has to be decided by the duly constituted selection committee which has the expertise on the subject. The Court has no such expertise. The decision of the selection committee can be interfered with only on limited grounds, such as illegality or patent material irregularity in the constitution of the committee or its procedure vitiating the selection, or proved mala fides affecting the selection etc. ***"*
>
> *ii) In a similar vein, in Secretary (Health), Department of Health and Family Welfare Vrs. Dr. Anita Puri, (1996) 6 SCC 282, this Court observed as under as regards the sanctity of a selection process and the grounds on which the results thereof may be interfered with: „*
>
> *'9. *** It is too well settled that when a selection is made by an expert body like the Public Service Commission which is also advised by experts having technical experience and high academic qualification in the field for which the selection is to be made,* ***the Courts should be slow to interfere with the opinion expressed by experts unless allegations of mala fide are made and established. It would be prudent and safe for the Courts to leave the decisions on such matters to the experts who are more familiar with the problems they face than the courts.*** *If the expert body considers suitability of a candidate for a specified post after giving due consideration to all the relevant factors, then the Court should not ordinarily interfere with such selection and evaluation. ***"*
>
> *iii) This position was reiterated by this Court in M.V. Thimmaiah Vrs. Union Public Service Commission, (2008) 2 SCC 119, in the following words:*
>
> *'21. Now, comes the question with regard to the selection of the candidates.* ***Normally, the recommendations of the Selection Committee cannot be challenged except on the ground of mala fides or serious violation of the statutory rules.*** *The Courts cannot sit as an Appellate Authority to examine the recommendations of the Selection Committee like the Court of appeal. This discretion has been given to the Selection Committee only and Courts rarely sit as a court of appeal to examine the selection of the candidates nor is the business of the court to examine each candidate and record its opinion.*
>
> *****

*30. We fail to understand how the Tribunal can sit as an Appellate Authority to call for the personal records and constitute Selection Committee to undertake this exercise. This power is not given to the Tribunal and it should be clearly understood that the assessment of the Selection Committee is not subject to appeal either before the Tribunal or by the courts. One has to give credit to the Selection Committee for making their assessment and it is not subject to appeal. Taking the overall view of ACRs of the candidates, one may be held to be very good and another may be held to be good. If this type of interference is permitted then it would virtually amount that the Tribunals and the High Courts have started sitting as Selection Committee or act as an Appellate Authority over the selection. It is not their domain, it should be clearly understood, as has been clearly held by this Court in a number of decisions. ***"*

iv) Om Prakash Poplai and Rajesh Kumar Maheshwari Vrs. Delhi Stock Exchange Association Ltd., (1994) 2 SCC 117, was a case where an appeal was filed before this Court challenging the selection of members to the Delhi Stock Exchange on the ground that the Selection Committee formed for the aforesaid purpose, arbitrarily favoured some candidates and was thus, against Article 14. This Court rejected the allegation of favouritism and bias by holding as under:

*"**5. *** the selection of members by the Expert Committee had to be done on the basis of an objective criteria taking into consideration experience, professional qualifications and similar related factors.** In the present cases, we find that certain percentage of marks were allocated for each of these factors, namely, educational qualifications, experience, financial background and knowledge of the relevant laws and procedures pertaining to public issues etc. Of the total marks allocated only 20 per cent were reserved for interviews. Therefore, the process of selection by the Expert Committee was not left entirely to the sweet-will of the members of the Committee. The area of play was limited to 20 per cent and having regard to the fact that the members of the Expert Committee comprised of two members nominated by the Central Government it is difficult to accept the contention that they acted in an unreasonable or arbitrary fashion. ***"*

12.1 ***Thus, the inexorable conclusion that can be drawn is that it is not within the domain of the Courts, exercising the power of judicial review, to enter into the merits of a selection process, a task which is the prerogative of and is within the expert domain of a Selection Committee, subject of course to a caveat that if there are proven allegations of malfeasance or violations of statutory rules, only in such cases of inherent arbitrariness, can the Courts intervene.*** *Thus, Courts while exercising the power of judicial review cannot step into the shoes of the Selection Committee or assume an appellate role to examine whether the marks awarded by the Selection Committee in the viva voce are excessive and not corresponding to their performance in such test. The assessment and evaluation of the performance of candidates appearing before the Selection Committee/Interview Board should be best left to the members of the committee. In light of the position that a Court cannot sit in appeal against the decision taken pursuant to a reasonably sound selection process, the following grounds raised by the writ petitioners, which are based on an attack of subjective criteria employed by the selection board/interview panel in assessing the suitability of candidates, namely, (i) that the candidates who had done their post-graduation had been awarded 10 marks and in the viva-voce, such PG candidates had been granted either 18 marks or 20 marks out of 20. (ii) that although the writ petitioners had performed exceptionally well in the interview, the authorities had acted in an arbitrary manner while carrying out the selection process, would not hold any water.*

13. The next aspect of the matter which requires consideration is the contention of the writ petitioners to the effect that the entire selection process was vitiated as the eligibility criteria enshrined in the Advertisement Notice dated 5th May, 2008 was recast vide a corrigendum dated 12th June, 2009, without any justifiable reason. In order to consider this contention, regard may be had to the following case law:

i) In Manish Kumar Shahi Vrs. State of Bihar, (2010) 12 SCC 576, this Court authoritatively declared that ***having participated in a selection process without any protest, it would not be open to an unsuccessful candidate to challenge the selection criteria subsequently.***

ii) In Ramesh Chandra Shah Vrs. Anil Joshi, (2013) 11 SCC 309, an advertisement was issued inviting applications for appointment for the post of physiotherapist. Candidates who failed to clear the written test presented a writ petition and prayed for quashing the advertisement and the process of selection. ***They pleaded that the advertisement and the test were ultra vires the provisions of the Uttar Pradesh Medical Health and Family Welfare Department Physiotherapist and Occupational Therapist Service Rules, 1998. After referring to a catena of judgments on the principle of waiver and estoppel, this Court did not entertain the challenge for the reason that the same would not be maintainable after participation in the selection process.*** *The pertinent observations of this Court are as under: „*

24. In view of the propositions laid down in the above noted judgments, it must be held that by having taken part in the process of selection with full knowledge that the recruitment was being made under the General Rules, the respondents had waived their right to question the advertisement or the methodology adopted by the Board for making selection and the learned Single Judge and the Division Bench of the High Court committed grave error by entertaining the grievance made by the respondents."

iii) Similarly, in Ashok Kumar Vrs. State of Bihar, (2017) 4 SCC 357, a process was initiated for promotion to Class-III posts from amongst Class-IV employees of a civil court. In the said case, the selection was to be made on the basis of a written test and interview, for which 85% and 15% marks were earmarked respectively as per norms. Out of 27 (twenty-seven) candidates who appeared in the written examination, 14 (fourteen) qualified. They were interviewed. The committee selected candidates on the basis of merit and prepared a list. The High Court declined to approve the Select List on the ground that the ratio of full marks for the written examination and the interview ought to have been 90:10 and 45 ought to be the qualifying marks in the written examination. A fresh process followed comprising of a written examination (full marks-90 and qualifying marks-45) and an interview (carrying 10 marks). On the basis of the performance of the candidates, results were declared and 6 (six) persons were appointed on Class-III posts. It was thereafter that the appellants along with 4 (four) other unsuccessful candidates filed a writ petition before the High Court challenging the order of the High Court on the administrative side declining to approve the initial Select List. The primary ground was that the appointment process was vitiated, since under the relevant rules, the written test was required to carry 85 marks and the interview 15 marks. This Court dismissed the appeals on the grounds that the appellants were clearly put on notice when the fresh selection process took place that the written examination would carry 90 marks and the interview 10 marks. The Court was of the view that the appellants having participated in the selection process without objection and subsequently found to be not successful, a challenge to the process at their instance was precluded. The relevant observations are as under:

13. The law on the subject has been crystalized in several decisions of this Court.

In Chandra Prakash Tiwari Vrs. Shakuntala Shukla, (2002) 3 SCR 948 this Court laid down the principle that when a candidate appears at an examination without objection and is subsequently found to be not successful, a challenge to the process is precluded. ***The question of entertaining a petition challenging an examination would not arise where a candidate has appeared and participated. He or she cannot subsequently turn around and contend that the process was unfair or that there was a lacuna therein, merely because the result is not palatable.***

In Union of India Vrs. S. Vinodh Kumar (2007) 8 SCC 100, this Court held that:

18. ***It is also well settled that those candidates who had taken part in the selection process knowing fully well the procedure laid down therein were not entitled to question the same*** *(See also Munindra Kumar Vrs. Rajiv Govil (1991) 3 SCC 368 and Rashmi Mishra Vrs. M.P. Public Service Commission (2006) 12 SCC 724)". ***"*

13.1 ***It is therefore trite that candidates, having taken part in the selection process without any demur or protest, cannot challenge the same after having been declared unsuccessful. The candidates cannot approbate and reprobate at the same time.*** *In other words, simply because the result of the selection process is not palatable to a candidate, he cannot allege that the process of interview was unfair or that there was some lacuna in the process.* ***Therefore, we find that the writ petitioners in these cases, could not have questioned before a Court of law, the rationale behind recasting the selection criteria, as they willingly took part in the selection process even after the criteria had been so recast.*** *Their candidature was not withdrawn in light of the amended criteria. A challenge was thrown against the same only after they had been declared unsuccessful in the selection process, at which stage, the challenge ought not to have been entertained in light of the principle of waiver and acquiescence.*

13.2 This Court in Sadananda Halo Vrs. Momtaz Ali Sheikh, (2008) 3 SCR 497 has noted that the only exception to the rule of waiver is the existence of mala fides on the part of the Selection Board. In the present case, we are unable to find any mala fide or arbitrariness in the selection process and therefore the said exception cannot be invoked.

Cancellation of the entire selection process: Whether justified?

14. In the present case, the entire selection of the appellants has been quashed by the High Court primarily on the ground of non-availability of individual award rolls or mark sheets awarding marks individually. Whether such an irregularity would vitiate the entire selection process and set it at naught is the next aspect of the matter that requires consideration.

14.1 The decision of a three-judge Bench of this Court in Kumari Anamica Mishra Vrs. Uttar Pradesh Public Service Commission, Allahabad, AIR 1990 SC 461 involved recruitment to various posts in the educational services of the State of Uttar Pradesh. There was a two-stage recruitment involving a written test and an interview therein. It was found that after the written examination, due to the improper feeding of data into the computer, some candidates who had a better performance in the written examination were not called for interview and candidates who secured lesser marks were not only called for the interview but were finally selected. The entire process was cancelled by the Public Service Commission. In the said context, this Court observed as under: „

4. We have heard counsel for the parties and are of the view that when no defect was pointed out in regard to the written examination and the sole objection was confined to exclusion of a group of successful candidates in the written examination from the interview, there was no justification for cancelling the written part of the recruitment examination."

The aforesaid case is therefore representative of a situation where the cancellation of the entire recruitment process was held to be not justified since there was no systemic flaw in the written test, and the issue was only with regard to award of marks to the candidates in the interview. The situation could have been remedied by setting aside the selection made after the interview stage and calling for a fresh interview of all eligible candidates if the case so warranted which is also not so in the instant case.

14.2 In Mohinder Sain Garg Vrs. State of Punjab, (1991) 1 SCC 662, 1200 candidates were called for the interview, for filling up 54 posts. Though not through a proper course to have been adopted it was held that it would not vitiate the selection, more particularly when it could not be said to be tainted with mala fides or ill motive.

14.3 The observations of this Court in Union of India Vrs. Rajesh P.U., (2003) Supp. (1) SCR 883 are highly instructive as regards the question, whether, setting aside the entire selection process would be excessive or disproportionate a remedy in a given case. The pertinent findings of this Court in the said case are as under:

*"*** Applying a unilaterally rigid and arbitrary standard to cancel the entirety of the selections despite the firm and positive information that except 31 of such selected candidates, no infirmity could be found with reference to others, is nothing but total disregard of relevancies and allowing to be carried away by irrelevancies, giving a complete go-by to contextual considerations throwing to the winds the principle of proportionality in going farther than what was strictly and reasonably to meet the situation. In short, the competent authority completely misdirected itself in taking such an extreme and unreasonable decision of cancelling the entire selections, wholly unwarranted and unnecessary even on the factual situation found too, and totally in excess of the nature and gravity of what was at stake, thereby virtually rendering such decision to be irrational."*

14.4 In the present case, the entire selection of the appellants was set aside due to the non-availability of individual award rolls, despite, signed approval of the final Select List by the members of the Board. ***Whether quashing the entire selection process was excessive or justified, would depend on the selection procedure adopted and whether the same is arbitrary or reveals any mala fides on the part of the selection board."***

9.5. Examining the instant case in the light of the above decision(s) of the Hon"ble Supreme Court of India, it is explicitly clear that nothing is substantiated by the petitioners by demonstrating that there was mala fide in the action of the opposite party No.2 in conducting the interview and there appears no tinge of bias. It could also not been established that the Selection Committee was biased. However, the petitioners have taken part in the selection process without any demur or protest. Therefore, they cannot question the same after being declared unsuccessful and as held by the Hon"ble Supreme Court that the candidates cannot approbate or reprobate at the same time.

9.6. Under the above premise, this ground of attack that the selection process was faulty falls to ground.

10. It is lastly questioned by the counsel for the petitioners referring to the ratio of the Judgment of the Hon"ble Supreme Court of India rendered in the case of *Hemani Malhotra Vrs. High Court of Delhi, (2008) 7 SCC 11* that the Advertisement in Annexure-3 having not specified minimum mark in the interview, saidAdvertisement is liable to be scrapped and the selection of candidates is required to be quashed.

10.1. In absence of factual foundation for such contention, the contention based on reported decision is untenable. In absence of specific rules for walk-in-interview, the Expert Body have in their Meeting held on 21.10.2022 adopted procedure for selection, according to which for ascertaining eligibility for the position of "Microbiologist", qualifications have been prescribed. It has also been provided that candidates securing 50% or more marks in the walk-in-interview would be placed in the Final Merit List. Said Panel would remain valid for one year from the date of approval. It is contended by the opposite party No.2 that the selection has been made on the basis of marks secured in the interview, because the examination for selection was on "walk-in-interview" method. This is in consonance with Clause-X of the General Information and Instructions appended to the Advertisement.

10.2. It has also been specified in the Advertisement as follows:

> *"The authority reserves the right to cancel this advertisement or modify the terms and conditions of this advertisement and the recruitment criteria at any stage of recruitment process without assigning any reason thereof."*

10.3. In such view of the matter, it is incoherent for the petitioners to submit that changing the criteria without mentioning or issuing corrigendum before selection is not sustainable.

10.4. In Hemani Malhotra (supra) vide paragraph 14 it has been stated that "it is an admitted position that at the beginning of the selection process, no minimum cut-off marks for viva voce were prescribed". In the case at hand, Clause-X of the General Information and Instructions appended to the Advertisement made it abundantly clear that candidates securing 50% or more in the interview would be placed in the Final Panel Merit List. Therefore, the argument advanced by Dr. Jitendra Kumar Lenka, learned Advocate that minimum marks to be secured in the walk-in-interview being not specified at the beginning is contrary to record as the cut-off mark was specified in Clause-X of the General Information and Instructions appended to the Advertisement. The petitioners have misread the terms of Advertisement. It is needless to observe that simply because the result of the selection process was not palatable to the petitioners, the process of interview could not have been questioned assailing it to be unfair or finding loopholes in such process, more so when the petitioners have participated in the process of selection in terms of the Advertisement.

Summary and Conclusion:

11. On the discussed facts coupled with averments and submissions made in course of hearing with reference to the principles enunciated by the Courts, this Court on perusal of record finds that the petitioners have filed the instant writ petition assailing the propriety of selection process for the walk-in-interview as the selection of candidates was made on the basis of 50% or more marks secured in the walk-in-interview by placing them in the Final Panel Merit List, because such process was not palatable to them.

11.1. Citing non-uploading of the marks in the web-portal is objectionable, the petitioners sought to declare the entire selection process scrapped. On this score, this Court has found substance in the explanation proffered by the opposite party No.2 in the counter-affidavit and additional affidavit filed. Since the Advertisement has also not prescribed any time-limit for hosting results of the interview in the website of NHM, the allegation of mala fide or bias is uncalled for. Further, this Court declines to conduct a fishing and roving enquiry about the allegation of such mala fides as the petitioners have not arrayed the persons against whom such scurrilous allegation has been made.

12. In the wake of aforesaid discussion on the facts and in the circumstances of the case as well as the legal position as enunciated by the Hon"ble Supreme Court of India referred to supra, this Court finds no valid ground to show indulgence in the selection process of the opposite party No.2 in selecting the candidates who attended the walk-in-interview in response to the Advertisement dated 28.02.2023 (Annexure-3). As consequence thereto, the writ petition is liable to be dismissed, being devoid of merit and this Court does so.

12.1. Accordingly, the writ petition stands dismissed, but in the circumstances, there shall be no order as to costs.

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2024 (III) ILR-CUT-230

SANJAY KUMAR MISHRA, J.

W.P.(C) NO.18217 OF 2024

BINAYA KUMAR NAIK ……Petitioner

V.

SANJAY KUMAR NAIK & ANR. ……Opp.Parties

ARBITRATION AND CONCILIATION ACT, 1996 ─ Section 9 r/w Sections 6, 10 (3) and 15 of Commercial Courts Act, 2015 ─ Whether the District Judge was justified while transfering the application filed U/s. 9 of the 1996 Act to Commercial Court in absence of any valuation? ─ Held, Yes ─ The Suit and Applications, which require to give a declaration regarding the valuation of Suit/Application, which will be further subjected to valuation, if so required, to be determined in terms of Section 12 of the CC Act, 2015, will be the decisive factor to approach the fora under the 2015 Act. (Paras 18 -19)

Case Laws Relied on and Referred to :-

1. 2022 Live Law (SC) 860 : Jaycee Housing Pvt. Ltd. & Ors. Vrs. Registrar (General), Orissa High Court, Cuttack & Ors.
2. 2021 SCC OnLine MP 457 : Yashwardhan Raghuwanshi Vs. District & Sessions Judge & Anr.
3. MANU/MH/2578/2020 : Gaurang Manguesh Suctancar Vs. Sonia Gaurang Suctancar.
4. 2022(III)ILR-CUT-992 : M.G.Mohanty & Ors. Vs. State of Odisha & Ors.

For Petitioner : Mr. B.C. Panda,
For Opp.Parties : Mr. S. Dash (O.P.No.1)
Mr. S.K. Mohanty (O.P.No.2)

JUDGMENT Date of Hearing : 08.08.2024 : Date of Judgment : 12.08.2024

S.K. MISHRA, J.

The Writ Petition has been preferred challenging the order dated 18.07.2024 in ARBP No. 02 of 2024 passed by the District Judge, Cuttack, vide which it was ordered that the said Court lacks jurisdiction over the subject to entertain the application filed under Section 9 of the Arbitration and Conciliation Act, 1996, shortly hereinafter, 'the Act, 1996' and ordered to transfer the matter to the Commercial Court, Cuttack.

2. The factual matrix, which led to filing of the present Writ Petition, is that on 17.05.2022, the Petitioner and the Opposite Party Nos.1 & 2 entered into a Partnership Agreement for smooth running of the movie business inherited from their father in the name and style as M/s. Brajaraj Movies. The said partnership agreement was reduced to writing in shape of Deed of Agreement and subsequently registered with the I.G.R., Odisha, Cuttack on 31.05.2022, vide registration No. 720202200555. The Opposite Party No.1, instead of extending his cooperation for smooth running of the business of the firm, allegedly violated the terms of the said Deed of Agreement and committed breach of trust, as has been detailed in the Writ Petition. When the Petitioner tried to contact the Opposite Party No.1 to ascertain the fact and resolve the issue amicably, the Opposite Party No.1 did not come forward to resolve the said dispute. Hence, the Petitioner and the Opposite Party No.2 were constrained to lodge an F.I.R. against the Opposite Party No.1 in Purighat P.S. on 05.02.2024. They also issued a legal notice on 07.02.2024 for appointment of an Arbitrator in terms of Clause-15 of the Deed of Agreement dated 17.05.2022, which was received by the Opposite Party No.1 on 08.01.2024. The Petitioner and the Opposite Party No.2 thereby requested to extend consent within seven days from the date of receipt of the said notice for appointment of an Arbitrator to arbitrate and resolve the said dispute. However, the Opposite Party No.1, after receipt of the said legal notice dated 07.02.2024 for appointment of an Arbitrator, gave a reply vide letter dated 22.02.2024 expressing his unwillingness for giving his consent for appointment of the Arbitrator to resolve the said dispute. Finding no other way out, the Petitioner preferred an application under Section 11(6) of the Act, 1996 before this Court praying for appointment of an Arbitrator in terms of Clause 15 of the Deed of Agreement dated 17.05.2022, which has been registered as ARBP No.09 of 2024 and the same is still pending for consideration before this Court. As the Opposite Party No.1 has failed to perform his duties in contravention of terms and conditions of Deed of Agreement, the Petitioner, pending consideration of his application for appointment of an Arbitrator by this Court, was being constraint to approach the District Judge, Cuttack by filing an application under Section 9 of the Act, 1996 for grant of an order of interim injunction against the Opposite Party

No.1, thereby restraining the Opposite Party No.1 or his agents from telecasting the movies and songs of M/s. Brajaraj Movies in any form through television media, satellite broadcasting, F.M. channels, mobile operator, cinema halls, DVD & You Tube Channels and to restrain him from proceeding with the production of the Movie "I Love You-2" and also using the title and logo of M/s. Brajaraj Movies in any manner till the dispute is resolved through arbitration.

3. The said petition, registered as ARBP No.02 of 2024, was admitted and notice was issued to the Opposite Parties. Being noticed, the Opposite Party No.1 duly appeared and filed objection/show cause on 27.06.2024. On the very day, the District Judge, Cuttack was pleased to pass an interim order restraining the Opposite Party No.1 from proceeding with the release of the film "I Love You-2" and using the logo and banner of M/s. Brajaraj Movies till the next date and the matter stood adjourned to 11.07.2024. On the said date, the Petitioner filed another application for grant of interim order as well as an application for continuance of the interim order dated 27.06.2024 whereas, the Opposite Party No.1 filed applications under Order 7, Rule11 of C.P.C. for rejection of the ARBP No.02 of 2024 and for vacating the stay order dated 27.06.2024. However, the District Judge, Cuttack was pleased to extend the interim order and posted the matter to 18.07.2024. On the said date, the Petitioner filed his Reply in response to the application filed by the Opposite Party No.1 under Order 7 Rule, 11 of C.P.C. so also to the application for vacation of stay. However, the District Judge, Cuttack, though extended the interim order till the next date, but on a wrong noting and misconstruing the provisions enshrined under the Act, 1996 as well as the Commercial Courts Act, 2015, shortly hereinafter, 'CC Act, 2015' and relying on the Judgment of the Supreme Court in ***Jaycee Housing Pvt. Ltd. & others Vrs. Registrar (General), Orissa High Court, Cuttack & others***, reported in 2022 Live Law (SC) 860, transferred the case to the Court of the Senior Civil Judge (Commercial Court), Cuttack on the ground of lack of jurisdiction. While passing the said order, the District Judge, Cuttack also directed to dispose of the said matter on or before 23.07.2024 on merit in accordance with law, with an observation not to extend the interim order in a causal manner. Hence this Writ Petition.

4. The said order passed by the District Judge, Cuttack dated 18.07.2024 passed in ARBP No.02 of 2024 has been challenged on the following grounds:

> (i) The same is contrary to the provisions of law enshrined under the Act, 1996 as well as the CC Act, 2015.
>
> (ii) The Court below completely misconstrued the decision rendered by the Supreme Court in **Jaycee Housing Pvt. Ltd.** (supra).
>
> (iii) The Court below misconstrued the facts and circumstances of the Petitioner's case and wrongly rendered a finding that the case involved is pertaining to violation of intellectual property right and loss and the valuation of the same appears to be more than five lakhs, forgetting the fact that the Petitioner has filed the application under Section 9 of the Act, 1996 for grant of interim relief till disposal of the dispute through arbitration in which there is no specified value, as envisaged under section 3 of the Commercial Courts Act, 2015.

(iv) The order passed by the District Judge, Cuttack is also contrary to Section 6 of the CC Act, 2015 which mandates that the CC Act shall have jurisdiction to try all suits and applications relating to a commercial dispute of a specified value, though, in the instant case, there is no specified value as on the date.

(v) The impugned order is also in contravention to the provisions enshrined under Sections 10, 12 & 15 of the CC Act, 2015 and section 2(1)(e) of the Act, 1996.

(vi) Since the dispute has no specified value, as required under the provisions of the CC Act, 2015, the application under Section 9 of the Act, 1996 cannot come under the definition of Section 2(b),(c), vii, xv and xvii of the CC Act, 2015, as referred to in the impugned order, and the said order suffers from illegalities and infirmities and is liable to be quashed.

5. Reiterating the grounds agitated in the Writ Petition, Mr. Panda, learned Counsel for the Petitioner, drawing attention of this Court to the provisions enshrined under section 2 (1)(e) of the Act, 1996 so also under Section 6, 10 and 15 of the C.C Act, 2015 submitted that the District Judge, Cuttack, being the Principal Civil Court, is only competent to hear the application filed under section 9 of the Act, 1996. The section 9 application being in the nature of interlocutory application, having no valuation, the District Judge should not have transferred the said application to the Commercial Court, Cuttack, which lacks jurisdiction to try the said petition. In view of the provisions enshrined under section 6 read with section 15 of the CC Act, 2015, only suits and applications, including applications under the Act, 1996 relating to a commercial dispute of a specified value can only be tried by the Commercial Court. The specified value, as per the amended provisions under the CC Act, 2015, being Rs.3,00,000/- and admittedly the section 9 application filed by the Petitioner having no valuation and with a prayer for interim injunction, cannot be heard by the Commercial Court. Only the District Judge, Cuttack, being the Principal Civil Court, is competent to hear and decide the said application. Hence, the Impugned order dated 18.07.2024 passed in ARBP No.02 of 2024, being contrary to the legal provisions enshrined under the Act, 1996 so also the CC Act, 2015, deserves interference and be quashed and direction be given to the District Judge, Cuttack to hear the said application filed under section 9 of the Act, 1996 and dispose of the same on merit in the interest of justice.

6. To substantiate his submission, Mr. Panda, learned Counsel for the Petitioner, relying on the judgment of the Supreme Court in **Jaycee Housing Pvt. Ltd. (supra),** submitted that though the District Judge, Cuttack relied on the said judgment in the impugned order, but misconstrued the said decision of the Supreme Court. Mr. Panda submitted that, vide the said decision, it was never held by the Supreme Court that all the cases under sections 9, 14, and 24 of the Act, 1996 have to be filed and adjudicated by the Commercial Court irrespective of the valuation. Mr. Panda, relying on para-10 of the said judgment of the Supreme Court, submitted that it was also held vide the said judgment that as per section 15 of the CC Act, 2015, all suits and applications, including applications under the Act, 1996, relating to a commercial dispute of "specified value" shall have to be transferred to the Commercial Court.

7. Mr. Panda, learned Counsel, referring to para-15 of the order of the Madhya Pradesh High Court at Jabalpur, reported in 2021 SCC OnLine MP 457 (**Yashwardhan Raghuwanshi Vs. District & Sessions Judge and Another**) submitted that the Court of District Judge, being the Principal Civil Court of original jurisdiction, would be competent to decide the matters/disputes filed under the provisions of section 9 , 14, 34 and 36 of the Act, 1996 so also under the provisions of the CC Act, 2015, regardless of the value of claim and it can only distribute such work amongst any of the Additional District Judges under his supervision, but not to any Court of Civil Judge Class-I or Senior Civil Judge, or any Court of Small Causes.

8. In response to the argument advanced by Mr. Panda, learned Counsel for the Petitioner, Mr. Dash, learned Counsel for Opposite Party No.1, drawing attention of this Court to the definition of "Commercial Court", "commercial dispute" and "Specified Value", as defined under sections 2(1)(b), 2(1)(c) & 2(1)(i) respectively, so also section 3(3), 6 and 10(3) of the C.C. Act, 2015, submitted that in view of the definition of commercial dispute under the CC Act, 2015 read with section 6 and 10(3) of the CC Act, 2015, all applications and appeals, arising out of such arbitration under the provisions of the Act, 1996, that would ordinarily lie before any principal Civil Court of original jurisdiction in a district (not being High Court), has to be filed in and heard and disposed of by the Commercial Court exercising territorial jurisdiction over such arbitration, where such Commercial Court has been constituted. Since ARBP No.02 of 2024 has been preferred under section 9 of the Act, 1996, instead of filing such an application before the Commercial Court, Cuttack, the Petitioner wrongly filed such an application before the District Judge, Cuttack. Hence, the Opposite Party No.1, in addition to filing an application for vacation of stay, also filed an application under Order-7, Rule 11 of C.P.C. for rejection of the said petition on the ground of lack of jurisdiction of the District Judge, Cuttack so also on some other grounds. However, the District Judge, Cuttack, instead of hearing such application first, ordered for disposing of all the applications together with section 9 application. However, the District Judge ultimately thought it prudent to transfer the said proceeding to the Commercial Court, in terms of the legal provisions under the CC Act, 2015, referring to the Judgment of the Supreme Court in **Jaycee Housing Pvt. Ltd.** (supra).

9. Mr. Dash, learned Counsel for the Opposite Party No.1, drawing attention of this Court to the legal provisions under Section 10(3) of the CC Act, 2015, submitted that any application under the Act, 1996, pertaining to a commercial dispute, has to be moved before the Commercial Court after formation of the Commercial Court and not before the Principal Civil Court of original jurisdiction in a district and the District Judge, Cuttack should have returned the application filed under Section 9 of the Act, 1996 to the Petitioner. However, on being so pointed out by his client, the District Judge, Cuttack ordered for transfer of the said proceeding to the Commercial Court, Cuttack. There being no infirmity in the impugned order

and the same having been passed in terms of the legal provisions under the CC Act, 2015, the Writ Petition deserves to be dismissed.

10. From the pleadings made in the Writ Petition, grounds urged therein to challenge the impugned order so also submissions made at the Bar, the following points emerge to be answered in the present Writ Petition.

(i) In absence of any valuation, in an application filed under section 9 of the Act, 1996, whether the Commercial Court, constituted under sub-section (1) of section 3 of the CC Act, 2015, is competent to hear such application?

(ii) Whether the District Judge was justified to transfer the section 9 application, registered as ARBP No.02 of 2024, to the Court of Senior Civil Judge (Commercial Court), Cuttack?

