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Smt. Madhumita Panda, Advocate

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Can the decision in Criminal Appeal No. 30 of 2020 be quashed or required to be modified? – Held , No – Since the petitioner is alleged of a victim of domestic violence, while being in a domestic relationship with opposite party Nos.2 to 5, apart from any such reliefs, monetary as well as ancillary, she is entitled to receive back all the articles which are exclusively owned by her – The inevitable conclusion is that both the Courts below failed to discharge the statutory obligation in not dealing with the plea for return of stridhan or such other property claimed to have been received by opposite party No.2 to 5 at the time of her marriage – It is concluded that the learned J.M.F.C.(R), Cuttack, apart from considering enhancement of maintenance and other sums on monetary relief(s) is needed to exercise jurisdiction under Section 19(8) of the D.V. Act vis-à-vis the return of the articles claimed to have been possessed by the petitioner lying in the custody and enjoyment of opposite party Nos. 2,4 and 5 and if necessary, for the said purpose, to direct enquiry and inventory to be held and carried out, in the manner, it is considered just and expedient.

While dealing with matrimonial disputes, it is to be kept in mind that any such order towards maintenance and such other relief(s) should not be disproportionate and disadvantageous to the respondents, who must have the means to provide the same befitting the status of aggrieved person in a domestic relationship with them – A balance can be maintained provided all such material evidence is lying at the disposal of the Court dealing with the application under Section 12 of the D.V.Act. Judgment dated 14th February, 2023 passed in Criminal Appeal No.30 of 2020 and dated 26th February, 2020 passed in Crl. Misc. Case No. 93 of 2016 are set aside – Direction issued for expeditious disposal.

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The plea of the Petitioner-Management vis-à-vis exercise of jurisdiction by opposite party No.1 referring to the BIFR order or any such grounds is liable to be rejected leaving it the option to avail such other remedy as permissible under law- Writ Petitions stand dismissed.

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2024 (III) ILR-CUT-311

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

W.P.(C) NOS. 31241 & 24316 OF 2023

M/s. CHANDAN SECURITY SERVICES, CUTTACK .....Petitioner

V.

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

(A) CONSTITUTION OF INDIA, 1950 – Article 226 – Suppression of material fact – The petitioner intentionally suppressed the material facts with regard to filing of the earlier Writ Application wherein the petitioner had obtained an *ex parte* interim order – Whether the Court should exercise its extraordinary Jurisdiction in the above circumstance? – Held, No – A prerogative remedy is not a matter of course – If the applicant does not disclose full facts or suppresses relevant materials or is otherwise guilty of misleading the Court, the Court may dismiss the action without adjudicating the matter. (Para 12)

(B) Writ applications are dismissed with cost of ₹ 50,000/- (Fifty thousand). (Para 15)

Case Laws Relied on and Referred to :-

1. (2007) 8 SCC 449 : Prestige Lights Ltd. v. State Bank of India.
2. (2012) 12 SCC 133 : V. Chandrasekharan & Anr. v. Administrative Officer & Ors.
3. (2013) 11 SCC 531Bhaskar Laxman Jadhav `& others v. Karamveer Kakasaheb Wagh Education Society & Ors.
4. (2020) 14 SCC 210 : Satyan v. Deputy Commissioner and others

For Petitioner : Mr. Manoj Kumar Mohanty

For Opp.Parties : Mr. Lalatendu Samantray, Additional Government Advocate, Mr. B. K. Routray, Mr. M. K. Panda

JUDGMENT Date of Judgment : 11.09.2024

CHAKRADHARI SHARAN SINGH, C.J.

1. Both these writ applications have been filed by the same petitioner through the same learned Advocate and since both the matters relate to same contractual work for sanitation in Ward Nos.1,2,3,4,5,6,7,8,9,10,11,12,13,14,15,16,17,18,19 and 20 of Pattamundai Municipality, they have been heard together and are being disposed of by the present common judgment and order.

2. Mr. Manoj Kumar Mohanty, learned counsel appearing on behalf of the petitioner has raised an objection over this Court taking up both the matters together on the ground that as per the roster, W.P(C) No.24316 of 2023 is a Single Bench matter and, therefore, the same should not be heard by us in the absence of any specific administrative order passed by the Chief Justice. The said submission is manifestly preposterous and deserves to be rejected at the very threshold noticing the earlier judicial orders passed by this Court on 02.02.2024, 12.08.2024 and 20.08.2024, which read as under :-

Order dated 02.02.2024

"1. xxx xxx xxx

2. List this matter after one week along with W.P.(C) No.24316 of 2023.

Sd/-
(DR. B. R. SARANGI)
ACTING CHIEF JUSTICE
Sd/-
(M.S.RAMAN)
JUDGE"

Order dated 12.08.2024

"1. xxx xxx xxx

2. List this matter tomorrow i.e. 13.08.2024 along with W.P.(C) No.24316 of 2023.

Sd/-
(Chakradhari Sharan Singh)
Chief Justice
Sd/-
(Savitri Ratho)
Judge"

Order dated 20.08.2024

"1. xxx xxx xxx

2. List this matter on i.e. 27.08.2024 along with W.P.(C) No.24316 of 2023 within first five cases.

Sd/-
(Chakradhari Sharan Singh)
Chief Justice
Sd/-
(Savitri Ratho)
Judge"

3. We have heard both the writ applications and we intend to dismiss the matters taking into account suppression of material facts, which is not only by the petitioner but also on the advice of learned counsel for the petitioner, for reasons which are being discussed hereunder.

4. It is deemed apposite to notice first, certain essential facts asserted in W.P.(C) No. 24316 of 2023. The petitioner filed this writ application seeking quashing of a letter No. 2364 dated 19.07.2023 issued by the Executive Officer, Pattamundai Municipality, District Kendrapara whereby the petitioner's contract for providing service of sanitation was terminated, on the ground that it was done without giving him an opportunity of hearing. It was the petitioner's case that Pattamundai Municipality had invited a tender in the year 2016 from the intending organizations to perform sanitation work including street sweeping, drain cleaning, roadside-bush cutting, door to door waste collection, dish infection in the Pattamundai Municipality area. The petitioner was allotted the work, he having been found to be the lowest bidder. Subsequently, in the year 2018, again a tender was invited for the same work. The petitioner participated and was declared lowest bidder, and accordingly the work was allotted to it. The petitioner continued the work so allotted thereafter. On 20.07.2022, the Pattamundai Municipality again

invited tender for performing the same sanitation work. According to the petitioner, he had submitted its bid, which was not opened on 04.08.2022. It has been pleaded in the writ application that the petitioner was informed after a long time that its bid was rejected during the technical evaluation. Subsequently, it came to the petitioner's knowledge that the said tender process was cancelled by opposite party No.2. Therefore, the petitioner did not challenge the said cancellation of its bid by opposite party No.2. He has also asserted that the petitioner was allowed to do the sanitation work within the Pattamundai Municipal area.

5. It is noteworthy that these averments are vague inasmuch as there is no disclosure as to when did he learn and from whom about the cancellation of bidding process and rejection of his bid during the course technical evaluation.

6. It is further pleaded in the writ application that the letter dated 19.07.2023 issued by the authority of Pattamundai Municipality issued fifteen days pre-termination of contract notice to the petitioner, in the light of the terms and conditions and stipulation of Clause-12 of the agreement dated 29.09.2018 was received by the petitioner on 23.07.2023, which the petitioner challenged in the said W.P.(C) No.24316 of 2023.

7. The said writ application [W.P.(C) No.24316 of 2023] was taken up by a learned Single Judge of this Court on 02.08.2023 and an ex parte interim order was passed by this Court in I.A. No.11682 of 2023 to the following effect:-

> *"xxx xxx xxx*
>
> *2. It is observed, in the event Annexure-3, i.e., letter no.2364 dated 19.7.2023 issued by O.P.2 has not been given effect to, same shall not be given effect for a period of four weeks."*

8. Soon thereafter, on 22.09.2023, during the pendency of the said writ application, the petitioner filed the other writ application i.e. W.P.(C) No.31241 of 2023 seeking quashing of the decision of the Tender Committee dated 28.10.2022 whereby the technical bid of the petitioner was rejected. In W.P.(C) No.31241 of 2023, there is no whisper about the petitioner having filed the aforementioned writ application i.e. W.P.(C) No.24316 of 2023 in which the petitioner had obtained an interim order. As the second writ application related to a challenge to a tender process, it was placed before a Division Bench. The Division Bench did not have any reason or basis to know about the filing of another writ application i.e. W.P.(C) No.24316 of 2023 when W.P.(C) No.31241 of 2023 was taken up. This fact was intentionally suppressed. Only after a counter affidavit was filed on behalf of opposite party No.2 that this Court could learn about the fact that the petitioner had filed another writ application wherein the petitioner had obtained an ex parte interim order, in relation to the selfsame work of sanitation.

9. Mr. Mohanty, learned counsel appearing on behalf of the petitioner, has made elaborate arguments to question the decision of the Tender Committee, rejecting the petitioner's bid document on the ground that the petitioner had not complied with the provisions of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952.

10. We are, however, not inclined to entertain such submissions in view of the manifest conduct of the petitioner in suppressing material facts from the Court in a proceeding under Article 226 of the Constitution of India. We are of the considered opinion that the petitioner intentionally suppressed the material fact as regards filing of the earlier writ application wherein the petitioner had obtained an interim order.

11. The Supreme Court has repeatedly reminded that a litigant approaching the Court of equity must come with clean hands and in case any suppression is noticed, the Court should reject such application in limine without considering the merits of the case.

12. Reference may be made in this regard to the Supreme Court's decision in case of ***Prestige Lights Ltd. v. State Bank of India*** reported ***in (2007) 8 SCC 449*** wherein the Supreme Court has stated in no uncertain terms that a prerogative remedy is not a matter of course. In exercising extraordinary power, therefore, a Writ Court will indeed bear in mind the conduct of the party who is invoking such jurisdiction. If the applicant does not disclose full facts or suppresses relevant materials or is otherwise guilty of misleading the Court, the Court may dismiss the action without adjudicating the matter.

12.1. In the case of ***V. Chandrasekharan and another v. Administrative Officer and others*** reported in ***(2012) 12 SCC 133***, the Supreme Court, deprecating the conduct of the party has held that the judicial process cannot become an instrument of oppression or abuse, or a means in the process of the court to subvert justice, for the reason that the court exercises its jurisdiction, only in furtherance of justice. Paragraphs 44, 45 and 48 of the said decision are being reproduced herein below:

> **"44.** The appellants have not approached the court with clean hands, and are therefore, not entitled for any relief. Whenever a person approaches a court of equity, in the exercise of its extraordinary jurisdiction, it is expected that he will approach the said court not only with clean hands but also with a clean mind, a clean heart and clean objectives. Thus, he who seeks equity must do equity. The legal maxim *jure naturae aequum est neminem cum alterius detrimento et injuria fieri locupletiorem*, means that it is a law of nature that one should not be enriched by causing loss or injury to another. (Vide *Ramjas Foundation v. Union of India* [1993 Supp (2) SCC 20 : AIR 1993 SC 852], *Noorduddin v. K.L. Anand* [(1995) 1 SCC 242] and *Ramniklal N. Bhutta v. State of Maharashtra* [(1997) 1 SCC 134 : AIR 1997 SC 1236] .)
>
> **45.** The judicial process cannot become an instrument of oppression or abuse, or a means in the process of the court to subvert justice, for the reason that the court exercises its jurisdiction, only in furtherance of justice. The interests of justice and public interest coalesce, and therefore, they are very often one and the same. A petition or an affidavit containing a misleading and/or an inaccurate statement, only to achieve an ulterior purpose, amounts to an abuse of process of the court.
>
> xxx xxx xxx
>
> **48**. In *Maria Margarida Sequeira Fernandes v. Erasmo Jack de Sequeira* [(2012) 5 SCC 370 : (2012) 3 SCC (Civ) 126] this Court taking note of its earlier judgment in *Ramrameshwari Devi v. Nirmala Devi* [(2011) 8 SCC 249 : (2011) 3 SCC (Cri) 481 : (2011) 4 SCC (Civ) 1] held : *(Maria Margarida case* [(2012) 5 SCC 370 : (2012) 3 SCC (Civ) 126] , SCC p. 393, para 81)

> "81. False claims and defences are really serious problems with real estate litigation, predominantly because of ever escalating prices of the real estate. Litigation pertaining to valuable real estate properties is dragged on by unscrupulous litigants in the hope that the other party will tire out and ultimately would settle with them by paying a huge amount. This happens because of the enormous delay in adjudication of cases in our courts. If pragmatic approach is adopted, then this problem can be minimised to a large extent."
>
> The Court further observed that wrongdoers must be denied profit from their frivolous litigation, and that they should be prevented from introducing and relying upon false pleadings and forged or fabricated documents in the records furnished by them to the court."

12.2. A similar view has been taken by the Supreme Court in case of ***Bhaskar Laxman Jadhav and others v. Karamveer Kakasaheb Wagh Education Society and others*** reported in ***(2013) 11 SCC 531***. The Supreme Court conclusively opined in that case that since the petitioner had suppressed material facts from the Court, the special leave to appeal ought not to be granted. In the case of ***Satyan v. Deputy Commissioner and others*** reported in ***(2020) 14 SCC 210***, the same view has been echoed by the Supreme Court.

13. In view of the above, considering the conduct of the party in suppressing material facts from this Court in the pleadings, we are of the considered opinion that both the writ applications deserve to be dismissed without entering into the merits of the respective cases, as the petitioner has abused the process of the Court and attempted to pollute the stream of justice by suppressing material facts which amounts to falsehood.

14. What has truly disturbed us that unfortunately both the writ applications were filed by the same learned counsel. While filing the second writ application, learned counsel for the petitioner was aware of the averments made in the first writ application. The minimum, what was expected from learned counsel for the petitioner was that he ought to have ensured that the facts regarding the filing of the first writ application were disclosed in the second writ application. We express our displeasure.

15. Both these writ applications are accordingly dismissed with a cost of Rs.50,000/- (fifty thousand) to be deposited by the petitioner in the High Court's Bar Association Advocates' Welfare Fund within three months from today.

16. All the interim orders stand vacated.

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2024 (III) ILR-CUT-315

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

W.P.(C) NO. 15171 OF 2009

TARINI CHARAN SAHU & ORS. …. Petitioners

V.

COMMISSIONER OF ENDOWMENTS, ORISSA, BHUBANESWAR & ORS. …..Opp.Parties

(A) ODISHA HINDU RELIGIOUS ENDOWMENTS ACT, 1951 – Section 68 – Whether an application U/s. 68 of the Act can be maintained by a Trustee or Executive Officer of the religious institution for obtaining the possession of the endowment property? – Held, No – The Trustee wrongly invoked Section 68 of the Act. (Paras 10, 11 & 14)

(B) ODISHA HINDU RELIGIOUS ENDOWMENTS ACT, 1951 – Section 68 – "Such person" – Meaning – The class of persons fall within the definition of "Such person" has been delineated. (Para - 9)

Case Laws Relied on and Referred to :-

1. (39) 1973 CLT 796 : Radha Mohan Mohapatra & another v. Commissioner of Endowments, Orissa & Anr.

For Petitioners : Mr. Samir Kumar Mishra, Sr. Adv alongwith Mr. J. Pradhan, P.S. Mohanty, S. Sahoo & S. Sethi.

For Opp.Parties : M/s. S.N. Mohapatra, P.K. Panda & R.K. Routaray.

JUDGMENT Date of judgment: 12.09.2024

CHAKRADHARI SHARAN SINGH, CJ.

1. The petitioners in the present writ petition have put to challenge the order dated 04.09.2009 passed by the Commissioner of Endowments, Bhubaneswar in R.C. No. 4/04, confirming the order dated 09.01.2004 passed in O.A. No. 1/02 by the Additional Assistant Commissioner of Endowments, Berhampur, Ganjam.

2. We have heard Mr. Samir Kumar Mishra, learned Senior Counsel appearing for the Petitioners and Mr. S.N. Mohapatra, learned counsel appearing for opposite party no.3.