11. Since both points are interrelated, the same are dealt with together for the sake of brevity and clarity. Before answering the points as detailed above, this Court deems it appropriate to reproduce below section 2(1)(e)(i) and 9 of the Act, 1996 and Section 2(1)(b),(c),(i), 3,6,10,12, 15 and 21 of the CC Act, 2015 for ready reference:

"Section 2(1)(e)(i) & 9 of the Arbitration Act, 1996:

2. Definitions-(1) In this Part, unless the context otherwise requires,-
(e) "Court" means –

(i) in the case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject matter of the arbitration if the same had been the subject matter of a suit, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes;

***9. Interim measures, etc., by Court**.—(1) A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court—*

(i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or
(ii) for an interim measure of protection in respect of any of the following matters, namely:—

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;
(b) securing the amount in dispute in the arbitration;
(c) the detention, preservation or inspection of any property or thing which is the subjectmatter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;
(d) nterim injunction or the appointment of a receiver;
(e) such other interim measure of protection as may appear to the Court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

(2) Where, before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection under sub-section (1), the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the Court may determine.

(3) Once the arbitral tribunal has been constituted, the Court shall not entertain an application under subsection (1), unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious.]

Sections 2(1)(b),(c),(i), 3, 6, 10, 15 & 21 of the Commercial Courts Act, 2015:

2. Definitions.—(1)

*(b) "**Commercial Court**" means the Commercial Court constituted under sub-section (1) of section 3;*

*(c) "**commercial dispute**" means a dispute arising out of—*

(i) ordinary transactions of merchants, bankers, financiers and traders such as those relating to mercantile documents, including enforcement and interpretation of such documents;

(ii) export or import of merchandise or services;

(iii) issues relating to admiralty and maritime law;

(iv) transactions relating to aircraft, aircraft engines, aircraft equipment and helicopters, including sales, leasing and financing of the same;

(v) carriage of goods;

(vi) construction and infrastructure contracts, including tenders;

*(vii) **agreements relating to immovable property used exclusively in trade or commerce;***

(viii) franchising agreements;

(ix) distribution and licensing agreements;

(x) management and consultancy agreements;

(xi) joint venture agreements;

(xii) shareholders agreements;

(xiii) subscription and investment agreements pertaining to the services industry including outsourcing services and financial services;

(xiv) mercantile agency and mercantile usage;

*(xv) **partnership agreements;***

(xvi) technology development agreements;

*(xvii) **intellectual property rights relating to registered and unregistered trademarks, copyright, patent, design, domain names, geographical indications and semiconductor integrated circuits;***

(xviii) agreements for sale of goods or provision of services;

(xix) exploitation of oil and gas reserves or other natural resources including electromagnetic spectrum;

(xx) insurance and re-insurance;

(xxi) contracts of agency relating to any of the above; and

(xxii) such other commercial disputes as may be notified by the Central Government

Explanation.—A commercial dispute shall not cease to be a commercial dispute merely because—

a) it also involves action for recovery of immovable property or for realisation of monies out of immovable property given as security or involves any other relief pertaining to immovable property;

(b) one of the contracting parties is the State or any of its agencies or instrumentalities, or a private body carrying out public functions;

(i) ***"Specified Value", in relation to a commercial dispute, shall mean the value of the subject-matter in respect of a suit as determined in accordance with section 12 1[which shall not be less than three lakh rupees] or such higher value, as may be notified by the Central Government.***

3. Constitution of Commercial Courts (1) *The State Government, may after consultation with the concerned High Court, by notification, constitute such number of Commercial Courts at District level, as it may deem necessary for the purpose of exercising the jurisdiction and powers conferred on those courts under this Act:*

Provided that with respect to the High Courts having ordinary original civil jurisdiction, the State Government may, after consultation with the concerned High Court, by notification, constitute Commercial Courts at the District Judge level

Provided further that with respect to a territory over which the High Courts have ordinary original civil jurisdiction, ***the State Government may, by notification, specify such pecuniary value which shall not be less than three lakh rupees and not more than the pecuniary jurisdiction exercisable by the District Courts****, as it may consider necessary.]*

(1A) Notwithstanding anything contained in this Act, the State Government may, after consultation with the concerned High Court, by notification, ***specify such pecuniary value which shall not be less than three lakh rupees or such higher value****, for whole or part of the State, as it may consider necessary.]*

2) The State Government shall, after consultation, with the concerned High Court specify, by notification, the local limits of the area to which the jurisdiction of a Commercial Court shall extend and may, from time to time, increase, reduce or alter such limits.

(3) The [State Government may], with the concurrence of the Chief Justice of the High Court appoint one or more persons having experience in dealing with commercial disputes to be the Judge or Judges, of a [Commercial Court either at the level of District Judge or a court below the level of a District Judge].

6. Jurisdiction of Commercial Court*.—The Commercial Court shall have jurisdiction to try all suits and applications relating to a commercial dispute of a Specified Value arising out of the entire territory of the State over which it has been vested territorial jurisdiction.*

Explanation.—For the purposes of this section, a commercial dispute shall be considered to arise out of the entire territory of the State over which a Commercial Court has been vested jurisdiction, if the suit or application relating to such commercial dispute has been instituted as per the provisions of sections 16 to 20 of the Code of Civil Procedure, 1908 (5 of 1908).

10. Jurisdiction in respect of arbitration matters*.- Where the subject matter of an arbitration is a commercial dispute of a* ***specified value*** *and—*

(1) If such arbitration is an international commercial arbitration, all applications or appeals arising out of such arbitration under the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) that have been filed in a High Court, shall be heard and disposed of by the Commercial Division where such Commercial Division has been constituted in such High Court.

(2) If such arbitration is other than an international commercial arbitration, all applications or appeals arising out of such arbitration under the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) that have been filed on the original

side of the High Court, shall be heard and disposed of by the Commercial Division where such Commercial Division has been constituted in such High Court.

(3) ***If such arbitration is other than an international commercial arbitration, all applications or appeals arising out of such arbitration under the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) that would ordinarily lie before any principal civil court of original jurisdiction in a district (not being a High Court) shall be filed in, and heard and disposed of by the Commercial Court exercising territorial jurisdiction over such arbitration where such Commercial Court has been constituted.***

12. Determination of Specified Value.—(1) *The* ***Specified Value*** *of the subject-matter of the commercial dispute in a suit, appeal or application shall be determined in the following manner:—*

(a) where the relief sought in a suit or application is for recovery of money, themoney sought to be recovered in the suit or application inclusive of interest, if any, computed up to the date of filing of the suit or application, as the case may be, shall be taken into account for determining such Specified Value;

(b) where the relief sought in a suit, appeal or application relates to movable property or to a right therein, the market value of the movable property as on the date of filing of the suit, appeal or application, as the case may be, shall be taken into account for determining such Specified Value;

(c) where the relief sought in a suit, appeal or application relates to immovable property or to a right therein, the market value of the immovable property, as on the date of filing of the suit, appeal or application, as the case may be, shall be taken into account for determining Specified Value; 1[and]

(d) ***where the relief sought in a suit, appeal or application relates to any other intangible right, the market value of the said rights as estimated by the plaintiff shall be taken into account for determining Specified Value;***

(2) The aggregate value of the claim and counterclaim, if any as set out in the statement of claim and the counterclaim, if any, in an arbitration of a commercial dispute shall be the basis for determining whether such arbitration is subject to the jurisdiction of a Commercial Division, Commercial Appellate Division or Commercial Court, as the case may be.

(3) No appeal or civil revision application under section 115 of the Code of Civil Procedure, 1908 (5 of 1908), as the case may be, shall lie from an order of a Commercial Division or Commercial Court finding that it has jurisdiction to hear a commercial dispute under this Act.

15. Transfer of Pending Cases— (1) *All suits and applications, including applications under the Arbitration and Conciliation Act, 1996 (26 of 1996), relating to a commercial dispute of a* ***Specified Value*** *pending in a High Court where a Commercial Division has been constituted, shall be transferred to the Commercial Division.*

(2) All suits and applications, including applications under the Arbitration and Conciliation Act, 1996 (26 of 1996), ***relating to a commercial dispute of a specified value*** *pending in any civil court in any district or area in respect of which a Commercial Court has been constituted, shall be transferred to such Commercial Court:*

Provided that no suit or application where the final judgment has been reserved by the court prior to the constitution of the Commercial Division or the Commercial Court shall be transferred either under subsection (1) or subsection (2).

(3) ***Where any suit or application, including an application under the Arbitration and Conciliation Act, 1996 (26 of 1996), relating to a commercial dispute of specified value shall stand transferred to the Commercial Division or Commercial Court under subsection (1) or subsection (2), the provisions of this Act shall apply to those*** *procedures that were not complete at the time of transfer.*

4) The Commercial Division or Commercial Court, as the case may be, may hold case management hearings in respect of such transferred suit or application in order to prescribe new timelines or issue such further directions as may be necessary for a speedy and efficacious disposal of such suit or application in accordance [with Order XVA] of the Code of Civil Procedure, 1908 (5 of 1908):

Provided that the proviso to sub rule (1) of Rule 1 of Order V of the Code of Civil Procedure, 1908 (5 of 1908) shall not apply to such transferred suit or application and the court may, in its discretion, prescribe a new time period within which the written statement shall be filed.

(5) In the event that such suit or application is not transferred in the manner specified in subsection (1), subsection (2) or subsection (3), the Commercial Appellate Division of the High Court may, on the application of any of the parties to the suit, withdraw such suit or application from the court before which it is pending and transfer the same for trial or disposal to the Commercial Division or Commercial Court, as the case may be, having territorial jurisdiction over such suit, and such order of transfer shall be final and binding.

21. Act to have overriding effect *—Save as otherwise provided, the provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law for the time being in force other than this Act."* ***(Emphasis supplied)***

12. Though "Court" is defined under Section 2(1)(e) of the Act, 1996 to be the principal Civil Court of original jurisdiction in the district, but in the provisions enshrined under Section 10(3) of the CC Act, 2015, it has been clearly enumerated that, where the subject matter of an arbitration is a "commercial dispute" of "Specified Value" and such arbitration is other than the international commercial arbitration, all applications or appeals arising out of such arbitration under the provisions of the Act, 1996, that would ordinarily lie before any principal Civil Court of original jurisdiction in a district (not being a High Court) shall be filed in, and heard and disposed of by the Commercial Court exercising territorial jurisdiction over such arbitration where such Commercial Court has been constituted.

13. The word "commercial dispute" has been defined under section 2(1)(c) of the C.C. Act, 2015, which clearly includes a dispute arising out of partnership agreements in terms of sub-clause (xv) under clause (c) of section 2(1) of the C.C Act, 2015. Similarly, the word "Specified Value" used in various provisions of the C.C Act, 2015 has been defined under section 2(1)(i). Specified Value, in relation to a commercial dispute, shall mean the value of the subject matter in respect of a "**suit**", which is to be determined in accordance with section 12 and the same shall not be less than three lakh rupees or such higher value, as may be notified by the Central Government.

14. So far as the Order of Madhya Pradesh High Court in **Yashwardhan Raghuwanshi** (supra) cited by the learned Counsel for the Petitioner, it was held as follows:

> ***"15.*** *In view of the above discussions, the present petition deserves to succeed. The Entry No.45 of the impugned order dated 20.10.2020 is set aside. It is hereby declared that the Court of District Judge as the Principal Civil Court of original jurisdiction would be competent to decide the matters/disputes filed under the provisions of Sections 9, 14, 34 & 36 of the Arbitration Act and also under the provisions of the Commercial Courts Act regardless of the value of claim. However, the District Judge by virtue of Section 7 read with Section 15 of the Civil Courts Act would be entitled to distribute such work amongst any of the Additional District Judges under his supervision, but not to any Court of Civil Judge Class-I or Senior Civil Judge, or any Court of Small Causes."*

15. However, the High Court of Bombay in **Gaurang Manguesh Suctancar Vs. Sonia Gaurang Suctancar**, reported in MANU/MH/2578/2020, dealing with an issue as to whether the Commercial Court under the CC Act, 2015 was justified to refuse to entertain an application under Section 9 of the Act, 1996 and return it to the Petitioner/Applicant to be presented before the appropriate Court, held as follows:

> ***"Issue:***
>
> ***2. For adjudicating an application under Section 9 of the Arbitration Act, which is the forum: Is it the court as defined under Section 2 (1) (e) of the Arbitration Act, read with Section 5 of the Goa Civil Courts Act 1965 or is it the Commercial Court under Section 3 (1) of the Amended Commercial Courts Act 2015?***
>
> ***92.*** *Evidently, the Commercial Courts Act is a later enactment, but it does not work at cross purpose with the Arbitration Act. In fact, both aim at speedy adjudication. The Commercial Courts Act covers all the commercial disputes, whereas the Arbitration Act covers only those disputes that involve arbitration. As Kandla Export Corporation has held, both the enactments call for a harmonious interpretation. If at all there is any conflict, as to the substantive provisions, the Arbitration Act prevails; but it has left the procedural niceties to the Commercial Courts Act. Section 10 (3) of the Commercial Courts act and the Remote Conditional:*
>
> ***93.*** *Let us revisit Section 10 (3) of the Commercial Courts Act. "If it is a domestic arbitration, all applications or appeals arising out of arbitration "that would ordinarily lie before any principal civil court of original jurisdiction" in a district (not being a High Court) shall be filed in, and heard and disposed of by the Commercial Court".*
>
> *94. Sub-section (3) begins with a conditional "if. Then, it delineates on how "all applications or appeals" arising out of arbitration should be adjudicated. They "would ordinarily" lie before the "principal civil court of original jurisdiction." In that sentence, "ordinarily" is an adverbial emphasiser; let us keep it aside. Now the sentence is "they would lie before the principal civil court of original jurisdiction." It is, grammatically speaking, the 'second conditional' employing the subjunctive "would". If refers to an unlikely or improbable future event or arrangement. What could have been an ordinary course of remedial event now stands altered. This uncertainty or altered course under sub-section (3) is because of a statutory development-the advent of the Commercial Courts Act. So, to repeat, what could have been the subject of adjudication before the principal civil court of original jurisdiction, now "shall be filed in, and heard and disposed of by the Commercial Court exercising territorial jurisdiction over such arbitration where such Commercial Court has been constituted."*

95. *Because, now, the Commercial Courts have been established, "all applications" under the Arbitration Act should lock, stock, and barrel go before the Commercial Courts. So the concept of" the principal civil court of original jurisdiction" no longer applies. Instead, what matters is the "Commercial Court". That accepted, which is the Commercial Court-the Senior Civil Judge's Court or the District Court? In Goa, the District Court is no longer the primary Commercial Court; it is, in fact, a Commercial Appellate Court.*

96. *In this context, I may once again quote G.P. Singh, G.P. Singh (n 13) 91, who says that "the words of a statute are first understood in their natural, ordinary or popular sense and phrases and sentences are construed according to their grammatical meaning, unless that leads to some absurdity or unless there is something in the context, or in the object of the statute to suggest the contrary." Here, if sub-section (3) is not read in its ordinary grammatical sense, it will lead to absurdity.*

The Decisions:

97. *The respondent wants me to treat co-equal Bench decisions in D.M. Corporation and Jaiswal Ashoka Infrastructure as per incuriam. They have been rendered, as she points out, in ignorance of Kandla Export Corporation. As the Supreme Court has held in B. Satyanarayana Rao, the rule of per incuriam can be applied "where a Court omits to consider a binding precedent of the same court or the superior court rendered on the same issue or where a court omits to consider any statute while deciding that issue."*

98. *In* ***D.M. Corporation****, a learned Single Judge (Dr. Shalini Phansalkar-Joshi, J.) has, on facts, noted that the dispute concerns an arbitration agreement, the subject-matter of which is above Rs. 1 crore; it is a dispute of commercial nature.* ***So even if the relief claimed is mere injunction, because of Section 10(3) of the Commercial Courts Act, the Principal District Judge has correctly transferred the arbitration application to the Commercial Court. The impugned order passed by the District Court being just, legal, and correct; it warranted no interference.***

99*. In Jaiswal Ashoka Infrastructure, another learned Single Judge (A.S. Chandurkar, J) has observed that because of Section 15(2) of the Commercial Courts Act, suits and applications in relation to a commercial dispute pending in any civil court must be transferred to the Commercial Court. That is, the civil court "ceases to have jurisdiction to entertain an application under the provisions of the [Commercial Courts] Act in relation to a commercial dispute of a specified value." Once the court lacks inherent jurisdiction, express or implied consent, failure to raise jurisdictional object, or even acquiescence cannot clothe the court with jurisdiction.*

100. I have already elaborately discussed Kandla Export Corporation, and I see no precedential transgression in D.M. Corporation or Jaiswal Ashoka Infrastructure.

Conclusion:

(1) Contrary to the respondent's contentions, the Notification, dt. 05.05.2020, issued by the Government of Goa, is in tune with the legislative mandate under Sections 3 and 3A of the Commercial Courts Act, 2015.

(2) In the State of Goa, the designated District Courts are the Appellate Commercial Courts, and the Senior Civil Judges' Courts are the Commercial Courts.

(3) ***Even adjudication of an application under Section 9 of the Arbitration Act must be before the Commercial Court, and that Commercial Court need not be the principal civil court of original jurisdiction.***

(4) ***There is no conflict between the Arbitration and Conciliation Act 1996 and the Commercial Courts Act 2015. If at all we maintain the distinction, the former Act***

deals with the substantive rights of the parties to the arbitration, and the latter Act with the procedural essentials, the choice of the forum being a part of it. (5) As Kandla Export Corporation has held, regarding any commercial arbitral dispute, the Arbitration and Conciliation Act 1996 determines, among other things, the appellate remedies and the Commercial Courts Act 2015 provides for the forum and adjudicatory procedure.

(5) As Kandla Export Corporation has held, regarding any commercial arbitral dispute, the Arbitration and Conciliation Act 1996 determines, among other things, the appellate remedies and the Commercial Courts Act 2015 provides for the forum and adjudicatory procedure.

Result:

As a result, I hold that the Ad-hoc Senior Civil Judge, "A" Court, Panaji, has failed to exercise the jurisdiction vested in it as the Commercial Court*. Its returning the petitioner's application to be presented "before proper court" is erroneous and unsustainable, for it is, by itself, the proper court. The impugned Order, dt. 08.07.2020, is set aside.*

So the Commercial Court at North Goa, Panaji, will have the CMA Stamp No. 243/2020 restored to file and adjudicated on merits, after giving the regular number."

(Emphasis supplied)

16. The Division Bench of this Court in **M.G. Mohanty and others Vs. State of Odisha and others**, reported in 2022 (III) ILR-CUT-992, while deciding the issue regarding constitutional validity of section 10(3) of the CC Act, 2015 in a batch of cases, took note of both the said Orders of Madhya Pradesh High Court so also Bombay High Court. The Division Bench disagreed with the reasoning of the High Court of Madhya Pradesh in **Yashwardhan Raghuwanshi** (supra), whereas, respectfully agreed with the views of Bombay High Court in **Gaurang Manguesh Suctancar** (supra) and observed as follows:

"39. *In* ***Yashwardhan Raghuwanshi v. District & Sessions Judge*** *(supra), the Madhya Pradesh High Court relied on the decision of the Supreme Court of India in State of Maharashtra, through Executive Engineer v. Atlanta Limited (2014) 11 SCC 619 to hold that the Court of superior most jurisdiction in a district is the Court of the District Judge. It concluded that:*

"14……Segregation of an arbitration matters on the basis of a pecuniary limit is not what the law provides for. All the arbitration matters, irrespective of the value of claim, are required to be adjudicated by Principal Civil Court of original jurisdiction. Therefore, it is clear that in respect of commercial disputes involving an arbitration dispute only the Commercial Court of the status of District Judge or Additional District Judge would be the competent court to entertain the matters under Sections 9, 14, 34 & 36 of the Arbitration Act."

42. In any event, this Court is unable to agree with the reasoning of the High Court of Madhya Pradesh in Yashwardhan Raghuwanshi *(supra). In particular, the Court would like to refer to the Parliamentary intent in enacting the CC Act in 2015 much after the A&C Act of 2016 and the SOR not only of the Bill introduced in 2015 but also the SOR of the Bill introduced in 2018, amending the said statute. The debates in the Parliament in this regard are instructive. In defending its decision to expand the scope of commercial disputes beyond those which were of high value, three aspects that were mentioned on behalf of the Government defending the Bill in the Parliament, which read as under:*

"Now, what really has transpired in December 2017? As has already been mentioned by the hon. Minister, in December, 2017, the Government had established a total of 247 commercial courts across the country. But, the nonexhausted list of 22 disputes, termed as commercial disputes, has also been brought in. To increase the efficiency of the system, there are still many enactments and many things which we need to correct and this is just one part of the correction to improve the ease of doing business. By bringing the jurisdiction to three lakhs, we will actually be bringing judicial accessibility to a wider audience and to a larger number of people. By making it available to a larger number of people, we will be resolving a larger number of disputes. It is in this context that the jurisdiction has been reduced after studying the data in detail.

This particular amendment has been brought in with the specific value which was determined under Section 2(1)(i), where the minimum pecuniary jurisdiction is mentioned, which was one crore earlier before the Ordinance, now it has been brought to three lakhs. This jurisdiction will initiate more such disputes to have a faster disposal.

As I have mentioned earlier, under the Charter, there are Chartered High Courts and non-Chartered High Courts. So, certain original jurisdictions are vested with certain High Courts and not with every High Court. This was one impediment in establishing commercial divisions. So, there was a bar of some sort. To do away with the bar, this particular enactment has been brought in and this is another major change which has been brought in through this particular Bill

The third aspect of the commercial appellate court is that normally at the District Level, either a District Judge or a Judge below the level of District Judge, will be notified as the Commercial Court Judge. Then the appeal need not go to the High Court. The appeal can go to the District Judge. That is also a part of this particular enactment."

43. *The legislature appears to have left it open to the High Court and the State government either to appoint a Civil Judge (Senior Division) or an Additional District Judge as the Commercial Court of first instance to expedite the adjudication of commercial disputes.* ***It is interesting to note that there are several States that have constituted Commercial Courts both at the District Judge level as well as below the District Judge level****. In Gujarat, the Courts of the Additional District Judges in Bhuj, Anjar, Gandhidham and Bhachau have been constituted for hearing arbitration matters whereas the Courts of the Principal Senior Civil Judge in these places are for hearing other commercial disputes. In Karnataka, in some districts, it is the Principal D&SJ and in others the AD&SJ. In Bihar, depending on the pecuniary value, it could be the District Judge or the Sub-Judge. In Uttarakhand, it is the Additional District Judge Commercial Court, Dehradun.* ***The intent clearly was to expand the power and to bring in more Courts under the rubric of 'Commercial Courts'. Considering that the specified value was being lowered, it was but natural to allow Courts below the rank of the District Judge to be designated as such.***

44. Section 10(3) of the CC Act specifically deals with arbitrations, 'other than international commercial arbitrations'. The jurisdiction in respect of such disputes would now be based with the Commercial Courts, although earlier it was with a principal Civil Court, which would ordinarily exercise jurisdiction under Section 2(1)(e) of the A&C Act. The orders passed by the D&SJ on 7th July 2021, transferring the arbitration petitions to the Court of the Senior Civil Judge Commercial Court, was only by way of implementation of these provisions.

46. *There might be an anomaly inasmuch as arbitral disputes of a commercial value of less than Rs.3 Lacs may have to be dealt with directly by the D&SJ in terms of the definition under Section 2(1)(e) of the A&C Act and appeal against which would lie to*

the commercial appellate division in the High Court. But none of the petitions before this Court has that fact situation. The questions is, therefore, purely academic. Nevertheless, it will be open to the State Government to revise its notification in view of the above anomaly.

48. *At this stage, it must be pointed out that this Court's attention has been drawn to the Judgment of the Bombay High Court in* ***Gaurang Mangesh Suctancar v. Sonia Gaurang Suctancar*** *(Supra). The Bombay High Court, on analyzing these very provisions, came to the conclusion that it is the CC Act provisions that would prevail.* ***The Court is in respectful concurrence with the said view****. As rightly noted by the Bombay High Court both Sections 42 of the A&C Act and Section 21 of the CC Act appeared to be similar provisions inasmuch as they begin with a non-obstante clause, precluding the applicability of any other law for the time being in force. The following observations of the Bombay High Court in this regards are relevant, which reads as under:*

"60. *G.P. Singh, in his cerebral commentary, Principles of Statutory Interpretation (G.P. Singh, Interpretation of Statutes, (reprint, 14 edn., Lexis Nexis, 2018) 403), has explained that "the expression 'notwithstanding anything in any other law' occurring in a section of an Act cannot be construed to take away the effect of any provision of the Act in which that section appears. In other words, 'any other law' will refer to any law other than the Act in which that section occurs." In contrast, the expression 'notwithstanding anything contained in this Act' may be construed to take away the effect of any provision of the Act in which the section occurs but it cannot take away the effect of any other law.*

61. *Indeed, a special enactment or Rule cannot be held to be overridden by a later general enactment or simply because the latter opens up with a non obstante clause. There should be a clear inconsistency between the two before giving an overriding effect to the non obstante clause.*

62. *The learned author G.P. Singh has also remarked that sometimes one finds two or more enactments operating in the same field and each containing a non obstante clause. Each clause, in fact, declares that its provisions will have effect 'notwithstanding anything inconsistent therewith contained in any other law for the time being in force'. The conflict in such cases is resolved on consideration of purpose and policy underlying the enactments and the language used in them. Another test applied is that the later enactment normally prevails over the earlier one. It is also relevant to consider as to whether either of the two enactments can be described a special one; in that case the special one may prevail over the more general one notwithstanding that the general one is later in time.*

63. *In fact, the Arbitration Act and the Commercial Courts Act, both central enactments, have employed this 'nonobstante clause' at more than one place. Precisely for this reason, Kandla Export Corporation has harmoniously resolved this imbroglio: that the Arbitration Act prevails when it concerns the parties' substantive rights, and the Commercial Courts Act does when it concerns the parties' procedural rights."*

49. *The Bombay High Court then undertook an analysis of the un-amended provisions of the CC Act and noted that there is a two-tier Court at the district level. One is the Commercial Court of original jurisdiction and another at the District Judge level of the Commercial Appellate Court. The approach in* ***Kandla Exports*** *(supra) about the CC Act being procedural in nature and therefore having retrospective effect, found support in the decision in* ***New India Assurance Company Limited v. Shanti Misra (1975) 2 SCC 840,*** *where a three-Judge Bench held that once there was a change not in the*

substantive law but in the procedural law, it would operate retrospectively and 'the person has to go to the new forum even if his cause of action or right of action accrued prior to the change of forum'. The relevant passage of the decision of the Bombay High Court in ***Gaurang Mangesh Suctancar v. Sonia Gaurang Suctancar****, reads as under:*

"92. Evidently, the Commercial Courts Act is a later enactment, but it does not work at cross purpose with the Arbitration Act. In fact, both aim at speedy adjudication. The Commercial Courts Act covers all the commercial disputes, whereas the Arbitration Act covers only those disputes that involve arbitration. As Kandla Export Corporation has held, both the enactments call for a harmonious interpretation. If at all there is any conflict, as to the substantive provisions, the Arbitration Act prevails; but it has left the procedural niceties to the Commercial Courts Act."

50. *The Court finds merit in the contention on behalf of the Opposite Parties that the A&C Act must yield to the CC Act and not vice versa given that the objective of both enactments is the speedy disposal of the cases and the CC Act was a later enactment. There is no apparent conflict between the A&C Act and the CC Act for being resolved. The objective of both is the speedy resolution of the disputes. As far as challenge to the vires of Section 10 of the CC Act is concerned, indeed no ground has been made out before this Court to show how Section 10 of the CC Act is ultra vires the legislative powers of the Parliament or how it is 'manifestly arbitrary'.* ***The identification of commercial disputes as distinct from ordinary civil disputes is based on an intelligible differentia and subjecting them to a special expedited procedure can neither be considered to be arbitrary nor ultra vires the A&C Act. That prayer, therefore, has to be rejected.***

51*. Incidentally, there is no challenge to either Section 15 or 21 of the CC Act.* ***If indeed commercial cases involving arbitral disputes have necessarily to be transferred under Section 10(3) read with Section 15(2) of the CC Act, then as a natural corollary the Commercial Court alone will have to decide those disputes and not of the Court in terms of the A&C Act****. In passing the impugned orders transferring the cases, the D&SJ has not committed any illegality nor has the Senior Civil Judge, Commercial Court, Bhubaneswar committed any illegality in accepting the cases on transfer and proceeding with them in accordance with law."* ***(Emphasis supplied)***

17. The Judgment of this court in **M.G. Mohanty** (supra) being challenged before the Supreme Court, the same was upheld in **Jaycee Housing Pvt. Ltd.** (supra). Paragraphs 6, 10 & 11 of the said judgment, being relevant, are reproduced below:

"6. The question of law arising for consideration in the present appeal is, whether in exercise of powers under Section 3 of the Commercial Courts Act, 2015, the State Government can confer jurisdiction to hear applications under Sections 9, 14 and 34 of the Arbitration and Conciliation Act, 1996, upon Commercial Courts which are subordinate to the rank of the Principal Civil Judge in the District, contrary to the provisions of Section 2(1)(e) of the Arbitration Act?

10. *Thus, the Objects and Reasons of Commercial Courts Act, 2015 is to provide for speedy disposal of the commercial disputes which includes the arbitration proceedings. To achieve the said Objects, the legislature in its wisdom has specifically conferred the jurisdiction in respect of arbitration matters as per Section 10 of the Act, 2015.* ***At this stage, it is required to be noted that the Act, 2015 is the Act later in time and therefore when the Act, 2015 has been enacted, more particularly Sections 3 & 10, there was already a provision contained in Section 2(1)(e) of the Act, 1996. As per settled position of law, it is to be presumed that while enacting the subsequent law, the legislature is conscious of the***

provisions of the Act prior in time and therefore the later Act shall prevail. *It is also required to be noted that even as per Section 15 of the Act, 2015, all suits and applications including applications under the Act, 1996, relating to a commercial dispute of specified value shall have to be transferred to the Commercial Court.* ***Even as per Section 21 of the Act, 2015, Act, 2015 shall have overriding effect. It provides that save as otherwise provided, the provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force.***

11. *Therefore, considering the afore stated provisions of the Act, 2015 and the Objects and Reasons for which the Act, 2015 has been enacted and the Commercial Courts, Commercial Division and Commercial Appellate Division in the High Courts are established for speedy disposal of the commercial disputes including the arbitration disputes,* ***Sections 3 & 10 of the Act, 2015 shall prevail and all applications or appeals arising out of arbitration under the provisions of Act, 1996, other than international commercial arbitration, shall be filed in and heard and disposed of by the Commercial Courts, exercising the territorial jurisdiction over such arbitration where such commercial courts have been constituted.*** *If the submission on behalf of the appellants that all applications/appeals arising out of arbitration under the provisions of Act, 1996, other than the international commercial arbitration, shall lie before the principal civil Court of a district, in that case, not only the Objects and Reasons of enactment of Act, 2015 and establishment of commercial courts shall be frustrated, even Sections 3, 10 & 15 shall become otiose and nugatory.* ***If the submission on behalf of the appellants is accepted, in that case, though with respect to other commercial disputes, the applications or appeals shall lie before the commercial courts established and constituted under Section 3 of Act, 2015, with respect to arbitration proceedings, the applications or appeals shall lie before the principal civil Court of a district. There cannot be two fora with respect to different commercial disputes.***

Under the circumstances, notification issued by the State of Odisha issued in consultation with the High Court of Orissa to confer jurisdiction upon the court of learned Civil Judge (Senior Division) designated as Commercial Court to decide the applications or appeals arising out of arbitration under the provisions of Act, 1996 cannot be said to be illegal and bad in law. On the contrary, the same can be said to be absolutely in consonance with Sections 3 & 10 of Act, 2015. We are in complete agreement with the view taken by the High Court holding so." ***(Emphasis supplied)***

18. Law is well settled that the Court under section 9 of the Act, 1996 is only to formulate interim measure so as to protect the right under adjudication before the Arbitral Tribunal from being frustrated. In view of the provisions enshrined under section 10(3) read with the definition of "Commercial Dispute" and "Specified Value", as defined under section 2(1)(c) & (i) of the CC Act, 2015 respectively, in addition to the settled position of law, as detailed above, this Court is of the view that only Suits and Applications, which require to give a declaration regarding the valuation of Suit/Application, which will be further subjected to valuation, if so required, to be determined in terms of section 12 of the CC Act, 2015, will be the decisive factor to approach the fora under the CC Act, 2015. This Court is of further view that, in view of definition of "Specified Value" under section 2(1)(i) of the CC Act, 2015, the same is not applicable to a section 9 application for determination of the jurisdiction of a Commercial Court to consider such application and the Commercial Courts, where such Courts have been established in the state, are only competent to hear and decide the section 9 application filed under the Act, 1996.