3. The brief facts relevant for the present adjudication are that opposite party no.3, i.e. Sri Sri Balabhadra Mahaprabhu @ Sundaram Math Bije Sankarpur Street, Berhampur, represented by Udayanath Behera, Executive Officer of the deity appointed by the Endowment Commissioner (opposite party no.3) had filed an application under Section 68 of the Orissa Hindu Religious Endowment Act, 1961 (in short 'Act') with a plea that the petitioners were in unauthorized possession of the properties belonging to opposite party no.3. A prayer was made for eviction of the petitioners from the properties in question. Opposite party no. 3 claimed that the property in question belonged to the deity and after coming to know about the fact that the petitioners were in occupation by raising a double storeyed building, they were asked to vacate, but as they did not vacate, the said application under Section 68 of the Act was filed.

4. The petitioners upon notice, filed a reply to the said application before the Additional Assistant Commissioner of Endowments asserting that the property was in their possession which was purchased by them through registered sale deed executed by one Krushna Patra. The Additional Assistant Commissioner of Endowments, after considering the respective stands of the parties directed the

petitioners to vacate the case schedule lands in favour of opposite party no.3 within a month failing which opposite party no.3 shall be at liberty to get the order executed through the Court as per the procedure laid down under the Act.

5. Against the said order of the Additional Assistant Commissioner of Endowments, the petitioners approached this Court by filing a writ petition giving rise to W.P.(C) No. 2042 of 2004. This Court disposed of the said writ application with a liberty to challenge the order of the Additional Assistant Commissioner of Endowments under Section 9 of the Act by filing a revision application. Accordingly, the petitioners filed the revision application, which has been dismissed by the Commissioner of Endowments (opposite party no.1) which is under challenge in the present writ application.

6. Learned Senior Counsel appearing on behalf of the petitioners assailing the orders of opposite party nos.1 and 2 has submitted that opposite party no.3 wrongly invoked Section 68 of the Act as the petitioners were admittedly neither the trustee, nor the office holder nor servants of the concerned religious institution, dismissed or suspended from such office nor they claimed or derived title from any trustee or, office holder or servant within the meaning of Sub-Section 1 of Section 68 of the Act and, therefore, the application filed by the opposite party no.3 under Section 68 of the Act was not at all maintainable. He has submitted that it was not the case of the opposite party no.3 that the vendor of the petitioners was in any way associated with the trust in question. He has accordingly submitted that the original order passed by the Additional Assistant Commissioner of Endowments is wholly beyond jurisdiction. He argues that the Revisional order passed by the Endowment Commissioner is equally unsustainable for the same reason.

7. Learned counsel appearing on behalf of opposite party no.3 defending the impugned orders has submitted that as a matter of fact the property in question belongs to the deity of Sri Sri Balabhadra Mahaprabhu @ Sundaram Math Bije Sankarpur Street, Berhampur and in such view of the matter, opposite party no.3 had rightly invoked the provisions under Section 68 of the Act. He has submitted that the opposite party no.3 had choice to invoke either Section 68 or Section 25 (2) of the Act for evicting the petitioners, who were in unauthorized occupation of the land belonging to opposite party no.3.

8. We have carefully gone through the pleadings on record and we have given our anxious consideration to the rival submissions advanced on behalf of the parties. In order to address rival submissions made on behalf of the parties, it would be appropriate to notice Section 68 of the Act, at the outset, which reads as under:-

> ***"68. Putting Trustee or Executive Officer in possession*** *:–*
> *(1) Where a person has been appointed–*
> *(a) as Trustee or Executive Officer of a Religious institution; or*
> *(b) to discharge the functions of a Trustee of a Religious institution in accordance with the provisions of this Act; or*

(c) as the Executive Officer in any scheme settled under the provisions of the Odisha Hindu Religious Endowments Act, 1939 (Odisha Act IV of 1939) and such person is resisted in, or prevented from, obtaining possession of the Religious institution or of the record, accounts and properties thereof, by a Trustee, Officeholder or Servant of the Religious institution who has dismissed or suspended from his Officer or is otherwise not entitled to be in possession, or by any person claiming or deriving title from such Trustee, Office-holder or Servant, other than a person claiming in good faith to be in possession of his own account or on account of some person not being such Trustee, Officeholder or Servant.

The Assistant Commissioner concerned shall, on application by the person so appointed, direct delivery of possession of the Religious institution and its endowments or the records, accounts and properties thereof, as the case may be, to him in the prescribed manner.

***Explanation** :– A person claiming under an alienation contrary to Sub Section (1) of Section 19 and Section 24 shall not be regarded as a person claiming in good faith within the meaning of this Section.*

(2) The Assistant Commissioner and any person authorised by him or acting under his written instructions in the prescribed form, may, for the purpose of delivery of possession under Sub-Section (1), take or cause to be taken such steps and use or cause to be used such force as may, in his opinion, be reasonably necessary and may also enter upon any land or other property whatsoever and in the event of any apprehension of breach of peace in the course of such delivery of possession, the Superintendent of Police shall, on a requisition from the Assistant Commissioner in the prescribed manner, provide such Police aid as may be necessary for the purposes.

(3)(a) The Commissioner may also make a requisition to the Collector of the district in which the property of the math or temple or endowment is situated, in the prescribed form to deliver its possession to the Trustee.

(b) On receipt of a requisition under Clause (a) the Collector shall serve a notice on the person reported to be in occupation or his agent to vacate the said property within such time as the Collector may specify in the said notice. If such notice is not obeyed, the Collector shall remove him or depute a Subordinate Officer to remove such person or agent. In the case of any resistance or obstruction the Collector shall hold a summary enquiry into the facts of the case and if satisfied that the resistance or obstruction was without any just cause and that such resistance or obstruction still continues, may issue a warrant for the arrest of the said person and on his appearance may send him with a warrant in such form as may be prescribed for imprisonment in the civil jail of the district for a period not exceeding thirty days as may be necessary to prevent the continuance of such resistance or obstruction.

(4) No suit, prosecution or other legal proceedings shall lie against the Assistant Commissioner or any person acting under his instruction or authorised by him for anything done in good faith under Sub-Sections (1) and (2).

(5) Every person authorized by the Commissioner or acting under his instructions in pursuance of this Section shall be deemed to be a 'Public Servant' within the meaning of Section 21 of the Indian Penal Code (XLV of 1860).

(6) The provisions contained in this Section shall mutatis mutandis apply to cases –

(a) for delivery of possession of a Religious institution alongwith its endowments or recorded, accounts and properties thereof to a succeeding hereditary Trustee; and

(b) for recovery of pension of leasehold land belonging to a Religious institution after expiry of the term of the lease.

Notes :– The property belongs to the deity – the non hereditary trustee intend to retain the same for the purpose of improvement of the religious institution cannot directly approach the Hon'ble High Court. Rather they should have approached the Commissioner of Endowment U/s- 9 against the order of Additional Commissioner of Endowment passed the order for recovery of possession in favour of the religious institution. 106 (2008) CLT150, 2008(II) CLR117, 2008(Supp.I) OLR 737 (Sri Janmajaya Das and another Vs. State of Orissa and others)

Claim having been made for permanent tenancy of the rooms which had been occupied under the leases granted by the hereditary trustees – the leases were granted without due procedure of law as there being no sanction of the Commissioner of Endowment and the leases were void in view of section 19, 2003 (I) OLR 145 (Surendra Babu Patra and Others Vs. Commissioner of Endowment Orissa, Bhubaneswar and Others."

9**.** On careful scrutiny of the said provision it can be discerned that an application under Section 68 can be maintained against 'such person' who :

(i) is a Trustee, Office-holder; or Servant of the Religious institution who has dismissed or suspended from his Officer; or is otherwise not entitled to be in possession;

(ii) or by any person claiming or deriving title from such Trustee, Office-holder or Servant, other than a person claiming in good faith to be in possession of his own account;

(iii) or on account of some person not being such Trustee, Office-holder or Servant;

If he resists in obtaining possession of properties of a religious institution attempted by a person who is a trustee or executive officer or religious institution etc. Unless an applicant under Section 68 of the Act is in a position to demonstrate that 'such person(s)' as noted above resists any attempt in obtaining the possession by a Trustee or Executive Officer of the religious institution, an application under Section 68 of the Act cannot be maintained. The class of persons fall within the definition of "such person" as has been delineated hereinabove,

10**.** Learned counsel appearing on behalf of the petitioners has rightly placed reliance on a decision of this Court in case of ***Radha Mohan Mohapatra and another v. Commissioner of Endowments, Orissa and another***, reported in ***(39) 1973 CLT 796***, paragraph-3 of which reads thus:-

"So far as the applicability of Section 68 of the Act to the case of the Petitioners is concerned, the language of the section clearly shows that a proceeding under Section 68 can only be instituted against a trustee who has been dismissed, suspended or is otherwise not entitled to be in possession when he prevents the newly appointed trustee from taking possession of the endowment properties. Further, Section 68 of the Act has no application against, a person who claims the property in good faith on his own account. The Explanation to Section 68 of the Act says that a person claiming under an alienation contrary to Section 19 or Section 24 of the Act shall not be regarded as a person claiming in good faith. In the present case, the alienations in favour of the Petitioners being prior to the commencement of the Act it cannot be said that the alienations in favour of the Petitioners are contrary to either Section 19 or 24 of the Act. Secondly, the alienations in favour of the Petitioners being in the year 1927 and the proceeding under Section 68 of the Act having been started in the year 1966, the claim of the Petitioners that they have perfected their title by adverse possession cannot be lost

sight of Section 68 of the Act does not empower the Assistant Commissioner or the Commissioner to forcibly take possession of land by evicting a person who has been in possession for more than the statutory period and has acquired title by adverse possession. Regarding the plea of limitation, the further question which arises for consideration is as to what would be the period necessary to perfect title of the person claiming adversely to the deity. Under Article 96 of the Limitation Act, for a suit by a manager of a Hindu religious or charitable endowment to recover possession of the property comprised in the endowment which has been transferred by a previous manager for a valuable consideration is twelve years from the date of death, resignation or removal of the transferor or the date of appointment of the Plaintiff as manager of the endowment whichever is later. If this Article would apply to the case of the Petitioners, opp. party No. 2 having been appointed in the year 1962 as the managing trustee, for a suit to be instituted by him to recover possession of the aforesaid two plots from the Petitioners, the period of limitation would be twelve years from 1962. There are also authorities which say that a person being in possession of the property belonging to a religious endowment, by asserting a hostile title, begins to prescribe his title against the endowment from the date of his possession. There is no dispute that a proceeding under Section 68 of the Act is summary in nature. It cannot therefore be said that questions of law regarding limitation would not be decided in such a proceeding. The impugned order does not decide what would be the period of limitation in the present case and what provision of Limitation Act would govern the case. That apart, when there is special section, viz : Section 25 under the Act which is more appropriate to the present case, a proceeding under Section 68 of the Act, in our opinion, is misconceived. On the aforesaid analysis of the legal position, we are of the view that in the case before us where alienations in favour of the Petitioners are about half a century old and when the Petitioners have been in possession of the aforesaid two plots since the year 1927 till the date of commencement of the proceeding under Section 68 of the Act in the year 1966 asserting a hostile title in themselves, they cannot be evicted in a summary proceeding under Section 68 of the Act without even deciding if the Petitioners have perfected their title by adverse possession. The proper course for the managing trustee in a case of this nature is to take recourse to either a regular suit or a proceeding under Section 25 of the Act for recovery of possession of the properties belonging to the endowment of Shri Jagannath Swami. The question of limitation and of adverse possession which has a great bearing in the present case cannot be left undecided before an eviction order can be passed against the Petitioners."

11**.** Learned counsel appearing on behalf of opposite party no.3 has not been able to demonstrate, even prima facie, that the petitioners fell within the definition of such person as noted above under Section 68 of the Act, which could have entitled opposite party no.3 to maintain an application under Section 68 of the Act against them.

12**.** It would be beneficial at this juncture to notice Section 25 of the Act which reads thus:-

*"**25. Recovery of immovable trust Property unlawfully alienated** :–*
(1) In case of any alienation, in contravention of Section 19 of this Act or Section 51 of the Odisha Hindu Religious Endowment Act, 1939, or in case of unauthorised occupation of any immovable property belonging to or given or endowed for the purpose of any Religious institution, the Commissioner may, after summary enquiry as may be prescribed and on being satisfied that any such property has been so alienated or unauthorisedily occupied send requisition to the Collector of the district to deliver

possession of the same to the Trustee of the institution or a person discharging the function of the said Trustee.

(2) The Collector in exercising his powers under Sub-Section (1), shall be guided by rules made under this Act.

(3) Any person aggrieved by the action of the Collector may institute a suit in the Civil Court to establish his rights."

13. Section 25 of the Act confers upon the Commissioner within the meaning of the Act to entertain a dispute relating to any alienation or unauthorised occupation of any immovable property belonging to or given or endowed for the purpose of any religious institution, after summary inquiry. If the Commissioner is satisfied that such property has been so alienated or unauthorisedly occupied, has the authority to send requisition to the Collector of the district to deliver possession of such property to the Trustee of the institution or a person discharging the function of the said Trustee. Sub Section 3 permits a person aggrieved by the action of the Collector to institute a suit in the Civil Court to establish his rights.

14. After having gone through the records, we are convinced that opposite party no.3 wrongly invoked Section 68 of the Act and opposite party no.2 acting beyond jurisdiction entertained the said application filed by the opposite party no.3. The order passed by opposite party no.2, in our opinion is unsustainable for this reason and is accordingly quashed, being without jurisdiction. Consequently, the order of the Revisional Authority, i.e. opposite party no.1 also stands quashed.

15. Learned Senior Counsel appearing on behalf of the petitioners has submitted that in the facts and circumstances of the case, even an application under Section 25 (2) of the Act cannot be maintained. It will not be proper for us to comment upon such submission as that will amount to prejudging an issue which has not arisen.

16. This writ application is, accordingly, allowed with the aforesaid observations. There shall be no orders as to costs.

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2024 (III) ILR-CUT-321

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

W.P.(C) NO. 21377 OF 2024

ZIQITZA HEALTH CARE LTD, MUMBAI …. Petitioner

V.

STATE OF ODISHA & ORS. …..Opp.Parties

(A) TENDER MATTER – The petitioner prayed for declaring the Opposite Party No. 3 as ineligible to Request for Proposal inviting tender for operation and management of Integrated Patient Transport and Health Helpline Service in Odisha – An order of blacklisting was issued by the Commissioner of Health and Family Welfare Department, Govt.of Karnataka against Opp.Party No.3 which has been stayed by the

High Court of Karnataka – Whether the order of blacklisting makes the Opposite Party No. 3 ineligible to participate in the tender? – Held, No – There is no gainsaying that by operation of the interim order passed by the High Court of Karnataka, the order of blacklisting has become ineffective till the same is modified or vacated – The interim order of stay by the High Court of Karnataka is still in operation – In such view of the matter, Opp. Party No.3 could not have been declared as ineligible. (Para 8)

(B) CONSTITUTION OF INDIA, 1950 – Article 226 – Scope of Judicial Review in tender matter – Held, Judicial review is not required to interfere in such matters and ought to defer it to the discretion of the tender inviting authorities which, by reason of having authored the tender documents, are the best placed to interpret their terms. (Para 11)

Case Laws Relied on and Referred to :-

1. (39) 1973 CLT 796 : Radha Mohan Mohapatra & Anr. v. Commissioner of Endowments, Orissa & Anr.

For Petitioner : Mr. Sanjit Mohanty, Sr. Adv assisted by Mr. Shibashish Misra, S.S. Tripathy, A. Samal & T. Shreyashi.

For Opp.Parties : Mr. L. Samantaray, AGA (O.P.No.1)
M/s. B.P. Tripathy, R.D. Acharya & N. Barik (O.P.No.2)
Mr. Pinaki Mishra, Sr. Adv assisted by Mr. Chandan Kumar Mohanty & Mr. S.R. Pradhan (O.P. No.3)

JUDGMENT Date of Judgment: 24.09.2024

CHAKRADHARI SHARAN SINGH, CJ.

1. The petitioner is a company incorporated under the Companies Act having its registered office at Mumbai. The present writ application has been filed for declaring opposite party no.3 ineligible for the Request For Proposal (RFP) inviting tender for Operation and Management of Integrated Patient Transport and Health Helpline Service (Phase-II) in Odisha bearing RFP Reference No.OSH& FWS/01/2024/IPTHHS-II. Opposite Party no.3 has been declared L1 in the tender process.

2. We have heard Mr. Sanjit Mohanty, learned Senior Counsel appearing for the Petitioners, Mr. B.P. Tripathy, learned counsel for opposite party no.2 and Mr. Pinaki Mishra, learned Senior Counsel for opposite party no.3.

3. It is the petitioner's case that the opposite party no.3 suffers disqualification as stipulated under Clauses 1.2.5 and 1.2.7 of the RFP document. Considering the nature of challenge, which has been made by the petitioner in the present writ application based on the averments made in the writ application, it would be apt to reproduce herein below the aforesaid clauses:-

> *"1.2.5 The participating entity (i) should not be insolvent, in receivership, bankrupt or being wound up (ii) not having its affairs administered by a court or a Judicial officer (iii) not having its business activities suspended and (iv) must not be subject of legal proceedings for any of the foregoing reason.*

xxx xxx xxx

1.2.7 The participating entity should not have been blacklisted or otherwise disqualified pursuant to any debarment proceedings by any Central or State Government, Local Government or Public Sector Undertaking in India and which is for the time being in force."

3.1 It is the petitioner's case that opposite party no.3 was blacklisted by the Commissioner of Health & Family Welfare Department, Government of Karnataka on 27.11.2023. Further the National Health Mission (NHM), Government of Meghalaya had suspended the contract of opposite party no.3 with National Health Mission by way of closure notice dated 08.08.2022. It is accordingly, the petitioner's case that since opposite party no.3 was blacklisted and suffered the order of suspension passed by NHM, Government of Meghalaya, it should be declared disqualified. The petitioner was found L2 in the bidding process and it is accordingly, the petitioner's case that the work ought to have been awarded to him.

4. A counter affidavit has been filed on behalf of opposite party no.3 stating therein that the order of blacklisting dated 27.11.2023 issued by the Commissioner of Health and Family Welfare Department, Government of Karnataka has been stayed by the High Court of Karnataka in W.P.(C) No. 27840 of 2023 and the order of stay is still operating. As regards the suspension of the work ordered by the NHM, Government of Meghalaya, it is the case of opposite party no.3 that there was no such order of suspension passed during subsistence of the period of contract between opposite party no.3 and the NHM, Government of Meghalaya. After expiry of the term of contract, the term was extended for certain period and because of inevitable circumstances, Government of Meghalaya had decided to suspend the project, which does not amount to suspension so as to attract Clause 1.2.5 of the RFP.

5. Mr. Mohanty, learned Senior Counsel appearing on behalf of the petitioner as argued that the fact that opposite party no.3 has been blacklisted is not in dispute. Merely on the basis that an interim order of stay passed by the High Court of Karnataka was in operation, opposite party no.3 cannot claim that there is no blacklisting order against it. He has further argued, with reference to the documents, which have been brought on record that the project in Meghalaya undertaken by opposite party no.3 had to be suspended because opposite party no.3 was not able to carry out the work. In such circumstances, it was obligatory on the part of the opposite party no.3 to have disclosed this fact at the time of submission of its bid. He has submitted that had this fact been disclosed, the technical evaluation committee would have the opportunity to duly assess the eligibility of opposite party no.3. Non-disclosure of this crucial facts amounts to suppression and on this ground also opposite party no.3 should be declared disqualified. He has relied on Annexure-10 to the writ application to contend that the term of the agreement was extended for three months beyond 30.06.2022. The body of the said communication reads as under:-

"With reference to the subject and letter No. cited above, I am to inform you that the office of the undersigned is in the process of finalization the Tender/RFP for operationalization of Emergency Response Service (ERS) under the Dial-108 platform.

Since, the extension of your services is ending as on 30th June, 2022 and in order to ensure continuation of services, GVK EMRI is to continue providing the services under the same Terms and Conditions for another period of 3 (three) months or till the tender formalities are completed."

6. Mr. Mishra, learned Senior Counsel appearing on behalf of opposite party no.3 has submitted that the order of blacklisting dated 27.11.2023 issued by the Commissioner of Health and Family Welfare Department, Government of Karnataka was not in operation as on the date of submission of bids by opposite party no.3, by operation of the order of stay, passed by the High Court Karnataka in W.P.(C) No. 27840 of 2023. Such order of blacklisting could not have been considered against opposite party no.3 as that would have amounted to ignoring the order of stay passed by the High Court of Karnataka. He has further submitted that there is no suppression of any material fact as regards the suspension of project ordered by the NHM, Government of Meghalaya. He has relied on a communication made by Meghalaya Government to contend that there was no order of suspension during the currency of the agreement of contract between opposite party no.3 and NHM, Government of Meghalaya. Mr. Mishra, learned Senior Counsel has submitted with reference to the communication dated 30.06.2022 that the said communication cannot be treated to be an extension of agreement between the opposite party no.3 and NHM, Government of Meghalaya for the reasons that opposite party no.3 was asked to ensure continuance of services beyond the stipulated period till future tender formalities were completed. He submits that the said communication cannot be treated to be an extension of agreement.

7. Mr. Tripathy, learned counsel has appeared on behalf of opposite party no.2, National Health Mission, Government of Odisha. While opposing the prayer made in the writ application, he has adopted the submission made by Mr. Mishra, learned Senior Counsel.

8. We have carefully examined the pleadings and other materials which are available on record and we have given our anxious consideration to the rival submissions advanced on behalf of the parties. We do not find any force in the submission made by Mr. Mohanty, that the order of blacklisting issued by the Commissioner of Health and Family Welfare Department, Government of Karnataka should have been taken into account and based on that opposite party no.3 ought to have been declared ineligible by applying Clause 1.2.7 of RFP document for the reason that admittedly an order of stay passed by the High Court of Karnataka is operating against the order of blacklisting. There is no gainsaying that by operation of the interim order passed by the High Court of Karnataka, the order of blacklisting has become ineffective till the same is modified or vacated. On the date of submission of bids as also on the date of evaluation of technical bid, the interim order of stay was in operation. The interim order of stay by the High Court of Karnataka is still in operation. In such view of the matter, opposite party no.3 could not have been declared to be ineligible, invoking Clause 1.2.7 of RFP document.

9. Coming to the plea of suspension of work as stipulated under Clause 1.2.5 for disqualification, it is apparent from the pleadings and documents brought on record that the agreement between opposite party no.3 and NHM, Government of Meghalaya had earlier ended and it was subsequently extended to 30.06.2022. Thereafter the agreement was extended for a further period of three months. In the meanwhile there was a strike called by the field staff on 18.07.2022. It is clearly mentioned in the closure notice issued by NHM, Government of Meghalaya regarding suspension of the project because of the said circumstance. On careful examination of the communication dated 30.06.2022, we are of the considered opinion that the same is apparently unilateral, issued by NHM, Government of Meghalaya, whereby opposite party no.3 was asked to continue for further period because, the NHM, Government of Meghalaya was unable to complete the tender formalities for subsequent period.

10. In our considered view, the plea that the opposite party no.3 suffered any kind of suspension in the nature of "having its business activities suspended" to attract disqualification under Clause 1.2.5 of the RFP, is not acceptable.

11. Further we are of the considered opinion that the Court exercising the power of judicial review is not required to interfere in such matters and ought to defer to the discretion of the tender inviting authorities which, by reason of having authored the tender documents, are the best placed to interpret their terms.

12. This Court exercising the power of judicial review should not sit as Courts of Appeal. Scope of judicial review in the matter of consideration of tender documents has been dealt with in a catena of Supreme Court's decisions laying down the limitations of exercise power of judicial review under Articles 226 and 32 of the Constitution of India.

13. For the reasons noted above, we are not inclined to interfere. The writ application is accordingly dismissed.

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2024 (III) ILR-CUT-325

CHAKRADHARI SHARAN SINGH, C.J.

ARBP NO. 18 OF 2024

GRAM TARANG EMPLOYABILITY TRAINING SERVICES PVT. LTD, VISAKHAPATNAM .....Petitioner

V.

NATIONAL SKILL DEVELOPMENT CORPORATION, NEW DELHI .....Opp.Party

(A) ARBITRATION AND CONCILIATION ACT, 1996 – Section 11 – Maintainability of the application on the ground of Jurisdiction – Whether the application for appointment of arbitrator U/s. 11(6) of the Act, 1996 is maintainable before this Hon'ble Court? – Held, No – Since

the parties by virtue of Clause 10.2(ii) of the loan agreement have mutually agreed to New Delhi as the seat of arbitration and, therefore, the said clause excludes the Jurisdiction of this Court having no territorial jurisdiction over the said place. (Para - 33)

(B) WORDS & PHRASES – 'Seat' and 'Place of Arbitration' – The interplay between the expressions "seat" and "place of arbitration" discussed with reference to case laws. (Paras 29 - 32)

Case Laws Relied on and Referred to :-

1. (2013) 9 SCC 32 : Swastik Gases Private Limited v. Indian Oil Corporation Limited.
2. (2020) 5 SCC 462 : NBrahmani River Pellets Limited v. Kamachi Industries Limited.
3. 2020 SCC OnLine Ori 958 : SJ Biz Solution Pvt. Ltd. v. Sany Heavy Industry India Pvt.Ltd.
4. (2020) 5 SCC 399 : Mankastu Impex Private Limited v. Airvisual Limited.
5. (2022) SCC OnLine SC 568 : Ravi Ranjan Developers Pvt. Ltd v. Aditya Ku.Chatterjee.
6. (2023) 1 SCC 693 : BBR (India) Pvt. Ltd v. S.P.Singla Construction Pvt. Ltd.
7. (2017) 7 SCC 678 : Indus Mobile Distribution Pvt. Ltd v. Datawind Innovations Pvt Ltd.

For Petitioner : Mr. Tanmay Mishra
For Opp.Party : Mr. R.C. Panigrahi.

JUDGMENT Date of Judgment: 04.09.2024

CHAKRADHARI SHARAN SINGH, C.J.

This matter is taken up through Hybrid mode.

2. The petitioner is a private limited company having its registered office at Visakhapatnam in Andhra Pradesh. This application has been filed under Section 11 of the Arbitration and Conciliation Act, 1996 (in short 'the Act'), through the Director, Abhinav Madan, resident of Gurgaon, seeking appointment of an Arbitrator for adjudication of the disputes and the differences that have arisen between the petitioner and the opposite party.

3. The petitioner claims to be a social entrepreneurial outreach set up by Centurion University of Technology & Management, in partnership with National Skill Development Corporation (NSDC), which is a not-for-profit public limited company, set up by the Ministry of Finance in Public Private Partnership (PPP) model. The NSDC has its registered office at Shaheed Jeet Singh Marg, New Delhi.

4. The petitioner and the opposite party had entered into a loan agreement for a sum of Rs.52.8 Crore on 28.11.2012 for setting up of skill training centers in various parts of Odisha, Eastern UP, Jharkhand and Assam. A copy of the said loan agreement has been brought on record by way of Annexure-1 to this application.

5. Article X of the said loan agreement contains the provisions concerning "governing law, dispute resolution and jurisdiction", Clause-10.2(ii) of which reads as under:

> *"(ii) The place of arbitration shall be New Delhi. The arbitration proceedings shall be conducted in the English language."*

6. Upon notice, the opposite party has entered appearance and raised objection questioning the maintainability of the present petition before this Court, on the ground of lack of territorial jurisdiction. It is also the case of the opposite party that this petition seeking appointment of an Arbitrator under Section 11 of the Arbitration and Conciliation Act, 1996 is pre-mature in view of the terms of the agreement.

7. I have heard Mr. Tanmay Mishra, learned counsel appearing on behalf of the petitioner and Mr. R.C. Panigrahi, learned counsel appearing on behalf of the opposite party.

8. In view of the submissions which have been advanced on behalf of the parties, particularly, on the question of maintainability of the present petition on the grounds as noted above, it is deemed expedient to briefly take note of certain facts that gave rise to the present petition and relevant terms of the agreement, before dealing with the preliminary objection of maintainability taken on behalf of the opposite party.

9. It is the petitioner's case that in terms of the loan agreement, which required pre-disbursement conditions, including infusion of proportionate capital from shareholders, the first disbursement after necessary compliances, for a sum of Rs.10,80,00,000/- had taken place on 12.02.2014 and the second disbursement for a sum of Rs.11,12,19,522/- on 06.12.2016. It is further the case of the petitioner that in March, 2017 it had approached the NSDC seeking their permission to use the sanctioned loan to set up centers for Pradhan Mantri Kaushal Kendras (PMKKs), a specific scheme announced by the NSDC for setting up aspirational centers in each district of India. A significant portion of the loan was therefore allocated for setting up of PMKKs in remote parts of Odisha. It is noted at this juncture itself that the use of the sanctioned loan for setting up of PMKKs in some parts of Odisha is the sole cause of action which according to the petitioner entitles it to maintain this petition for appointment of Arbitrator before this Court.

10. It is further the petitioner's case that in 2017, the NSDC announced an interest rate incentive scheme for its training partners, including the petitioner who were working in difficult geographies and consequently, the petitioner signed a revised term sheet on 04.10.2017 wherein, interest rate was revised down to 3% from 6% for achieving training targets in difficult geographies, reviewable on an annual basis.

11. The third disbursement of loan of Rs.14,60,04,035/- had taken place on 12.12.2017 and the fourth for a sum of Rs.16,27,76,443/- on 17.09.2017. In remote rural and tribal areas of East & North-East India, where the Gross Enrolment Ratio in higher education was much below the national average, the petitioner was finding it hard to get its presence because the paid courses had always been immensely difficult to run in those impoverished areas and the rural, tribal communities having little means of livelihood for training. Further, the definition of 'difficult geographies'

was never clarified by the NSDC at any point though request was made by the petitioner for this definition to be broadened from NITI Ayog's list of aspirational districts.

12. The petitioner was subsequently permitted by the NSDC to report 50% of the Government funded schemes and, accordingly, it went on to take up operations in several schools in Odisha, Andhra Pradesh and Chhattisgarh to ensure that they met their targets in difficult geographies. For the reason that the loan that was drawn was primarily invested in setting up of PMKKs, the petitioner's performance in Pradhan Mantri Kaushal Vikas Yojana (PMKVY) should also have been considered while assessing the petitioner's performance in difficult geographies. Later, COVID-19 pandemic severely impacted the skilling eco-system. More than half of the petitioner's centers had to be closed during the lockdown and it took inordinate time to re-operationalize the centers with a poor flow of students. These are the facts, *inter alia*.

13. It is an admitted position thus that the petitioner failed to achieve the target in difficult geographies. The NSDC, through an e-mail dated 13.12.2022, informed the petitioner that the petitioner's interest rate would be reinstated to 6% with effect from 01.01.2023 due to the non-achievement of the target in difficult geographies. The petitioner responded to the said e-mail urging the NSDC that keeping in view of the adverse circumstances the petitioner might have been given adequate intimation to make up for perceived gap in the performance.

14. As the petitioner-Company did not receive any response, it made a formal request for mediation to mutually discuss and resolve the dispute pertaining to arbitrary incentive withdrawal that had arisen between the parties vide e-mail dated 05.01.2023 (Annexure-5). Thereafter, another formal request was made for mediation to the NSDC in order to mutually discuss and resolve the dispute between the parties through an e-mail dated 20.09.2023 (Annexure-6).

15. There is reference in the present application to review meetings conducted by the NSDC to assess the petitioner's performance for the period during the Financial Year 2016-17 to 2022-23. The petitioner was informed by the NSDC on 20.10.2023 about the shortfall of the target. The petitioner responded to the said communication dated 20.10.2023.

16. It is the petitioner's case that had the definition of 'difficult geographies' has broadened, the target achievement in difficult geographies would be above 100% and, therefore, the petitioner would have been entitled to retain the interest rate incentive.