19. This Court is of further view that section 15 of the CC Act, 2015 regarding transfer of suits and applications being only applicable to pending cases, the District Judge, Cuttack ought to have returned the section 9 application to the Petitioner for its presentation before the Court of the Senior Civil Judge (Commercial Court), Cuttack. However, during hearing of the said application, realizing the fact that the said Court lacks jurisdiction to hear the said application, after assessing the cost of such application to be more than rupees five lakhs, as is permissible under section 12 of the CC Act, 2015 (though it was not so required in a section 9 application), it was rightly ordered to transfer the matter to the Commercial Court.

20. In view of the detailed discussions made in the forgoing paragraphs, this Court is also of the view that the plea of the Petitioner regarding lack of jurisdiction of the Commercial Court to adjudicate an application under section 9 of the Act, 1996, in absence of any valuation, is misconceived. Both the points emerged, detailed above, are answered accordingly.

21. There being no infirmity in the impugned order passed in ARBP No.02 of 2024, the Writ Petition stands dismissed. No order as to cost.

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2024 (III) ILR-CUT-247

SANJAY KUMAR MISHRA, J.

W.P.(C) NO.15034 OF 2024

GULSAN BIBI & ORS. ….Petitioners

V.

SWAPAN KUMAR GHOS & ORS. ….Opp.Parties

CONSTITUTION OF INDIA, 1950 – Article 227 r/w Section 24 of Code of Civil Procedure and Rule 12 of Motor Vehicles Accident Tribunal Rules, 2019 – The petitioner prayed for a direction for analogous hearing of Motor Accident Claim cases pending before 1st MACT, Cuttack and 5th MACT, Khorda – Whether writ petition for transfer of proceeding under the M.V. Act was maintainable? – Held, Yes – For intra-district transfer of claim cases filed under the M.V. Act, party aggrieved has to move before the concerned District Judge and for inter-district transfer, the party aggrieved has to approach the Writ Court under Article 227 of the Constitution of India. (Para 20)

Case Laws Relied on and Referred to :-

1. Civil Appeal No.5220 of 2022 : Janabai widow of Dinkar Rao Gharpada and others Vs. M/s. ICICI Lombard Insurance Company Ltd.
2. SLP (Civil) No.7805 of 2022 : New India Assurance Co. Ltd. Vs. Anand Pal.
3. (2004) 13 SCC 564 : Kahlon Vs. K. Paramasivam.
4. (2015) 15 SCC 222 : Neha Arun Jugadar and another Vs. Kumari Palak Diwan Ji.
5. 1994 (1) T.A.C. 654 : Aurondhati Das and others Vs. New India Assurance Co. Ltd & Ors.

6. W.P.(C) No.19729 of 2022 : Raimani Tudu and others Vs. Satyabrata Mohanty & Ors.
7. 2018 SCC OnLine All 2545 : Shankar Lal Jaiswal Vs. Asha Devi and 10 others.
8. 1977 ACJ 283: MANU/OR/0241/1977 : Orissa Co-operative Insurance Company Vs. Subashini Pradhan & Ors.
9. 2000(I) OLR 494: 2000 (2) TAC 551 : Sarat Kumar Moharana Vs. M. Rajsekhar Reddy & Ors.

For Petitioners : Mr. B. Mohanty.
For Opp.Parties : Mr. P.K. Mahali.
None (for O.P.Nos.1, 3 to 6)

JUDGMENT Date of Hearing: 02.08.2024 : Date of Judgment: 28.08.2024

S.K. MISHRA, J.

1. The present Writ Petition has been preferred by the Petitioners, who are the legal heirs of Late Sambhu Prasad Tripathy, who dies in a road accident, to tag MAC Case No.889 of 2021 pending in 1st M.A.C.T, Cuttack along with MAC Case No.60 of 2021, pending in 5th M.A.C.T, Khordha for analogous hearing of both the cases either at Cuttack or in any other neutral place, convenient to both the set of Claimants.

2. The brief background facts, which led to filing of this Writ Petition, are that late Sambhu Prasad Tripathy died on 06.08.2021 in a motor vehicular accident involving a truck bearing Registration No.33-E-3747. Accordingly, Khordha Police Station registered P.S. Case No.305 of 2021 against the driver of the offending vehicle. On 24.08.2021, the Petitioners, who are the wife and two minor children of late Sambhu Prasad Tripathy, filed an application under section 166 of the Motor Vehicles Act, 1988 before the 1st M.A.C.T, Cuttack, claiming compensation of Rs.80,00,000/- from the owner as well as Insurer of the offending vehicle, with a joint and several liability, impleading both as Opposite Party Nos.3 & 4 respectively, which has been registered as MAC Case No.889 of 2021.

3. After filing of the said claim application, it came to the notice of the present Petitioner No.1 that the married daughter (present Opposite Party No.3) and major son (present Opposite Party No.4) of late Sambhu Prasad Tripathy begotten from his first wife, who died much prior to the marriage of the present Petitioner No.1, have filed MAC Case No.60 of 2021 before the 5th M.A.C.T, Khordha as legal representatives claiming compensation of Rs.40,00,000/- without making the present Petitioners as Opposite Parties to the said proceeding by indicating their names and relationship with the deceased.

4. Knowing about the filing of the subsequent application vide MAC Case No.60 of 2021 before 5th M.A.C.T, Khordha on the self-same incident of motor vehicular death of late Sambhu Prasad Tripathy, the 1st M.A.C.T, Cuttack called for a report from the 5th M.A.C.T, Khordha vide order dated 07.02.2024 and received the same vide order dated 15.04.2024. Still the 1st M.A.C.T, Cuttack, instead of ordering for tagging of both the cases, simply adjourned the matter.

5. The case of the Petitioners is that, it is a settled principle of law that, major, married and settled son and daughter of the motor accident victim are not entitled to any compensation in presence of the widow and minor children of the deceased as observed by the Supreme Court in Civil Appeal No.5220 of 2022 (**Janabai widow of Dinkar Rao Gharpada and others Vs. M/s. ICICI Lombard Insurance Company Ltd.**) and in SLP (Civil) No.7805 of 2022 (**New India Assurance Co. Ltd. Vs. Anand Pa*l***). Further, the present Opposite Party No.3 being a major married daughter of late Sambhu Prasad Tripathy, her inheritance to parental property is doubtful, as she embraced Islam religion by marrying to a Muslim man.

6. Though all the Opposite Parties, including the Claimants-Petitioners in MAC Case No.60 of 2021, were duly noticed, only the Opposite Party No.2-Insurance Company has appeared and the Opposite Party No.1, who is the owner of the offending vehicle and the Opposite Party Nos.3 & 4, who are the Claimants in MAC Case No.60 of 2021, now pending before the 5th M.A.C.T., Khordha, despite due notice, chose not to appear in this case to oppose the prayer made in the Writ Petition.

7. From the facts detailed above so also provisions enshrined under Section 166 of the Motor Vehicles Act, 1988, shortly, "M.V. Act", though there is no prohibition in presenting the number of applications at the instance of each legal representative of the deceased before different Tribunals, this Court is of the view that in order to avoid conflicting decision regarding determination of respective share/right of such legal representative, so also to avoid multiple payment of court fee for receiving a single award, a single claim application shall always be for the benefit of all legal representatives and the legal representatives, not so joined as claimants, should be given an opportunity of being heard by making them Respondents, if the claim application/s are not heard or decided by any of the Tribunals by a common order.

8. From the pleadings, as detailed above, though this Court feels that a case has been made out for transfer of proceeding from 5th M.A.C.T, Khordha to 1st M.A.C.T, Cuttack, as prayed for, Mr. Mahali, learned Counsel for the Opposite Party-Insurance Company made a submission before this Court that he has no objection to such prayer made in the Writ Petition, but raised a technical issue before this Court that the Writ Petition under Articles 226 and 227 of the Constitution of India for intrastate transfer of proceeding under the M.V. Act is not maintainable. His Contention is, the Petitioners ought to have preferred an application under Section 24 of the Code of Civil Procedure, 1908, shortly hereinafter, "C.P.C".

9. To substantiate such submission, Mr. Mahali, learned Counsel cited the orders of the Supreme Court in (**Kahlon Vs. K. Paramasivam**) reported in (2004) 13 SCC 564 and in (**Neha Arun Jugadar and another Vs. Kumari Palak Diwan Ji**) reported in (2015) 15 SCC 222. Mr. Mahali further submitted that in those cases, transfer petitions being filed under section 25 of the C.P.C, the Supreme Court ordered for interstate transfer of claim cases from one Claims Tribunal to the other Claims Tribunal.

10. Per contra, learned Counsel for the Petitioners submitted that those are mere orders passed by the Supreme Court exercising its power under section 25 of C.P.C for interstate transfer of the accident claim cases. The issue regarding applicability of section 24 of C.P.C. for intra-state transfer has not been decided vide those orders. Learned Counsel for the Petitioner further submitted that whether the Claims Tribunal is a Court subordinate to High Court for the purpose of applicability of section 24 of C.P.C was not the issue before the Supreme Court in those cases.

11. Learned Counsel for the Petitioners, relying on the judgments of this Court in (**Aurondhati Das and others Vs. New India Assurance Co. Ltd and others**) reported in 1994 (1) T.A.C. 654 and judgment dated 22.04.2024 passed in W.P.(C) No.19729 of 2022 (**Raimani Tudu and others Vs. Satyabrata Mohanty and others**) so also judgment of the High Court of Allahabad in **Shankar Lal Jaiswal Vs. Asha Devi and 10 others**, reported in 2018 SCC OnLine All 2545, submitted that the division bench of this Court in **Aurondhati Das** (supra) so also this Court in **Raimani Tudu** (supra) exercising of writ jurisdiction, ordered for transfer of proceeding from one Claims Tribunal to the other Claims Tribunal for analogous hearing.

12. Mr. Mohanty, learned Counsel for the Petitioners, in order to further fortify his submission, relying on the judgment in **Shankar Lal Jaiswal** (supra), submitted that in the said judgment, Allahabad High Court clearly held that the Claims Tribunal being created by a notification of the State Government under the provisions of M.V. Act, it cannot be said that such Tribunal is a Court subordinate to the High Court within the meaning of the term occurring in section 24 of C.P.C, despite the fact that an award of the Claims Tribunal is appealable to the High Court under section 173 of the M.V. Act.

While holding so, the Allahabad High Court held that transfer applications, under section 24 of C.P.C, seeking transfer of motor accident claim petitions pending before the Claims Tribunal, are not maintainable.

13. In view of said submission made by the learned Counsel for the Petitioners, it would be apt to extract below paragraph Nos.11 to 16, 19 & 20 of the said judgment:-

> *"**11.** Section 176 confers the Rule making power upon the State Government. It also provides that Rules can be framed regarding the powers of a Civil Court, which may be exercised by a Claims Tribunal.*
>
> ***12.** In exercise of the aforementioned rule making power, the U.P. Motor Vehicle Rules, 1998 have been framed. Rule 221 thereof, reads as follows.-*
>
> *"221. Code of Civil Procedure to apply in certain cases.- The following provisions of the First Schedule to the Code of Civil Procedure, 1908 shall so far as may be apply to proceedings before the Claims Tribunal, namely, Rules 9 to 13 and 15 to 30 of Order V; Order IX, Rules 3 to 10 of Order XIII, Rules 2 to 21 of Order XVI; Order XVII; and Rules 1 to 3 of Order XXIII."*
>
> **13.** ***From a conjoint reading of the provisions noticed above, it emerges that the Motor Vehicle Act is a complete code in itself. It is also clear from a bare reading of Rule 221***

that Section 24 of the Civil Procedure Code has no application to matters before the Motor Accident Claims Tribunal.

14. ***Section 24, Civil Procedure Code, which has been invoked in these transfer applications, confers a general power of transfer and withdrawal of a suit, appeal or proceeding upon the High Court or the District Judge, pending in any Court subordinate to them.***

15. *The words "subordinate to it" occurring in Section 24(1)(b) are, in my considered opinion, crucial for deciding the controversy at hand.*

16. ***Since a Claims Tribunal is created by a notification of the State Government under the provisions of the Motor Vehicles Act, it cannot be said that such Tribunal is a Court subordinate to the High Court within the meaning of the term occurring in Section 24 CPC, despite the fact that an award of the Claims Tribunal is appealable to the High Court under Section 173.***

19. *In view of the above and since only certain provisions of the Civil Procedure Code have been made applicable to proceedings before the Claims Tribunals, constituted under the Motor Vehicles Act and Section 24 CPC is not one of them, the same, in my considered opinion, cannot be invoked tor transfer of a claim petition, pending before a Claims Tribunal.*

20. *Accordingly, this Court is constrained to hold that these transfer applications, under Section 24 CPC, seeking transfer of Motor Accident Claims Petitions pending before the Claims Tribunal, are clearly, not maintainable."* ***(Emphasis Supplied)***

14. In addition to same, learned Counsel for the Petitioners, drawing attention of this Court to the provisions under Rule 20 of the Odisha Motor Vehicles (Accident Claims Tribunal) Rules, 1960, shortly hereinafter, "Rules, 1960", which is akin to Rule-221 of the U.P. Motor Vehicle Rules, 1998, submitted that under the said Rule it has been detailed as to which provisions of C.P.C, 1908 are applicable to the proceedings before the Claims Tribunal. The said rule is extracted below for ready reference.

> ***"20. Code of Civil Procedure to apply in certain case.***
> *The following provisions of the First Schedule to the Code of Civil Procedure, 1908, shall, so far as may be, apply to proceedings before the Claims Tribunals, namely, Order V, Rules 9 to 13 and 15 to 30; Order IX, Order XIII, Rules 3 to 10; Order XVI, Rules 2 to 21; Order XVIII and Order XXIII Rules 1 to 3."*

15. Further, referring to Rule 12 of Odisha Motor Vehicles (Accident Claims Tribunal) Rules, 2019, shortly hereinafter, "Rules, 2019", Mr. Mohanty, learned Counsel submitted that in view of sub-rule (1) of Rule 12 under the Rules, 2019, empowers the District Judge of the concerned district to transfer an application for claim under the M.V. Act from the file of one Claims Tribunal, before whom the application is pending, to any other Claims Tribunal, if Claims Tribunal is situated within the same district. Similarly, subrule (2) of Rule 12 of the Rules, 2019 empowers the High Court to transfer the claim application from the file of one Claims Tribunal of a district to the other Claims Tribunal beyond the district. Accordingly, a prayer has been made in the present Writ Petition for transferring the claim case from 5th M.A.C.T, Khordha to 1st M.A.C.T., Cuttack and the Petitioners have rightly approached the Writ Court for interdistrict transfer of such proceeding

and in view of the specific provisions under the Rules, 2019, section 24 of C.P.C, for transfer of proceeding pertaining to motor accident claim cases is not applicable.

16. In view of said submission made by Mr. Mohanty, it would be apt to reproduce below Rule 12 of the Motor Vehicles Accident Claims Tribunal Rules, 2019:-

> *"**12. Transfer of claim cases:-***
> *(1) The District Judge shall have the power to transfer an application for claim from the file of one Claims Tribunal, before whom the application is pending, to any other Claims Tribunal, if;*
> *(a) the Claims Tribunal before whom the application is pending makes such a request on grounds, personal or otherwise, or*
> *(b) upon consideration of the application for transfer by any party to the application, the District Judge is satisfied, for reasons to be recorded in writing, that there are sufficient grounds to do so.*
> *(2) **The High Court may transfer the application from the file of one Claims Tribunal to the other Claims Tribunal for any sufficient reasons." (Emphasis Supplied)***

17. Admittedly, in the judgments of this Court, relied upon by the learned Counsel for the Petitioner, the point as to maintainability of the Writ Petition for transfer of proceeding under the M.V. Act was not an issue and no such point has been decided in those cases as to whether a Claims Tribunal is a Court subordinate to High Court and applicability of section 24 of C.P.C for the purpose of intrastate transfer of proceeding of claim cases filed under the M.V. Act.

18. However, in view of the legal point involved regarding maintainability of Writ Petition, it would be appropriate to deal with the judgment of division Bench of this Court in (**Orissa Co-operative Insurance Company Vs. Subashini Pradhan and others**) reported in 1977 ACJ 283: MANU/OR/0241/1977 so also coordinate Bench judgment in (**Sarat Kumar Moharana Vs. M. Rajsekhar Reddy and others*)*** reported in 2000(I) OLR 494: 2000 (2) TAC 551. In **Subashini Pradhan** (supra), the division Bench of this Court, since the maintainability of such Revision Petition was challenged on the ground that the Claims Tribunal under the Act is not a 'Court' and, therefore, section 115 of the C.P.C, 1908 has no application, while dealing with the said issue, referring to various judgments of different High Courts, held as follows:-

> *"**17.** Mr. Patnaik in support of the preliminary objection, on the other hand, relies on a series of authorities. In the case of Khairunnissa A.K. Siddiki v. The Municipal Corporation, Bombay [1966 A.C.J. 37.] a Bench of the Bombay High Court was considering the question of maintainability of a claim without notice under section 527 of the Bombay Municipal Corporation Act, (corresponding to section 80 of the Civil Procedure Code) and incidentally held that the Tribunal was not a Court. In the case of Harbans Singh v. Atma Singh [1966 A.C.J. 172.] a learned Single Judge of the Punjab High Court came to hold that the Claims Tribunal was a persona designata notwithstanding the fact that it had been given a jurisdiction which has been taken away from an ordinary civil Court and it has been given some of the powers of a civil Court. The reasonings given by Narula, J. (as the learned Judge then was) in the Punjab High*

Court in the case of Ram Sarup v. Gurdev Singh [1966 A.C.J. 240.] , while examining whether the commissioner under the Workmen's Compensation Act would be a 'court.' support the view that the Claims Tribunal would not be a 'Court'. The Allahabad High Court in the Case of Satish Chandra v. State of Uttar Fradesh [1971 A.C.J. 180.] , held that the Claims Tribunal was not a court and, therefore, its decision was not amenable to revisional jurisdiction of the High Court. The Rajasthan High Court in the case of Laxminarain Misra v. Kailash Narain Gupta [1974 A.C.J. 79.] , examined the question at some length and came to hold that the Claims Tribunal under the Act was a mere Tribunal and not a Court. A learned Single Judge in this Court in the case of Vanguard Insurance Company Ltd. v. Janki Amma [1971 C.W.R. 158.] , has held that the Claims Tribunal is not a Court. Though there is no reasoning given and the conclusion was reached mostly on concession of counsel, we are of the view that the conclusion is in accord with the law.

18. From the discussion made above, it follows that the Claims Tribunal is a persona designata and not a court. Therefore, the Claims Tribunal is not amenable to the revisional jurisdiction of this Court." (Emphasis Supplied)

19. However, in **Sarat Kumar Moharana** (supra), the issue before the coordinate Bench was directly on the point as to whether an application under section 24 of the Code for transfer of proceeding under the Motor Vehicles Act is maintainable. The coordinate Bench, referring to the division Bench judgment of this Court in ***Subashini Pradhan*** (supra), held that application under section 24 of C.P.C, 1908 for transfer of proceeding under the M.V. Act is not maintainable and appropriate remedy for the parties would be to approach the Writ Court under Article 227 of the Constitution of India. Paragraph Nos.2 to 4 of the said judgment, being relevant, are extracted below:

*"**2.** On the assertions made in the application Under Section 24 of the Code which have not been rebutted, prima facie, I feel that a case has been made out for transfer of the case. **However, I am unable to accede to such prayer for transfer in exercise of power under Section 24 of the Code, as according to me, the Claims Tribunal not being a "Court subordinate" to the High Court, within the meaning of Section 24 of the Code, such an application is not maintainable and the remedy, if any, of the petitioner is to approach the High Court in its supervisory jurisdiction under Article 227 of the Constitution of India.***

***3.** The learned counsel for the petitioner has, however, placed reliance upon two decisions of the Supreme Court reported in 1979 ACJ 205 (**State of Haryana v. Darshana Devi and Ors.**) and 1983 ACJ 123 (**Bhagwati Devi and Ors. v. M/s. L.S. Goel and Ors.**). The first decision of the Supreme Court related to question of applicability of Order 33 of the Code to claim applications filed before the Claims Tribunal. In the said case, the Supreme Court observed as follows:*

"..... The reasoning of the High Court in holding that Order XXXIII will apply to tribunals which have the trappings of the Civil Court finds our approval. We affirm the decision."

I do not find anything directly or indirectly laid down in the said decision to hold that a Claims Tribunal under the Motor Vehicles Act is a "Court subordinate" to the High Court for the purpose of applying the provisions contained in Section 24 of the Code. The other decision of the Supreme Court reported in 1983 ACJ 123, however, on the face of it appears to be supporting the contention of the petitioner, though on closer scrutiny, in my opinion, is inapplicable. In the said decision, it was observed:

*"In view of the observations of this Court in **State of Haryana v. Darshana Devi**, 1979 ACJ 205 (SC), we are of the view that the Motor Accidents Claims Tribunal constituted under the Motor Vehicles Act is a Civil Court for the purpose of Section 25 of the Code of Civil Procedure....." (Emphasis supplied)*

*In the aforesaid decision, the Supreme Court purported to exercise its power Under Section 25 of the Code which in the first flush of reading may appear to be akin to provisions contained in Section 24. **However, on closer scrutiny, it appears that there is a significant difference in the sense that while under Section 24, the expression "a Court subordinate" has been used, in Section 25 of the Code, the expression "any Civil Court" has been incorporated.** As already noticed, in earlier decision of the Supreme Court reported in 1979 ACJ 205, it was observed that the Claims Tribunal had all the trappings of the Civil Court and in the context of Section 25 of the Code, following the said observation, it was observed that the Claims Tribunal is a Civil Court for the purpose of Section 25 of the Code. **The question whether a Claims Tribunal is a "Court subordinate" to the High Court for the purpose of Section 24 was not before the Supreme Court.***

4.** The expression "Court subordinate" has been used by the Legislature not only in Section 24, but also in Section 115 of the Code. **It appears that in the context of Section 25, the expression "Civil Court" has been utilised with a view to give wider jurisdiction, expression "Court whereas, the subordinate" as contained in Section 115 or Section 24 of the Code has necessarily a limited connotation.** It is well-known that when the same expression is used by the Legislature in the same Act at different places, ordinarily, the same meaning is to be ascribed to the expression given. All the High Courts are almost of the unanimous view that a Claims Tribunal is not a "Court" but a "persona designata", At least, so far as this Court is concerned, it has been well-settled that a Claims Tribunal is not a "Court subordinate" to High Court, but a "persona designata" not amenable to the civil revisional jurisdiction of the High Court under Section 115 of the Code. The said Division Bench decision of this Court reported in 1977 1 CWR 103 **[The Orissa Co-operative Insurance Company (New India Assurance Company Ltd.) v. Subhasini Pradhan and Ors.]** wherein it has been observed that a Claims Tribunal is a persona designata and is not a "Court subordinate" to the High Court and is not subjected to civil revisional jurisdiction, is still holding the field for over two decades. The meaning ascribed to the expression "Court subordinate" in the said decision in the context of Section 115 is also applicable to Section 24 of the Code, as the same expression "Court, subordinate" has been used. **It cannot be said that the decision of the Supreme Court reported in 1983 ACJ 123, has the effect of overruling either expressly or impliedly the Division Bench decision of this Court. The Division Bench decision which has held the field for such a long period should be followed in applying the doctrine of stare decisis."

(Emphasis Supplied)

20. In view of the above observations, this Court is in respectful agreement with the views taken by the coordinate Bench in **Sarat Kumar Moharana** (supra) so also judgment of the Allahabad High Court in **Shankar Lal Jaiswal** (supra). Apart from the same, in view of the specific provision under Rule 12 of the amended Rules, 2019, as extracted above, where there is a specific provision for intradistrict so also interdistrict transfer of claim cases under the M.V. Act, this Court is of the view that section 24 of the C.P.C is not applicable for transfer of file from one Claims Tribunal to other Claims Tribunal. The party aggrieved, has to move before the

concerned District Judge, seeking for intradistrict transfer of claim cases filed under the M.V. Act and for interdistrict transfer, the party aggrieved has to approach the Writ Court under Article 227 of the Constitution of India. This Court is of the further view that the present Writ Petition under Article 227 is maintainable and the Petitioners have rightly approached Writ Court for interdistrict transfer of the claim case.

21. Accordingly, the Presiding Officer, 5th M.A.C.T., Khordha (Opposite Party No.6), is directed to transmit the record in MAC Case No.60 of 2021 to the Presiding Officer, 1st M.A.C.T., Cuttack (Opposite Party No.5), immediately for analogous hearing of the said claim case along with MAC Case No.889 of 2021.

22. It is further directed that on receiving the records in MAC Case No.60 of 2021 from the Presiding Officer, 5th M.A.C.T, Khordha (Opposite Party No.6), the Opposite Party No.5 i.e. Presiding Officer, 1st M.A.C.T., Cuttack, shall tag the said case record in MAC Case No.60 of 2021 to M.A.C case No.889 of 2021, which is pending before the said Tribunal, for analogous hearing of both the said cases and shall proceed further in accordance with law and try to conclude the said claim cases at the earliest.

23. With the said observation and direction, the Writ Petition stands allowed and disposed of. No order as to cost. 24. The Registry is directed to communicate a copy of this judgment to the Presiding Officer, 5th M.A.C.T, Khordha so also the Presiding Officer, 1st M.A.C.T, Cuttack in MAC Case No.60 of 2021.

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2024 (III) ILR-CUT-255

G. SATAPATHY J.

CRA NO. 52 OF 1994

KUMAR CHANDRA SITHA …..Appellant

V.

STATE OF ORISSA …..Respondent

(A) NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985 – Sections 20(b)(i), 42, 52, 57 – Appellant was convicted on 16.12.1993 U/s. 20(b)(i), NDPS Act by the 1st Addl. Sessions Judge, Puri, camp at Nayagarh in S.T. Case No. 57/331 of 1993 – Rigorous imprisonment for 5 years and fine of ₹ 50,000/- imposed with one year in default sentence if fine is not paid – Conviction challenged U/s. 374(2) Cr.P.C.

(B) Section 42 Proviso of NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT – Mandates that if such officer has reason to believe that a search warrant or authorization cannot be obtained without affording opportunity for the concealment of evidence or facility

for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief – Trial Court held that compliance of Section 42 of the Act is not required, but it has observed so without noticing the aforesaid provision. (Para 4)

(C) Sections 42 (1) & (2), NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT – Non-compliance – Mandatory requirements of Sections 42 (1) & (2), NDPS Act not complied - Vitiates the trial.
(Para 5)

(D) Section 57, NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT – Whenever any person makes an arrest or seizure under this Act, he shall within 48 hours next after such arrest or seizure make a full report of all the particulars of such arrest or seizure to his immediate official superiors. Directory in nature – Not complied.
(Para 8)

(E) Non-Compliance of Sections 42 & 52, NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT – Benefit of doubt extended to the appellant – Conviction set aside. (Paras 10 & 11)

Case Laws Relied on and Referred to :-
1. (2009) 8 SCC 539 : Karnail Singh Vrs. State of Haryana

For Appellant : Mr. B.P. Dhal, *Amicus Curiae*
For Respondent : Mr. T.K. Praharaj, SC

JUDGMENT Date of Hearing & Judgment (Oral) : 23.08.2024

G. SATAPATHY, J.

1. This appeal U/S.374(2) of the Code of Criminal Procedure, 1973 (in short, "the Code") is directed against the judgment dated 16.12.1993 passed by the learned 1st Additional Sessions Judge, Puri, Camp at Nayagarh in S.T. Case No.57/331 of 1993 convicting the appellant for offence Under Section 20(b)(i) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short, "the Act") and sentencing him to undergo Rigorous Imprisonment (R.I.) for five year and to pay a fine of Rs. 50,000/- (Rupees Fifty Thousand) only in default whereof, to undergo R.I. for a further period of one year with a stipulation setting off the pre-trial detention against the substantive sentence.

2. The prosecution case in precise is on 24.02.1993 at about 7.15 P.M., the O.I.C., Nayagarh Police Station P.W.6-Preyaranjan Patra on receipt of a credible information about a person carrying Contraband Ganja in a Bullet Motorcycle bearing Regd. No.TN-45-Z-1630 from Sarankul side towards Nayagarh, proceeded to the spot along with A.S.I. P.W.5-Narasingh Bhola in the Police Jeep being driven by one Jabar Mahammad and on their way, near Odagaon crossing, they stopped the above motor cycle at 7.30 P.M. while the appellant was coming riding the said

motor cycle along with two pillion riders carrying a polythene bag containing Contraband Ganja. The moment the motorcycle was stopped, the two pillion riders suddenly got down from the motor cycle and fled away into nearby dark area and despite hot chase by P.W.5, the pillion riders could not be caught hold of. However, the appellant was detained along with the Contraband Ganja which was weighed at the spot and found to be 10Kgs and thereafter, P.W.6 drew plain paper F.I.R. vide Ext. 2 at the spot and sent the same to Police Station for registration of the case paving the way for registration of Nayagarh P.S. Case No.32 of 1993.

Further, P.W.6 seized the motorcycle and Contraband Ganja in presence of witness as well as arrested the accused-appellant and forwarded him so also made prayer to the Court for drawing of sample. Accordingly, learned S.D.J.M., Nayagarh drew the sample from the bag containing Contraband Ganja and resealed the same. On completion of investigation, charge sheet was placed against the accused-appellant resulting in trial in the present case after denial of the accused to plead guilty to the charge for offence U/S. 20(b)(i) of the Act.