17. The NSDC on 29.01.2024, communicated to the petitioner through an e-mail that as the target achievement of 75% was still falling short, the rate of 6% interest would be levied over the current loan outstanding.

18. Apparently, the dispute and disagreement thus arose between the parties, pertaining to withdrawal of the interest incentive granted to the present petitioner

and connected issues concerning the definition of the 'difficult geographies', the COVID period allowance and unilateral change in the manner of training numbers.

19. The petitioner has asserted that in order to resolve the dispute amicably, an e-mail was sent on 20.02.2024 invoking Clause-10.2 of the said loan agreement dated 28.11.2012, requesting for initiation of 3rd Party Arbitration proceedings to resolve the disputes arisen between the parties.

20. The sole question which requires determination, in the wake of objection taken on behalf of the opposite party-NSDC is as to whether this Court has the territorial jurisdiction to entertain this application or not, more particularly, in view of Clause 10.2(ii) of the loan agreement, that has been quoted in paragraphs hereinabove which provides that the place of arbitration shall be 'New Delhi'.

21. Mr. Panigrahi, learned counsel appearing on behalf of the opposite party, raising the preliminary objection, has submitted that Article X of the agreement dated 28.11.2012 contains the dispute resolution clause and stipulates the form and manner of arbitration, place of arbitration, seat of arbitration and jurisdiction of the arbitration. He submits that since the parties to the agreement have categorically submitted their jurisdiction to a particular seat/place of arbitration at New Delhi, this Court should not assume the jurisdiction to entertain this application. He has argued that when the intention of the parties in a particular clause in the agreement is clear and unambiguous that the Courts at particular place shall have the jurisdiction which means that the Courts at that place alone shall have the jurisdiction.

22. Mr. Panigrahi, in support of his contention, has relied on the Supreme Court's decision in case of ***Swastik Gases Private Limited v. Indian Oil Corporation Limited (2013) 9 SCC 32***. He has also submitted that the parties to the proceedings do not have their addresses within the territorial jurisdiction of this Court which is evident from the memo of the parties. Referring to Section 20 of the Arbitration & Conciliation Act, 1996, he has submitted that in the present case, the parties agreed on the place of arbitration at New Delhi. Accordingly, respecting the party-autonomy, this Court may not assume jurisdiction. In support of his submission, he has relied on the Supreme Court's decision in case of ***Brahmani River Pellets Limited v. Kamachi Industries Limited (2020) 5 SCC 462*** and this Court's decision in case of ***SJ Biz Solution Pvt. Ltd. v. Sany Heavy Industry India Pvt. Ltd. 2020 SCC OnLine Ori 958***. He has argued that it has been clearly laid down in the aforesaid decisions that when the parties have agreed to a particular place, they exclude other places, and the Courts of agreed place only shall have the jurisdiction. He submits that in the aforesaid circumstances, this application deserves to be dismissed as not maintainable.

23. Mr. Tanmay Mishra, learned counsel appearing on behalf of the petitioner, in response to the preliminary objection taken on behalf of the opposite party, has submitted that Clause 10.2 of the loan agreement merely specifies New Delhi as a venue of arbitration which does not confer the jurisdiction in a particular Court. Placing reliance on the Supreme Court's decision, in case of ***Mankastu Impex***

Private Limited v. Airvisual Limited (2020) 5 SCC 399, he has argued that the 'seat of arbitration' and 'venue of arbitration' cannot be used interchangeably and the mere expression 'place of arbitration' cannot be the basis to determine the intention of the parties that they had intended that place as the 'seat of arbitration'. The intention of the parties as to the 'seat' should be determined from other clauses in the agreement and the conduct of the parties. He has also relied on another Supreme Court's decision in case of ***Ravi Ranjan Developers Private Limited v. Aditya Kumar Chatterjee (2022) SCC OnLine SC 568*** and has submitted that based on the language of the arbitration agreement in the present case, it can be said that the parties had agreed that New Delhi would be the venue for holding the sitting of the arbitral Tribunal. He has also placed reliance on the Supreme Court's decision in case of ***BBR (India) Private Limited v. S.P. Singla Construction Private Limited (2023) 1 SCC 693*** to submit that New Delhi, in the present case, can at the best be said to be the 'venue of arbitration' and not the 'seat of arbitration'.

24. In view of the above mentioned submissions, it would be worthy to reproduce Clause 10.2 under Article X of the loan agreement dated 28.11.2012, which reads as under:

> *"**10.2- Dispute Resolution***
> *(i) All or any dispute, controversy, claim or disagreement arising out of or touching upon or in relation to the terms of this Agreement or its termination, breach, invalidity, including the interpretation and validity thereof and the respective rights and obligations of the Parties hereof, that cannot be amicably resolved by mutual discussion within thirty (30) calendar days, shall be settled as per the provisions of the Arbitration and Conciliation Act, 1996 which shall be final and binding arbitration. The proceedings of the arbitration shall be in accordance with the Rules of Arbitration of the Indian Council of Arbitration ("ICA") which rules are deemed to be incorporated by reference in this clause and the award made in pursuance thereof shall be binding on the Parties;*
> *(ii) The place of arbitration shall be New Delhi. The arbitration proceedings shall be conducted in the English language.*
> *(iii) During the pendency of any dispute resolution exercise whether by negotiations or arbitration, the Parties shall be bound by the terms of this Agreement and shall continue to perform their respective obligations not under dispute under this Agreement."*

25. Before addressing the rival submissions advanced on behalf of the parties as noted above, it would be apt to notice at the outset that the loan agreement was not executed within the territorial jurisdiction of this Court. The parties do not have their offices within the territorial jurisdiction of this Court. It is the case of the petitioner that this Court has the territorial jurisdiction to entertain this application on the sole ground that a part of the loan amounts which were disbursed by the opposite party was also for setting up of skill training centers in "difficult geographies" in the State of Odisha.

26. In the given facts and circumstances noted above, as disclosed by the petitioner himself in the application, a cause of action cannot be treated to have arisen on a plea that the State of Odisha was also area of operation of the petitioner

where it had failed to achieve its target because of which original interest rate was restored by the NSDC, within the territorial jurisdiction of this Court for the purpose of appointment of an arbitrator under Section 11(6) of the Arbitration & Conciliation Act, 1996.

27. In any event, I find substance in the submissions made on behalf of the opposite party that the parties, in no uncertain terms had agreed that the place of arbitration shall be New Delhi.

28. Mr. Panigrahi, learned counsel for the opposite party has rightly relied on the decision of the Supreme Court in case of ***Swastik Gases Private Limited*** (*supra*) wherein, the Supreme Court, referring to Section 20 of the Arbitration & Conciliation Act, 1996, has held that the autonomy of the parties to chose the place of arbitration has to be construed in the context of choosing a Court out of two or more Courts having competent jurisdiction under Section 2(1)(e) of the said Act.

29. In the case of ***Indus Mobile Distribution Private Limited v. Datawind Innovations Private Limited (2017) 7 SCC 678***, the Supreme Court has lucidly dealt with the interplay between the expressions "seat" and "place of arbitration" and has held that under the law of arbitration, unlike the Code of Civil Procedure which applies to suits filed in Courts, a reference to "seat" is a concept by which a neutral venue can be chosen by the parties to an arbitration clause. In arbitration law, the Court held, the moment "seat' is determined, the fact that seat is at New Delhi (in the present case) would vest only Delhi Courts with exclusive jurisdiction for the purpose of regulating arbitral proceedings arising out of the agreement between the parties. Paragraphs 18 to 20 of the decision in case of ***Indus Mobile Distribution Private Limited*** (*supra*), can be usefully reproduced herein below, which in my opinion, directly supports the plea against the maintainability of the present application as taken on behalf of the NSDC:

> *"18. The amended Act, does not, however, contain the aforesaid amendments, presumably because the BALCO [BALCO v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810] judgment in no uncertain terms has referred to "place" as "juridical seat" for the purpose of Section 2(2) of the Act. It further made it clear that Sections 20(1) and 20(2) where the word "place" is used, refers to "juridical seat", whereas in Section 20(3), the word "place" is equivalent to "venue". This being the settled law, it was found unnecessary to expressly incorporate what the Constitution Bench of the Supreme Court has already done by way of construction of the Act.*
>
> *19. A conspectus of all the aforesaid provisions shows that the moment the seat is designated, it is akin to an exclusive jurisdiction clause. On the facts of the present case, it is clear that the seat of arbitration is Mumbai and Clause 19 further makes it clear that jurisdiction exclusively vests in the Mumbai courts. Under the Law of Arbitration, unlike the Code of Civil Procedure which applies to suits filed in courts, a reference to "seat" is a concept by which a neutral venue can be chosen by the parties to an arbitration clause. The neutral venue may not in the classical sense have jurisdiction — that is, no part of the cause of action may have arisen at the neutral venue and neither would any of the provisions of Sections 16 to 21 of CPC be attracted. In arbitration law however, as has been held above, the moment "seat"is determined, the fact that the seat*

is at Mumbai would vest Mumbai courts with exclusive jurisdiction for purposes of regulating arbitral proceedings arising out of the agreement between the parties.

20. It is well settled that where more than one court has jurisdiction, it is open for the parties to exclude all other courts. For an exhaustive analysis of the case law, see Swastik Gases (P) Ltd. v. Indian Oil Corpn. Ltd. [Swastik Gases (P) Ltd. v. Indian Oil Corpn. Ltd., (2013) 9 SCC 32 : (2013) 4 SCC (Civ) 157] This was followed in a recent judgment in B.E. Simoese Von Staraburg Niedenthal v. Chhattisgarh Investment Ltd. [B.E. Simoese Von Staraburg Niedenthal v. Chhattisgarh Investment Ltd., (2015) 12 SCC 225 : (2016) 1 SCC (Civ) 427] Having regard to the above, it is clear that Mumbai courts alone have jurisdiction to the exclusion of all other courts in the country, as the juridical seat of arbitration is at Mumbai. This being the case, the impugned judgment [Datawind Innovations (P) Ltd. v. Indus Mobile Distribution (P) Ltd., 2016 SCC OnLine Del 3744] is set aside. The injunction confirmed by the impugned judgment will continue for a period of four weeks from the date of pronouncement of this judgment, so that the respondents may take necessary steps under Section 9 in the Mumbai Court. The appeals are disposed of accordingly."

30. After having carefully perused the Clause 10.2(ii) of the arbitration clause which has been referred to at the outset, I am of the considered view that the same refers to "the seat" of the arbitration as agreed upon between the parties for dispute resolution.

31. The decision in case of ***BBR (India) Private Limited*** (*supra*), as relied on by learned counsel appearing on behalf of the petitioner, has no application in the facts and circumstances of the present case. In the said case, the arbitration clause between the parties was silent and did not stipulate the seat or venue of arbitration. The contract and letter of intent were signed at Panchkula in Haryana. The corporate office of the respondent in that case was also located at Panchkula. The registered office of the appellant was located in Bengaluru. The arbitration proceedings were held at Panchkula, Haryana and Chandigarh. Before conclusion of arbitration, the Arbitrator had recused, recording that he did not want to continue as the Arbitrator for personal reasons. Thereafter, another Arbitrator took over the proceeding. The sole Arbitrator had recorded in the first procedural order that the venue of the proceedings would be Delhi. The award was signed and pronounced in Delhi. This led to filing of two proceedings, one by S.P. Singla Construction Private Limited under Section 9 of the Arbitration & Conciliation Act, 1996 and the other by BBR (India) Private Limited under Section 34 of the Arbitration & Conciliation Act, 1996 before the Delhi High Court. In that circumstance, an issue had arisen as to whether conducting the arbitration proceedings at Delhi, owing to the appointment of the new Arbitrator, would shift the "jurisdictional seat of arbitration" from Panchkula in Haryana to the place fixed by the first Arbitrator for the arbitration proceedings. Answering the said question in negative, the Supreme Court, in case of ***BBR (India) Private Limited*** (*supra*), has held that the expression "seat of arbitration" is the centre of gravity in arbitration with the following reasoning in paragraphs 15 to 20 :

"15. Interpretation of the term "court", as defined in clause (e) to sub-section (1) of Section 2 of the Act, had come up for consideration before a Constitutional Bench of five Judges in Balco v. Kaiser Aluminium Technical Services Inc. [Balco v. Kaiser

Aluminium Technical Services Inc., (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810] , (for short "Balco case") which decision had examined the distinction between "jurisdictional seat" and "venue" in the context of international arbitration, to hold that the expression "seat of arbitration" is the centre of gravity in arbitration. However, this does not mean that all arbitration proceedings must take place at "the seat". The arbitrators at times hold meetings at more convenient locations. Regarding the expression "court", it was observed that Section 2(2) of the Act does not make Part I applicable to arbitrations seated outside India. The expressions used in Section 2(2) [See para 20 below. By Act 3 of 2016 proviso to Section 2(2) of the Act has been inserted with retrospective effect from 23-10-2015, and the provision as substituted/amended by Act 33 of 2019 for clause (a), now reads—"(2) Scope.—This Part shall apply where the place of arbitration is in India:Provided that subject to an agreement to the contrary, the provisions of Sections 9, 27 and clause (b) of sub-section (1) and sub-section (3) of Section 37 shall also apply to international commercial arbitration, even if the place of arbitration is outside India, and an arbitral award made or to be made in such place is enforceable and recognised under the provisions of Part II of this Act."] of the Act do not permit an interpretation to hold that Part I would also apply to arbitrations held outside the territory of India.

16. Noticing the above interpretation, a three-Judge Bench of this Court in BGS SGS Soma JV v. NHPC Ltd. [BGS SGS Soma JV v. NHPC Ltd., (2020) 4 SCC 234 : (2020) 2 SCC (Civ) 606] has observed that the expression "subject to arbitration" used in clause (e) to sub-section (1) of Section 2 of the Act cannot be confused with the "subject-matter of the suit". The term "subject-matter of the suit" in the said provision is confined to Part I. The purpose of the clause is to identify the courts having supervisory control over the judicial proceedings. Hence, the clause refers to a court which would be essentially a court of "the seat" of the arbitration process. Accordingly, clause (e) to sub-section (1) of Section 2 has to be construed keeping in view the provisions of Section 20 of the Act, which are, in fact, determinative and relevant when we decide the question of "the seat of an arbitration". This interpretation recognises the principle of "party autonomy", which is the edifice of arbitration. In other words, the term "court" as defined in clause (e) to sub-section (1) of Section 2, which refers to the "subject-matter of arbitration", is not necessarily used as finally determinative of the court's territorial jurisdiction to entertain proceedings under the Act.

17. In BGS SGS Soma [BGS SGS Soma JV v. NHPC Ltd., (2020) 4 SCC 234 : (2020) 2 SCC (Civ) 606] , this Court observed that any other construction of the provisions would render Section 20 of the Act nugatory. In view of the Court, the legislature had given jurisdiction to two courts : the court which should have jurisdiction where the cause of action is located; and the court where the arbitration takes place. This is necessary as, on some occasions, the agreement may provide the "seat of arbitration" that would be neutral to both the parties. The courts where the arbitration takes place would be required to exercise supervisory control over the arbitral process. The "seat of arbitration" need not be the place where any cause of action has arisen, in the sense that the "seat of arbitration" may be different from the place where obligations are/had to be performed under the contract. In such circumstances, both the courts should have jurisdiction viz. the courts within whose jurisdiction "the subject-matter of the suit" is situated and the courts within whose jurisdiction the dispute resolution forum, that is, where the Arbitral Tribunal is located.

18. Turning to Section 20 of the Act, sub-section (1) in clear terms states that the parties can agree on the place of arbitration. The word "free" has been used to emphasise the autonomy and flexibility that the parties enjoy to agree on a place of arbitration which

is unrestricted and need not be confined to the place where the "subject-matter of the suit" is situated. Sub-section (1) to Section 20 gives primacy to the agreement of the parties by which they are entitled to fix and specify "the seat of arbitration", which then, by operation of law, determines the jurisdictional court that will, in the said case, exercise territorial jurisdiction. Sub-section (2) comes into the picture only when the parties have not agreed on the place of arbitration as "the seat". [Section 20(2) also applies when "the seat" as mentioned in the agreement is only a convenient venue.] In terms of sub-section (2) of Section 20 the Arbitral Tribunal determines the place of arbitration. The Arbitral Tribunal, while doing so, can take into regard the circumstances of the case, including the convenience of the parties. Sub-section (3) of Section 20 of the Act enables the Arbitral Tribunal, unless the parties have agreed to the contrary, to meet at any place to conduct hearing at a place of convenience in matters, such as consultation among its members, for the recording of witnesses, experts or hearing parties, inspection of documents, goods, or property.

19. Relying upon the Constitutional Bench decision in Balco [Balco v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810], in BGS SGS Soma [BGS SGS Soma JV v. NHPC Ltd., (2020) 4 SCC 234 : (2020) 2 SCC (Civ) 606], it has been held that sub-section (3) of Section 20 refers to "venue" whereas the "place" mentioned in sub-section(1) and sub-section (2) refers to the "jurisdictional seat". To explain the difference, in Balco [Balco v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810], a case relating to international arbitration, reference was made to several judgments, albeit the judgment in Shashoua v. Sharma [Shashoua v. Sharma, 2009 EWHC 957(Comm)] was extensively quoted to observe that an agreement as to the "seat of arbitration" draws in the law of that country as the curial law and is analogous to an exclusive jurisdiction clause. [C v. D, 2008 Bus LR 843 : 2007 EWCA Civ 1282 (CA)] The parties that have agreed to "the seat" must challenge an interim or final award only in the courts of the place designated as the "seat of arbitration". In other words, the choice of the "seat of arbitration" must be the choice of a forum/court for remedies seeking to attack the award.

20. The aforesaid principles relating to international arbitration have been applied to domestic arbitrations. In this regard, we may refer to para 38 of BGS SGS Soma [BGS SGS Soma JV v. NHPC Ltd., (2020) 4 SCC 234 : (2020) 2 SCC (Civ) 606] , which reads as under : (SCC p. 274)

"38. A reading of paras 75, 76, 96, 110, 116, 123 and 194 of Balco [Balco v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810] would show that where parties have selected the seat of arbitration in their agreement, such selection would then amount to an exclusive jurisdiction clause, as the parties have now indicated that the courts at the "seat" would alone have jurisdiction to entertain challenges against the arbitral award which have been made at the seat. The example given in para 96 buttresses this proposition, and is supported by the previous and subsequent paragraphs pointed out hereinabove. The Balco [Balco v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810] judgment, when read as a whole, applies the concept of "seat" as laid down by the English judgments (and which is in Section 20 of the Arbitration Act, 1996), by harmoniously construing Section 20 with Section 2(1)(e), so as to broaden the definition of "court", and bring within its ken courts of the "seat"of the arbitration [Section 3 of the English Arbitration Act, 1996 defines "seat" as follows:"3. The seat of the arbitration.—In this Part "the seat of the arbitration" means the juridical seat of the arbitration designated—(a) by the parties to the arbitration agreement, or (b) by any arbitral or other institution or

> *person vested by the parties with powers in that regard, or (c) by the Arbitral Tribunal if so authorised by the parties, or determined, in the absence of any such designation, having regard to the parties' agreement and all the relevant circumstances."It will be noticed that this section closely approximates with Section 20 of the Indian Arbitration Act, 1996. The meaning of "Court" is laid down in Section 105 of the English Arbitration Act, 1996 whereby the Lord Chancellor may, by order, make provision allocating and specifying proceedings under the Act which may go to the High Court or to County Courts.] ."*

32. The Supreme Court in no uncertain terms has held in ***BBR (India) Private Limited*** (*supra*) that in the context of domestic arbitrations, once the "seat of arbitration" has been fixed, then the Courts at the said location alone will have exclusive jurisdiction to exercise the supervisory powers over the arbitration. Further, the Courts at other locations would not have jurisdiction, including the Courts where the cause of action has arisen. The moment the parties by agreement designate "the seat", it becomes akin to an exclusive jurisdiction to regulate the arbitration proceedings arising out of the agreement between the parties. Clarifying further, it has been held in case of ***BBR (India) Private Limited*** (*supra*) in paragraph 34 as under:

> *"34. For clarity and certainty, which is required when the question of territorial jurisdiction arises, we would hold that the place or the venue fixed for arbitration proceedings, when sub-section (2) of Section 20 applies, will be the jurisdictional "seat" and the courts having jurisdiction over the jurisdictional "seat" would have exclusive jurisdiction. This principle would have exception that would apply when by mutual consent the parties agree that the jurisdictional "seat" should be changed, and such consent must be express and clearly understood and agreed by the parties."*

33. Accordingly, the Supreme Court's decision in case of ***BBR (India) Private Limited*** (*supra*), as a matter of fact, directly answers the issue involved in the present case, since I am of the view that the parties, in the present case, by virtue of Clause 10.2(ii) of the loan agreement have mutually agreed to New Delhi as the seat of arbitration and, therefore, the said clause excludes the jurisdiction of such Courts having no territorial jurisdiction over the said place.

34. Similar view has been taken by this Court in case of ***SJ Biz Solution Pvt. Ltd.*** (*supra*). After having noticed various decisions of the Supreme Court, including the decision in case of ***Indus Mobile Distribution Private Limited*** (*supra*), this Court dismissed an application for appointment of an Arbitrator under Section 11(6) of the Arbitration & Conciliation Act, 1996 since in the said case, the parties had agreed that the place of arbitration shall be at Pune. I fully endorsed the view taken by this Court in case of ***SJ Biz Solution Pvt. Ltd.*** (*supra*).

35. Accordingly, this application is dismissed as not maintainable in this Court for the reasons noted above.

36. It is, however, clarified that I have not considered the preliminary objection question as to whether this application is pre-mature or not, as raised on behalf of the opposite party, since this application is being dismissed for want of territorial jurisdiction.

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2024 (III) ILR-CUT-336

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

W.P.(C) NO.11908 OF 2016

NOVARTIS INDIA LTD. ….Petitioner

V.

BICHIMAYA MISHRA & ANR. ….Opp.Parties

INDUSTRIAL DISPUTES ACT, 1947 – Section 2(s) – The Petitioner/ management made an objection before the Labour Court that Opp.Party does not come under the definition of 'workman' as defined U/s. 2(s) – Neither issue was framed nor was the contention dealt with – Effect of – Held, framing of issues is a procedural aspect in adjudication – Omission to urge framing the issue, in context of record of the contention in the impugned award itself, points at omission of the Labour Court – Issues arise when pleadings are at variance – Here the contention was specifically recorded by the Labour Court – Yet, omission to frame issue – It thus points towards non-application of mind by the Labour Court, irrespective of issues framed on suggestion of parties or by itself. (Para - 11)

Case Laws Relied on and Referred to :-

1. (1994) 5 SCC 737: H.R. Adyanthaya v. Sandoz (India) Ltd.
2. AIR 2001 SC 3290: Hussain Mithu Mhasvadkar v. Bombay Iron and Steel
3. AIR 2000 SC 915: Secretary Tea Association v. Ajit Kumar Barat
4. W.P.(C) 40518 / 2023 (19.12.2023): M/s. Sanofi India Ltd., Mumbai v Sanofi Employees and Allied Workers Union, Ludiana & others.
5. (1996) 2 SCC 66: Sultan Singh v. State of Haryana & another
6. W.P.(C) 8797/2017(08.08.2023) : Kallamudin Khan v. Presiding Officer, Central Government Industrial Tribunal-cum-Labour Court, Bhubaneswar & others.
7. W.P.(C) 8569/2006 (20.04. 2011) : Indian Oil Corporation Ltd. v. Union of India & others.
8. (2000) 10 SCC 211 : Hindustan Zinc Ltd. v. Industrial Tribunal.

For Petitioner : Mr. S.S. Das, Sr. Adv.

For Opp.Parties : Mr. D.P. Nanda, Sr. Adv. (O.P. No.1)
Mr. A.K. Pati, ASC (O.P. No. 2)

JUDGMENT Date of Judgment : 27.08.2024

ARINDAM SINHA, J.

1. Mr. Das, learned senior advocate appears on behalf of petitioner-management. He submits, impugned is award dated 8th April, 2016 made by the Labour Court directing reinstatement with 50% back wages. The Labour Court directed reinstatement on purportedly finding retrenchment, without dealing with objection raised by his client and recorded in impugned order that opposite party no.1 is not 'workman' within meaning of section 2(s) in Industrial Disputes Act, 1947. He demonstrates from impugned award, at the end of paragraph-3 there is clear record of the contention of his client that opposite party no.1 is not a workman. Without prejudice Mr. Das submits, otherwise the award is a nullity as passed by the Labour Court because retrenchment is a matter that must be dealt with by the Tribunal under entry-10 in the third schedule.

2. He relies on judgment of the Supreme Court in **H.R. Adyanthaya v. Sandoz (India) Ltd**., reported in **(1994) 5 SCC 737**, inter alia, paragraphs 29, 33 and 34. He submits, the Supreme Court made an analysis on interpreting applicability of Industrial Disputes Act, 1947 to sales promotion employees after enactment of Sales Promotion Employees (Conditions of Service) Act, 1976 and particularly after amendment thereto in year, 1987. Declaration of law in the judgment was that it is only the weaker section of sales promotion employees, who were covered by the Act of 1947. Opposite party no.1 was a medical representative getting remuneration of more than Rs.10,000/- per month. In the circumstances, he was offered ex-gratia package as suggested by the Union. Opposite party did not accept it and raised purported industrial dispute. It culminated in impugned award dated 8th April, 2016. He then relies on another judgment of the Supreme Court in **Hussain Mithu Mhasvadkar v. Bombay Iron and Steel** reported in **AIR 2001 SC 3290**, paragraph-5. By said judgment law declared was, issue of claiming to be workman is to be decided first. He seeks interference for impugned award to be set aside and quashed.

3. Mr. Nanda, learned senior advocate appears on behalf of opposite party no.1 (workman) and Mr. Pati, learned advocate, Additional Standing Counsel for opposite party no.2.

4. On query from Court Mr. Nanda draws attention to schedule in the reference. It is reproduced below.

> *"SCHEDULE*
>
> *Whether the action of the management of M/s. Novartis India Ltd., Pharmaceutical Division, Sandoz House, 7th Floor, Shiv Sagar Estate, Dr. Annie Besant Road, Worli, Mumbai-400018 in terminating the services of Sri Bichimaya Mishra, w.e.f. 30.12.2013 is legal and/or justified ? If not, what relief Sri Mishra is entitled to?"*

5. He relies on judgment of the Supreme Court in **Secretary Tea Association v. Ajit Kumar Barat**, reported in **AIR 2000 SC 915**. Paragraph-9 is reproduced below.

> *"9. Before making a reference under Section 10 of the Act the appropriate Government has to form an opinion whether an employee is a workman and thereafter has to consider as to whether an industrial dispute exists or is apprehended."*

He submits, the appropriate government made the reference on duly forming opinion that his client is a workman. He also relies on view taken by Division Bench, in which one of us was party (Arindam Sinha, J.). It was on **judgment dated 19th December, 2023** in **W.P.(C) no. 40518 of 2023 (M/s. Sanofi India Ltd., Mumbai v Sanofi Employees and Allied Workers Union, Ludiana and others**) for proposition that a medical representative is a workman.

6. Mr. Nanda further relies on **Sultan Singh v. State of Haryana and another**, reported in **(1996) 2 SCC 66**, paragraph-4 reproduced below.

> *"4. A conjoint reading, therefore, would yield to the conclusion that on making an application for reference,* ***it would be open to the State Government to form an opinion***

> ***whether industrial dispute exists or is apprehended and then either to make a reference to the appropriate authorities or refuse to make the reference****. Only on rejection thereof, the order needs to be communicated to the applicant.* ***Nonetheless the order is only an administrative order and not a quasi-judicial order****. When it rejects, it records reasons as indicated in sub-section (5) of Section 12 of the Act.* ***The appropriate Government is entitled to go into the question whether an industrial dispute exists or is apprehended****. It would be only a subjective satisfaction on the basis of the material on record.* ***Being an administrative order no lis is involved. Thereby there is no need to issue any notice to the employer nor to hear the employer before making a reference or refusing to make a reference****. Sub-section (5) of Section 12 of the Act does not enjoin the appropriate Government to record reasons for making reference under Section 10(1). It enjoins to record reasons only when it refuses to make a reference."* (Emphasis supplied)

7. The Supreme Court said that an order of reference is an administrative order, not requiring, inter alia, hearing to be given. In the circumstances, schedule to a reference order made without opportunity of hearing, being in the realm of administration and said to be not even a quasi-judicial order, cannot bind petitioner-management, as urged by opposite party (workman), who says that he is a workman as found so by the appropriate government. It cannot be said that subsequent judgment of the Supreme Court in **Ajit Kumar Barat** (supra) was in effect overruling **Sultan Singh** (supra). **Ajit Kumar Barat** (supra) does not say so and neither is it in conflict with **Sultan Singh** (supra). In the circumstances, the judgments are of no aid to opposite party-workman.

8. During course of hearing we had drawn attention of the parties to **judgment dated 8th August, 2023** made by a Bench, in which one of us was party (Arindam Sinha, J.), dealing with **W.P. (C) No.8797 of 2017 (Kallamudin Khan v. Presiding Officer, Central Govt. Industrial Tribunal-cum-Labour Court, Bhubaneswar and others)**. This is because schedule of reference in that case was similar inasmuch as it said, action of the management refusing employment instead of regularizing after more than 8 years of continuous service had been rendered, whether was legal and justified. Management in that case had earlier challenged the order of reference because it implied that opposite party was a workman. The earlier challenge was dealt with by coordinate Bench on **judgment dated 20th April, 2011 in W.P.(C) No. 8569 of 2006 (Indian Oil Corporation Ltd. v. Union of India and others)**. We reproduce below paragraph-8 from the judgment.

> *"8. As could be seen from the pleadings and the failure report submitted by the Assistant Labour Commissioner, the termination of service was done without following the provision of Section 25-F and the conciliation having failed and considering the failure report the appropriate Government exercised its power under section 10 and made the reference to the Industrial Tribunal for adjudication of the existing industrial/Labour Court dispute between the parties. Therefore, the points of dispute formulated in the Schedule is perfectly legal and valid and the appropriate Government is competent to make the reference.* ***Whether it is an industrial dispute or not is a fact to be ascertained by the Tribunal/Labour Court in the enquiry required to be conducted under the I.D. Act.*****"**
>
> (Emphasis supplied)

9. The Labour Court by last sentence in paragraph-3 in impugned award recorded a contention of petitioner-management that the second party (workman) is not coming under definition of „workman" as defined under section 2(s). Hence, he is not entitled to any relief. Having done that, neither issue was framed nor the contention dealt with.

10. We do see similarity in schedule of reference in **Kallamudin Khan** (supra) and this case. We respectfully agree with view taken by coordinate Bench in **Indian Oil Corporation Ltd**. (supra), wherein it was said that whether it is an industrial dispute or not is a fact to be ascertained by the Tribunal/Labour Court in the enquiry required to be conducted under the Act. In impugned award, contention on this question of fact was raised and recorded by the Labour Court. It was a contention relevant to the reference. However, as aforesaid, it was not dealt with. Mr. Nanda submits, the two issues framed were without objection from petitioner. It is estopped from now pressing the contention.

11. There is no operation of estoppel against the law. The law is that a relevant contention made in a proceeding must be adjudicated. Framing of issues is a procedural aspect in adjudication. Omission to urge framing of the issue, in context of record of the contention in the impugned award itself, points at omission of the Labour Court as well. Issues arise when pleadings are at variance. Here, the contention was specifically recorded by the Labour Court. Yet, omission to frame issue. It thus points towards non-application of mind by the Labour Court, irrespective of issues framed on suggestion of parties or by itself.

12. On our having found there were omissions by the Labour Court in making impugned award, we set aside the same and restore the reference. In such view of things, other judgments relied upon need not be commented upon by us. Mr. Nanda submits, there be direction for up-todate payment on the section 17-B application. Mr. Das opposes the submission on no consideration of his client"s contention that opposite party no.1 is not a workman, to attract enforcement of the provision for relief. He points out further, the writ petition has been pending since year 2016 and substantial amount has already been paid. He reiterates his submission earlier made. We reproduce below a passage from paragraph-3 of order dated 10th November, 2023, made in recording the submission.