2.1 In support of its case, the prosecution examined altogether six witnesses vide PWs. 1 to 6; proved eight documents vide Exts. 1 to 8 and identified Ganja bag as material object under MO-I as against the sole documentary evidence of the certified copy of the order sheet dated 25.02.1993 in G.R. No.16 of 1993 under Ext.A by the defence. Of the witnesses examined, PWs. 1 to 4 are private independent witnesses, but they have not supported the prosecution case in any manner, however, PW5 and the IO PW6 are the two police officials associated with search, seizure and detection of the case.

2.2. The plea of the convict-appellant was not only complete denial, but also false implication in addition to the specific plea which was stated by him in his statement U/S. 313 of CrPC that he had given free lift to the pillion riders without knowing them to be carrying any Contraband article in the bag and he was thereby ignorant about transportation of Contraband Ganja in his motor cycle.

2.3. After appreciating the evidence upon hearing the parties, the learned trial Court convicted the appellant by mainly relying upon the evidence of PWs. 5 and 6.

3. In assailing the impugned order, Mr. Biswa Prakash Dhal, learned counsel engaged by the Court to conduct this appeal has very strenuously argued that not only there is non-compliance of the mandatory provisions of the Act, but also the oral evidence does not inspire confidence to record a conviction against the appellant. He further submits by referring to the evidence of the A.S.I. and the O.I.C., who are being examined as P.Ws. 5 and 6 respectively that it is the consistent case of the prosecution that the Contraband Ganja recovered when the motorcycle being driven by the appellant was detained at the spot, but the admitted facts remain that two of the pillion riders ran away from the spot and the defence plea which was established to the effect that the pillion riders were being given free lift by the appellant, who does not know them and thereby, on the very score of oral evidence, the prosecution was unable to establish the guilt of the appellant for transporting any

Contraband Ganja. Mr. Dhal further submits that the evidence of P.W.6 discloses that the appellant was found carrying Contraband Ganja, but evidence of P.W.5 reveals that the pillion riders were carrying Contraband Ganja which in the circumstance create suspicion in the veracity of prosecution case, especially when the appellant has taken a plea at the spot that he did not know what the pillion riders were carrying and the Contraband Ganja was not found from the exclusive possession of the appellant, rather it was found being dropped from one of the pillion rider, who while fleeing away from the spot dropped it. Mr. Dhal also brings to the notice of the Court that although 50 grams sample of Contraband Ganja was drawn and sent for chemical examination, but the Chemical Examination report reveals about receipt of sample of 500 grams of Contraband Ganja which in the circumstance not only creates further suspicion, but also widens the gap between accusation against the appellant and proof of his guilt beyond all reasonable doubt and thus, the benefit of doubt must be extended to the appellant on the very score of material inconsistencies in the prosecution evidence.

On the contrary, Mr. T.K. Praharaj, learned Standing Counsel, however, by placing reliance on the evidence of PWs. 5 & 6 very strongly submits that the oral evidence not only confirms the appellant to have carried the Contraband Ganja, but also clinchingly establishes that it was the appellant, who was guilty for the offence had been carrying the Contraband Ganja in his motorcycle and P.W.6 had earlier got prior information about transportation of Contraband Ganja in the said motorcycle, which was being detained at the spot with the appellant and the contraband article and, therefore, the guilt of the appellant having been firmly established by the prosecution, the conviction of the appellant calls for no interference. Mr.Praharaj accordingly prays to dismiss the appeal.

4. After having bestowed an anxious and careful consideration to the rival submissions upon perusal of record, the admitted case of the prosecution is that the Contraband Ganja was being transported on a motorcycle which was in terms of the prior secret information as received by P.W.6, but when the Police raiding party detained the motorcycle, it was being ridden by the appellant with two pillion riders, who fled away from the spot. It is also not in dispute that the plea of the appellant was that he had given free lift to two unknown persons on his motorcycle. Sub-Sec.1 of Sec. 42 of the Act as it stood prior to its amendment by the Act of 9 of 2001 that the empowered officer on receipt of prior information as in this case should necessarily take it down in writing before proceeding to carryout search, seizure and arrest without warrant between sunrise and sunset. Proviso thereto, mandates that if such officer has reason to believe that a search warrant or authorization cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief. Although the learned trial Court has held that compliance of Sec 42 of the Act is not required, but it has observed so without noticing the aforesaid provision.

5. Indisputably, the testimony of PWs. 5 & 6 transpires that the secret information was received by PW6 at 7.15 PM and the case was detected at about 7.30 PM and thereby, the case was detected after sunset, but neither PW6 had recorded any grounds of his belief in terms of the proviso to Sec 42(1) of the Act, nor any evidence is tendered to overcome the aforesaid impediment mandated under law. The admitted evidence of the prosecution discloses about transportation of Contraband Ganja by a private bullet motor cycle which is a conveyance within the meaning of Sec 42 of the Act and thereby attracting the compliance of Sec 42 of the Act. However, the evidence of PW6 neither indicates his recording the prior information in any concerned Register/Station Diary nor sending of any copy recording such information to his immediate official superior, notwithstanding to the provision U/S. 42(2) of the Act which makes it obligatory/mandatory to send a copy thereof (secret information given by any person and taken down in writing) "forthwith" to the immediate official superior, however, the word "forthwith" was replaced by "within 72 hours" by the Act of 09 of 2001. Admittedly, PW6 had neither taken down the secret information into writing in terms of Sec 42(1) of the Act nor recorded his grounds of belief in terms of proviso thereto. In the aforesaid situation, this Court is constraint to hold about non-compliance of Sec 42(1) & (2) of the Act which are mandatory in nature. In this regard, this Court gainfully refers to the paragraph(d) of the conclusion of the decision of the constitutional Bench of five judges of Apex Court in ***Karnail Singh Vrs. State of Haryana; (2009) 8 SCC 539*** wherein it has been held that while total non-compliance of requirements of Sub-Sec(1) & (2) of Sec 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance of Sec 42. In this case, the total failure of the prosecution to comply with these mandatory requirements thus affects its case and, therefore, vitiates the trial.

6. On coming back to the oral testimony of the witnesses, P.W.1 being the weighman has not supported the prosecution case by simply testifying in the Court that he does not know anything about the case. Similarly, P.W.2 being an independent and private seizure witness has also not supported the prosecution case by simply testifying in the Court that he does not know anything about the case. Further, P.W.3 has not supported the prosecution case on material aspect about the recovery of Contraband Ganja from the possession of the appellant. Besides, P.W.4 being another independent witness has not supported the prosecution case. In the aforesaid circumstance, the prosecution case only rests only on the basis of the evidence of PWs. 5 & 6, who are not only the Police Officers, but also have done everything in this case starting from detection to submission of charge sheet. Adverting to re-appreciate the evidence of P.W.5, who was the A.S.I. of Police then, it transpires that on 24.02.1993, the O.I.C. got secret information regarding transportation of Contraband Ganja on a motorcycle and, therefore, he took him to Odagaon chhack of Nayagarh and while they were there, one Bullet motorcycle came from Odagaon side with two pillion riders with the appellant being its rider, but the moment they stopped the vehicle, the two pillion riders fled away and he

chased them, but could not trace them out. On his return, P.W. 5 found P.W.6 to have detained the appellant along with the polythene bag which was kept behind the accused, by the time they stopped the motorcycle. The evidence of P.W.5 further transpires that the bag was found with Contraband Ganja which came to 10 Kgs on weighment and the bag was seized and sealed at the spot. The defence, however, has made inroad in the cross-examination of P.W.5 by eliciting from him that one of the pillion riders was holding the bag when the accused stopped the motorcycle.

7. In the above situation, the evidence of P.W.6 appears to be significant, but his evidence transpires that on receipt of a credible information that a person carrying Contraband Ganja on a motorcycle bearing Regd. No-TN-45-Z-1630 from Sarankul side towards Nayagarh, he and P.W.5 proceeded to the spot and detained the vehicle. One of the interesting facts in this case is that although P.W.6 has got secret information, but admittedly he has not made any Station Diary with regard to the receipt of such secret information. Normally, the Police on receipt of secret information use to record it on Station Diary. Neither any document was produced in the evidence to indicate about receipt of any secret information by P.W.6, nor was any evidence led to substantiate such claim. More is the punishment; strict is the standard of proof. Had P.W.6 received any reliable information, he should have reduced it into writing in the concerned Station Diary, but it is not established that P.W.6 has made any Station Diary entry with regard to receipt of secret information. It is also elicited from the mouth of P.W.6 that the bag under MO-I was kept on the tanki of the motorcycle and nobody was holding the bag, but P.W.5 says that the bag was being carried by the pillion riders which is contrary to each other. Further, P.W.6 has admitted in the cross-examination that neither he informed the Magistrate after getting the secret information, nor did he take the accused to any Magistrate immediate after arrest of the accused and from the accused he ascertained that the two pillion riders, who escaped from the spot were given free lift from Darpada.

8. Cross-examination of P.W.6 further transpires that on 03.05.1993, he for the first time tried to enquire about those two persons who fled away from the spot and his investigation discloses that those two persons were only given free lift by the accused on his motorcycle. Further, the evidence of P.W.6 does not disclose about submitting any report to any higher authority with regard to arrest or seizure of the Contraband Ganja, but Section 57 of the Act makes it very clear that whenever any person makes an arrest or seizure under this Act, he shall within 48 hours next after such arrest or seizure make a full report of all the particulars of such arrest or seizure to his immediate official superiors. However, this provision is although directory in nature, but P.W.6 has not at all complied the provision of Section 57 of the Act as his evidence is totally silent with regard to submission of any detail report, no matter P.W.6 has stated in his evidence that he informed the matter to his immediate authorities, which is not the compliance as required U/S.57 of the Act.

9. One of the glaring discrepancies in this case is that the forwarding report under Ext.5 discloses about sending of 50 grams. of Contraband Ganja as a sample to the Director of State Forensic Science Laboratory, Rasulgarh, Bhubaneswar for

chemical examination, but the Chemical Examination report under Ext.6 transpires about receipt of 500 grams of some plant materials with fruiting and flowering tops said to be Contraband Ganja. In the circumstance, it is not understood as to how the Forensic Laboratory received a sample packet of 500 grams, when a sample of 50 grams was sent to it. This not only contributes to the discrepancies, but also a glaring inconsistency attached to the case, which has not been explained by the prosecution by leading any evidence. Further, Section 55 of the Act prescribes procedure for the Police to take charge of article seized and delivered to it and in this case, the sample which was sent to the Forensic Laboratory had fair chance of being tampering in view of the aforesaid discrepancies.

10. In view of the aforesaid discussion of facts and evidence together with the failure of the prosecution to establish the safe custody of sample from the Court to the Forensic Laboratory coupled with failure of the prosecution to lead any independent and cogent evidence to prove the conscious possession of Contraband Ganja by the appellant coupled with total non-compliance of provisions of Sec 42 which is mandatory in nature as well as non-compliance of Sec 52 of the Act, this Court considers that the benefit of doubt as forthcoming in this case must be extended to the appellant for the reasons stated hereinabove and, therefore, the conviction of the appellant is found to be unsustainable in the eye of law.

11. In the result, the appeal is allowed on contest, but in the circumstance, there is no order as to costs. Consequently, the judgment of conviction and order of sentence passed by the learned 1st Additional Sessions Judge, Puri, Camp at Nayagarh in S.T. Case No.57/331 of 1993 are hereby set-aside.

Consequently, the appellant is acquitted of the offence U/S. 20(b) (i) of the Act and he is discharged of his bail bonds.

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2024 (III) ILR-CUT-261

SIBO SANKAR MISHRA, J.

CRLREV NO.899 OF 2011

TAPAN KUMAR SAHU ….Petitioner

V.

STATE OF ORISSA ….Opp.Party

CRIMINAL TRIAL ─ Benefit of doubt – Petitioner was charged for the offences punishable U/ss. 279/337/338/304-A of IPC ─ There are vital lacunas in the prosecution version ─ There are discrepancies and various contradictions appearing on record in the testimony of P.W. 7 who is the sole eye witness and P.W. 8 ─ If the evidence of all the witnesses is analyzed, a serious doubt is cast on the prosecution story ─ Whether the petitioner is entitled to acquittal?– Held, Yes ─ The

benefit of doubt is granted in favour of the petitioner and accordingly, the petitioner is entitled for acquittal. (Paras 16-18)

For Petitoner : Mr. Arun Kumar Das
For Opp.Party : Mr. B.K. Ragada, Addl. Government Advocate.

JUDGMENT Date of Hearing : 18.06.2024 : Date of Judgment : 16.07.2024

S. S. MISHRA, J.

The present Criminal Revision filed under Section 401 r/w section 397 of Cr.P.C. is directed against the judgment and order dated 05.08.2008 passed by the learned Sessions Judge, Dhenkanal in Criminal Appeal No.14 of 2006, whereby the judgment of conviction and order of sentence dated 05.04.2006 passed by the learned S.D.J.M., Dhenkanal in G.R. Case No.451 of 1998/Trial Case No.166/2000 has been confirmed.

2. The case of the prosecution as per the F.I.R. is that on 16.08.1998 evening, while the deceased Dullav Naik and his Halia Akula Naik were returning from village Jhilli in a bicycle, at about 7.30 P.M., the accused came in a Scooter bearing Regn. No.0R-06-8792 from Nagena side in high speed and dashed against their bicycle, as a result of which Dullav fell down and sustained bleeding injuries on his head and became unconscious. The accused fled away from the spot leaving the scooter there. On receiving such information, the informant, who is the son of the deceased, rushed to the spot, took his injured father to Dhenkanal Hospital and thereafter to Cuttack Hospital for treatment. He received information that in the night time, some persons of village Deogaon came in a jeep and took away the offending scooter from the spot.

3. Thereafter, the informant lodged an F.I.R. at the Police Station on the basis of which Gondia P.S. Case No.107/98 was registered. After completion of investigation, charge-sheet was submitted against the petitioner for the offences punishable under Sections 279/337/338/304-A of IPC. The learned trial court framed charges against the petitioner, and he was put to trial.

4. To bring home the charges, the prosecution had examined as many as 9 witnesses and 7 documents were exhibited. The plea of defence was that of complete denial. The defence had examined one witness.

5. The learned trial Court analyzed the entire evidence on record and sentenced the petitioner to undergo simple imprisonment for three months and pay the fine of Rs.500/- (Five hundred) in default to undergo simple imprisonment for one month for the offence U/s.279 IPC and he was sentenced to undergo simple imprisonment for two months and pay fine of Rs.250/- (Two hundred fifty) in default to undergo simple imprisonment for fifteen days for the offence U/s.327 IPC. The convict was sentenced to undergo simple imprisonment for six months and pay the fine of Rs.500/- (Five hundred) in default to undergo simple imprisonment for one month for the offence U/s.338 IPC and for the offence U/s. 304(A) of IPC, the convict was

sentenced to undergo simple imprisonment for a period of one year and pay the fine of Rs.1,000/- (One thousand) in default to undergo simple imprisonment for a period of one month. The substantive sentences were directed to be run concurrently.

6. The judgment of conviction and sentence dated 05.04.2006 passed by the learned S.D.J.M., Dhenkanal in G.R. Case No.451 of 1998/Trial Case No.166/2000 was called in question by filing Criminal Appeal No.14 of 2006 before the Court of the learned Sessions Judge, Dhenkanal, by the petitioner.

7. Having failed in his appeal, the petitioner has challenged the judgment/order of conviction and sentence of both the Courts below in the present Revision Petition.

8. Heard Mr. Arun Kumar Das, learned counsel for the petitioner and Mr. B.K. Ragada, learned Additional Government Advocate for the State.

9. Perused the impugned judgment and order of conviction and sentence passed against the petitioner and meticulously evaluated the evidence on record.

10. The accused stood charged for the alleged offences U/Ss. 279/ 337/ 338/ 304(A) IPC. The prosecution in order to bring home the charges had examined as many as nine witnesses. Out of them, P.W.1, who is the son of the deceased/victim, was the informant. P.W.7 was the eye witness whereas P.W.9 was the Investigating Officer of the case. The other independent witnesses examined by the prosecution did not lean any support to the prosecution story.

11. The trial Court had emphatically relied upon the testimony of P.Ws.1, 7 & 9 and convicted the petitioner for the offences U/Ss.279/337/338/304(A) IPC and passed various sentences to run concurrently. Therefore, the petitioner was substantively sentenced to undergo S.I. of one year with fine of Rs.2,250/- (Rupees two thousand two hundred fifty) in toto. The trial Court had analyzed the evidence of the star witnesses of the prosecution and returned the following findings:

> *"6. P.W.7 is Akula Naik and as per the F.I.R. story he was coming with the deceased in a bicycle when the accident took place. According to him on 17.8.98 at about 7.30 P.M. while they were coming the accused came in a scooter from Nagena in a rash and negligent manner and hit the deceased as a result he fell down from the bicycle and sustained severe injuries on his person. After the accident the accused went away leaving the scooter on the accident spot. He went to the house of the deceased and intimated about the same to his family members. During cross-examination he could not say the Regn. No. of the scooter as he was illeterate. Besides the accused another person was also coming in the said scooter as a pillion rider.*
>
> *P.W.8, the informant has deposed that due to rash and negligent driving of the scooter the accused had caused the accident. Hearing about the accident he went to the spot and found his father lying on the ground with bleeding injuries on his person. The scooter was also lying on the spot. He ascertained from the persons present on the spot that the accused was driving the scooter and after causing the accident went away. He shifted his father to Dhenkanal for treatment and as his condition was serious he took him to Cuttack. On 23.8.98 while his father was undergoing treatment died in S.C.B. Medical College Hospital, Cuttack. On 17.8.98 morning at about 8.00 A.M. after returning from S.C.B. Medical College Hospital he lodged the F.I.R. marked as Ext.3. During cross-examination he admitted that he is not an eye-witness of the accident. By the time of his arrival on the spot the accused had already left*

the place. During cross-examination he stated that one of his friends had scribed the F.I.R. as per his instruction and as his mind was upset at that time he could not go through the F.I.R. He had disclosed the Registration No. of the scooter involved in the accident as OR-G9418."

12. The judgment of conviction and order of sentence recorded by the trial Court vide its judgment dated 05.04.2006 was assailed by the petitioner by filing Criminal Appeal No.14 of 2006. Learned Sessions Judge, Dhenkanal vide its judgment dated 05.08.2008 had dismissed the appeal being devoid of merit and upheld the conviction and sentence.

13. Learned appellate Court, although had upheld the conviction and sentence passed by the learned trial Court, had not dealt with the evidence in detail except recording the following findings:

"4. In the case, altogether the prosecution has examined nine witnesses including the informant, his halia and other witnesses of the village and the owner of the scooter to prove its case against the appellant and defence has examined one, namely, Mayadhar Sahu as D.W.1 in support of its plea. Admittedly, the informant Barun Naik is not an eye witness to the accident. He rushed to the spot being informed regarding the injuries, sustained by his father in a road accident and when he reached the spot, found a scooter lying on the road. His father was lying unconscious with profuse bleeding injuries. Their halia, Akula Naik has stated that the accused Tapan Sahu, who was driving a scooter rashly and negligently dashed against the bicycle, as a result, Dullav fell down on the ground sustaining bleeding injuries. It seems that the appellant was known to P.W.7 prior to the incident. This apart of the evidence of P.W.7 that the accused was driving the scooter rashly and negligently, dashed against their bicycle resulting injuries on the person of Dullav, who received bleeding injuries, fell down on the ground and later, succumbed to the same, all remained unassailed.

5. P.Ws.1, 2 and 3, the villagers became hostile to the prosecution. P.W.4 Darpanarayan Sahu has stated that he along with others including Dullav, on 17.8.98, while coming without wearing helmet, during police check their scooter was seized with its documents and subsequently, fine was paid and police released the scooter and documents. Similar is the evdience of P.W.5, Dillip Samal, whereas, the I.O. P.W.9 claims that on 17.8.98, at 3 P.M., on production by the accused Tapan Kumar Sahu, he had seized the offending scooter i.e. one Bajaj Auto, bearing Regn. No.OR/06/8792 and its documents left those in zima of the accused under Zimanama, Ext.4. It is never the claim of the defence that the scooter, which was seized by the I.O. on production by the accused-appellant Tapan Sahu was never seized in connection with this case. But, it was seized from the owner of the vehicle during helmet checking and to initiate a case against the accused, seizurelist and zimanama have been created.

6. Thus, in view of the positive evidence of the eye witnesses that this accused-appellant was driving the scooter rashly and negligently causing accident and the deceased Dullav Naik's death was the outcome of a vehicular accident on 16.8.98 at about 7.30 P.M. Further, it is overwhelming evidence that at the spot of occurrence, the offending scooter was found lying, is the circumstance, which gives a ring of truth regarding the occurrence and commission of the offence by the accused-appellant on 16.8.1998 to hold that the prosecution has well proved its case beyond all reasonable doubt against the accusedappellant for the offences, punishable U/ss. 279/337/338/304-A I.P.C."

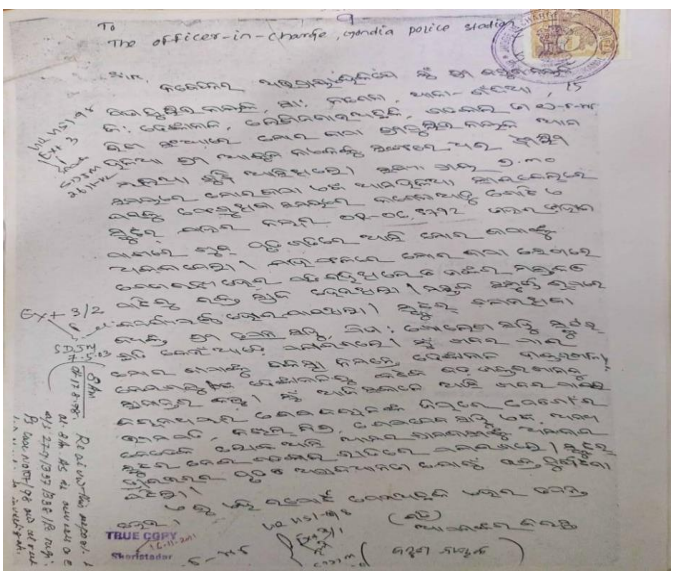
14. I have carefully perused the judgments on the strength of the evidence adduced by the parties before the Court below. Three things are broadly illuminating from the record.

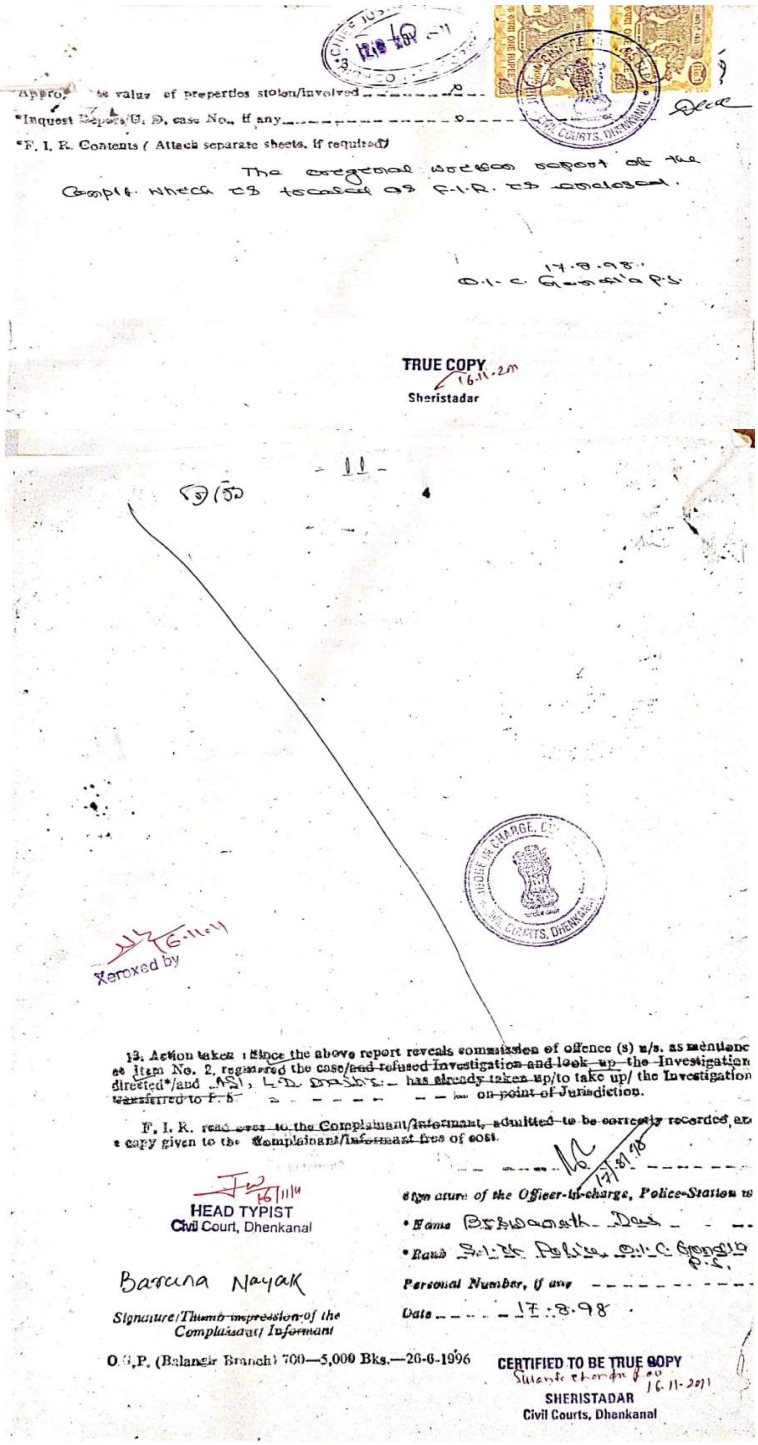
Firstly, in the F.I.R., it is alleged that the incident took place on 16.08.1998 evening. P.W.1 was the informant in the present case, on whose instance the F.I.R. was alleged to have been registered. When the said witness was examined by the trial Court in the witness box, he deposed that the incident had taken place on 17.08.1998. No evidence served clarification as to the variation in the dates of the incident. The prosecution also has not attempted to explain the same. Therefore, a doubt is being created as to whether the incident had taken place on 16.08.1998 or 17.08.1998. Learned trial Court in para-6 of its judgment, which has been reproduced in the preceding paragraph has attempted to explain the same but not up to the satisfaction of the record.

The second issue, which the prosecution is being confronted, regarding the offending vehicle. In the F.I.R., the informant had recorded that the scooter bearing Regn. No.OR-06-8792 had caused the accident as a result of which his father sustained injury. The informant P.W.1 had also stated that immediately after the incident, the accused had left his scooter at the spot and ran away. The police seized the scooter bearing Regn. No. OR-06-9418 which had been registered in the name of one Dillip Kumar Sahu.

It is apparent on record that the vehicle number mentioned in the F.I.R. belongs to one Khageswar Nayak and that vehicle had nothing to do with the incident. When P.W.8 stepped into the witness box, he had stated that he had told his friend, who is the scribe of the F.I.R. regarding the correct number of the vehicle. But the scribe had written a wrong vehicle number in the F.I.R. Surprisingly, the scribe of the F.I.R. had not come on record and he was not even examined.

I have perused the copy of the F.I.R. from the record which indicates that P.W.8, Baruna Naik had written the F.I.R. which is Ext.3/2 and it is pertinent from his signature in the F.I.R. However, in the last page of the F.I.R., the same Baruna Naik has signed in English. Therefore, who had written the F.I.R. and at whose instance, the F.I.R. was written, is creating a serious doubt. For appreciation, the F.I.R. is reproduced hereunder:


To
The officers-in-Charge, Gondia police station
TRUE COPY



Approx. value of properties stolen/involved ..... Rs.

*Inquest Report/U. D. case No., if any .....

*F. I. R. Contents (Attach separate sheets, if required)

The original written report of the Complt. where is treated as F.I.R. is enclosed.

17.8.98
O.I.C. Ghasipur P.S.

TRUE COPY
16.11.2021
Sheristadar

- 11 -

Xeroxed by
16.11.21

13. Action taken : Since the above report reveals commission of offence (s) u/s. as mentione at Item No. 2, registered the case/~~and refused investigation and took up the Investigation~~ directed*/and ASI, L.D. Dhabra has already taken up/to take up/ the Investigation ~~transferred to P. S.~~ on point of Jurisdiction.

F. I. R. read over to the Complainant/~~informant~~, admitted to be correctly recorded, and a copy given to the Complainant/Informant free of cost.

17/8/98

HEAD TYPIST
Civil Court, Dhenkanal

Barsuna Nayak

Signature/Thumb impression of the Complainant/ Informant

Signature of the Officer-in-charge, Police-Station with

*Name Basudeb Das

*Rank Sub-Ins. Police, O.I.C. Ghasipur P.S.

Personal Number, if any

Date 17.8.98

O. S.P. (Balangir Branch) 700—5,000 Bks.—26-6-1996

CERTIFIED TO BE TRUE COPY
16.11.2021
SHERISTADAR
Civil Courts, Dhenkanal

15. Learned trial Court in its judgment has dealt with this issue and recorded the following findings:

> *"The question remains whether the present accused had caused the accident as a result the deceased sustained injuries and ultimately died. In the F.I.R. the Regn. No. of the offending scooter has been mentioned as OR-06-8792. But in this case the I.O. has seized one scooter bearing Regn. No. OR-06-9418 registered in the name of Dillip Kumar Sahu. He had also seized the driving license of the present accused under seizure list marked as Ext.1/2. The informant P.W.8 has stated that as his mind was upset due to the serious condition of his father he did not go through the F.I.R. written by his friend to ascertain its correctness. But he has instructed his friend regarding the Regn. No. of the scooter as 9418. The I.O. had also seized the said scooter and its document on production of the accused in presence of witnesses and left the same in the zima of its owner Dillip Kumar Sahu. The aforesaid evidence of the I.O. has not been impeached during cross-examination. The informant P.W.8 had also received information from the people on the spot that the present accused had caused accident by his rash and negligent driving. Any discrepancy in the Regn. No. of the scooter can not be a ground to disbelieve the prosecution case. P.W.7 Akul Naik who is an eye-witness of the alleged accident being in the company of the deceased has also implicated the present accused for rash and negligent driving and causing injuries to the deceased by dashing the scooter against him. P.W.6 had also ascertained on the spot that the present accused was driving the scooter and caused the accident. Their evidence remains undisturbed during cross-examination. The evidence of D.W.1 does not negative the evidence of the prosecution witnesses as aforesaid."*

16. The explanation offered by the prosecution to explain the difference of the vehicle (scooter) number seized and the scooter number mentioned in the F.I.R. inspires no confidence. In the naked eye it could be seen that the F.I.R. was indeed written by P.W.8, the informant. Therefore, the testimony of P.W.8, that he had disclosed to his friend, the scribe of the F.I.R. regarding the registration number of the vehicle being OR-06-9418 and the wrong vehicle number being OR-06-8792 which was written by him appears to be a futile attempt on the part of the prosecution to justify the wrong seizure.

Thirdly, the presence of the sole eye witness namely P.W.7 at the place of the incident is also creating a doubt in view of the evidence of P.W.8. There are various contradictions appearing on record in so far as the testimony of P.Ws.7 & 8 are concerned.

Apart from the aforementioned three vital lacunas of the prosecution version, learned counsel for the petitioner has also pointed out many other issues which create serious doubt on the prosecution story.

It is submitted by learned counsel for the petitioner that the story of the prosecution appears to be improbable because when the deceased and P.W.7 were coming in a bicycle and the offending vehicle collided with them, surprisingly, one of them sustained and succumbed to the injuries whereas P.W.7, who was the pillion rider of the cycle has not received a single injury. P.W.7 has deposed in favour of the prosecution only because he was an employee of the deceased. P.W.7, who was the vital witness for the prosecution, stated in his evidence that he was riding the

cycle with the deceased when the incident had taken place. The fact that he had escaped absolutely with no injury indicates that he was a planted witness. This aspect of the matter has also escape notice as such not dealt with by the Courts below.

P.Ws.1, 2 & 3 those who are the villagers and independent witnesses turned hostile to the prosecution.

The allegation in the F.I.R. that the accused/petitioner was driving the scooter bearing Regn. No.OR-06-8792, but the police had seized another scooter bearing Regn. No. OR-06-9418 needs to be weighed visà-vis the statement of the registered owner of the vehicle i.e. P.W.5, who had deposed that his vehicle was seized on 17.08.1998 by the police on the way from Gondia to Dhenkanal, as he had no helmet and after payment of fine, the said scooter was released. Thus, the scooter bearing Regn. No. OR-06-9418 was in no way connected with the incident. Therefore, it creates a reasonable doubt regarding the involvement of the offending vehicle as claimed by the prosecution.

17. The aforementioned aspects of the matter have escaped the notice of the Courts below. In totality of the circumstances as mentioned above, if the evidence of all the witnesses is analyzed, a serious doubt is being casted in the prosecution story.

18. In that view of the matter, the benefit of doubt is granted in favour of the petitioner and accordingly, the petitioner is entitled for acquittal. Therefore, the Revision Petition is allowed and the judgment of conviction and order of sentence dated 05.04.2006 passed by the learned S.D.J.M., Dhenkanal in G.R. Case No.451 of 1998/Trial Case No.166/2000 and the judgment and order dated 05.08.2008 passed by the learned Sessions Judge, Dhenkanal in Criminal Appeal No.14 of 2006 are set aside. Petitioner being acquitted from all the charges, bail bond furnished by him stands discharged.

19. The Criminal Revision is accordingly disposed of.

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2024 (III) ILR-CUT-268

SIBO SANKAR MISHRA, J.

CRLMC NO. 4141 OF 2022

VINEET CHHATWAL ….Petitioner

V.

STATE OF ORISSA & ANR. ….Opp.Parties

CODE OF CRIMINAL PROCEDURE, 1973 — Sections 200 and 202 — A protest petition was filed against the petitioner by the Opp. Party No. 2 — The learned S.D.J.M. by arriving at the subjective satisfaction took cognizance of the offences on the basis of the averments in protest petition and on the statement of witnesses recorded U/s. 202 Cr.P.C. —

Whether the order calls for any interference? ─ Held, No ─ The course opted by the learned S.D.J.M, is absolutely just, legal and proper in the facts and circumstances of the case and well within the scope of the law. (Para 21)

Case Laws Relied on and Referred to :-

1. (1998) 5 SCC 749 : Pepsi Foods Ltd. & Anr. vrs. Special Judicial Magistrate & Ors.
2. 2015 (12) SCC 420 : Mehmood U1-Rehman vrs. Khazir Mohammad Tunda & Ors.
3. 2022 SCC OnLine SC 2021 : Tarak Dash Mukharjee & Ors. vrs. State of Uttar Pradesh & Ors.
4. AIR OnLine 2020 SC 303 : Samta Naidu & Anr. vrs. State of Madhya Pradesh and Anr.
5. AIR 1962 SC 876 : Pramatha Nath Talukdar vs. Saroj Ranjan Sarkar.
6. 2023 Livelaw (SC) 730 : Zunaid vrs. State of U.P. & Ors.

For Petitioner : Mr. Ajit Kumar Singh

For Opp.Parties : Mr. B.K. Ragada, Additional Government Advocate
Mr. Samir Kumar Mishra, Sr. Adv. (for O.P.2).

JUDGMENT Date of Hearing : 25.04.2024 : Date of Judgment : 16.07.2024

S.S. MISHRA, J.

1. By invoking the inherent jurisdiction of this Court under Section 482 Cr.P.C., the petitioner in the present petition is seeking quashing of the order dated 13.09.2022 passed by the learned S.D.J.M., Paralakhemundi in 1.C.C. Case No.17 of 2022, whereby the learned Court below has taken cognizance of offences under Sections 408/465/468/469/471/201 of I.P.C. read with Sections 66(C)/66(D)/72 of the I.T. Act against him on the complaint/protest petition filed by opposite party No.2.

2. The prime contention of the petitioner in attacking the cognizance order as mentioned above and the consequential proceeding arising therefrom are that on the selfsame allegations, an F.I.R. has already been registered at Jatni Police Station being Jatni P.S. Case No.0017 of 2021. After investigation, charge-sheet has already been filed in that case, wherein the present petitioner has been cited as a witness. On the selfsame allegations, another F.I.R. has been registered on 14.04.2021 at Gurandi Police Station being Gurandi P.S. Case No.0024 of 2021 only to harass the petitioner. The police investigated into the alleged offences in the second F.I.R. and filed a closure report inter alia stating that ***"there is already a case been filed in Jatni police station and parallel investigation of multiple cases on the same cause of action is not maintainable in the eye of law."***

After the closure report was filed by the Investigating Agency, the opposite party No.2 being dissatisfied filed a protest petition and led evidence under Section 200 Cr.P.C. The learned Trial Court has taken cognizance of the offences in the said protest petition vide the impugned order. Therefore, the petitioner contends that the F.I.R. has already been registered and investigated by the Jatni Police, wherein the petitioner has been arrayed as a witness and on the selfsame allegation and alleged transactions the protest petition has been filed implicating the petitioner as accused despite the police filed a closer report after thorough investigation. The intention of

the opposite party No.2 to file second F.I.R. in a remote place is only with a otivated design to harass the petitioner.

3. Substratum of allegation in the protest petition reads as under:-

"On 19th Dec 2020 it came to light that Mr. Himanshu Kabi had done a misappropriation of money amounting to Rs.87 lakhs. Citing this, Prof. D. N. Rao, sent a mail on 20th December, 2020 instructing Mr. Vineet Chhatwal to seek explanation from Mr. Himanshu Kabi on this matter, and in the reply mail dated 19th Dec 2020, Mr. Kabi had accepted the same. On 20th Dec 2020 Prof. D.N Rao instructed Mr. Vineet Chhatwal, through mail, to immediately suspend the CFO for which Mr. Vineet Chhatwal replied as done. The official mail ID of TFO was also immediately suspended on 20th Dec 2020 by the System Administrator of the university. However, it was later found by the Vice President, on the contrary that Mr. Vineet Chhatwal had neither suspended the CFO nor had he taken any action against him. Mr. Vineet Chhatwal had also again instructed the System Administrator to restore the ID and give it back to the CFO. This mail ID was with Mr. Kabi till 30th Dec 2020. In the meantime Mr. Vineet Chhatwal also entrusted Mr. Kabi with the task of working on GST settlement. This gave Mr. Kabi enough time to take out/delete all important data from his official mail ID. Mr. Kabi also took certain steps to settle GST matter which led the university to fall into a bribery trap case which brought down the image and the goodwill of the university. All these days Mr. Kabi was reporting to Mr. Vineet Chhatwal. This attracts 212 IPC which points at harbouring the offender, which Mr. Vineet Chhatwal has done in this case. Prime facie of this case shows by not acting as the instruction of the Vice Presidentcum-Trustee of the University, Mr. Vineet Chhatwal had committed criminal breach of trust which attracts 405 IPC. Mr. Vineet Chhatwal has done grave misconducts of not responding to the directions of the authorities, and had done disobedience and insubordination, negligence or failure to perform duty and being a party to allow misappropriation of funds and helping the culprits to escape.

Further, Mr. Kabi was terminated from his services and was asked to handover the office laptop and the data related to university to the newly appointed Comptroller of Finance (in-charge), Mr. Debasis Panda. He sent a mall refusing to do so. Hence, the data and the laptop is still with him. An FIR has already been filed against Mr. Kabi under Jatni PS, DR.No.-159 dated 08.01.2021 (FIR No. 0017).

While all this while Mr. Vineet was assuring the founder trustees that he is taking action against the CFO, Mr. Kabi, he kept on engaging with him, giving him access to official records and actively aided him in destroying crucial evidence. Mr. Vineet, however was not present and proceeded to Dubai on 24th December, 2020. This calls for vicarious liability on the part of Mr. Vineet.

Further, Mr. Chhatwal had been the CEO till 11 Feb 2021. In the meantime, in the GST bribery case he was called upon by CBI for investigation. The Trustees of the university had asked him return back from to office just after the CBI Investigation started on the GST bribery case in early January 2021. He had shown his inability to come to the university as he had taken Covid 19 vaccination till end of Jan 2021. It was later noticed that he has given statements to CBI on 9th Feb 2021 & IIC Jatni on 10th Feb 2021 in connection with the university without any consultation of & documents of the university. He has shown scant respect for the due processes of the University and reneged on his own commitment to return to the University after returning from Dubai to settle all outstanding issues. Further, Mr. Chhatwal was terminated via e-mall dated 12th Feb 2021 and was asked to handover the charge and details. But, though he was

> heading the administration as CEO, Mr. Vineet replied that he had not got any data or files or details to handover to the university.
>
> It has also come to the notice of the University that the accused persons Mr. Vineet and Mr. Kabi colluded to defame the university by recording false evidence and going on TV on 14th Feb, 2021. Mr. Kabi used the data collected by him (which was allowed by the CEO Mr. Chhatwal) during the course of his duties, for this purpose. This amounts to breach of trust as well as theft of data which will attract punishment under Section 66 of the IT Act, 2000."

4. To substantiate the allegations made in the protest petition, the opposite party No.2 examined three witnesses. The complainant himself filed a detailed affidavit by way of evidence dated 20.07.2022 and exhibited the said affidavit by appearing and deposing before the Court. Similarly, one Mr. Nrusingha Das was also examined as witness No.2. He too filed evidence by way of affidavit dated 16.08.2022 and exhibited the same in the Court on 07.09.2022. Similarly, Mr. Suri Venkata Ramana was also examined as witness No.3. He had filed an affidavit by way of evidence on 16.08.2022 and appeared before the Court on 07.09.2022 to affirm and exhibit the affidavit. Apart from the detailed narration of the sequence of events and the allegations against the petitioner, these witnesses appearing in the Court had made specific allegation against the petitioner, outline of which *inter alia* reads as under:-

> "1. I know the complainant of this case Durga Prasad Padhi. I know the accused person Vineeth Chatwal.
>
> 2. The Board Member of Centurion University appointed the accused as Chief Executive Officer (CEO) for raising investments, strengthen admissions, finance, placement and other administrative development in the month of May, 2019. He joined in the month of August, 2019. After his appointment he himself appointed one Himanshu Kabi as Chief Finance Officer, CFO and his appointment they both were dealing with all the administrative work including the finances of the University. I also directed to report CEO for every financial matter of the university. Thereafter, CEO and CFO made several financial transaction of the university during Covid Period. In December, 2020 the University found out that CFO was doing misappropriate of the funds of the university and accordingly a direction was issued to the CEO for suspension of mail ID of CFO as well as of his removal. But instead of that the CEO not only activate the mail of CFO but also help the CFO for committing further misappropriation of the funds as well as for sharing the data with other investors. When another notice was issued to CEO with regard to supplying of data in reply he submits that he got no data with him and delete all the datas. For the misappropriation of the funds as well as for sharing the confidential data a case has been registered against CFO at Jatni PS also with the ground for return back the official laptop. One case was also registered by the complainant in this regard before Paralakhemundi PS against CEO and CFO."

All the witnesses besides the complainant have broadly made same statements before the summoning court in the enquiry under section 202 Cr.P.C.

5. The learned S.D.J.M., Paralakhemundi by taking into consideration the allegations made in the protest petition and the depositions of three witnesses including the informant in their pre-summoning evidences has taken cognizance of

the alleged offences against the petitioner. Therefore, the petitioner is aggrieved by the said cognizance order and challenged the same in this petition.

6. Heard Mr. Ajit Kumar Singh, learned counsel for the petitioner, Mr. B. K. Ragada, learned Additional Government Advocate for the State and Mr. Samir Kumar Mishra, learned Senior Counsel for the opposite party No.2.

7. Mr. Singh, learned counsel for the petitioner submits that in the present case, on the same set of incidents and also connected with the same set of transactions, two FIRs have been registered. In the first F.I.R. dated 08.01.2021 registered at Jatni Police Station on the written report of Chitta Ranjan Pattnaik, Sr. Manager, HR & Admin, Centurion University, the petitioner has been cited as a witness. In the second F.I.R. dated 14.04.2021 registered at Gurandi Police Station on the written report of Dr. Durga Prasad Padhi, Deputy Registrar, Centurion University after thorough investigation, closure report was filed. However, the opposite party No.2 filed a criminal complaint under Section 200 Cr.P.C. as a protest petition against the police report before the learned S.D.J.M., Paralakhemundi reiterating same allegations as was made in the earlier two F.I.Rs relating to the same set of incidents and transactions. The learned S.D.J.M., Paralakhemundi ignored the closure report, which expressly stated that there is already a case filed in Jatni Police Station and parallel investigation of multiple cases on the same cause of action is not maintainable in the eye of law. The learned Court below ought not to have ignored this material evidence already collected and placed on record in the charge sheet of the first F.I.R. Further, the learned Court below should not have ignored the law applicable thereto i.e. there cannot be a second F.I.R. on the same set of incidents/transactions or connected set of incidents/transactions.

8. To substantiate the aforementioned submission, Mr. Singh, learned counsel for the petitioner relied upon the judgment of the Hon'ble Supreme Court in the case of ***Pepsi Foods Ltd. and another vrs. Special Judicial Magistrate and others*** reported in ***(1998) 5 SCC 749***. He has also relied upon another judgment in the case of ***Mehmood U1-Rehman vrs. Khazir Mohammad Tunda and other*** reported in ***2015 (12) SCC 420***.

In ***Pepsi Foods*** (supra), it is held that summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed to bring home the charge. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. The Magistrate has to carefully scrutinize the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the

truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused.

9. The Hon'ble Supreme Court in the case of ***Mehmood*** (supra) has held that the Magistrate needs to apply judicial mind, while issuing summon to call on to an accused for facing criminal trial. It has held that in other words, the Magistrate is not to act as a post office in taking cognizance of each and every complaint filed before him and issue process as a matter of routine. There must be sufficient indication in the order passed by the Magistrate that he is satisfied that the allegations in the complaint constitute an offence and when considered along with the statements recorded and the result of inquiry or report of investigation under Section 202 Cr.P.C., if any, the accused is answerable before the criminal court, there is ground for proceeding against the accused under Section 204 Cr.P.C., by issuing process for appearance. The application of mind is best demonstrated by disclosure of mind on satisfaction. If there is no such indication in a case where the Magistrate proceeds under Sections 190/204 Cr.P.C., the High Court under Section 482 Cr.P.C. is bound to invoke its plannery power so as to prevent abuse of the process of law. To be called to appear before the criminal court as an accused is a serious matter affecting one's dignity, self-respect and image in society. Hence, the process of criminal court shall not be made as a weapon of harassment.

10. Mr. Singh, learned counsel for the petitioner highlighted the nature of the complaint filed before the Magistrate under Section 200 Cr.P.C., in form of a protest petition. Essentially the complaint/protest petition reflects the complainant's dissatisfaction with the police investigation. However, it is surprising that the learned Magistrate completely overlooked the fact that in the second F.I.R. No.0024 dated 14.04.2021 at Gurundi Police Station, there are two accused, with the petitioner allegedly aiding and assisting A-2, (Himanshu Shekhar Kabi), in the diversion of funds through forgery of the document etc. Strikingly, in the protest petition, only the names of the petitioner as an accused found mentioned, this discrepancy that not only deviates from the original police complaint but also poses a logical challenge as to how the offence could have been committed solely by the petitioner in absence of Himanshu Shekhar Kabi. This oversight demonstrates a clear non-application of mind by the cognizance taking Court.

11. Mr. Singh, further relied upon the judgment of the Hon'ble Supreme Court in the case of ***Tarak Dash Mukharjee and others vrs. State of Uttar Pradesh and others*** reported in ***2022 SCC OnLine SC 2021*** and submitted that facts of this case matches with the facts of the cited judgment. Paragraphs-11, 12 & 13 of the said judgment have been cited, which reads as under:-

> "11. We have perused both the FIRs. The respondent no.4 is the first informant in both the FIRs and the same are based on the same agreement for sale executed on 14th June 2006. The allegation made in both the FIRs is the same. The allegation is that by practising forgery and fraud, the appellant no.1 has sold the subject property to appellant no.2 thereby deceiving the respondent no.4. The second FIR, which is the subject matter of challenge, was registered nearly four years after the first FIR was registered. The

challenge to the first FIR is pending before the High Court. These aspects have been completely overlooked by the High Court in the impugned judgment.

12. If multiple First Information Reports by the same person against the same accused are permitted to be registered in respect of the same set of facts and allegations, it will result in the accused getting entangled in multiple criminal proceedings for the same alleged offence. Therefore, the registration of such multiple FIRs is nothing but abuse of the process of law. Moreover, the act of the registration of such successive FIRs on the same set of facts and allegations at the instance of the same informant will not stand the scrutiny of Articles 21 and 22 of the Constitution of India. The settled legal position on this behalf has been completely ignored by the High Court.

13. Accordingly, the appeal must succeed. The FIR No.0177 of 2019 registered at Bhelupur Police Station in District Varanasi, charge-sheet dated 12 July 2019 on the basis of the said FIR and the summoning order dated 12th July 2019 passed by the Court of ACJM, Varanasi in Criminal Case No.480 of 2019 are thereby quashed and set aside. No order as to costs."

In essence, the contention of Mr. Singh is that this Court inheres the power to interdict the proceeding at the threshold stage on the broad principle that the proceeding is instituted being the manifestation of malafide attempt with an ulterior motive for wreaking vengeance on the petitioner. Prima facie triable offence is not disclosed which would warrant subjecting the petitioner to suffer the agony of often protracted legal proceeding. A prosecution which is bound to become lame or a sham ought to be interdicted in the interest of justice lest the continuance thereof will amount to an abuse of process of law.

12. *Per Contra*, Mr. S.K. Mishra, learned Senior Counsel for the opposite party No.2 has argued that if the submission of the petitioner is taken into consideration at this stage, this Court has to conduct some sort of mini trial to ascertain the fact as to whether the transaction related to the earlier F.I.R. registered in Jatni P.S. has anything to do with the transaction alleged in the present case or not. He further submitted that the judgment cited by Mr. Singh, learned counsel for the petitioner has no bearing on the facts of the present case, because in both the F.I.Rs. the act complaint of are pertaining to distinct transactions.

13. Mr. Ragada, learned Additional Government Advocate for the State by concurring with the submission made by Mr. Mishra, learned Senior Counsel for opposite party No.2 submits that the cognizance taking Court needs to be satisfied as to whether *prima facie* case is made out on the basis of material available on record. In the instant case, since the complaint/protest petition contains specific allegation against the petitioner and the said allegations are being reiterated in the evidence of the witnesses, the Court below had no other option rather to take cognizance of offences. Probative value of that evidence borne on record in the enquiry under section 202 Cr.P.C could only be tested in the trial.

14. I have heard the learned counsel for the parties at length and have also perused the material available on record. The judgments cited by the petitioner are also being analyzed vis-à-vis the facts of the present case.

15. Mr. Singh, learned counsel for the petitioner to begin with cited couple of judgments to persuade this Court to give indulgence in this matter under the inherent jurisdiction of this Court. There is no quarrel on the legal proposition that the inherent jurisdiction of the High Court under section 482 Cr.P.C. is designed to achieve salutary purpose that criminal proceedings ought not to be permitted to degenerate into the weapon of harassment. If the Court is satisfied that the criminal proceeding amounts to abuse of process of law, it must exercise the inherent power and scuttle the prolonged rigors of trial at the threshold.

16. I agree with Mr. Singh, learned counsel for the petitioner that registration of the second F.I.R. based on the same set of facts and related to the same series of transaction is nothing but abuse of process of law. However, grains has to be separated from chaff to accept the contention that the transaction/incident indeed are same or germinating from the same series of transaction/incident which has been the subject matter of the first F.I.R. registered at Jatni P.S. Case No.0017 of 2021 needs to be gone into at the appropriate stage. There is a distinction between the same transaction/incident and similar transaction/incident. For the same transaction/ incident no doubt second F.I.R. or repeated F.I.R. cannot be registered but for the similar incident/transaction, there could be more than one F.I.R., the Investigating Agency has to investigate the case so as to ascertain as to whether the incidents are similar or same. In the instant case, the Investigating Agency in the second F.I.R. i.e. Gurandi P.S. Case No.0024 of 2021 has although filed a closure report *inter alia* stating that the transaction/incident is arising out of the same cause of action, however, in the protest petition, the opposite party No.2 has made very specific allegation against the petitioner making out a similar case to that of the first F.I.R. and the said allegations are substantiated through enquiry by Magistrate by recording the statement under Section 202 Cr.P.C. There are overlapping facts which has been pointed out by Mr. Singh, learned counsel for the petitioner. Those ambivalence facts which are complicated and culminated into the registration of the first F.I.R. and subsequently the second F.I.R. needs to be seen in the light of the fact as to whether the allegations are same or similar in nature.

17. It is said that every trial is a voyage of discovery in which truth is the quest. Therefore, the process of trial is inevitable to discover the truth from these complicated, overlapping and ambivalence facts like the present case. The petitioner has questioned the prosecution at the very incipient stage. The learned Court below has taken cognizance of offences on the basis of the averment made in the complaint and the statement of witnesses recorded under Section 202 Cr.P.C. The only test for the cognizance taking court is to see through the record as to whether *prima facie* case is borne out from the material form part of the record or not. The Trial Court in the instant case has only looked into the allegation made by the opposite party No.2 in the complaint/protest petition and the subsequent statement of the witnesses namely Suri Venkata Ramana, Nrusingha Das and Santosh Kumar Nanda.

18. Perusal of the contents of the complaint and the evidence, no doubt makes out a *prima facie* case on facts in the first flush against the petitioner for the offences

punishable under Sections 408/465/468/469/471/201 of I.P.C. read with Sections 66(C)/66(D)/72 of the I.T. Act. But availability of necessary ingredient from the materials on record to constitute a particular offence or offences needs to be gone into by the Court below at the appropriate stage, however, definitely not at this stage of cognizance. Therefore, no fault could be found in the impugned order and I think the Court below in this case has rightly taken note of the fact that the complainant/opposite party No.2 has successfully made out a *prima facie* case against the petitioner.

19. The contention of the petitioner through Mr. Singh, that on the selfsame allegation, there was already an F.I.R. registered wherein the petitioner has been arrayed as a witness, therefore, the subsequent F.I.R. is a mala fide action on the part of the opposite party No.2 could only be tested at the appropriate stage by the Trial Court. At the incipient stage of taking of cognizance of offences, the Court is not required to go into all these issues. The contention of Mr. Singh, learned counsel for the petitioner regarding lack of ingredients to substantiate few of the offences cognizance of which has been taken against the petitioner is also an issue to be gone into by the Court below at the stage of framing of charges.

20. The Hon'ble Supreme Court in the case of ***Samta Naidu & Anr. vrs. State of Madhya Pradesh and Anr.*** reported in ***AIR OnLine 2020 SC 303*** while taking clue from its earlier judgment the *Pramatha Nath Talukdar vs. Saroj Ranjan Sarkar* reported in *AIR 1962 SC 876* has held as under:-

> 48. Under the Code of Criminal Procedure the subject of "Complaints to Magistrates" is dealt with in Chapter 16 of the Code of Criminal Procedure. The provisions relevant for the purpose of this case are Sections 200, 202 and 203. Section 200 deals with examination of complainants and Sections 202, 203 and 204 with the powers of the Magistrate in regard to the dismissal of complaint or the issuing of process. The scope and extent of Sections 202 and 203 were laid down in Vadilal Panchal v. Dattatraya Dulaji Ghadigaonker. The scope of enquiry Under Section 202 is limited to finding out the truth or otherwise of the complaint in order to determine whether process should issue or not and Section 203 lays down what materials are to be considered for the purpose. Under Section 203 Code of Criminal Procedure the judgment which the Magistrate has to form must be based on the statements of the complainant and of his witnesses and the result of the investigation or enquiry if any. He must apply his mind to the materials and form his judgment whether or not there is sufficient ground for proceeding. Therefore if he has not misdirected himself as to the scope of the enquiry made Under Section 202, of the Code of Criminal Procedure, and has judicially applied his mind to the material before him and then proceeds to make his order it cannot be said that he has acted erroneously. An order of dismissal Under Section 203, of the Code of Criminal Procedure, is, however, no bar to the entertainment of a second complaint on the same facts but it will be entertained only in exceptional circumstances, e.g., where the previous order was passed on an incomplete record or on a misunderstanding of the nature of the complaint or it was manifestly absurd, unjust or foolish or where new facts which could not, with reasonable diligence, have been brought on the record in the previous proceedings, have been adduced. It cannot be said to be in the interests of justice that after a decision has been given against the complainant upon a full consideration of his case, he or any other person should be given another opportunity to have his complaint enquired into."

21. The Hon'ble Supreme Court in the case of ***Zunaid vrs. State of U.P. & Ors***. reported in ***2023 Livelaw (SC) 730*** while dealing with a matter some what matching the facts of the present case has also held that the Magistrate by arriving at the subjective satisfaction can take cognizance of the offences on the basis of the averments in protest petition and an inquiry under Section 202 Cr.P.C. Paragraphs-11 & 12 of the said judgment is relevant to be reproduced as under:-

> 11. In view of the above, there remains no shadow of doubt that on the receipt of the police report under Section 173 Cr.P.C., the Magistrate can exercise three options. Firstly, he may decide that there is no sufficient ground for proceeding further and drop action. Secondly, he may take cognizance of the offence under Section 190(1)(b) on the basis of the police report and issue process; and thirdly, he may take cognizance of the offence under Section 190(1)(a) on the basis of the original complaint and proceed to examine upon oath the complainant and his witnesses under Section 200. It may be noted that even in a case where the final report of the police under Section 173 is accepted and the accused persons are discharged, the Magistrate has the power to take cognizance of the offence on a complaint or a Protest Petition on the same or similar allegations even after the acceptance of the final report. As held by this Court in ***Gopal Vijay Verma Vs. Bhuneshwar Prasad Sinha and Others***, as followed in ***B. Chandrika Vs. Santhosh and Another***, a Magistrate is not debarred from taking cognizance of a complaint merely on the ground that earlier he had declined to take cognizance of the police report. No doubt a Magistrate while exercising his judicial discretion has to apply his mind to the contents of the Protest Petition or the complaint as the case may be.
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> 12. So far as the facts of the present case are concerned, the concerned CJM vide the detailed order passed on 15.11.2018 had rejected the final report submitted by the Investigating Officer and had accepted the Protest Petition, and decided to proceed further under Section 200 Cr.P.C. Such a course opted by the CJM was absolutely just, legal and proper in the facts and circumstances of the case. The said order dated 15.11.2018 remained unchallenged at the instance of the respondents-accused. It was only when the concerned CJM after recording the statements of the complainant and eight witnesses, issued summons on 11.01.2022, the respondents filed the application challenging the said order dated 11.01.2022 under Section 482 before the High Court, and in the said application, the order dated 15.11.2018 came to be challenged by way of amendment. As such, the High Court should not have permitted the respondents-accused to amend the Application for challenging the order dated 15.11.2018 after about four years of its passing, and in any case should not have interfered with the discretion exercised by the CJM within the four corners of law. The discretionary order of 11.01.2022 passed by the concerned CJM issuing summons to the accused, after recording statements of the complainant and the eight witnesses and after recording prima facie satisfaction about the commission of the alleged crime, also did not warrant any interference by the High Court. In our opinion, the High Court has committed gross error in setting aside the orders dated 15.11.2018 and 11.01.2022 passed by the CJM."

In the present case the Magistrate has opted for third option and by ignoring the police report, entered into an enquiry under section 202 Cr.P.C on the protest petition filed by the Opposite Party No.2. Basing on the allegations made in the protest petition and relying upon reiterations of the same in the pre-summoning evidence by the three witnesses, took cognizance of the offences against the petitioner. Such a course opted by the learned S.D.J.M., Paralakhemundi is absolutely just, legal and proper in the facts and circumstances of the case and well

within scope of the law. Therefore, no interference from this Court in the matter is called for at this stage, however, dismissal of the present petition shall not preclude the petitioner to avail all his remedy under law at the appropriate stage before the court below.

22. Regard being had to the reasons enumerated in the preceding paragraphs, I find no cause to interfere with the impugned order rather I feel it appropriate to relegate the petitioner to urge all his points before the trial Court at the appropriate stage.

23. With the aforementioned liberty, the CRLMC is disposed of.

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2024 (III) ILR-CUT-278

A.C. BEHERA, J.

SA NO.106 OF 1995

ORISSA STATE FINANCIAL CORPORATION, SUNDARGARH .....Appellant

V.

BASANTA KUMAR AGARWAL .....Respondent

STATE FINANCIAL CORPORATIONS ACT, 1951 ─ Sections 29 and 29 (4) ─ The appellant corporation seized the financed truck of the respondent and sold it to a third party on 30.03.1986 ─ After adjustment of the outstanding loan dues from the sold money of the vehicle, the surplus amount should be refunded to the respondent ─ The corporation did not pay the surplus amount to the respondent ─ Whether the appellant corporation is liable to pay interest whatsoever on the differential amount? ─ Held, Yes ─ The Corporation being a model as well as virtuous litigant should not harass its poor loanee retaining his legitimate dues/claims unjustly. (Paras 16 - 17)

Case Laws Relied on and Referred to :-

1. AIR 2001 (S.C.) 5: Himachal Pradesh State Financial Corporation, Shimla Vrs. Prem Nath Nanda & Ors.
2. 2008 (I) C.J.D (SC) 341: Everest Wools Pvt.Ltd. & Ors Vrs. U.P.Financial Corpn. & Ors.
3. (2011) 8 S.C.C. 161 : Indian Council for Enviro-Legal Action Vrs. Union of India & Ors.
4. 2018 (1) CLR 1191 : The Postmaster General, Sambalpur and Anr vrs. Miss Sanjukta Hota

For Appellant : Mr. A. Routray (on behalf of Mr.P.K. Routray)
For Respondent : Ms.M. Mishra

JUDGMENT Date of Hearing : 27.08.2024: Date of Judgment : 04.09.2024

A.C. BEHERA, J.

This Second Appeal has been preferred against the partially reversing judgment.