> *"3… …Opposite party no.1 was a medical representative getting remuneration of more than Rs.10,000/- per month. In the circumstances, he was offered ex-gratia package as suggested by the Union. Opposite party did not accept it and raised purported industrial dispute. It culminated in impugned award dated 8th April, 2016. His client presented the writ petition on 12th July, 2016, after which it remained pending for adjudication. Opposite party no.1 made successive applications under section 17-B and has thereby obtained substantial amount of money of his client."*

In the circumstances, we direct that the Labour Court will expeditiously deal with the reference on restoration. Mr. Nanda submits, at least there be direction for the arrears on the relief to be deposited in the Labour Court pending adjudication on

restoration. In event the adjudication goes against the management, there can then be direction for the relief to be disbursed to his client.

13. On behalf of petitioner reliance was placed on **Hussain Mithu Mhasvadkar** (supra). We reproduce below a passage from paragraph-5.

> *"5. On careful consideration of the respective submissions of the learned counsel on either side, we are of the view that in a case of the nature where* ***the Labour Court*** *as well as the High Court entertained doubts the status of the appellant as a workman within the meaning of S.2(s) of the I.D. Act,* ***instead of embarking upon an adjudication in the first instance as to whether the respondent Board is an industry or not so as to attract the provision if Industrial Dispute Act ought to have refrained from doing so and taken up the question about the status of the applicant for adjudication at the threshold and if only the finding recorded was against the appellant refrained from adjudicating on the larger issue*** *affecting the various kinds of other employees, as to the character of the Board, as an industry or not. The larger issue should have been entertained for consideration only in a case where it is absolutely necessary and not when the claim before it could have been disposed of otherwise without going into the nature and character of the Undertaking itself. ... ..."* (Emphasis supplied)

The contention of opposite party no.1 not being a workman did not receive adjudication in the Labour Court though it should have been decided as the first issue. In the circumstances, we make no further order on the pending application under section 17-B. This will also be in line with order of the Supreme Court in **Hindustan Zinc Ltd. v. Industrial Tribunal**, reported in **(2000) 10 SCC 211.**

14. Before parting with the case we must deal with contention of petitioner that impugned award is a nullity as passed by the Labour Court because retrenchment is a matter that must be dealt with by the Tribunal under entry-10 in the 3rd schedule. Section 7-A empowers the appropriate Government to constitute one or more Industrial Tribunals for adjudication of industrial disputes including relating to any specified matter in the second schedule. The second schedule by entry-3 includes, inter alia, dismissal and reinstatement as matters within the jurisdiction of Labour Courts, duly constituted by the appropriate government under section 7. In the circumstances, the objection taken for the first time before us need not detain us any further.

15. The writ petition is disposed of.

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2024 (III) ILR-CUT-340

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

W.P.(C) NO. 21541 OF 2024

RSL OVERSEAS LLP, KOLKATA & ANR. ….Petitioners

V.

STATE OF ODISHA & ORS. ….Opp.Parties

(A) ODISHA GOODS AND SERVICES TAX ACT, 2017 – Section 129, Sub-section(1), the *non-obstante* clause – As per proviso under the sub

section no goods or conveyance shall be detained or seized without serving an order of detentions or seizure on the person transporting the goods – Whether the provision includes driver? – Held, Yes.

(Para - 6)

(B) ODISHA GOODS AND SERVICES TAX ACT, 2017 – Section 129(3) – The word 'of' as provided in the sub-section – Interpretation – Held, the first part of the provision can be interpreted as within 7 days with respect to detention or seizure. (Paras 7 - 8)

Case Laws Relied on and Referred to :-

1. W.P(C)-27140/2023 (Dtd.14.09.2024) : TVL. V.V. Iron and Steels v. State Tax Officer.

For Petitioners : Mr. Debasish Ghosh, Mr. Talha Ahmed Khan, Mr. Sourav Suman Bhuyan, Advocates

For Opp.Parties : Mr. Sunil Mishra, Standing Counsel.

JUDGMENT Date of Hearing & Judgment : 03.09.2024

ARINDAM SINHA, J.

1. Mr. Ghosh, learned advocate appears on behalf of petitioner and submits, his client dispatched goods to the consignee upon them having been purchased. E-Way bill was generated on 6th August, 2024 to enable the goods being transported from his client to the buyer in West Bengal, whose instruction was to ship to the consignee in Chhattisgarh. The goods vehicle was seized on 7th August, 2024. Notice in Form GST Mov-07 dated 14th August, 2024 was served on driver of the vehicle. On that date itself his client had informed the authority of being owner of the goods.

2. He submits, there are two grounds of challenge to subsequently issued order of demand of penalty dated 21st August, 2024, that too upon the driver. Firstly, mandate in section 129 in Odisha Goods and Services Tax Act, 2017 is for the notice to be issued within seven days of detention or seizure. It was not so done. Commencing from seizure dated 7th August, 2024, notice dated 14th August, 2024 was one day out of time.

3. He relies on view taken by learned single Judge in the High Court of Judicature at Madras in **W.P.No. 27140 of 2023 on judgment dated 14th September, 2023 (TVL. V.V. Iron and Steels v. State Tax Officer**). He relies on paragraph 12 in Centax Law Publications report. The paragraph is reproduced below.

> *"12. Section 129(3) of the TNGST Act, 2017 has not used the expression "within seven days from the date of detention or seizure". The language in Section 129(3) of the TNGST Act, 2017 is clear. Notice specifying payment of penalty has to be issued within seven days of detention or seizure of goods. Issuance of notice within seven days has to be calculated from the date on which seizure was to be effected and not from the following date. Thus, the last date for issuance of the impugned notice would have expired on 6-9-2023. However, the impugned notice has been dispatched through email only on the following date i.e., on 7-9-2023 after the expiry of limitation."*

4. Mr. Ghosh's second ground is that when his client had informed the authority of being owner of the goods and person responsible therefor, noticing and thereafter serving demand notice on the driver was clear act on part of the authority to deny his client recourse in law to remedy.

5. Mr. Mishra, learned advocate, Standing Counsel appears on behalf of revenue and opposes the writ petition. He draws attention to sub-section (1) in section 129 to submit, the driver is the proper person to be served notice and demand. Furthermore, the notice issued and served on 14th August, 2024 was within seven days of the seizure made on 7th August, 2024. On the seizure made, identification particulars attaching to the seizure were created and is available for petitioner to take things further, if aggrieved, in accordance with law. Mr. Ghosh in reply submits, since the notice and demand issued are against the driver, his client cannot access the portal other than through the driver. This makes it impossible for his client to obtain recourse to law because the driver is engaged in driving vehicle for transport of goods. He is not his client's employee. Mr. Mishra disputes the submission.

6. We deal with the second point first. Sub-section (1) in section 129 commences with non-obstante clause, to include any person transporting goods or storing them while in transit. Proviso under the sub-section says no such goods or conveyance shall be detained or seized without serving an order of detentions or seizure on the person transporting the goods. We are clear in our mind that the provision includes the driver.

7. So far as first ground of challenge is concerned, it requires adjudication by interpretation of sub-section (3) in section 129. While first part of the provision provides for period of within 7 days of detention or seizure, second part of it provides for period of seven days from date of service of notice. On behalf of petitioner distinction is sought to be drawn between use of different phrases in said two parts of the provision. Mr. Ghosh submits, period 'of' 7 days would necessarily be reckoning for commencement from the date of detention or seizure, while period 'from' 7 days would require reckoning for commencement from the next day.

8. We looked up Chambers dictionary 12th edition for meaning of word 'of'. The meanings given include 'with respect to'. Hence, we can interpret first part of the provision as within 7 days with respect to detention or seizure.

9. In **TVL. V.V. Iron and Steels** (supra) the learned single Judge found facts to be that interception was on 30th August, 2023. In reproduced above paragraph-12 there was calculation made to say that time for issuance of the notice would have expired on 6th September, 2023. Further facts in that case was, the notice was issued on 7th September, 2023. Reckoning by the learned Judge that time would expire on 6th September, 2023 was taking commencement of period of seven days for issuance of notice within the period of interception as on 31st August, 2023. Interception was on 30th August, 2023. It falls in line with reckoning of periods as in law, to be from the date following. In this case the seizure was on 7th August, 2024. Notice dated

14th August, 2024 issued to the driver thus, in our view, was within 7 days of the seizure.

10. Petitioner in also having informed the authority on 14th August, 2024 that it is the owner of the goods, responsible therefor and ought to be noticed has by conduct sought to extend the period for issuance of the notice. As such the conduct militates against petitioner's contention on reckoning of the time.

11. On difficulties said as may be faced by petitioner in seeking recourse of law for remedy, Mr. Mishra points out from disclosure Form GST DRC-01 dated 14th August, 2024, mentioned therein is case ID as well as distinctive numerical and alphabetical ID mentioned in address given in the Form. In event petitioner seeks recourse of law to obtain remedy and is obstructed thereby, otherwise remedy in seeking interference is always available.

12. No interference is called for. The writ petition is disposed of.

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2024 (III) ILR-CUT-343

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

OTAPL NO. 19 OF 2024

PRINCIPAL COMMISSIONER, CGST & CENTRAL EXCISE, BHUBANESWAR ….Appellant

V.

M/s. INDIAN METAL & FERRO ALLOYS LTD, ODISHA ….Respondent

CENVAT CREDIT RULES, 2004 – Rules 2(k)(iii) and Rule 3 – Respondent has two units in the State, separated by approximately 500 Kilometers – It is engaged in manufacture of high carbon ferro chrome and chrome ore briquette – The units of respondent engaged in manufacture of the products – One unit manufactures electricity for captive use – Part of surplus production was sold to Gridco and cenvat credit obtained, reversed – Part of surplus electricity was transmitted to the other unit for use in manufacture of final products which are dutiable goods – Whether the surplus electricity supplied by respondent to its another unit is entitled to cenvat credit? – Held, Yes – Because the electricity has been used in the manufacture of dutiable final products and also the fact that all units belong to the Respondent/ the same manufacturer. (Paras 6 - 7)

Case Laws Relied on and Referred to :-

1. 2017 (6) TMI 502 – CESTAT New Delhi : M/s. Shree Cement Ltd. v. CCE, Jaipur-II.

For Appellant : Mr. T.K. Satapathy, Sr.Standing Counsel (Income Tax)
For Respondent : Mr. Jagabandhu Sahoo, Sr. Adv. & Mrs. Kajal Sahoo.

JUDGMENT Date of Hearing & Judgment : 03.09.2024

ARINDAM SINHA, J.

1. Revenue seeks to prefer appeal under section 35G in Central Excise Act, 1944. Mr. Satapathy, learned advocate, Senior Standing Counsel appears on behalf of revenue and submits, substantial questions of law arise from impugned final order dated 4th August, 2023 passed by Customs, Excise and Service Tax Appellate Tribunal, Eastern Zonal Bench, Kolkata in Excise Appeal no.75101 of 2017.

2. He draws attention to impugned final order to demonstrate that revenue's contention was, the surplus electricity supplied free of cost by respondent to its another unit does not entitle it to cenvat credit on input and input services in respect thereof. Therefore, periodical show cause notices were issued to respondent, to deny credit of input and input services used for generation of the electricity. Revenue was successful before the appellate authority but, the Tribunal erred on facts and in law, to set aside the appellate order.

3. Substantial questions of law arise regarding impugned final order, when definition of 'factory' in section 2 (e) of the Act is read with rules 2(k)(iii) and rule 3 in Cenvat Credit Rules, 2004. He submits, the appeal be admitted on substantial questions of law suggested in the memorandum or to be framed by us.

4. Mr. Sahoo, learned senior advocate appears on behalf of respondent and seeks service and audience. Mr. Satapathy opposes on submission, the appeal is on threshold of admission, only after which respondent is entitled to notice.

5. We made queries of Mr. Satapathy to ascertain the facts as appearing from impugned final order. Respondent has two units in the State, separated by approximately 500 kilometers. It is engaged in manufacture of high carbon ferro chrome and chrome ore briquette. The units of respondent are engaged in manufacture of the products. One unit also manufactures electricity for captive use. Admittedly, part of surplus production was sold to Gridco and cenvat credit obtained, reversed. Respondent also used part of the surplus electricity by transmitting it to its other unit, engaged in the line of manufacture to produce the final products. They are dutiable goods.

6. Both units of respondent correspond or come within the meaning of 'factory' given in the Act. Input includes all goods used for generation of, inter alia, electricity for captive use. Apart from surplus electricity sold to Gridco, electricity that was surplus in the generating unit was transmitted to the other unit for use in manufacture of the dutiable goods. Hence, it cannot be said that the transmitted electricity was not captively used.

7. The Tribunal, by impugned final order relied on final order made in **M/s. Shree Cement Ltd. v. CCE, Jaipur-II [2017 (6) TMI 502 – CESTAT New Delhi],** we reproduce below a passage from relied upon final order.

"... ... The admitted fact is that the Cenvat credit on input services used in the generation of power is eligible to the appellant as long as the electricity is used in the manufacture of dutiable final product. The only dispute is relating to the usage of electricity captively within the plant of generation or also outside the generation unit by the same manufacturer. Considering that the electricity has been used in the manufacture of dutiable final products and also the fact that all units belong to the appellant the denial of credit is not justifiable in the present case. ... ... "

Aforesaid final order was affirmed by the Rajasthan High Court, noted by the Kolkata Bench in impugned order.

8. We do not find any substantial question of law arises regarding use of the electricity manufactured in one unit of respondent but transmitted for use by another for use in manufacture of dutiable goods, to obtain cenvat credit.

9. The appeal is dismissed.

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2024 (III) ILR-CUT-345

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

CRA NO. 230 OF 2001

BIJU @TAPAN KUMAR BEHERA ….Appellant

V.

STATE OF ODISHA ….Respondent

(A) JUVENILE JUSTICE ACT, 1986 – Section 2(h) r/w Sections 2(l), 7-A,15, 16, 20, 64, and 69 of the amended provision of the Juvenile Justice (Care & Protection of Children) Act, 2000 r/w provisions of amended Act of 2006 & Section 25 of Amendment Act, 2015 & Section 06 of General Clauses Act – Appellant has assailed the judgment of conviction u/ss 302/201 of the Indian Penal Code,1860 and the order of sentence dated 15.10.2001 passed by the learned Sessions Judge, Keonjhar in S.T. Case No. 20 of 2001.

(B) JUVENILE – Meaning/determination of juvenility – Claim of juvenility in the appeal – In the present case, it is admitted fact that at the time of occurrence i.e. on 21.09.2000, the age of accused was more than 16 years and the charge was framed on 02.03.2001 – The 2000 Act came into force on 01.04.2001 and charge-sheet filed after 2015 amended Act came into force – In the trial, the accused was punished under sections 302/201 of the IPC – Challenging the punishment present appeal has been filed – Meanwhile 24 years have been elapsed and appellant is working as daily labourer having no adverse conduct/ criminal antecedent other than the present case – Whether this case is to be remitted to Juvenile Justice Board as per section 15 of the JJ (CPC) Act for passing of appropriate order or the Court has the power to pass any reason order? – Held, in light of Section 6 of the General

Clauses Act read with Section 25 of the JJ (CPC) Act 2015, an accused cannot be denied his right to be treated as a juvenile when he was less than eighteen years of age at the time of commission of the offence, a right which he acquired and has fructified under the JJ (CPC) Act, 2000 even if the offence was committed prior to enforcement of the JJ (CPC) Act, 2000 on 1.04.2001 in terms of Section 25 of the JJ(CPC) Act, 2015, the JJ (CPC) Act, 2000 would continue to apply and govern the proceedings which were pending when the JJ (CPC) Act, 2015 was enforced – Considering his age & in the interest of justice remission of the matter to the Board serves no useful purpose in the direction of fulfilling/achieving the objective set forth under the Acts. (Paras 25-31)

Case Laws Relied on and Referred to :-

1. (2020) 10 SCC 555 : Satya Deo@ Bhoorey -v- State of Uttar Pradesh.
2. (2010) 5 SCC 344 : Dharambir-versus-State (NCT of Delhi).
3. (2016) 11 SCC 786 : Mumtaz-versus-State of Uttar Pradesh.
4. (2005) 3 SCC 685 : Bijender Singh v. State of Haryana & Anr.
5. (2010) 5 SCC 344 : Dharambir v. State (NCT of Delhi).
6. (2012) SCC 34 : Kalu-versus-State of Haryana.
7. (2009) 13 SCC 211 : Hari Ram-versus- State of Rajasthan.
8. (2001) 4 SCC 355 : Akhtari Bi V. State of M.P.
9. (2019) 4 SCC 549 : Gaurav Kumar-versus-State of Haryana.
10. (2013) 11 SCC 193 : Jitendra Singh-versus-State of Uttar Pradesh .