2. The appellant in this Second Appeal was the defendant before the Trial Court in the suit vide M.S. No.48 of 1989 and respondent before the 1st Appellate Court in the first appeal vide M.A. No.2 of 1992.

The respondent in this 2nd Appeal was the sole plaintiff before the Trial Court in the suit vide M.S. No.48 of 1989 and appellant before the 1st Appellate Court in the 1st appeal vide M.A. No.2 of 1992.

3. The suit of the plaintiff (respondent in this 2nd Appeal) vide M.S. No.48 of 1989 before the Trial Court against the defendant (appellant in this 2nd appeal) was a suit for realization of Rs.50,308.67 Paise along with pendentelite and future interest thereon.

4. The case of the plaintiff as per his plaint was that, the defendant is the Orissa State Financial Corporation. He (plaintiff) had purchased a truck bearing registration No.OAO-5277 for Rs.1,96,000/- on being financed by the defendant corporation and when, he (plaintiff) could not able to run the said truck for his business purpose smoothly, for which, he (plaintiff) could not able to repay the loan installment dues of the defendant corporation. Therefore, the defendant corporation seized the financed truck of the plaintiff on dated 13.03.1986 by exercising its power under Section 29 of the State Financial Corporations Act, 1951 and thereafter sold the said truck on 30.03.1986 through auction for Rs.1,90,000/- to a third party. After selling the seized truck, the defendant-corporation intimated him (plaintiff) that, after adjustment of the outstanding loan dues of Rs.1,57,913.30 Paise from the sold money of the truck, the surplus amount i.e. Rs.32,667.95 Paise shall be refunded to him (plaintiff), after payment of the entire sold money by the auction purchaser of the truck. When, the defendant-corporation did not pay the said amount to the plaintiff, then, he (plaintiff) requested the defendant-corporation through a notice by his Advocate for providing him the surplus sold money i.e. Rs.32,667.95 Paise with 18% interest thereon since the date of selling of the truck i.e. since 30.03.1986 till its payment, but the defendant-corporation did not respond to his request. For which, without getting any way, the plaintiff approached the Civil Court by filing the suit vide M.S. No.48 of 1989 against the defendant-corporation for realization of the surplus sold money of the truck i.e. Rs.32,667.55 Paise plus 18 % interest per annum thereon i.e. Rs.17,640.72 Paise in total Rs.50,308.67 paisa along with the pendentilite and future interest thereon.

5. Having been noticed from the Trial Court in the suit vide M.S. No.48 of 1989 filed by the plaintiff, the defendant-corporation challenged the same by filing its written statement taking its stands therein, admitting the sanction of loan of Rs.1,90,000/- in favour of the plaintiff for purchasing the truck with interest at the rate of 121/2% per annum thereon, but, due to failure of the plaintiff to repay all the installments of the loan in due time, a sum of Rs.1,57,913.30 Paise including interest as on 31.12.1985 became outstanding against him (plaintiff). For which, the financed truck of the plaintiff was seized by the defendant-corporation exercising its statutory power under Section 29 of the Orissa State Financial Corporations Act,1951

and the same was sold through public auction on dated 30.03.1986 for Rs.1,90,000/- and the auction purchaser made down payment of Rs.80,000/- and the balance consideration money was stipulated to be paid in equal monthly installments of Rs.10,000/- starting from the month of May 1986, for which, the interest upon the outstanding loan dues against the plaintiff was calculated for the period from 01.01.1986 to 30.03.1986 and the interest on the outstanding dues during that period became Rs.4,677.43 Paise and in addition to that, the defendant-corporation had spent a sum of Rs.595.25 Paise for the seizure of the financed truck for its auction sell. Therefore, through addition of the above interest i.e. Rs.4,677.43 Paise for the period from 01.03.1986 to 30.03.1986 on the outstanding loan dues of Rs.1,57,913.30 Paise plus Rs. 595.25 Paise towards the cost of seizure, the total outstanding dues till the auction of the financed truck against the plaintiff became Rs.1,62,590.73 Paise, for which, after deduction of the said Rs.1,62,590.73 Paise from the sold money i.e. Rs.1,90,000/- of the financed truck, the plaintiff was entitled to be refunded of Rs.26,804.27 Paise from the defendant-corporation as per Section 29 (4) of the State Financial Corporations Act, 1951, only after the payment of the entire sold money by the auction purchaser, for which, there is no provision under law for payment of interest on the surplus amount. Therefore, the plaintiff is not entitled for the decree as prayed for by him against the defendant-corporation. So, the suit of the plaintiff is liable to be dismissed.

6. Basing upon the aforesaid pleadings and matters in controversies between the parties, altogether four numbers of issues were framed by the Trial Court in the suit vide M.S. No.48 of 1989 and the said issues are:-

Issues

1. Whether the plaintiff is entitled to receive the suit amount with interest as prayed for?
2. What amount was due payble by the plaintiff to the defendant, interest as on 30th March 1986?
3. To what amount, the plaintiff is entitled to receive from the defendant?
4. To what relief, the plaintiff is entitled to?

7. In order to substantiate the aforesaid relief(s), sought for by the plaintiff against the defendant, he (plaintiff) examined him as P.W.1 and relied upon the documents vide Exts.1 to 4/B on his behalf.

On the contrary, in order to nullify/defeat the suit of the plaintiff, the defendant-corporation examined one witness i.e. one of its Officer as D.W.1 and relied upon the documents vide Exts.A to B/1.

8. After conclusion of hearing and on perusal of the materials, evidence and documents available in the record, the Trial Court answered only issue No.1 in part in favour of the plaintiff, but answered other issues i.e. issue Nos.2 and 3 against the plaintiff and in favour of the defendant and basing upon the findings and observations made by the Trial Court in the issues, the Trial court decreed the suit of the plaintiff in part on contest against the defendant entitling the plaintiff for Rs.26.804.27 Paise from the defendant-corporation as the surplus amount of the sold

money of the financed truck after adjustment of the loan outstanding dues against him (plaintiff) with interest, but he (plaintiff) is not entitled for any interest on the same as per its judgment and decree dated 24.01.1992 and 04.02.1992 respectively.

9. On being dissatisfied with the aforesaid part judgment and decree of the suit of the plaintiff vide M.S. No.48 of 1989 by the Trial Court declining the claim of interest on the surplus amount of the sold money of the truck, he (plaintiff) challenged the same by preferring the 1st Appeal vide M.A. No.2 of 1992 being the appellant against the defendant arraying the defendant-corporation as respondent.

10. After hearing from both the sides, the 1st Appellate Court allowed that first appeal of the plaintiff vide M.A. No.2 of 1992 in part on contest against the defendant-corporation as per its judgment and decree dated 28.01.1995 and 09.02.1995 respectively and modified the judgment and decree of the Trial Court entitling the plaintiff for Rs.26,804.27 Paise along with interest at the rate of 6% thereon since 30.03.1986 i.e. since the date of auction till the date of decree passed by the Trial Court, in total Rs.43,837.20 Paise assigning the reasons that, since the date of selling of the financed truck of the plaintiff by the defendant-corporation, the plaintiff has been entitled for the surplus consideration amount of the sold truck, for which, for retention of that amount of defendant-corporation without refunding the same to the plaintiff has made the plaintiff entitled under law to get interest on the said amount from the defendant-corporation.

11. On being aggrieved with the aforesaid part judgment and decree passed by the 1st Appellate Court in M.A. No.2 of 1992 against the defendant-corporation, the defendant-corporation challenged the same by preferring this 2nd Appeal being the appellant against the plaintiff arraying the plaintiff as respondent.

12. This 2nd Appeal was admitted on formulation of the following substantial question of law i.e.:-

> (i) Whether the defendant-appellant (State financial Corporation) is liable to pay interest whatsoever on the differential amount payble to the plaintiff-respondent when, the corporation took action under Section 29 (1) and received money under Section 29 (4) of the S.F.C. Act, 1951?

13. I have already heard from the learned counsel for the appellantcorporation (defendant) as well as from the respondent (plaintiff).

14. As per the mandate of sub Section (4) of Section 29 of the State Financial Corporations Act, 1951, *"where the corporation takes any action against the lonee as per sub Section (1) of Section 29 of the State Financial Corporations Act, 1951 for seizure of financed item/vehicle to its possession and sells the same for realization of the loan outstanding dues, then, in absence of any contract to the contrary, be held by it in trust to be applied firstly in payment of costs, charges and expenses incurred towards such seizure and possession and then, secondly take steps towards the discharge of debt due to the financial corporation and after adjustment of the above both from the sell proceeds of the financed item/material, then, the residue (surplus money) thereof so received by the corporation from the purchaser of the unit/item shall be paid to the person entitled thereto".*

15. So, the sub Section (4) of Section 29 of the State Financial Corporations Act, 1951 provides the word shall be paid, which means, "must be paid" to the surplus amount of the sold money of the auctioned property to the person entitled to.

16. Therefore, according to the mandate of said sub Section (4) of Section 29 of the S.F.C. Act, 1951, the plaintiff was entitled to receive the surplus amount of the sold money of the truck from the defendant-corporation since the date of selling of his financed truck i.e. since 30.03.1986.

It has been held through the concurrent findings of the Trial court as well as 1st Appellate Court that, by the time of selling of the truck through auction on dated 30.03.1986, the outstanding dues against the plaintiff including the loan, interest and expenditures for seizure of the truck was Rs.1,63,185.73 Paise, but the truck was sold for Rs.1,90,000/- and after deduction of Rs.1,63,185.73 Paise from Rs.1,90,000/-, the surplus amount thereof was Rs.26.804.27.

Therefore, as per the mandate of section 29(4) of the State Financial Corporations Act, 1951, the plaintiff was entitled to get Rs.26.804.27 Paise from the defendant-corporation since 30.03.1986 and it was the duty and obligation of the defendant-corporation to pay the said surplus amount i.e. Rs.26.804.27 Paise immediately to the plaintiff, but the defendantcorporation did not pay the same to the plaintiff. For which, the plaintiff approached the Civil Court for realization of the same with interest thereof.

As, since 30.03.1986, the plaintiff had the legal due of Rs.26.804.27 Paise on the defendant-corporation and it was the legal duty and obligation of the defendant-corporation to pay the same to the plaintiff, for which, the above retention of the money of the plaintiff by the defendant-corporation without paying the same to the plaintiff is an unjust enrichment of the defendant-corporation. For such unjust enrichment of money i.e. Rs.26.804.27 Paise of the plaintiff by the defendant-corporation since 30.03.1986, the plaintiff is entitled to get interest on the same.

On this aspect, the propositions of law has already been clarified by the Hon'ble Courts and Apex Court in the ratio of the following decisions

> *(i)* ***AIR 2001 (S.C.) 5: Himachal Pradesh State Financial Corporation, Shimla Vrs. Prem Nath Nanda & Others***—State financial corporations Act (63 of 1951), Section 29—In appropriate cases interest may be awarded in lieu of compensation or damages for allegedly wrongfully retaining the amount payable to a party. Interest can be awarded on equitable grounds. (Para 6)
>
> *(ii)* ***2008 (I) C.J.D. (SC) 341: Everest Wools Pvt. Ltd. & Others Vrs. U.P. Financial Corporation & Others***—State Financial Corporation Act, 1951—Section 29—Power under—When corporation takes over possession, it acts as a trustee—Its action must be fair and reasonable. (Para 19)
>
> *(iii)* ***(2011) 8 S.C.C. 161 : INDIAN COUNCIL for ENVIRO-LEGAL ACTION VRS. UNION OF INDIA AND OTHERS***—Unjust enrichment—Meaning thereby— Unjust retention of a benefit to the loss of another or the retention of money or property of another against the fundamental principles of justice, equity and good conscience. (Para 152 to 156)

(iv) ***2018 (1) CLR 1191 : The Postmaster General, Sambalpur and another vrs. Miss Sanjukta Hota—Unjust Enrichment***—A benefit obtained from another, not intended as a gift and not legally justifiable, for which, the beneficiary must make restitution or recompense. (Para 14 & 17)

17. The defendant-corporation being a model as well as virtuous litigant should not harass its poor loanee i.e. plaintiff retaining his legitimate dues/claims unjustly.

18. Here, in this suit/appeal at hand, when the defendant-corporation has retained the legitimate dues of the plaintiff since the date of auction of the truck i.e. since 30.03.1986 unjustly and when the Acts and activities of the defendant-corporation are not fair and reasonable as per the discussions and observations made above, then at this juncture, in view of the principles of law enunciated in the ratio of the aforesaid decisions of the Hon'ble Courts and Apex Court, the non-refund of the same to the plaintiff is an unjust enrichment of the defendant-corporation. For which, the judgment and decree passed by the 1st Appellate Court modifying the judgment and decree of the Trial court for payment of the surplus amount of sold money of the financed truck after adjustment of the outstanding loan dues, interest and expenditures since the date of selling of the truck i.e. since 30.03.1986 till the date of decree passed by the Trial Court in the suit and the future interest thereon cannot be held as unreasonable or erroneous. Therefore, there is no justification under law for making interference with the said judgment and decree passed by the 1st Appellate Court through this 2nd Appeal filed by the appellant-corporation.

So, there is no merit in the 2nd appeal filed by the appellant-corporation. The same must fail.

19. In result, the 2nd appeal filed by the appellant-corporation is dismissed on contest against the respondent (plaintiff), but without cost. The judgment and decree passed by the 1st appellate Court in M.A. No.2 of 1992 is confirmed.

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2024 (III) ILR-CUT-283

A.C. BEHERA, J.

S.A. NO.117 OF 1994

BATA KRISHNA MOHANTY ……Appellant

V.

PITAMBAR MOHANTY & ORS. ……Respondents

TRANSFER OF PROPERTY ACT, 1882 ─ Section 54 ─ The mother of the defendants 1 & 2 sold the entire properties of the suit land beyond transferor's interest in the land jointly held with the plaintiff ─ Whether the transfer is invalid? ─ Held, No ─ It would be valid and operative to the extent of transferor's interest in the land. (Paras 14-15)

Case Laws Relied on and Referred to :-

1. 2010 (II) OLR (SC) 126: Shanti Budhiya Vesta Patel & Ors. Vrs. Nirmala Jayprakash Tiwari & Ors
2. 2005 (II) OLR 330: Pragnya Rout Vrs. Hemaprava Ray & Ors.
3. 1974 (I) CWR 222: Ganapath Sahu & Anr. Vrs. Smt. Bulli Sahu & Ors.
4. 1998 (II) OLR 543: Smt. Rebati Dei Vrs. Kunja Bihari Mohapatra.
5. AIR 1995 (S.C) 1377: Nagar Palika, Jind Vrs. Jagat Singh.
6. JBR Vol.XVII (1982) Part-II Page 43: Sudam Das Vs. Krushna Mahakur.

For Appellant : Mr. S.P. Mishra, Sr.Adv, Ms. M. Mishra.

For Respondents : None.

JUDGMENT Date of Hearing : 14.08.2024 : Date of Judgment : 06.09.2024

A.C. BEHERA, J.

1. This 2nd Appeal has been preferred against the confirming Judgment.

2. The appellant in this 2nd Appeal was the plaintiff before the Trial Court in the suit vide T.S. No.131 of 1981 and appellant before the First Appellate Court in the 1st appeal vide T.A. No.33 of 1984.

The respondents in this 2nd Appeal were the defendants before the Trial Court in the suit vide T.S. No.131 of 1981 and respondents before the First Appellate Court in the 1st Appeal vide T.A. No.33 of 1984.

The suit of the plaintiff (appellant in this 2nd Appeal) vide T.S. No.131 of 1981 before the Trial Court against the defendants (respondents in this 2nd Appeal) was a suit for partition simpliciter.

3. The suit properties are Ac.0.46 Decimals of Sabik Plot No.2375 under Sabik Khata No.473 in Mouza-Sipura under Mahanga Police Station in the district of Cuttack, which corresponds to Hal plot No.2770 under Hal Khata No.365.

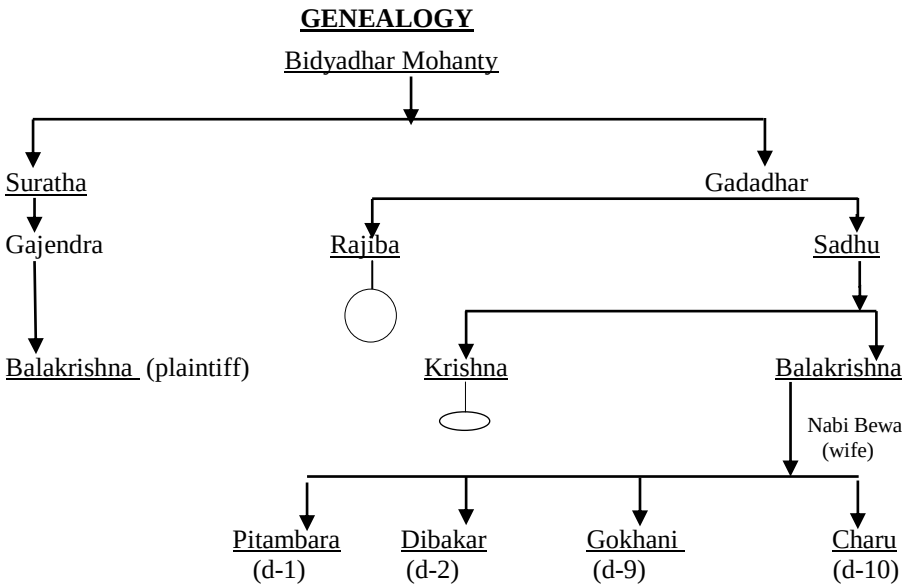
According to the plaintiff, they (parties) are Hindus and guided and governed by Mitakshara School of Hindu of Law.

Their common ancestor was Bidyadhar Mohanty. The said Bidyadhar Mohanty died leaving behind his two sons i.e. Suratha Mohanty & Gadadhara Mohanty.

Suratha Mohanty died leaving behind his only son Gajendra Mohanty. Gajendra Mohanty died leaving behind his only son Bata Krishna Mohanty (plaintiff).

The 2nd son of Bidyadhar Mohanty i.e. Gadadhara Mohanty died leaving behind his two sons i.e. Rajiba Mohanty & Sadhu Charan Mohanty. Rajiba Mohanty died issueless. Sadhu Charan Mohanty died leaving behind his two sons i.e. Krishna & Balakrishna. Krishna died issueless. Balakrishna died leaving behind his widow wife Nabi Bewa, two sons and two daughters i.e. Pitambar Mohanty (defendant No.1), Dibakar Mohanty (defendant No.2), Gokhani Dei (defendant No.9) and Charu Dei (defendant No.10).

The aforesaid family pedigree of the plaintiff and defendant Nos.1, 2, 9 & 10 is depicted hereunder for an instant reference:



4. The suit Sabik Khata No.473 was recorded jointly in the names of Suratha Mohanty son of Bidyadhar Mohanty eight Anna share and Rajiba Mohanty S/o Gadadhara Mohanty, Krushna Mohanty & Balakrishna Mohanty sons of Sadhu Charan Mohanty eight Anna share.

When Rajiba Mohanty and Krishna Mohanty died issueless, then their shares in the suit properties devolved upon their only successor i.e. Balakrishna Mohanty. The sabik recorded tenants of the suit properties i.e. Suratha, Rajiba, Krishna and Balakrishna had distributed the suit properties between their two branches equally without any metes and bound partition.

After the death of Rajiba & Krishna, when, Balakrishna died in the year 1935, his half share in the suit properties devolved upon his widow wife Nabi Bewa and two minor sons i.e. Pitambar (defendant No.1) and Dibakara (defendant No.2). While defendant Nos.1 and 2 were minors, their widow mother i.e. Nabi Bewa being the mother guardian of the defendant Nos.1 and 2 sold the entire Ac.0.46 Decimals of suit sabik plot No.2375 to one Sadia Dei wife of Iswara Sahu through Registered Sale Deed dated 16.12.1940. The said Sadia Dei died leaving behind the defendant Nos.3,4 & 5 as her successors. After the death of Sadia Dei, the defendant Nos.3 to 5 being her successors, they (defendant Nos.3,4 & 5) sold the suit properties to the defendant Nos.6 to 8 on dated 30.10.1981. Though, the plaintiff has title and possession as a co-owner (co-sharer) of the suit properties, which has been devolved upon him after the death of his grand father and his father i.e. Suratha Mohanty & Gajendra Mohanty, but, the defendants managed to create the aforesaid sale deeds dated 16.12.1940 & 30.10.1981 illegally in respect of the entire properties of suit

sabik plot No.2375 without having their title over the entire properties of suit Sabik Plot No.2375. For which, he (plaintiff) approached the Civil Court by filing the suit vide T.S. No.131 of 1981 against the defendants praying for partition of his half share from the suit properties.

5. Having been noticed from the Trial Court in the suit vie T.S. No.131 of 1981, the defendant Nos.1,2,9 & 10 filed their joint written statement supporting the case of the plaintiff.

But, whereas the defendant Nos.6 to 8 filed their joint written statement challenging the suit of the plaintiff taking their stands inter alia therein that:

> *The sale deed executed by Nabi Bewa on dated 16.12.1940 in respect of the entire properties of suit Sabik plot No.2375 in favour of Sadia Dei was valid and proper and accordingly, the said Sadia Dei was possessing the entire suit properties and when Sadia Dei died leaving behind her LRs i.e. defendant Nos.3 to 5 as her successors, then, they (defendant Nos.3 to 5) sold the same to them i.e. to the defendant Nos.6 to 8 through Registered Sale Deeds dated 30.10.1981, for which, they (defendant Nos.6 to 8) are the owners and in possession over the entire suit properties. In which, the plaintiff has no interest. For which, the suit of the plaintiff is liable to be dismissed against them (defendant Nos.6 to 8) with cost.*

6. 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.131 of 1981 and the said issues are:

ISSUES

1. Is the suit maintainable?

2. Has the plaintiff any cause of action to file the suit?

3. Is the suit barred by law of limitation?

4. Is the suit property valued properly and proper court fees has been paid?

5. Is the suit bad for non-joinder and mis-joinder of necessary parties?

6. Is there jurisdiction of the civil court to try the suit?

7. To what relief, if any, the plaintiff is entitled?

7. In order to substantiate the aforesaid relief i.e. partition sought for by the plaintiff against the defendants, he (plaintiff) examined three witness from his side including him as P.W.1 and relied upon the document vide Ext.1 (Sabik R.o.R. of suit sabik Khata No.473).

On the contrary, in order to defeat/nullify the suit of the plaintiff, they (contesting defendant Nos.6 to 8) examined 6 witnesses on their behalf including defendant No.6 as D.W.3 and relied upon the documents vide Ext.A & K.

8. After conclusion of hearing and on perusal of the materials, documents and evidence available in the record, the trial court answered all the issues against the plaintiff and in favour of the defendants and basing upon the findings and observations made by the Trial Court in the issues against the plaintiff and in favour of the defendants, the Trial Court dismissed the suit of the plaintiff vide T.S. No.131

of 1981 on contest against the defendants as per its Judgment and Decree dated 09.03.1984 and 11.02.1984 respectively assigning the reasons that, when in Para No.6 of the pleadings of the plaintiff, he (plaintiff) has stated that, prior to 1940, the suit properties along with other properties were partitioned between the members of the branch of the plaintiff and defendant Nos.1 & 2 and the entire suit properties had fallen in the share of the members of the branch of defendant Nos.1 & 2, for which, the members of the branch of defendant Nos.1 and 2 were the co-onwers of the entire suit properties and they were possessing the same. So, after purchasing the entire suit properties i.e. the properties of the sabik Plot No.2375 through registered sale deed dated 16.12.1940 (Ext.E) from Nabi Bewa (mother of defendant Nos.1 & 2) by the mother of the defendant Nos.3 to 5 i.e. Sadia Dei, she (Sadia Dei) was possessing the same and thereafter, the successors of Sadia Dei i.e. defendant Nos.3 to 5 sold the same to the defendant Nos.6 to 8 through Registered Sale Deed dated 30.10.1981 vide Exts.B,C & D and accordingly, after purchasing the entire properties of suit Sabik plot No.2375, they (defendant Nos.6 to 8) are in continuous possession over the same since the time of their vendors. For which, even if it will be assumed for a moment that, the plaintiff had 8 Anna share in the suit properties, still then, due to long and continuous possession of the defendant Nos.6 to 8 over the suit properties for more than 40 years since the time of their vendors, they (defendant Nos.6 to 8) have acquired their title over the entire suit properties of suit sabik plot No.2375 by way of adverse possession and accordingly, they (defendant Nos.6 to 8) have perfected their title over the entire properties of suit sabik plot No.2375 through adverse possession. Therefore, the plaintiff has no interest in the suit properties. For which, the plaintiff is not entitled for the decree of partition of the suit properties.

9. On being dissatisfied with the aforesaid Judgment and Decree of the dismissal of the suit of the plaintiff vide T.S. No.131 of 1981 passed by the Trial Court, he (plaintiff) challenged the same by preferring the 1st Appeal vide T.A. No.33 of 1984 being the appellant against the defendants arraying them (defendants) as respondents.

After hearing from both the sides, the First Appellate Court dismissed that 1st Appeal vide T.A. No.33 of 1984 of the plaintiff (appellant) on contest as per its Judgment and Decree dated 27.01.1994 & 11.02.1994 respectively concurring/ accepting the findings and observations made by the Trial Court for the dismissal of the suit of the plaintiff.

10. On being aggrieved with the aforesaid Judgment and Decree of the of the dismissal of the 1st Appeal vide T.A. No.33 of 1984 of the plaintiff, he (plaintiff) challenged the same by preferring this 2nd Appeal being the appellant against the defendants arraying them (defendants) as respondents.

11. This 2nd Appeal was admitted on formulation of the following substantial question of law i.e.,

Whether the findings and observations made by the Trial Court & First Appellate Court that, the suit properties were partitioned previously prior to the filing of the suit vide T.S. No.131 of 1981 between the plaintiff and defendant Nos.1 & 2?

12. I have already heard from the learned counsel for the appellant (plaintiff) only, as, none appeared from the side of the respondents (defendants) to participate in the hearing of the appeal.

13. It is the undisputed case of the parties that, the Sabik R.o.R of the suit Khata No.473 vide Ext.1 was published in the year 1929 jointly in the names of Suratha Mohanty (Grand Father of the plaintiff) indicating his share therein as eight Annas along with Rajiba Mohanty, Krishna Mohanty & Balakrishna Mohanty (predecessor of the defendant Nos.1 and 2) indicating their joint share therein as eight Anna.

So, as per the aforesaid Sabik R.o.R vide Ext.1 as well as the pleadings of the parties and findings of the Trial Court and First Appellate Court, the plaintiff's branch had 50% share and the branch of the defendant Nos.1 and 2 had 50% share in the suit properties.

The plaintiff has stated in Para No.6 of his plaint that, as per amicable partition to the suit sabik plot No.2375 equally between the members of their aforesaid two branches i.e. between the members of the branches of the plaintiff and defendant Nos.1 & 2 without any metes and bounds partition, they were possessing the suit properties half and half.

It is the undisputed case of the parties that, the members of the branch of the defendant Nos.1 and 2 had sold the entire properties of suit Sabik plot No.2375 Ac.0.46 decimals to the mother of the defendant Nos.3 to 5 i.e. Sadia Dei through Registered Sale Deed dated 16.12.1940 vide Ext.E. But, there is no indication in the sale deed dated 16.12.1940 (Ext.E) about the falling of the entire suit plot No.2375 in the share of the members of the branch of defendant Nos.1 & 2.

14. When the Sabik R.o.R of suit plot No.2375 under Sabik Khata No.473 was recorded jointly in the name of the predecessor of the branch of the plaintiff and the predecessors of the branch of the defendant Nos.1 and 2 as 50% share of each branch and when in the sale deed vide Ext.E dated 16.12.1940 executed by the mother of defendant Nos.1 and 2 i.e. Nabi Bewa in favour of the predecessor of the defendant Nos.3 to 5 i.e. Sadia Dei, there is no whisper/indication at all about the falling of the entire properties of suit plot No.2375 in the share of their branch through metes and bounds partition, then, at this juncture, on the basis of the joint R.o.R. vide Ext.1, it is held that, the sale/transfer of entire properties of suit sabik Plot No.2375 by Nabi Bewa in favour of Sadia Dei through sale deed dated 16.12.1940 (Ext.E) shall remain valid only to the extent of 50% share thereof, but not more than that. Because, the share of the members of the branch of Nabi Bewa in the suit properties was only 50%.

On this aspect the propositions of law has already been clarified in the ratio of the following decisions:

I. **2010 (II) OLR (SC) 126:Shanti Budhiya Vesta Patel & Othes Vrs. Nirmala Jayprakash Tiwari & Others**— *T.P. Act 1882—Section 54—No person can confer on another a better title than he himself has.(Para No.28)*

II. **2005 (II) OLR 330:Pragnya Rout Vrs. Hemaprava Ray & Others**—*T.P. Act 1882—Section 54—A person can alienate only the right which he possesses over the property and the purchasers acquire only that right. (Para No.15)*

III. **1974 (I) CWR 222:Ganapath Sahu and Another Vrs. Smt. Bulli Sahu and Others**—*T.P. Act 1882—Section 44 & 54—Transfer of property more than transferor's interest in land jointly held with others is not invalid in toto. It would be valid and operative to the extent to transferor's interest in the lands. (Para 10)*

IV. **1998 (II) OLR 543: Smt. Rebati Dei Vrs. Kunja Bihari Mohapatra**—*T.P. Act 1882—Section 54—Out of three co-sharers, one co-sharer transferred the entire property. Held, sale is valid for 1/3rd share. (Para Nos.3 to 5)*

V. **AIR 1995 (S.C) 1377:Nagar Palika, Jind Vrs. Jagat Singh**, **Advocate**—*T.P. Act 1882—Section 54— No cosharer can convey title to a specific part of joint property. (Para 6)*

15. When, in view of the propositions of law enunciated in the ratio of the aforesaid decisions the transfer/sale through sale deed dated 10.12.1940 (Ext.E) was valid only to the extent of 50% share in suit plot No.2375, the subsequent transfer/sale made by the defendant Nos.3 to 5 in favour of the defendant Nos.6 to 8 through Registered Sale Deeds dated 30.10.1981 (Exs.B,C & D) on the basis of the previous sale deed dated 16.12.1940 (Ext.E) cannot create title in respect of more than 50% of the properties of suit plot No.2375.

16. So, as per the discussions and observations made above, it is held that, the purchasers of suit plot No.2375 i.e. the defendant Nos.6 to 8 have only 50% share in the properties of suit Sabik plot No.2375 corresponding to Hal Plot No.2770, but they (defendant Nos.6 to 8) are not the owners of the entire properties of suit plot No.2375.

When, the defendant Nos.6 to 8 have purchased the shares of the branch of the defendant Nos.1 and 2, then, as per law, the defendant Nos.6 to 8 have become the co-shares (co-owners) of the suit properties in place of their sellers i.e. defendant Nos.1 & 2 with the plaintiff.