For Appellant : Mr. G. N. Parida
For Respondent : Mr. P. K. Mohanty, ASC

JUDGMENT Date of Hearing: 13.08.2024 : Date of Judgment : 04.09.2024

BY THE BENCH

The Appellant, by filing this Appeal, has assailed the judgment of conviction and the order of sentence dated 15.10.2001 passed by the learned Sessions Judge, Keonjhar in S.T. Case No.20 of 2001.

The Appellant (accused) has been convicted for commission of offence under section 302/201 of the Indian Penal Code, 1860 (in short, 'IPC') and he has been sentenced to undergo imprisonment for life.

2. Prosecution case is that the accused and Sridhar (deceased) are the residents of village Belabahali. The father of the accused and the deceased have their grocery business. The retailors used to take the grocery articles on credit from the father of the accused as well as the deceased for onward sale in the weekly market. The accused and the deceased being friends, used to go to collect the dues of their father from those retailors. This was the practice which they were performing for quite some time.

On 21.09.2000, it was around 5.30 to 6 am, the accused and the deceased left the village riding their cycles to collect dues from the creditors at different villages. The accused returned around 9 am. But Sridhara (deceased) did not. When

the parents and relations of Sridhara did not find him coming to the village, they went for search. The accused had been asked regarding the whereabouts of Sridhara (deceased). He then gave prevaricating statements. The agnatic brother of Sridhara namely, Niranjan (Informant-P.W.14) had gone to the house of the accused to enquire. The father of the accused was not there and he arrived sometime thereafter. Being asked by the villagers, the accused went on giving pre-varicating statements to the effect that Sridhara had jumped into the river Kusei; that he had gone somewhere in the bus. The father of the accused then told that the accused be taken to the police station where he would disclose the truth. P.W.14 and the father of the accused then came to the Ghasipura Police Station and similarly, another namely, Surendra (P.W.17) Pradeep and the accused also came. On the way, at Salapada crossing, accused requested all to stop to scooter giving out that he would disclose the truth. It is stated that the accused then expressed that he had committed the murder of Sridhara beneath Gudiaghara Bridge by smashing his head by means of a stone. He then stated to have concealed the dead body beneath the water. But thereafter, when accused was being taken away by Niranjan in the scooter, he jumped from the same and both sustained injuries. The dead body of Sridhara was recovered from beneath the water and it was noticed that he has sustained injuries on his face and head. The informations as the above being given in writing to the Officer-inCharge, Ramachandrapur Police Station, the same was treated as FIR and upon registration of the case, investigation was commenced.

On completion of the investigation, the I.O (P.W.29) submitted the Final Form placing the accused to face the Trial for commission of offence under section 302/201 of the IPC.

3. Learned SDJM, Anandapur receiving the Final Form as above, took cognizance of the offence and after observing the formalities committed the case to the Court of Sessions. That is how the Trial commenced by framing charge against the said offence against the accused.

4. In the Trial, the prosecution in total has examined twenty nine (29) witnesses and have proved several documents which have been admitted in evidence and marked as Ext.1 to Ext.21.

5. The defence being called upon has not led any evidence in support of his plea of denial and false implication.

6. The prosecution case is based on circumstantial evidence. The Trial Court on detail examination of the evidence on record and their evaluation has finally held that the prosecution has been able to establish the incriminating circumstances and those being joined together make the chain of events complete in such a manner that it excludes all the hypothesis other than the guilt of the accused. Having said so, the Trial Court has convicted the accused for the offence under section 302 of the IPC as to have intentionally caused the death of Sridhara (deceased) and sentenced him as aforestated.

7. Mr. G. N. Parida, learned counsel on behalf of Mr. S. P. Mishra, learned Senior Counsel for the Appellant (accused) from the beginning instead of advancing the submission in impeaching the finding of guilt against the accused as has been returned by the Trial Court confined his submission that here is a case where despite upholding the conviction of the accused, the sentence of life imprisonment has to be set aside as it concerns with the issue of juvenility of the accused at the time of commission of the offences.

He submitted that the incident as per the prosecution case took place on 21.09.2000 when the Juvenile Justice Act, 1986 (hereinafter, referred to as "JJ Act") was in force and the Juvenile Justice (Care and Protection of Children) Act, 2000 (henceforth noted as "JJ(CPC) Act") came into force with effect from 01.04.2001. He then submitted that the position of law has been well settled that the 'juvenility' of the offender is to be determined as on the date of the commission of the offence. Inviting our attention to the age of the accused as per the prosecution case that he was 17 (seventeen) at the relevant time, he next drew our attention to the provision contained in section 2(h) of the JJ Act which defined "juvenile" and 2(l) of the JJ(CPC) Act which defines "Juvenile in conflict with law. Referring to the provision contained in section 20 of the JJ(CPC) Act, he contended that since the JJ(CPC) Act came into force when the trial was in progress; the Trial Court even after holding the accused guilty for commission of the offence under section 302 of the IPC was under legal obligation to pass appropriate order/directions under section 15 of the JJ(CPC) Act or to remit the matter to the concerned Juvenile Justice Board for dealing with the matter in accordance with the provisions of the JJ (CPC) Act.

He next submitted that accused is now about 40 years old and he is earning his livelihood and maintaining his family by working as a daily labour when no such report as regards his adverse conduct and dealing in the locality is forthcoming and it is also not stated that he during all these period has indulged in any criminal activity at any point of time. He then relying upon the decision in case of ***Satya Deo@ Bhoorey -v- State of Uttar Pradesh (2020) 10 SCC 555*** having submitted that the order of sentence of life imprisonment cannot be sustained contended that at this distance of time and in the prevailing circumstances concerning the accused and the surroundings and taking note of the fact that the accused has been suffering from the mental agony of a criminal trial for such a long period of about 24 years and when he has also remained in custody during trial as also after conclusion of the trial till his release on bail by order of this Court in the Appeal, it would be against the interest of justice to remit the matter to the jurisdiction of the Juvenile Justice Board for passing appropriate order/directions under section 15 of the JJ (CPC) Act and that would sever no useful purpose.

8. Mr. P. K. Mohanty, learned counsel for the State-Respondent submitted that the accused was more than 16 years of age when he committed the offence and, therefore, rightly the charge was framed by the Trial Court as he was not falling within the definition of the "juvenile" as defined in the JJ Act. He further submitted that after the commencement of the trial when the it was is in progress, the Act of

2000 having come into force that being not placed before the Trial Court for the needful in consonance with the provision of section 20 of the JJ(CPC) Act, the Trial Court having held the accused guilty for commission of offence under section 302/201 of the IPC has awarded the sentence of imprisonment for life. He also submitted that the accused is now age around 40 years and no instruction has been received by him that he has indulged in any criminal activity during all these long period or as regards any adverse conduct in the locality during the period.

9. Keeping in view the submissions made, we have perused the record of the Trial Court as well as the Court which committed the case.

10. It is undisputed that the accused was more than 16 years of age as on the date of commission of the offence. So he has been rightly placed under regular trial as he was not a 'juvenile' as defined in the JJ Act. When the Trial Court framed the charge on 02.03.2001 since the JJ (CPC) Act had by then not come into force, the trial has rightly commenced. During progress of the trial, the JJ (CPC) Act came into force with effect from 01.04.2001.

Section 20 of the JJ (CPC) Act which takes care in respect of pending cases reads as under:-

> **"20.Special provision in respect of pending cases:-**
>
> Notwithstanding anything contained in this Act, all proceedings in respect of a juvenile pending in any court in any area on the date on which this Act comes into force in that area, shall be continued in that Court as if this Act had not been passed and if the court finds that the juvenile has committed an offence, it shall record such finding and instead of passing any sentence in respect of the juvenile, forward the juvenile to the Board which shall pass orders in respect of that juvenile in accordance with the provisions of this Act as if it had been satisfied on inquiry under this Act that a juvenile has committed the offence:
>
> Provided that the Board may, for any adequate and special reason to be mentioned in that order, review the case and pass appropriate order in the interest of such juvenile.
>
> Explanation.- In all pending cases including trial, revision, appeal or any other criminal proceedings in respect of a juvenile in conflict with law, in any court, the determination of juvenility of such a juvenile shall be in terms of clause (l) of section 2, even if the juvenile ceased to be so on or before the date of commencement of this Act and the provisions of this Act shall apply as if the said provisions had bene in force, for all purposes and at all material times when the alleged offence was committed."

11. Section 20 of the JJ (CPC) Act is a special provision with respect to pending cases and begins with a limited non obstante or overriding clause; notwithstanding anything contained in the said Act. Legislative intent is clear and expressly stated that all proceedings in respect of a "juvenile" pending in any court on the date on which the JJ (CPC) Act came into force shall continue before that court as if JJ (CPC) Act had not been passed. Though the proceedings are to continue before the Court, the section states that if the court comes to a finding that a "juvenile" has committed the offence, it shall record the finding but instead of passing an order of sentence, forward the juvenile to the Juvenile Justice Board which shall then pass orders in accordance with the provisions of the JJ (CPC) Act, as if the Board itself

had conducted an inquiry and was satisfied that the juvenile had committed the offence. The proviso, however, stated that the Board, for any adequate and special reasons, can review the case and pass appropriate order in the interest of the juvenile.

12. The explanation added to section 20 vide Amendment Act 33 of 2006, which again is of significant importance, it states that the Court where 'the proceedings" are pending "at any stage" shall determine the question of juvenility of the accused. The expression "all pending cased" includes not only trial but even subsequent proceedings by way of appeal, revision, etc. or any other criminal proceedings. Lastly, the JJ (CPC) Act applies even to cases where the accused was a juvenile on the date of commission of the offence, but had ceased to be a juvenile on or before the date of commission of the JJ (CPC) Act. Even in such cases, provisions of the JJ (CPC) Act are to apply as if these provisions were in force for all purposes and at all material time when the offence was committed.

13. Thus, in respect of pending cases, section 20 of the JJ (CPC) Act authoritatively commands that the Court must at any stage, even post the judgment by the trial court when the matter is pending in appeal, revision or otherwise, consider and decide upon the question of juvenility. Juvenility is determined by the age on the date of commission of the offence. The factum that the juvenile was an adult on the date of enforcement of the 2000 Act or subsequently had attained adulthood would not matter. If the accused was juvenile, the court would, even when maintaining conviction, send the case to the Board to issue direction and order in accordance with the provisions of the 2000 Act.

14. By Amendment Act 33 of 2006, section 7-A was inserted in the 2000 Act setting out the procedure to be followed by the Court to determine the claim of juvenility. Section 7-A, which came into effect on 22.08.2006, reads:

> "7-A Procedure to be followed when claim of juvenility is raised before any court.-(1) Whenever a claim of juvenility is raised before any court or a court is of the opinion that an accused persons was a juvenile on the date of commission of the offence, the court shall make an enquiry, take such evidence as may be necessary (but not an affidavit) so as to determine the age of such person, and shall record a finding whether the person is a juvenile or a child or not, stating his age as nearly as may be:
>
> Provided that a claim of juvenility may be raised before any court and it shall be recognized at any stage, even after final disposal of the case, and such claim shall be determined in terms of the provisions contained in this Act and the Rules made thereunder, even if the juvenile has ceased to be so on or before the date of commencement of this Act.
>
> (2) If the finds a person to be a juvenile on the date of commission of the offence under sub section (1), it shall forward the juvenile to the Board for passing appropriate order, and the sentence if any, passed by a court shall be deemed to have no effect."

15. The proviso of Section 7-A is important for our purpose as it states that the claim of juvenility may be raised before "any Court" "at any stage", even after the final disposal of the case. When such claim is made, it shall be determined in terms

of the provisions of the JJ (CPC) Act and the Rules framed thereunder, even when the accused had ceased to be a juvenile on or before commencement of the JJ (CPC) Act. Thus, it would not matter if the accused, though a juvenile on the date of commission of the offence, had become an adult before or after the date of commencement of the JJ (CPC) Act on 01.04.2001. He would be entitled to benefit of the JJ (CPC) Act.

16. Section 64 of the JJ (CPC) Act was also amended by Act 33 of 2006 by incorporating a proviso and Explanation and by replacing the words "may direct" with the words "shall direct" in the main provision. Post the amendment, Section 64 reads as under:

> **"64.Juvenile in conflict with law undergoing sentence at commencement of this Act.-** In any area in which this Act is brought into force, the State Government shall direct that a juvenile in conflict with law who is undergoing any sentence of imprisonment at the commencement of this Act, shall, in lieu of undergoing such sentence, be sent to a special home or be kept in fit institution in such manner as the State Government thinks fit for the remainder of the period of the sentence; and the provisions of this Act shall apply to the juvenile as if he had been ordered by the Board to be sent to such special home or institution or, as the case may be, ordered to be kept under protective care under sub-section (2) of section 16 of this Act:
>
> Provided that the State Government, or as the case may be the Board, may, for any adequate and special reason to be recorded in writing, review the case of a juvenile in conflict with law undergoing a sentence of imprisonment, who has ceased to be so on or before the commencement of this Act, and pass appropriate order in the interest of such juvenile.
>
> Explanation.- In all cases where a juvenile in conflict with law is undergoing a sentence of imprisonment at any stage on the date of commencement of this act, his case including the issue of juvenility, shall be deemed to be decided in terms of cluse (1) of Section 2 and the other provisions contained in this act and the Rules made thereunder, irrespective of the fact that he ceases to be a juvenile or on before such date and accordingly, he shall be sent to the special home or a fit institution, as the case case may be, for the remainder of the period of the sentence but such sentence shall not in any case exceed the maximum period provided in section 15 of this Act."

17. The above substitution of the words "may direct" with "shall direct" in the main provision is to clarify that the provision is mandatory and not directory. Section 64 had to be read harmoniously with the newly added proviso and Explanation and also other amendments made vide Amendment Act 33 of 2006 in section 20 and by way of inserting Section 7-A in the JJ (CPC) Act. The main provision states that where a Juvenile in Conflict with law is undergoing any sentence of imprisonment at the commencement of the JJ (CPC) Act, he shall, in lieu of undergoing in such manner as the State Government think fit for the remainder of the period of sentence.

18. Further, the provisions of the JJ(CPC) Act are to apply as if the juvenile had been ordered by the Board to be sent to the special home or institution and ordered to be kept under protective care under sub section (2) of section 16 of the Act. The proviso states that the State Government or the Board, for any adequate and special

reasons to be recorded in writing, review the case of the juvenile in conflict with law who is undergoing sentence of imprisonment and who had cease to be a juvenile on or before the commencement of JJ (CPC) Act and pass appropriate orders. However, it is the explanation which is of extreme significance as it states that in all cases where a juvenile in conflict with law is undergoing a sentence of imprisonment on the date of commencement of the JJ (CPC) Act, the juvenile's case including the issue of juvenility, shall be deemed to be decided in terms of clause (1) of section 2 and other provisions and Rules made under the JJ (CPC) Act irrespective of the fact that the juvenile had ceased to be a juvenile. Such juvenile shall be sent to a special home or fit institution for the remainder period of his sentence but such sentence shall not exceed the maximum period provided in section 15 of the JJ (CPC) Act. The statute overrules and modifies the sentence awarded, even in decided cases.