On this aspect the propositions of law has already been clarified in the ratio of the following decision:

i. **JBR Vol.XVII (1982) Part-II Page 43:Sudam Das Vs. Krushna Mahakur**.
When one of the co-sharers sells his share, the purchaser will become the co-sharer in place of the seller. If he wants to record some particular plot in his name, he has to make partition suit. No particular plot of land can be mutated in his name, unless other co-sharers consent to it or a decree from the Civil Court is obtained indicating his share.

When, it is held that, the defendant Nos.6 to 8 are the co-sharers (coowners) of the suit properties with the plaintiff, then, at this juncture, the Trial Court as well as the First Appellate Court should not have dismissed the suit for partition of the

plaintiff, but both the courts should have decreed the suit of the plaintiff for partition of his half share from the suit properties.

For which, there is justification under law for making interference with the Judgments and Decrees of the dismissal of the suit of the plaintiff passed by the Trial Court and First Appellate Court through this 2nd Appeal filed by the appellant (plaintiff).

17. Therefore, there is merit in the appeal of the appellant (plaintiff). The same must succeed.

18. *In result, the 2nd Appeal filed by the appellant (plaintiff) is allowed on merit, but without cost*.

19. The Judgments and Decrees passed by the Trial Court in T.S. No.131 of 1981 & First Appellate Court in T.A. No. 33 of 1984 are set aside.

20. The suit be and the same vide T.S. No.131 of 1981 filed by the plaintiff is decreed preliminarily for partition on contest against the defendant Nos.1,2 & 6 to 8 on contest and ex parte against other defendants, but without cost.

21. Out of the suit properties, the plaintiff alone is entitled to get half share and the defendant Nos.6 to 8 are jointly entitled to get half share, but other defendants are not entitled for any share, because, they (other defendants) are the vendors/sellers of the defendant Nos.6 to 8.

22. The parties i.e. plaintiff and defendant Nos.6 to 8 may amicably affect the partition of the suit properties in proportion to their respective shares as indicating above within a period of 3 months hence, failing which, any one of the parties among the plaintiff and defendant Nos.6 to 8 may apply the Trial Court for making the decree final.

23. In the final decree proceeding, the Civil Court Commissioner to be appointed by the Court shall make division of the suit properties amongst the plaintiff and defendant Nos.6 to 8 by allotting their respective shares in their favour in accordance with the apportionments made above and while so partitioning, he shall respect to the possession and convenience of the plaintiff and defendant Nos.6 to 8 with stipulation that, the alienations if any made by them i.e. plaintiff and defendant Nos.6 to 8 in the meanwhile from the suit properties, the same shall be adjusted from their respective shares.

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2024 (III) ILR-CUT-290

A.C. BEHERA, J.

SA NO. 72 OF 1996

BHIKARI CHARAN SAMANTRAY (DEAD) & ORS. ….Appellants

V.

GAJENDRA KUMAR SAMANTRAY (DEAD) & ORS. ….Respondents

(A) CODE OF CIVIL PROCEDURE, 1908 – Order 32, Rules 3,4 (4-A) – A Court guardian was appointed upon the application made by the plaintiff without any notice to the minor or his guardian – Whether the order passed by the learned Court is binding upon the minor? – Held, No – It would be a nullity and without jurisdiction and as such a guardian-ad-litem cannot legally represent the minor, so as to bind him by his acts. (Para 18)

(B) CODE OF CIVIL PROCEDURE, 1908 – Order 32, Rules 1, 2, 3, 6, 7, 9, 12, 13 & 14 – The defendant attained majority during pendency of suit – Duty of the Court – Held, It is the duty and obligation of the Court to give notice to the said minor defendant for providing him an opportunity to contest the suit for protection of his interest in the said suit. (Para 22)

(C) LIMITATION ACT, 1963 – Section 22, Articles 58, 59 – "Right to sue" when accrues – Held, Right to sue accrues only when cause of action arises. But action initiated on discovery of fraud is not barred by limitation. Since fraud is a continuing wrong and the period of limitation for challenging the same would begin to run at every moment. (Para 24)

Case Laws Relied on and Referred to :-

1. (2020) 7 SCC 366: Dahiben Vs. Arvindbhai Kalyanji Bhanusali (Gajra) (dead) & Others.
2. AIR 1979 All. 242: Hazari and Another Vs. Suresh & Other.
3. AIR 1968 Orissa 236: Khetrabasi Parida Vs. Chaturbhuja Parida & Others.
4. AIR 2001 Supreme Court 965: Santosh Hazari Vs. Purushottam Tiwari (dead) by LRs
5. 1950 SCC 714: Sarju Pershad Vs. Raja Jwaleshwari Pratap Narain Singh & Others.
6. A.F.A.D. No.1268 of 1949 (Patna) decided on 22.02.1957: Ramchandra Singh & Ors. Vs. B. Gopi Krishna Dass & Others.
7. (2018) 2 S.C.C.504: Nagaiah & Anr. Vs. Chowdamma (dead) by LRs & Anr.
8. 38 (1972) CLT 173: Judhistir Das Vs. Ekamra Choudhury & Others.
9. AIR 1995 (Rajasthan) 38: Malkiyat Singh & Another Vs. Om Prakash & Others.
10. 2024 (3) Civ. L.J. 116 (Mad.) : K.R. Andu Gowder and Others Vs. Saroja & Others
11. 2006 (1) Apex Court Judgment 449 (SC): Bank of India & Another Vs. Avinash D. Mandivikar & Others.
12. 2019 (1) CLR 748: Subala Tarai & Diriba Swain Vs. Collector Puri & Others.
13. (2010) 8 SCC 383: Meghmala & Others Vs. G. Narasimha Reddy & Others.
14. (2011) 14 SCC 770: State of Punjab Vs. Davinder Pal Singh Bhullar & Others
15. (2005) 3 Supreme Court Cases 422: Mangal Prasad Tamoli (dead) by LRs Vs. Narvadeshwar Mishra (dead) by LRs & Others.
16. (2006) 1 Supreme Court Cases 228:C. Albert Morris Vs. K. Chandrasekaran & Others.
17. 2008 (1) Civ.C.C. 386 (Raj): Yatendra Swaroop Vs. Smt. Asha Devi.
18. 2011 (Supp.) OLR (NOC) 545: M/s. Utkal Builders Limited Vs. Union of India & Others.

For Appellants : Mr. N.K. Sahu

For Respondents : Mr. G. Mukherji, Sr.Adv. assisted by Mr. A. Mishra.

JUDGMENT Date of Hearing :10.07.2024 : Date of Judgment : 06.09.2024

A.C. BEHERA, J.

This 2nd Appeal has been preferred against the reversing Judgment.

2. The original appellant in this 2nd Appeal i.e. Bhikari Charan Samantaray was the defendant before the Trial Court in the suit vide T.S. No.17 of 1985-I and respondent before the 1st Appellate Court in the 1st Appeal vide T.A. No.60 of 1993.

When during pendency of this 2nd Appeal, the original appellant Bhikari Charan Samantaray expired, then, the appellant Nos.1 to 8 were substituted as appellants in his place.

Likewise, Gajendra Kumar Samantaray and his mother Kamala Dei were the original respondents in this 2nd Appeal and plaintiffs before the trial court in the suit vide T.S No 17 of 1985-I and appellants before the 1st Appellate Court in the 1st Appeal vide T. A. No.60 of 1993.

When, during the pendency of this second appeal, they (original respondents i.e. Gajendra Kumar Samantaray and Kamala Dei) expired, then respondent Nos.-1(a) to (c) were substituted as respondents in their places.

3. The suit vide T.S No.17 of 1985-I filed by the plaintiffs i.e. Gajendra Kumar Samantaray and his mother Kamala Dei (original respondents in this 2nd Appeal) against the defendant Bhikari Charan Samantaray (original appellant in this 2nd Appeal) was a suit for setting aside the ex parte judgment and decree passed against them on dated 24.09.1977 in O.S No.58 of 1976-I by the learned Munsif, Khordha and to declare that, the said ex parte Judgment and Decree dated 24.09.1977 passed in O.S No.58 of 1976-I is illegal, void and not binding upon them (plaintiffs) and to declare that, the plaintiff No.1 (Gagendra Kumar Samantaray) is the son of the defendant (Bhikari Charan Samanatray) and plaintiff No.2 (Smt. Kamala Dei) is the mistress of the defendant i.e. Bhikari Charan Samantaray and to direct the defendant Bhikari Charan Samantaray to pay Rs.300/- as monthly maintenance to the plaintiff No.2 (Smt. Kamala Dei).

4. The case of the plaintiffs in the suit vide T.S. No.17 of 1985-I against the defendant as per their pleadings was that, the plaintiff No.1 has born from his mother (plaintiff No.2, Kamala Dei) through his father Bhikari Charan Samantaray (defendant).

In the year 1958, while the mother of the plaintiff No.1 i.e. the plaintiff No.2 was young and unmarried, at that time, the brother of the plaintiff No.2 and the defendant had a joint timber business. For which, the defendant had free access to the parent's house of the plaintiff No.2 and during that time, relationship between the plaintiff No.2 and the defendant developed and during the course of such relationship between them, the defendant promised for keeping her (plaintiff No.2) as his mistress and giving such promise/assurance to the plaintiff No.2, the defendant brought the unmarried plaintiff No. 2 from her parent's house to Puri and kept her

(plaintiff No.2) with him in a rented house at Puri and they (plaintiff No.2 & defendant) consummated their lives in the said rented house at Puri as husband and wife and out of their such consummation, the plaintiff No.1 had borne at Puri and accordingly, the name of the defendant was entered in the birth certificate of the plaintiff No.1 as the father of the plaintiff No.1. Three months after the birth of the plaintiff No.1, the defendant abandoned the plaintiffs i.e. son and mother both at Puri in a helpless condition and came to his native village and did not take their any care. So, the plaintiff No.2 could not able to maintain herself and her minor son i.e. plaintiff no-1 at puri in the rented house, for which, without getting any way, she (plaintiff No.2) came from puri to her parent's house and took shelter there with her minor son (plaintiff No.1). Then, the plaintiff No.2 filed a case under section 488 of Old Cr.P.C against the defendant praying for maintenance, but, due to her financial incapability, she (plaintiff No.2) could not able to prosecute that case till its final hearing, for which, her said maintenance case was dismissed for default due to non-prosecution.

5. Thereafter, the defendant Bhikari Charan Samanataray being plaintiff, mischievously filed a suit vide O.S No.58 of 1976-I secretly without the knowledge of the plaintiffs arraying Smt. Kamala Dei as Defendant No.1 and minor Gajendra as defendant No.2 without their correct status and ages praying for a declaration that, the defendant No.1 (Kamala Dei) is not his legally married wife or his mistress and the minor defendant no-2 (Gajendra) is not his son. The mischievous plaintiff Bhikari Charan Samantaray of O.S No.58 of 1976-I managed to obtain the ex-parte decree in that suit vide O.S. No.58 of 1976-I against the defendants of that suit i.e. against Kamala Dei and minor Gajendra behind their back and without their knowledge by practising fraud and through suppression of notices/summons of that suit vide O.S. No.58 of 1976-I from its service upon them. Although, during the pendency of that suit vide O.S. No.58 of 1976-I, the minor defendant No.2 (Gajendra) attained his majority and as per law, it was mandatorily required for service of notices/summons on the minor defendant No.2 who attained majority during the pendency of the suit, but without complying such mandatory requirements/provisions of law, the plaintiff in O.S. No.58 of 1976-I i.e. Bhikari Charana Samantaray managed to obtain an ex parte Judgment and Decree on dated 24.09.1977 in that suit vide O.S. No.58 of 1976-I against the defendants thereof i.e. against Kamala & Gajendra illegally by adopting unlawful means and procedures abusing the process of the Court behind their back and without their knowledge.

6. They (defendants of O.S. No.58 of 1976-I) came to know about the said ex parte Judgment and Decree passed in O.S. No.58 of 1976-I against them for the first time on dated 14.05.1982, when the certified copy of that ex-parte judgment and decree of O.S No.58 of 1976-I was filed in an another suit vide O.S No.24/60-I of 1979-I by Bhikari Charan Samantaray in the court of Munsif, Banpur. Then, after knowing about the same, they (defendants in O.S No.58 of 1976-I i.e. Gajendra and Kamala) being the plaintiffs No.1 & 2 respectively filed the suit vide T.S No.17 of 1985-I against the plaintiff of O.S. No. 58 of 1976-I i.e. against Bhikari Charan

Samantaray arraying him as defendant praying for setting aside the ex-parte judgment and decree dated 24.09.1977 passed in O.S No.58 of 1976-I against them (Gajendra & Kamala), to declare that, the said ex-parte judgment and decree dated 24.09.1977 passed in O.S No.58 of 1976-I is illegal, void and not binding upon them (plaintiffs), to declare that, he (plaintiff No.1) is the son of the defendant and the plaintiff No.2 is the mistress of the defendant, to direct the defendant (Bhikari Charan Samantaray) to pay Rs.300/- as monthly maintenance to the plaintiff No.2 (Smt. Kamala Dei) and for partition of the properties.

7. Having been noticed from the trial court in the suit vide T.S No.17 of 1985-I, the defendant Bhikari Charan Samantaray contested the same by filing his written statement denying all the allegations alleged by the plaintiffs against him taking his stands therein that, *the suit of the plaintiffs is malicious in nature. He (defendant) has his own family consisting of his wife, three sons and three unmarried daughters. The specific pleas/stands of the defendant were that, the plaintiff No.2 had married Bhima Naik alias Bhima Dutta of village Arakhakuda under Brahmagiri Police Station in the district of Puri. Her marriage with the said Bhima Naik alias Bhima Dutta is still subsisting and plaintiff No.1 has born from plaintiff No.2 through that Bhima Naik alias Bhima Dutta. The plaintiff No.2 had filed Criminal Misc. Case No.89 of 1959 under Section 488 of old Cr.P.C and Criminal Case No.190 of 1959 under Section 352 of IPC against him in the court of S.D.J.M, Khurda. The said cases of the plaintiff No.2 were dismissed on dated 23.03.1961 and 13.11.1961 respectively. So, the plaintiffs have no cause of action to file the present suit vide T.S. No.17 of 1985-I. Therefore, the plaintiffs have no locus standi to file the suit against him (defendant). In view of the earlier adjudications of Criminal Misc. Case No.89 of 1959 on 23.03.1961 and O.S No.58 of 1976-I on 24.09.1977 against the plaintiffs, they (plaintiffs) are estopped under law to claim themselves as his son and mistress.*

The suit of the plaintiffs is barred by the law of limitation for the relief of declaration. Because, the suit has been filed by the plaintiffs after the statutory period i.e. 3 years after the disposal of Criminal Misc. Case No.89 of 1959 and more than 3 years after attaining the majority of the plaintiff No.1 as well as more than 3 years after the disposal of O.S No.58 of 1976-I. Even if, it is assumed about the knowledge of the plaintiffs from the date of filing of certified copy of the Judgment and Decree of O.S No.58 of 1976-I in O.S No.24/60 of 1979, still then, the suit of the plaintiffs is barred by limitation. Because, the certified copy of the Judgment and Decree in O.S. No.58 of 1976-I was filed in O.S. No.24/60 of 1979 in the year 1980, but the present suit vide T.S. No.17 of 1985-I has been filed more than 3 years after 1980. So, the suit of the plaintiffs is barred by law of limitation and the same is also hit by the principles of Res Judicata due to earlier adjudication of the status of the plaintiffs in criminal Misc. Case No.89 of 1959 under Section 488 of old Cr.P.C as well as in O.S No.58 of 1976-I against the plaintiffs.

There was no suppression of notices/summons in O.S No.58 of 1976-I against the defendants of that suit. So, the decree passed in O.S No.58 of 1976-I against the defendants of that suit is not an invalid decree.

The further case of the defendants was that, the defendant No.1 in O.S. No.58 of 1976-I i.e. Kamala Dei for herself and for her minor son i.e. defendant No.2 (Gajendra), she had received the Court summons of O.S. No.58 of 1976-I as mother guardian of minor defendant No.2. When after receiving the said summons, she (defendant No.1) did not appear either for herself or for her minor son Gajendra (defendant No.2) as her mother guardian in

the suit vide O. S. No. 58 of 1976-I, then Guardian ad Litem (GAL) was appointed by the Court in O.S. No.58 of 1976-I for the minor defendant No.2 (Gajendra) and the said GAL was supplied with the copy of plaint. As such, GAL contested the suit vide O.S No.58 of 1976-I on behalf of the minor defendant No.2 (Gajendra). Accordingly, after hearing of the suit vide O.S. No.58 of 1976-I on active participation of the GAL for the minor defendant No.2, that suit vide O.S. No.58 of 1976-I was decreed on dated 24.09.1977 against the defendants of that suit. Therefore, the Judgment and Decree passed on dated 24.09.1977 in O.S No 58 of 1976-I against the defendants (plaintiffs in the present suit vide T.S. No.17 of 1985-I) is valid and binding upon them. Because, the defendants in O.S No.58 of 1976-I (plaintiffs in the present suit) without appearing personally in that suit vide O.S No 58 of 1976-I, they had contested the same through GAL appointed by the court for the minor defendant No.2. The defendant of the present suit vide T.S. No.17 of 1985-I had/has no relationship with the plaintiffs in any manner at any point of time. He (defendant) and the plaintiff No.2 (Kamala) have not stayed in any house at Puri at any point of time. The plaintiff No.1 is not his son. Therefore, the suit of the plaintiffs is liable to be dismissed against him (defendant) with cost.

8. 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.17 of 1985-I and the said issues are:

ISSUES

i. Is the suit maintainable?
ii. Is the suit barred by limitation?
iii. Is there any cause of action to file the suit?
iv. Is the suit hit by the principles of res judicata?
v. Whether the ex parte Judgment and Decree in O.S. No.58 of 1976-I has been obtained by fraud, suppression of summons against the defendants in the suit vide O.S. No.58 of 1976-I without any notice to the minor defendant No.2, the Court guardian (GAL) was appointed for the minor defendant No.2 to defend the suit?
vi. Whether the Judgment and Decree passed in O.S. No.58 of 1976-I is illegal and void and not binding on the plaintiffs of this suit vide T.S. No.17 of 1985-I (defendants in O.S. No.58 of 1976-I)?
vii. Whether the plaintiff No.1 is the son of defendant and plaintiff No.2 is the mistress of the defendant?
viii. Whether the defendant is liable to pay maintenance of Rs.300/- per month to the plaintiff No.2?
ix. To what other relief, the plaintiffs are entitled for?

9. In order to substantiate the aforesaid relief(s) sought for by the plaintiffs in T.S. No.17 of 1985-I against the defendant, they (plaintiffs) examined altogether 4 numbers of witnesses from their side including them (plaintiffs) as P.Ws.4 and 3 and relied upon the documents vide Exts.1 to 5.

On the contrary, in order to nullify/ defeat the suit of the plaintiffs vide T.S. No.17 of 1985-I, the defendant examined 3 witnesses on his behalf including him as D.W.2 and exhibited series of documents from his side vide Exts.A to O.

10. After conclusion of hearing and on perusal of the materials, evidence and documents available in the records, the Trial Court answered all the issues against the plaintiffs and in favour of the defendant and basing upon the answers in the

issues against the plaintiffs, the Trial Court dismissed the suit of the plaintiffs vide T.S No.17 of 1985-I on contest against the defendant as per its Judgment and Decree dated 21.04.1993 and 06.05.1993 respectively assigning the reasons that, *"as it appears from the certified copies of the Order Sheets and summons of O.S. No.58 of 1976-I vide Exts.3 & P that, after service of summons on the minor defendant No.2 (Gajendra) through his mother Guardian Kamala (defendant No.1), the defendant No.1 did not turn up, then, direction was made to the plaintiff by the Court to deposit fee for the appointment of Court guardian for minor defendant No.2 (Gajendra) and accordingly, Advocate Bishnu Charan Patnaik was appointed as Guardian Ad Litem (GAL) for the minor defendant No.2 in that O.S. No.58 of 1976-I. The said GAL was examined as D.W.1 in that O.S. No.58 of 1976-I and he (GAL, D.W.1) deposed by stating that, he had, issued notices to the minor (defendant No.2) and his mother Kamala (defendant No.1) as per the plaint address through under certificate of posting and accordingly, they (defendants) gave him instructions to proceed with the suit, but, he is not able to produce the receipt of the said under certificate of posting, for which, the above non-filing of the receipt of the under certificate of posting by the DW-1 (GAL) cannot take away the truthfulness of his evidence. Therefore, it cannot be held that, the ex parte Judgment and Decree passed in O.S. No.58 of 1976-I has been obtained by the plaintiff in O.S. No.58 of 1976-I by practising fraud and suppression of service of summons upon the defendants of that O.S. No.58 of 1976-I. So, the Judgment and Decree passed in O.S. No.58 of 1976-I is neither illegal nor void, but the same is lawful and proper and that is binding upon the defendants in O.S. No.58 of 1976-I (those are the plaintiffs in the present suit vide T.S. No.17 of 1985-I). That apart when, the certified copies of the Judgment and Decree passed in O.S. No.58 of 1976-I was filed in O.S. No.24/60 of 1979-I on dated 24.01.1980, but, not on 14.05.1982, then, the present suit vide T.S. No.17 of 1985-I filed by the defendants in O.S. No.58 of 1976-I being the plaintiffs three years after 24.01.1980 is barred by law of limitation, as the same has not been filed within 3 years since 24.01.1980. In addition to that, it was also further held by the Court that, the plaintiff No.1 of the present suit vide T.S. No.17 of 1985-I is not the son of the defendant. The plaintiff No.2 is not the mistress of the defendant. In view of the earlier Judgment and Decree passed in O.S. No.58 of 1967-I, the present suit vide T.S. No.17 of 1985-I is barred by res judicata. For which, the present suit vide T.S. No.17 of 1985-I filed by the plaintiffs (defendants in O.S. No.58 of 1976-I) is not maintainable under law and the same liable to be dismissed."*

11. On being dissatisfied with the aforesaid Judgment and Decree of the dismissal of the suit vide T.S. No.17 of 1985-I of the plaintiffs, they (plaintiffs) challenged the same by preferring the 1st Appeal vide T.A. No.60 of 1993 being the appellants against the defendant arraying him (defendant) as respondent.

After hearing from both the sides, the First Appellate Court allowed that 1st Appeal vide T.A. No.60 of 1993 of the plaintiffs in part on contest as per its Judgment and Decree dated 21.12.1995 & 12.01.1996 respectively and set aside in part to the Judgment and Decree of the dismissal of the suit vide T.S. No.17 of 1985-I of the plaintiffs passed by the Trial Court and decreed the suit vide T.S. No.17 of 1985-I of the plaintiffs in part on contest against the defendant and allowed all the reliefs prayed for by the plaintiffs in their favour against the defendant except the relief for partition assigning the reasons that, according to the order sheets of O.S.No.58 of 1976-I (Ext.A), no notice either under Sub-rule (4) or Sub-rule (4-A) of Rule 3 under Order 32 of the CPC, 1908 was served on the mother of the minor

defendant No.2 i.e. on defendant No.1, or on the minor defendant No.2 inviting objections if any from them for appointment of guardian ad litem for the minor defendant No.2 in order to contest the suit on behalf of the minor defendant No.2. Even after attainment of majority of the minor defendant No.2 during the pendency of the suit vide O.S. No.58 of 1976-I, no notice was served on the defendant No.2 providing him (defendant No.2) opportunity to contest the suit independently. For which, the procedures adopted for the adjudication of the suit vide O.S. No.58 of 1976-I by the Court i.e. learned Munsif, Khorda were not lawful. Therefore, the Judgment and Decree passed in O.S. No.58 of 1976-I adopting unlawful means/procedures is invalid/void and non-est in the eye of law. So, there is no applicability of Article 59 of the Limitation Act for making the suit barred by Limitation. Therefore, the Judgment and Decree passed in O.S. No.58 of 1976-I is void, non-est and the same is not binding upon the defendants of O.S. No.58 of 1976-I (plaintiffs in T.S. No.17 of 1985-I). The First Appellate Court after declaring the Judgment and Decree of O.S. No.58 of 1976-I as void and non-est as stated above further held that, the plaintiff No.1 (Gajendra) in T.S. No.17 of 1985-I is the son of the defendant and the plaintiff No.2 (Kamala Dei) is the mistress of the defendant and she (plaintiff No.2) is entitled to get Rs.300/- per month as her maintenance from the defendant.

12. On being aggrieved with the aforesaid part Judgment and Decree dated 21.12.1995 and 12.01.1996 respectively passed in T.A. No.60 of 1993 against the defendant and in favour of the plaintiffs, he (defendant) challenged the same by preferring this 2nd Appeal being the appellant against the plaintiffs arraying them (plaintiffs) as respondents.

This 2nd Appeal was admitted vide Order No.7 dated 02.09.1996 treating the Ground Nos.a,b,c & d of the Memorandum of Appeal as the substantial questions of law, but the said substantial questions of law (those were formulated vide Order No.7 dated 02.09.1996) were substituted by the following two substantial questions of law vide Order No.17 dated 20.12.2022 after hearing from the learned counsels of both the sides and the said two substantial questions of law are:

> ***i.*** *Whether, the finding of the lower appellate court in holding that, the "Ex parte Judgment and Decree in O.S. No.58 of 1976-I was obtained by suppressing summons" suffers from non-consideration of the material evidence on record and as such raises a question of law being vitiated by perversity?*
>
> ***ii.*** *Whether the suit filed by plaintiff-respondent was completely barred by limitation by application of Articles 58 and 59 of the Limitation Act in as much as the suit was not filed within 3 years from the date of the knowledge about the passing of the decree in the previous suit?*

13. When, during the pendency of this 2nd Appeal, the appellant (defendant in the suit vide T.S. No.17 of 1985-I, i.e. Bhikari Charana Samantaray) expired on 29.12.2005, then, the appellant Nos. 1 to 8 have been substituted in his place as appellant Nos.1 to 8 in this 2nd Appeal.

Likewise, When, during the pendency of this 2nd Appeal, the respondent No.2 (Kamala Dei) died leaving behind her son i.e. respondent No.1 as her LR, then, as per Order dated 30.04.2012, the respondent No.1 (Gajendra) alone was prosecuting the appeal. But, when subsequent thereto, the respondent No.1 (Gajendra) expired, then in his place, his LRs have been substituted as respondent Nos.1(a) to 1(c).

I have already heard from the learned counsel for the appellants and the learned senior counsel for the respondents.

14. In order to assail the impugned Judgment and Decree passed by the First Appellate Court in the 1st Appeal vide T.A. No.60 of 1993 and in support of the Judgment and Decree passed by the Trial Court in the suit vide T.S. No.17 of 1985-I, the learned counsel for the appellants relied upon the following decisions:

> **i. (2020) 7 SCC 366: Dahiben Vs. Arvindbhai Kalyanji Bhanusali (Gajra) (dead) & Others**—*Limitation Act, 1963—Articles 58 & 59—Suit to obtain declaration or to set aside instrument or decree, or, for rescission of contract—"Right to sue" when accrues—Court must determine when right to sue first accrued—Right to sue accrues only when cause of action arises—Suit must be instituted when right asserted in suit is infringed or there is clear and unequivocal threat of infringement by dependant.*
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> **ii. AIR 1979 All. 242: Hazari and Another Vs. Suresh & Other**—*CPC (5 of 1908), Order 32, Rule 12—Omission to elect either to continue or to abandon suit—Effect of—Suit held may proceed.*
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> **iii. AIR 1968 Orissa 236: Khetrabasi Parida Vs. Chaturbhuja Parida & Others**—*CPC 1908, Order 32—Though a major described as a minor—Decree and sale in execution not a nullity.(Para No.5)*
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> **iv. AIR 2001 Supreme Court 965: Santosh Hazari Vs. Purushottam Tiwari (dead) by LRs**—*CPC, 1908, Section 100—Second Appeal—First Appellate Court did not restate effect of evidence nor gave reasons—Cryptic order passed by Frist Appellate Court, not proper.*
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> **v. 1950 SCC 714: Sarju Pershad Vs. Raja Jwaleshwari Pratap Narain Singh & Others**—*CPC, 1908, Section 107—Appreciation of evidence by appellate Court—Finding of fact based on conflicting evidence, can be reversed.*

15. On the contrary in support of the Judgment and Decree passed by the First Appellate Court in T.A. No.60 of 1993, the learned counsel for the respondents relied upon the following decisions:

> **i. A.F.A.D. No.1268 of 1949 (Patna) decided on 22.02.1957 : Ramchandra Singh & Others Vs. B. Gopi Krishna Dass & Others**—*When the appointment of GAL for the minor defendant would be a nullity and without jurisdiction, then such a guardian-ad-litem cannot legally represent the minor, so as to bind him by his acts. In that case such minor will not be considered to be a party of such a proceeding, notwithstanding that his name appears on the record, therefore, any order passed or any proceeding taken against him will be null and void.*
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> **ii. (2018) 2 Supreme Court Cases 504:Nagaiah & Another Vs. Chowdamma (dead) by LRs & Another**— *In case, if the Court discovers during the pendency of the suit that the minor plaintiff has attained majority, such plaintiff needs to be called upon by the*

Court to elect whether he intends to proceed with the suit or not. In other words, the minor who attained during the pendency of the matter must be informed of the pendency of the suit.

16. So far the 1st formulated substantial questions of law i.e. *Whether the findings of the lower appellate court in holding that, the "Ex parte Judgment and Decree in O.S. No.58 of 1976-I was obtained by suppressing summons" suffers from non-consideration of the material evidence on record and as such raises a question of law being vitiated by perversity is concerned;*

According to the pleadings and evidence of the plaintiffs in T.S. No.17 of 1985-I (defendants in O.S. No.58 of 1976-I), the plaintiff in O.S. No.58 of 1976-I (defendant in T.S. No.17 of 1985-I) has obtained the decree in that suit vide O.S. No.58 of 1976-I in his favour by practising fraud, suppression of notices/summons from its service of the same on them (defendants in O.S. No.58 of 1976-I) and without complying with the mandatory provisions of Order 32, Rule 3, 4 & 12 of the CPC, 1908.

The certified copies of the entire order sheets of the suit vide O.S. No.58 of 1976-I have been marked as Exts.3, A & E by the parties in T.S. No.17 of 1985-I.

In order to bring a clear picture about the compliances or non-compliances of the provisions of Order 32 of the CPC, 1908 during the course of adjudication of the suit vide O.S No.58 of 1976-I, I thought it proper to place it on record to the entire Order Sheets of O.S. No.58 of 1976-I, on the basis of the contents of Exts.3, A & E and the said Order sheets are as follows:

Order Sheets of O.S. No.58 of 1976-I

Order No.1 dt.12.05.1976./

Plaintiff presented by Sri. B.D. Mohapatra, Advocate for the plaintiff with Court Fee worth Rs.22.50p. Register and put up on 16.06.1976 with office note.

Sd/-P.N. Patnaik.
Munsif, Khurda.

Order No.2 dt.16.06.1976./

Perused the office note. Plaintiff to file another declaratory Court Fee worth of Rs.22.50 as he has prayed for two declaration and file petition with affidavit for appointment of guardian for minor D.2 and to file requisites by 25.06.1976 and for further Orders.

Sd/-P.N. Patnaik.
Munsif,Khurda.

Order No.3 dt.25.06.1976./

Plaintiff files a petition praying for time to take steps as per the office note. I am indisposed. Put up on 02.07.1976. *Sd/-P.N. Patnaik.*
Munsif, Khurda.

Order No.4 dt.02.07.1976./

No steps taken by the plaintiff. Later plaintiff files a petition praying for time to take steps. Heard. Time allowed on 15.07.1976 for steps. *Sd/-P.N. Patnaik.*
Munsif, Khurda

Order No.5 dt.15.07.1976./

Plaintiff files Pl.C.Fee worth of Rs.22-50 & requisites. He has not file the petition and affidavit for appointment of Guardian for the minors. Put up on 17.07.1976 for filing of the same and for further Orders. *Sd/-P.N. Patnaik.*
Munsif, Khurda.

Order No.6 dt.17.07.1976./
Plaintiff files a petition praying for time to take steps for appointment of the minor guardian. Heard. Time allowed. Till 27.07.1976 for steps and for further Orders.
Sd/-P.N. Patnaik.
Munsif, Khurda.

Order No.7 dt.27.07.1976./
A petition supported by an affidavit is filed praying for appointment of the guardian for the minor. The process fee worth of Rs.2/- has been filed. The P. Fee is deficit by Rs.2/-. Let him file the same by 02.08.1976 and for further Orders. *Sd/-P.N. Patnaik.*
Munsif, Khurda.

Order No.8 dt.02.08.1976./
The deficit P. Fee has been paid. The requisites are complete. Admit. Issue summons against the defendants and notice against the minor fixing 03.09.1976 for settlement of issue. *Sd/-P.N. Patnaik.*
Munsif, Khurda.

Order No.9 dt.03.09.1976./
Plaintiff files hazira S.R. back after service by affixure on refusal. Plaintiff files affidavit in proof of service. Service held sufficient. Defendant No.1 does not appear and takes no step. Hence set ex parte. Plaintiff to take steps and to deposit Rs.20/- towards G.A.L. fee by 06.09.1976. *Sd/-P.N. Patnaik.*
Munsif, Khurda.

Order No.10 dt.06.09.1976./
The G.A.L. fees has not been deposited. Put up on 07.09.1976 for filing of the same failing which the suit shall stands dismissed. *Sd/-P.N. Patnaik.*
Munsif, Khurda.

Order No.11 dt.07.09.1976./
No steps taken by the plaintiff to deposit the fees of the G.A.L. Later plaintiff files a petition with late fee praying for time to file the G.A.L Fees. Heard time allowed till 21.09.1976 for filing of the same and for further orders. *Sd/-P.N. Patnaik.*
Munsif, Khurda.

Order No.12 dt.21.09.1976./
Plaintiff files P.C.R. showing deposit of G.A.L. fees and a petition praying for time to file requisites. Sri. B. Ch. Patnaik, Advocate is appointed as G.A.L. for the minor defendant No.2. Time allowed till 12.10.1976 for filing of the necessary requisites for the G.A.L. Amended the plaint and register accordingly. *Sd/-P.N. Patnaik.*
Munsif, Khurda.

Order No.13 dt.12.10.1976./
Plaintiff has not taken steps for service of copy of plaint on the G.A.L. The G.A.L. is present. The Advocate for the plaintiff is present. Let him serve the copy on the G.A.L. or to cause service of summon on the G.A.L. by 19.10.1976 positively and G.A.L. to file W/S. by the date. *Sd/-P.N. Patnaik.*
Munsif, Khurda.

Order No.14 dt.19.10.1976./
Plaintiff files P. Fee and the written processes. Issue summon to the G.A.L. for the minor D.2 fixing 09.11.1976 for filing of W.S. by the G.A.L. *Sd/-P.N. Patnaik.*
Munsif, Khurda.

Order No.15 dt.09.11.1976./
Summon to the G.A.L. has not been issued. It is issued to-day fixing 17.11.1976 for return. *Sd/-P.N. Patnaik.*
Munsif, Khurda.

Order No.16 dt.17.11.1976./
S.R. not back. Put up on 22.11.1976 awaiting S.R. *Sd/-P.N. Patnaik.*
Munsif, Khurda.

Order No.18 dt.24.11.1976./
Summon to G.A.L. received unserved with a report that returned for want of time. Re-issue the same fixing 03.12.1976 for return. *Sd/-P.N. Patnaik.*
Munsif, Khurda.

Order No.19 dt.03.12.1976./
S.R. of summons not back. Await and put up on 15.12.1976.
Sd/-P.N. Patnaik.
Munsif, Khurda.

Order No.20 dt.15.12.1976./
S.R. summons against the G.A.L. is personal. G.A.L. files a memo on 14.12.1976 praying for directing the plaintiff to supply a copy of plaint. Plaintiff is directed to supply a copy of plaint to the G.A.L. by 21.12.1976 and for further orders. Inform the Advocate for the plaintiff. *Sd/-P.N. Patnaik.*
Munsif, Khurda.

Order No.21 dt.21.12.1976./
G.A.L. files a memo intimating he could not file his W.S. for want of plaint copy. The learned counsel for the plaintiff has already been informed to supply the same to G.A.L. In case copy of the plaint is not supplied to G.A.L. by 4.30 P.M. today, the suit shall stand dismissed for default of the plaintiff. *Sd/-P.N. Patnaik.*
Munsif, Khurda.

Later:-

The copy of plaint has been supplied to the G.A.L. in court and endorses to that effect. Let him file W.S. by 05.01.1977 and for further Orders.

Order No.22 dt.05.01.1977./
The G.A.L. for the minor defendant No.2 filed W/S. Copy served. Put up on 17.01.1977 for settlement of issues and examination of parties. Parties to come ready.
Sd/-P.N. Patnaik.
Munsif, Khurda.

Order No.23 dt.17.01.1977./
Both parties present. Heard. Issues settled. To 27.01.1977 for fixing a date of hearing.
Sd/-P.N. Patnaik.
Munsif, Khurda.

Order No.28 dt.27.01.1977./
Plaintiff and the G.A.L. for minor D.2 files separate haziras. No documents filed. To 02.05.1977 for hearing. Parties to come ready. *Sd/-P.N. Patnaik.*
Munsif, Khurda.

Order No.29 dt.02.05.1977./
G.A.L. files hazira. Advocate for the plaintiff files a petition praying for time on the ground stated therein.
Heard. Time allowed till 28.06.1977 for hearing. Parties to come ready.
Sd/-P.N. Patnaik.
Munsif, Khurda.

Order No.30 dt.28.06.1977./
G.A.L. files hazira. Advocate for the plaintiff files a petition praying for time for hearing on the ground stated therein. Copy served. Heard time allowed till 27.07.1977 for hearing when the parties to come ready. *Sd/-P.N. Patnaik.*
Munsif, Khurda.

Order No.31 dt.27.07.1977./
Both parties file haziras. P.O. is on C.L. Put up on 23.08.1977 for hearing.
Sd/-G.N. Singh.
Add. Munsif, I/C.

Order No.32 dt.23.08.1977./
Advocate for the G.A.L. files hazira. Advocate for the plaintiff files a petition for adjournment of the suit as per reasons stated therein. Copy served. Heard. Time is allowed. Call on 13.09.1977 for hearing when parties to come ready.
Sd/-P.N. Patnaik.
Munsif, Khurda.

Order No.33 dt.13.09.1977./
Plaintiff and G.A.L. file haziras. P.Ws.1 and 2 examined. Exts.1 and 2 marked. To 17.09.1977 for orders. *Sd/-P.N. Patnaik.*
Munsif, Khurda.

Order No.34 dt.17.09.1977./
Judgment not ready. Put up on 19.09.1977 for Judgment.
Sd/-P.N. Patnaik.
Munsif, Khurda.

Order No.35 dt.19.09.1977./
Order not ready. To 24.09.1977 for Order. *Sd/-P.N. Patnaik.*
Munsif, Khurda.

17. *Sub-rule (1) of Rule 3 of Order 32 of the CPC provides that, where in a suit, the defendant is a minor, the Court shall appoint a proper person to be a guardian in that suit for such minor. Sub-rule (2) of Rule 3 of Order 32 CPC provides that, for the appointment of a person as a guardian of the minor defendant, an application is to be made either by the plaintiff or on behalf of the minor.*

Sub-rule (3) of Rule 3 of Order 32 of the CPC provides that, such application for an appointment of a person as a guardian of the minor defendant, must be supported by an affidavit verifying the fact indicating that, the proposed guardian has no adverse interest to that of the minor and he is a fit person to be so appointed.

As per sub Rule (4) & (4-A) of Rule 3 of Order 32 of the CPC, 1908, no order shall be made on any such application under Rule 3 for the appointment of a person as a guardian of the minor defendant, except upon notice to the minor and to the guardian of the minor appointed or declared by an authority or to the father or to the mother or to other natural guardian of the minor. Upon such notice to the minor and his guardian, the Court is required to hear objections, if any, which may be made on behalf of any person, served with notice under sub Rule (4) & (4-A) of Rule 3 of Order 32 of the CPC, 1908.

Sub Rule (5) of Rule 3 of Order 32 of the CPC, 1908 lays down that, a guardian of the minor defendant, who is to be appointed only after compliances of Sub-rules-(2),(3),(4) and (4-A) of Rule 3 of Order 32 of the CPC, 1908, he shall continue as such throughout all proceedings arising out of the suit.

Sub Rule (3) of Rule 4 of Order 32 of the CPC, 1908 provides that, no person shall without his consent in writing be appointed as guardian for the minor in the suit.

Sub Rule (4) of Rule 4 of Order 32 of the CPC, 1908 provides that, where there is no other person, obviously meaning, the person mentioned in sub Rule (4) of Rule 3 of Order 32 of the CPC, 1908 who is fit and is willing to act as a guardian for the minor defendant, then only the Court is empowered under law to appoint such person as a guardian of the minor defendant in the suit.

In view of the aforesaid provisions of law envisaged in sub-Rule (4) & (4-A) of Rule 3 of Order 32 of the CPC, 1908 for an appointment of a guardian of the minor defendant, the following two criteria must be complied with i.e. (i) notice to the minor and his guardian, and (ii) upon service of such notice to hear objections, if any, that may urged, on behalf of either, or both of them, who have been served with such a notice.

It is only after compliance with the provisions of sub Rule (4) & (4-A) of Rule 3 of Order 32 of the CPC, 1908, and not otherwise, that, the Court gets jurisdiction to appoint a guardian for the minor under sub Rule (1) of Rule 3 of Order 32 of the CPC, 1908.

18. Order 32 of the CPC, 1908 has been specially enacted for no other reason/ purpose, but to protect the interests of the minors in a suit, and, to see that, they are represented in the suit or proceeding by a person, who is qualified to act as such.

In order to achieve the said object, the legislature has laid down in Order 32 Rule 3 (4) & (4-A) of the CPC, 1908 that, the wishes of the minor and his guardian are to be obtained before any guardian for the minor is appointed by the Court. Their wishes can only be ascertained through issuance of notices to them for the same.

Therefore, the object of Order 32 of the CPC, 1908 will be defeated, if without any notice to the minor and his guardian and without ascertaining their wishes, a guardian for the minor is appointed by the Court or a guardian is thus thrust upon him (minor).

Having regard, to the above languages of sub-Rule (4) & (4-A) of Rule 3 of Order 32 of the CPC, 1908 as well as to the policy and object underlying in it, it is reasonably clear that, the said provisions must be taken to be mandatory.

Therefore, the serving of notice upon the minor and his guardian inviting their objections if any, before appointment of guardian for the minor in the suit is mandatory and compulsory.

It is the settled propositions of law that, a provision or a statute, which is vital and goes to the root of the matter, the same cannot be broken, and, its breach cannot be overlooked.

Therefore, a breach and disregard of the mandatory provisions contained in sub-Rule (4) & (4-A) of Rule 3 of Order 32 of the CPC, 1908, in a suit, shall make the appointment of a guardian for the minor in the suit by the Court under sub Rule (1) of Rule 3 of Order 32 of the CPC, 1908 shall become ineffective and useless automatically. For which, the Judgment of the said suit will not have any binding effect on the minor and the same will not be operative against him (minor) at all.

Therefore, in order to establish about the valid (lawful) appointment of a guardian in a suit for a minor (defendant), it is to be established that, *(i) notices under sub Rule (4) & (4-A) of Rule 3 of Order 32 of the CPC, 1908 were duly served upon the minor and his guardian and (ii) upon service of such notice to hear objections if any they may be urged on behalf of either or both and (iii) the written consent of the proposed guardian is to be obtained by the Court to appoint him/her as a guardian-ad-litem for the minor defendant in the suit.*

The aforesaid provisions of Order 32 of the CPC, 1908 clearly clarify that, only after compliance with the above mandatory provisions of sub Rule (4) & (4-A) of Rule 3 and Sub-rule (3) of Rule 4 of Order 32 of the CPC, 1908, if a guardian is appointed for a minor in a suit, then in the eye of law, he/she shall be deemed to represent the minor concern lawfully.

If, however, a guardian-ad-litem for the minor (defendant) is appointed upon application made by the plaintiff, without any notice of such an application having been served upon the minor and guardian as required under sub Rule (4) & 4-A of Rule 3 of Order 32 of the CPC, 1908, an order appointing guardian-ad-litem for such a minor defendant by the Court, purporting to act under sub Rule (4) of Order 32 of the CPC, 1908 would be a nullity and without jurisdiction and such a guardian-ad-litem cannot legally represent the minor, so as to bind him by his acts. Such a minor will not be considered to be a party to such a proceeding, notwithstanding that, his name appears in the record, and as such, any order passed or any proceeding taken against him (minor) shall be null and void

19. On this aspect, the propositions of law has already been clarified by the Hon'ble Courts in the ratio of the following decisions:

i. **A.F.A.D No.1268 of 1949 & AIR 1957 (Patna) 260:Ramchandar Singh & Others Vs. B. Gopi Krishna Dass & Others**—*CPC 1908, Order 32, Rule 3 & 4—If a Court guardian is appointed upon the application made by the plaintiff, without any notice of such an application having been served upon the minor and on his proposed guardian as required by Sub-rule (4) of Rule 3 of Order 32, the order appointing a guardian-ad-litem for such a minor by the Court, no doubt, purporting to act under Sub-rule (4) of Rule 4 of Order 32 CPC, 1908 would be a nullity and without jurisdiction and such a guardian-ad-litem cannot legally represent the minor, so as to bind him by his acts. Such a minor will not be considered to be a party to such a proceeding, notwithstanding that his name appears on the record, and as such, any order passed or any proceeding taken against him will be null and void.* **(Para No.27)**

ii. **38 (1972) CLT 173 : Judhistir Das Vs. Ekamra Choudhury & Others**—*CPC, 1908—Order 32, Rule 3(4) —Appointment of Court guardian of minor—Necessary compliance—On application of the plaintiff for appointment of a Court guardian, the Court directed the plaintiff to deposit the guardian-fee and thereafter the guardian was appointed—No prior notice to the natural guardian given—Order improper—Minor is not bound by the decree passed.*

The minor's natural guardian, his mother, was alive at the time, but she was not served with, notice of this application. In view of the legal principles the facts stated above, the decree passed so far as the present plaintiff was concerned was null and void, and therefore, not binding upon him. **(Para No.8)**

20. The order sheets of the suit vide O.S. No.58 of 1976-I (Exts.3,A and E) filed and proved by the parties in the suit vide T.S. No.17 of 1985-I do not at all reveal about the service of any notice either on the minor defendant No.2 or on his natural mother guardian (defendant No.1) in that suit vide O.S. No.58 of 1976-I giving them opportunities for filing objections as well as hearing of any objection from them (defendants) for appointment of Guardian-Ad-Litem for the minor defendant No.2, instead of which, without complying with the mandatory provisions of Sub-rule (4)

& 4-A of Rule 3 and Sub-rule (3) of Rule 4 of Order 32 of the CPC, 1908, steps for appointment of Guardian-Ad-Litem for the minor defendant No.2 in the suit vide O.S. No.58 of 1976-I were taken illegally by the Court since 16.06.1976 and appointment of Guardian-ad-Litem for the minor defendant No.2 was made on dated 21.09.1976 illegally in contravention with the mandatory provisions of law.

Therefore, in view of the principles of law enunciated in the ratio of the aforesaid two decisions of the Hon'ble Courts reported in ***AIR 1957 (Patna) (DB) 260 & 38 (1972) CLT 173***, the appointment of Sri B. Ch. Pattnaik advocate as Guardian-Ad-Litem for the minor defendant No.2 in O.S. No.58 of 1976-I was a nullity and without jurisdiction. For which, as per law, Sri. B. Ch. Pattnaik was not in fact GAL for the minor defendant No.2 so as to bind him by his acts. Therefore, he (defendant No.2) is not considered to be a party in that suit vide O.S. No.58 of 1976-I, though his name was indicated as defendant No.2 in that suit. Therefore, the orders passed in that suit vide O.S. No.58 of 1976-I starting from 16.06.1976 onwards are null and void automatically.

In the Judgment and Decree passed in T.S. No.17 of 1985-I, it has been held by the Trial Court that, *"even though, the minor defendant No.2 (Gajendra) in O.S. No.58 of 1976-I attained his majority during the pendency of that suit, as he (defendant No.2) himself did not voluntarily come to the Court and did not inform to the Court that he has attained majority, then, no irregularity has been committed by the court in passing the Judgment and Decree of O.S. No.58 of 1976-I against both the defendants including the defendant No.2. Because, the above conduct of the defendant No.2 i.e. non-furnishing intimation to the Court by him (defendant No.2) voluntarily about the attainment of his majority during the pendency of the suit vide O.S. No.58 of 1976-I shall be deemed that, he (defendant No.2) after attaining his majority has accepted the proceedings of O.S. No.58 of 1976-I. For which, the Judgment and Decree of O.S. No.58 of 1976-I is binding upon him (defendant No.2)".*

The entire Order Sheets of O.S. No.58 of 1976-I vide Exts.3, A & E do not reveal about the issuance of any notice to the defendant No.2 by the court after attainment of his majority during the pendency of the suit stating whether he (defendant No.2) intends to proceed with the suit or not.

21. On this aspect, the propositions of law has already been clarified by the Hon'ble Courts and Apex Court in the ratio of the following decisions:

> i. **(2018) 2 SCC 504:Nagaiah & Another VS. Chowdamma (dead) by Legal Representatives & Others.**
> *CPC, 1908—Order 32, Rules 1,2,3,6,7,9,12,13 & 14—In case, if the Court discovers during the pendency of the suit that, the minor plaintiff has attained majority, such plaintiff needs to be called upon by the Court to elect whether he intends to proceed with the suit or not. In other words, the minor who attained majority during the pendency of the suit must be informed of the pendency of the suit and in the absence of such a notice, the minor cannot be imputed with the knowledge of the pendency of the suit. So, before any adverse orders are to be made against the minor, who has attained majority, the court has to give notice to such person.* **(Para No.18)**

ii. ***AIR 1995 (Rajasthan) 38 : Malkiyat Singh & Another Vs. Om Prakash & Others.*** *CPC, 1908—Order 32, Rules 3 & 4—While invoking the residuary power conferred upon the Courts of law under Section 151 C.P.C, the Court is to see that, for a minor when written statement is already filed by his or her guardian ad litem on attaining majority, he or she can file a fresh written statement on showing "improper contest" or that minor's interest was not sufficiently protected and not otherwise.* **(Para No.10)**

22. As per the dictums of the Apex Court and Hon'ble Courts in the ratio of the aforesaid decisions, when during the pendency of the suit vide O.S. No.58 of 1976-I, the minor defendant No.2 (Gajendra) attained his majority, then, it was the duty and obligation of the Court to give notice to the said minor defendant No.2 (who attained majority during the pendency of the suit) for providing him an opportunity to contest the suit vide O.S. No.58 of 1976-I properly for protection of his interests in the said suit.

When the entire Order Sheets of the suit vide O.S. No.58 of 1976-I (Exts.3,A & E) do not at all reveal about the sending up of any notice by the Court to the defendant No.2 even after attainment of his majority during the pendency of the suit, then, at this juncture, the proceedings of the suit vide O.S. No.58 of 1976-I starting from 16.06.1976 till its Judgment and Decree cannot be held as lawful. For which, in other words, it is held that, due to non-compliance with the mandatory provisions of Order 32, Rule 3, 4 & 12 of the CPC, 1908, the proceedings of the suit vide O.S. No.58 of 1976-I starting from Order dated 16.06.1976 till its Judgment and Decree are invalid and non-est in the eye of law.

For which, in other words, it is held that, the plaintiff in O.S. No.58 of 1976-I (defendant in T.S. No.17 of 1985-I) has obtained the decree in O.S. No.58 of 1976-I against the defendants in O.S. No.58 of 1976-I by practising fraud through suppression of notices/summons as well as abuse of the process of the Court.

The acts of a party or parties which shall come within the purview of abuse of the process of the court has already been clarified by the Hon'ble Courts in the ratio of the following decision:

(i) **2024 (3) Civ.L.J. 116 (Mad.):K.R. Andu Gowder and Others Vs. Saroja & Others (Para No.37**)— *Abuse of process—Not defined in the Code, 1908—Circumstances enumerated, when a party is said to be guilty of abuse of process of the Court.*

A party to a litigation is said to be guilty of abuse of process of the Court, in any of the following cases:-

(i) Gaining an unfair advantage by the use of a rule of procedure

X X X X X X

(iii) Fraud or collusion in Court proceedings as between parties.

X X X X X X X

23. So far as the 2nd formulated substantial questions of law i.e. Whether the suit vide T.S. No.17 of 1985-I filed by plaintiff-respondent was barred by limitation as per Articles 58 and 59 of the Limitation Act, as the suit was not filed within 3 years from the date of the knowledge about the passing of the decree in O.S. No.58 of 1976-I is concerned;

When it has already been held on the basis of the answers given in the foregoing 1st substantial question of law that, the plaintiff in O.S. No.58 of 1976-I (defendant in T.S. No.17 of 1985-I) has obtained the Judgment and Decree in O.S. No.58 of 1976-I in his favour and against the defendants in O.S. No.58 of 1976-I (plaintiffs in T.S. No.17 of 1985-I) by practising fraud through suppression of notices/summons as well as abuse of the process of the Court without complying with the mandatory provisions of Order 32, Rule 3,4 & 12 of the CPC, 1908, then, at this juncture, the suit vide T.S. No.17 of 1985-I filed by the plaintiffs (defendants in O.S. No.58 of 1976-I) for setting aside the Judgment and Decree passed in O.S. No.58 of 1976-I against them on the ground of fraud and suppression of service of notices/summons as well as abuse of the process of the Court for non-compliances with the mandatory provisions of Order 32, Rule 3,4 & 12 of the CPC, 1908 cannot be held as barred by limitation, even though the suit vide T.S. No.17 of 1985-I has been filed in the year 1985 for setting aside the Judgment and Decree passed in O.S. No.58 of 1976-I on dated 24.09.1977.

On this aspect the propositions of law has already been clarified in the ratio of the following decisions:

> I. **2006 (1) Apex Court Judgment 449 (SC): Bank of India & Another Vs. Avinash D. Mandivikar & Others.**
> *When an action is founded on fraud the question of any reasonable period for initiation of action is clearly immaterial.*
>
> II. **2019 (1) CLR 748:Subala Tarai & Diriba Swain Vs. Collector Puri & Others—Indian Limitation Act, 1963 Section 22***—Action initiated on discovery of fraud is not barred by limitation—Since fraud is a continuous wrong, period of limitation would begin to run at every moment.*
>
> III. **(2010) 8 SCC 383:Meghmala & Others Vs. G. Narasimha Reddy & Others**.
> *Fraud—An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of the others in relation to a property would render the transaction void ab initio. Fraud and deception are synonymous. Any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine, including res judicata.*

24. On analysis of the facts in accordance with the law, in the answers of the aforesaid two substantial questions of law, it has been held that, the Judgment and Decree passed in O.S. No.58 of 1976-1 is tainted with fraud and the same has been passed through the abuse of the process of the Court and when as per law, the fraud is a continuing wrong and when, the period of limitation for challenging (setting aside) the same would begin to run at every moment, then, at this juncture, the filing of the suit vide T.S No.17 of 1985-I by the plaintiffs (defendants in O.S. No.58 of 1976-I) for setting aside the Judgment and Decree of O.S. No.58 of 1976-I is not barred by limitation.

For which, the decisions relied upon by the learned counsel for the appellants for terming the suit of the plaintiffs vide T.S. No.17 of 1985-I barred by limitation indicated in Para No.14 of this Judgment are not applicable to the suit/appeal at hand on law and facts as discussed above.

When, as per the discussions and observations made above, it has already been held that, the initial actions made in the suit vide O.S. No.58 of 1976-I as per Order dated 16.06.1976 were not in consonance/confirmity with the law, then, all subsequent/consequential proceedings thereof would fall through for the reason that, illegality strikes at the root of the order and the same is based on the legal maxim i.e. *SUBLATO FUNDAMENTO CADIT OPUS* meaning thereby that, foundation being removed, structure/work falls to the ground.

On this aspect the propositions of law has already been clarified by the Hon'ble Courts & Apex Court in the ratio of the following decisions:

i. **(2011) 14 SCC 770:State of Punjab Vs. Davinder Pal Singh Bhullar & Others**—*If initial action is not in consonance with law, all subsequent and consequential proceedings would fall through for the reasons that, illegality strikes at the root of the order. In such a fact situation, the legal maxim SUBLATO FUNDAMENTO CADIT OPUS meaning thereby that, foundation being removed structure/work falls come into play.* **(Para No.107)**

ii. **(2005) 3 Supreme Court Cases 422:Mangal Prasad Tamoli (dead) by LRs Vs. Narvadeshwar Mishra (dead) by LRs & Others.**
If an initial Order is bad in law, then all further proceedings consequent thereto would be non-est and have to be necessarily set aside. **(Para No.15)**

iii. **(2006) 1 Supreme Court Cases 228:C. Albert Morris Vs. K. Chandrasekaran & Others.**
Right—Which can exist only and only where it has lawful origin.

iv. **2008 (1) Civ.C.C. 386 (Raj):Yatendra Swaroop Vs. Smt. Asha Devi**—*Any order passed, subsequent to an order, which has been held to be non-est is of no consequence.* **(Para No.9)**

v. **2011 (Supp.) OLR (NOC) 545:M/s. Utkal Builders Limited Vs. Union of India & Others**
If a judgment proceeds without taking note of or ignoring relevant provisions of law, the said Judgment cannot be held to have correctly decided the case.

25. So, by applying the principles of law enunciated in the ratio of the above decisions to the Order Sheets of O.S. No.58 of 1976-I vide Exts.3,A & E it is held that, the Orders of O.S. No.58 of 1976-I starting from 16.06.1976 including the Judgment and Decree of that suit vide O.S. No.58 of 1976-I are void, illegal and non-est in the eye of law.

Even though, it is held that, all the consequential proceedings in the suit vide O.S. No.58 of 1976-I starting from 16.06.1976 including its Judgment and Decree were/are non-est in the eye of law, still then, the learned counsel for the respondents argued that, due to the death of the original plaintiff and defendants in the suit vide O.S. No.58 of 1976-I in the meanwhile, the entire proceedings of O.S. No.58 of 1976-I have become infructuous. For which, instead of setting aside the Judgment and Decree of O.S. No.58 of 1976-I, the Judgment and Decree passed in T.A. No.60 of 1993 arising out of T.S. No.17 of 1985-I are required to be confirmed.

When, it has been held above that, the subsequent/consequential proceedings in the suit vide O.S. No.58 of 1976-I starting from 16.06.1976 including its Judgment and Decree are non-est in the eye of law, then at this juncture, the Orders/proceedings in O.S. No.58 of 1976-I prior to 16.06.1976 cannot be held as non-est or infructuous under law. For which, the suit vide O.S. No.58 of 1976-I is required to be decided afresh (de novo) since the previous stage of Order dated 16.06.1976.

As, all the subsequent/consequential proceedings of O.S. No.58 of 1976-I starting from Order dated 16.06.1976 including its Judgment and Decree are held to be non-est in the eye of law, for which, there is justification under law for making interreference with the Judgment and Decree passed by the Trial Court in the suit vide T.S. No.17 of 1985-I as well as the Judgment and Decree passed by the First Appellate Court in T.A. No.60 of 1993 through this 2nd Appeal filed by the defendant of T.S. No.17 of 1985-I, because, in the suit vide T.S. No.17 of 1985-I filed by the plaintiffs (defendants in O.S. No.58 of 1976-I), they had prayed for setting aside the Judgment and Decree passed in O.S. No.58 of 1976-I on the grounds i.e. fraud, suppression of notices/summons and non-compliances with the provisions of Order 32, Rule 3,4 & 12 of the CPC, 1908.

26. Therefore, there is some merit in the 2nd Appeal of the appellants (substituted LRs of the defendant). The same is to be allowed in part.

27. In result, the 2nd Appeal filed by the defendant (predecessor of the appellants i.e. Bhikari) is allowed in part on contest against the respondents (substituted LRs of the plaintiffs), but without costs.

The Judgment and Decree i.e. the dismissal of the entire suit of the plaintiffs vide T.S. No.17 of 1985-I passed by the Trial Court is set aside.

The Judgment and Decree passed in T.A. No.60 of 1993 by the First Appellate Court is set aside in part.

28. The suit be and the same vide T.S. No.17 of 1985-I filed by the plaintiffs is decreed in part on contest against the defendant, but without costs.

29. The Orders of O.S. No.58 of 1976-I starting from 16.06.1976 along with the Judgment and Decree of that suit vide O.S. No.58 of 1976-I passed by the learned Munsif, Khurda are declared as null/void/non-est and inoperative and the said Orders of O.S. No.58 of 1976-I starting from 16.06.1976 including its Judgment and Decree are set aside.

The Court i.e. the Court of the learned Munsif, Khurda (in which, the suit vide O.S. No.58 of 1976-I was disposed of) is directed to proceed with the suit vide O.S. No.58 of 1976-I afresh (de novo) as per law since the previous stage of the Order No.2 dated 16.06.1976 of that suit vide O.S. No.58 of 1976-I.

30. The parties to this appeal are directed to appear before the Court of the learned Munsif, Khurda in the suit vide O.S. No. 58 of 1976-I on dated 27.09.2024

for the purpose of receiving the directions of that Court as to the further proceedings of the said suit vide O.S. No.58 of 1976-I afresh since the previous stage of Order dated 16.06.1976 in that suit. The said court i.e. learned Munsif, Khurda (presently Civil, Judge, Jr. Division, Khurda) is directed to take its best endeavour for disposal of the suit vide O.S. No.58 of 1976-I as expeditiously as possible as per law, as, the suit is a very old suit of the year, 1976.

31. The Registry is directed to send back the LCRs along with the copies of the Judgment to the Courts concerned within a week positively for proper compliances of the above directions made by this Court in this Judgment.

32. Pending application(s), if any, in this appeal stand disposed of.

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