19. The Hon'ble Apex Court in ***Dharambir-versus-State (NCT of Delhi) (2010) 5 SCC 344*** had analyzed the scheme and application of the JJ(CPC) Act to the accused who were below the age of eighteen years on the date of commission of offence which was committed prior to the enactment of the JJ(CPC) Act, to opine and hold:

> "Proviso to sub-section (1) of Section 7A contemplates that a claim of juvenility can be raised before any court and has to be recognized at any stage even after disposal of the case and such claim is required to be determined in terms of the provisions contained in the Act of 2000 and the rules framed thereunder, even if the juvenile has ceased to be so on or before the date of the commencement of the Act of 2000. The effect of the proviso is that a juvenile who had not completed eighteen years of age on the date of commission of the offence would also be entitled to the benefit of the Act of 2000 as if the provisions of Section 2(k) of the said Act, which defines "juvenile" or "child" to mean a person who has not completed eighteenth year of age, had always been in existence even during the operation of the 1986 Act. It is, thus, manifest from a conjoint reading of Sections 2(k), 2(l), 7A, 20 and 49 of the Act of 2000, read with Rules 12 and 98 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 that all persons who were below the age of eighteen years on the date of commission of the offence even prior to 1st April, 2001 would be treated as juveniles even if the claim of juvenility is raised after they have attained the age of eighteen years on or before the date of the commencement of the Act of 2000 and were undergoing sentences upon being convicted.
>
> In the view we have taken, we are fortified by the dictum of this Court in a recent decision in ***Hari Ram Vs. State of Rajasthan & Another".***

20. In ***Mumtaz-versus-State of Uttar Pradesh (2016) 11 SCC 786***, while referring to several earlier decisions, the Apex Court dealt with the effect of Section 20 of the 2000 Act and its interplay with the 1986 Act, to elucidate:

> "18.The effect of Section 20 of the 2000 Act was considered in Pratap Singh v. State of Jharkhand and another (2005) 3 SCC 551 and it was stated as under: "31. Section 20 of the Act as quoted above deals with the special provision in respect of pending cases and begins with a non obstante clause. The sentence "notwithstanding anything contained in this Act, all proceedings in respect of a juvenile pending in any court in any area on the

date on which this Act came into force" has great significance. The proceedings in respect of a juvenile pending in any court referred to in Section 20 of the Act are relatable to proceedings initiated before the 2000 Act came into force and which are pending when the 2000 Act came into force. The term "any court" would include even ordinary criminal courts. If the person was a "juvenile" under the 1986 Act the proceedings would not be pending in criminal courts. They would be pending in criminal courts only if the boy had crossed 16 years or the girl had crossed 18 years. This shows that Section 20 refers to cases where a person had ceased to be a juvenile under the 1986 Act but had not yet crossed the age of 18 years then the pending case shall continue in that court as if the 2000 Act has not been passed and if the court finds that the juvenile has committed an offence, it shall record such finding and instead of passing any sentence in respect of the juvenile, shall forward the juvenile to the Board which shall pass orders in respect of that juvenile."

21. In ***Bijender Singh v. State of Haryana and another (2005) 3 SCC 685***, the legal position as regards Section 20 of the JJ(CPC) Act was stated in following words:

"8. One of the basic distinctions between the 1986 Act and the 2000 Act relates to the age of males and females. Under the 1986 Act, a juvenile means a male juvenile who has not attained the age of 16 years, and a female juvenile who has not attained the age of 18 years. In the 2000 Act, the distinction between male and female juveniles on the basis of age has not been maintained. The age-limit is 18 years for both males and females.

9. A person above 16 years in terms of the 1986 Act was not a juvenile. In that view of the matter the question whether a person above 16 years becomes "juvenile" within the purview of the 2000 Act must be answered having regard to the object and purport thereof.

10. In terms of the 1986 Act, a person who was not juvenile could be tried in any court. Section 20 of the 2000 Act takes care of such a situation stating that despite the same the trial shall continue in that court as if that Act has not been passed and in the event, he is found to be guilty of commission of an offence, a finding to that effect shall be recorded in the judgment of conviction, if any, but instead of passing any sentence in relation to the juvenile, he would be forwarded to the Juvenile Justice Board (in short "the Board") which shall pass orders in accordance with the provisions of the Act as if it has been satisfied on inquiry that a juvenile has committed the offence. A legal fiction has, thus, been created in the said provision. A legal fiction as is well known must be given its full effect although it has its limitations. ……

11. xxxxxx xxxxxxxx xxxxxxx

12. Thus, by reason of legal fiction, a person, although not a juvenile, has to be treated to be one by the Board for the purpose of sentencing, which takes care of a situation that the person although not a juvenile in terms of the 1986 Act but still would be treated as such under the 2000 Act for the said limited purpose."

22. In ***Dharambir v. State (NCT of Delhi) (2010) 5 SCC 344*** the determination of juvenility even after conviction was one of the issues and it was stated:

"11. It is plain from the language of the Explanation to Section 20 that in all pending cases, which would include not only trials but even subsequent proceedings by way of revision or appeal, etc., the determination of juvenility of a juvenile has to be in terms of clause (l) of Section 2, even if the juvenile ceases to be a juvenile on or before 1-4-2001, when the Act of 2000 came into force, and the provisions of the Act would apply as if

the said provision had been in force for all purposes and for all material times when the alleged offence was committed.

12. Clause (l) of Section 2 of the Act of 2000 provides that "juvenile in conflict with law" means a "juvenile" who is alleged to have committed an offence and has not completed eighteenth year of age as on the date of commission of such offence. Section 20 also enables the court to consider and determine the juvenility of a person even after conviction by the regular court and also empowers the court, while maintaining the conviction, to set aside the sentence imposed and forward the case to the Juvenile Justice Board concerned for passing sentence in accordance with the provisions of the Act of 2000."

23. Similarly in ***Kalu-versus-State of Haryana (2012) SCC 34*** the Court summed up as under:

"21. Section 20 makes a special provision in respect of pending cases. It states that notwithstanding anything contained in the Juvenile Act, all proceedings in respect of a juvenile pending in any court in any area on the date on which the Juvenile Act comes into force in that area shall be continued in that court as if the Juvenile Act had not been passed and if the court finds that the juvenile has committed an offence, it shall record such finding and instead of passing any sentence in respect of the juvenile forward the juvenile to the Board which shall pass orders in respect of that juvenile in accordance with the provisions of the Juvenile Act as if it had been satisfied on inquiry under the Juvenile Act that the juvenile has committed the offence. The Explanation to Section 20 makes it clear that in all pending cases, which would include not only trials but even subsequent proceedings by way of revision or appeal, the determination of juvenility of a juvenile would be in terms of clause (l) of Section 2, even if the juvenile ceased to be a juvenile on or before 1-4-2001, when the Juvenile Act came into force, and the provisions of the Juvenile Act would apply as if the said provision had been in force for all purposes and for all material times when the alleged offence was committed."

24. This position of law and principle in Mumtaz case (supra) was affirmed by the Court for the first time in ***Hari Ram-versus- State of Rajasthan (2009) 13 SCC 211*** in the following words:

"39.The Explanation which was added in 2006, makes it very clear that in all pending cases, which would include not only trials but even subsequent proceedings by way of revision or appeal, the determination of juvenility of a juvenile would be in terms of Clause (l) of Section 2, even if the juvenile ceased to be a juvenile on or before 1st April, 2001, when the Juvenile Justice Act, 2000, came into force, and the provisions of the Act would apply as if the said provision had been in force for all purposes and for all material times when the alleged offence was committed. In fact, Section 20 enables the Court to consider and determine the juvenility of a person even after conviction by the regular Court and also empowers the Court, while maintaining the conviction, to set aside the sentence imposed and forward the case to the Juvenile Justice Board concerned for passing sentence in accordance with the provisions of the Juvenile Justice Act, 2000."

25. In the case at hand, indisputably, the accused was less than 18 years of age as on the date of commission of offence on 21.09.2000, he is thus entitled to be treated as a juvenile and be given the benefits as per the JJ (CPC) Act.

26. It now brings us to the question whether the Juvenile Justice (Care and Protection of Children) Act, 2015 would be applicable as the Act of 2015 vide sub-section (1) of Section 111 repeals the JJ(CPC) Act, 2000, albeit sub section (2) of section 111 states that notwithstanding this repeal anything done or any action taken under the Act of 2000 shall be deemed to have been done or taken under the corresponding provisions of the Act of 2015.

Section 69, the "Repeal and Saving Clause" of the Act of 2000 is identical as sub section (1) thereof had repealed the Act of JJ Act, 1986 and sub section (2) provides that notwithstanding such repeal anything done or any action taken under the JJ Act, 1986 shall be deemed to have been done or taken under the corresponding provisions of the JJ (CPC) Act, 2000.

27. However, what is important and relevant for us is section 25 of the JJ(CPC) Act, 2015 which, as per the headnote to that section, incorporates "Special provision in respect of pending cases" and reads:

> ***"25. Special provision in respect of pending cases:-***
>
> Notwithstanding anything contained in this Act, all proceedings in respect of a child alleged or found to be in conflict with law pending before any Board or court on the date of commencement of this Act, shall be continued in that Board or Court as if this Act had not been enacted".

28. Section 25 of the JJ (CPC) Act, 2015 is a non obstante clause which applied to all proceedings in respect of a child alleged or found to be in conflict with law pending before any Board or Court on the date of commencement of the said Act, that is, 31.12.2015. It states that the pending proceedings shall be continued in that Board or court as if the 2015 Act had not been passed.

In ***Akhtari Bi V. State of M.P (2001) 4 SCC 355***, it was observed that the right to appeal being a statutory right, the trial court's verdict does not attain finality during the pendency of the appeal and for that purpose the trial is deemed to be continuing despite conviction. Thus, the use of the word "any" before the Board or court in Section 25 of the JJ (CPC) Act, 2015 would mean and include any court including the appellate court or a court before which the revision petition is pending. This is also apparent from the use of the words "a child alleged or found to be in conflict with law". The word "found" is used in past tense and would apply in cases where an order/judgment has been passed. The word "alleged" would refer to those proceedings where no final order has been passed and the matter is sub-judice. Further, section 25 of the JJ (CPC) Act, 2015 applied to proceedings before the Board or the court and as noticed above, it would include any court, including the appellate court or the court where the revision petition is pending.

29. In the context of Section 25, the expression "Court" is not restricted to mean a civil court which has the jurisdiction in the matter of "adoption" and "guardianship" in terms of clause (23) of Section 2 of the JJ(CPC) Act, 2015. The definition clause is application unless the context otherwise requires. In case of section 25, the legislature is obviously not referring to a civil court as the section

deals with pending proceedings in respect of a child alleged or found to be in conflict with law, which cannot be proceedings pending before a civil court. since the 2015 Act protects and affirms the application of the JJ(CPC) Act, 2000 to all pending proceedings, we do not read that the legislative intent of the 2015 Act is to the contrary, that is, to apply the JJ(CPC) Act, 2015 to all pending proceedings.

30. Turning attention to section 6 of the General Clauses Act, 1897 which provides the consequence of "repeal" of an enactment; it reads:-

> "**6. Effect of repeal**-where this Act, or any Central Act or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not:
>
> xxxxxxx xxxxxxxxxx xxxxxxxxx
>
> (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repeated:"

31. Consequently, in light of Section 6 of the General Clauses Act read with Section 25 of the JJ(CPC) Act, 2015, an accused cannot be denied his right to be treated as a juvenile when he was less than eighteen years of age at the time of commission of the offence, a right which he acquired and has fructified under the JJ(CPC) Act, 2000 even if the offence was committed prior to enforcement of the JJ(CPC) Act, 2000 on 1.4.2001 in terms of section 25 of the JJ(CPC) Act, 2015, the JJ(CPC) Act, 2000 would continue to apply and govern the proceedings which were pending when the JJ(CPC) Act, 2015 was enforced. In the present case, thus it is not required to examine and decide the question where the JJ(CPC) Act, 2000 or the JJ(CPC) Act, 2015 would apply when the offence was committed before the enactment of the JJ(CPC) Act, 2015 but the charge-sheet was filed after enactment of the JJ(CPC) Act, 2015. The answer would require examination of clause (1) of Article 20 of the Constitution and several other aspects as the JJ(CPC) Act, 2015 provide an entirely different regime in respect of Children in Conflict with law and the procedure to be followed in such cases.

32. The decision of the Apex Court in ***Gaurav Kumar-versus-State of Haryana (2019) 4 SCC 549*** which was relied upon by the learned counsel for the State is of no avail as this decision is on interpretation and application of Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007, for the procedure to be followed in determination of age. The procedure adopted by the learned District and Sessions Judge is not challenged and questioned before us. We would again record that Satya Deo was less than 18 years of age on the date of commission of offence and this remains undisputed and challenged.

33. Satya Deo has under gone incarceration for more than 2 years thus far. In Mumtaz (supra) dealing with the quantum and nature of punishment which should be given to a person who was a juvenile on the date of commission of offence, this Court, while placing reliance upon an earlier decision in ***Jitendra Singh-versus-State of Uttar Pradesh (2013) 11 SCC 193*** had held:

"22. It is thus well settled that in terms of Section 20 of the 2000 Act, in all cases where the accused was above 16 years but below 18 years of age on the date of occurrence, the proceedings pending in the Court would continue and be taken to the logical end subject to an exception that upon finding the juvenile to be guilty the court would not pass an order of sentence against him but the juvenile would be referred to the Board for appropriate orders under the 2000 Act. What kind of order could be passed in matter where claim of juvenility came to be accepted in a situation similar to the present case, was dealt with by this Court in ***Jitendra Sing-versus-State of Uttar Pradesh*** *(Supra) in the following terms:*

"32. A perusal of the "punishments" provided for under the Juvenile Justice Act, 1986 indicate that given the nature of the offence committed by the Appellant, advising or admonishing him is hardly a "punishment" that can be awarded since it is not at all commensurate with the gravity of the crime. Similarly, considering his age of about 40 years, it is completely illusory to expect the appellant to be released on probation of good conduct, to be placed under the care of any parent, guardian or fit person. For the same reason, the appellant cannot be released on probation of good conduct under the care of a fit institution nor can he be sent to a special home under section 10 of the Juvenile Justice Act, 1986 which is intended to be for the rehabilitation and reformation of delinquent juveniles. The only realistic punishment that can possibly be awarded to the appellant on the facts of this case is to require him to pay a fine under clause (e) of Section 21(1) of the Juvenile Justice Act, 1986."

34. Regard being had to the ratio culled out from the decisions referred to above in stating the settled position of law; while upholding the conviction of the accused, we hereby set aside the sentence of imprisonment of life.

At this distance of time and considering his age to be around 40 years and when we too find that he has remained in custody during trial and thereafter till he was released on bail by the order passed in this Appeal, we do not feel it expedient in the interest of justice to remit the matter to the jurisdiction of the Board for passing appropriate order/directions under section 15 of the JJ(CPC) Act, 2000 as that in our considered view would serve no useful purpose in the direction of fulfilling/achieving the objective set forth under the discussed provisions of the said Acts.

35. Before parting, we feel it proper to record our appreciation for the able assistance rendered by Mr. G. N. Parida, learned counsel for the Appellant in placing the positions of law holding the field and for his hard work and endeavour.

36. In the result the Appeal is accordingly allowed in part. The judgment of conviction being confirmed, the order of sentence stands set aside. The bail bonds executed by the Appellant shall stands cancelled.

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2024 (III) ILR-CUT-357

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

JCRLA NO.111 OF 2022

PURNA BHATRA ….Appellant

V.

STATE OF ODISHA ….Respondent

CRIMINAL TRIAL – The appellant was convicted under Section 302 of I.P.C. – The learned Trial Court recorded the conviction basing upon the evidence of P.W. 2 who is the son of deceased – The evidence of P.W.2 and other witnesses clearly show that a land dispute was prevailing between the accused and deceased – It is not the evidence of P.W.2 or other witnesses that the accused had gone carrying the stone or iron rod – How the strike with that stone was made on the frontal part of the body of the deceased is not forthcoming in the evidence – Whether the appellant's prayer for alteration of conviction can be granted? – Held, Yes – The offence would be properly categorized as one punishable U/s. 304-II of I.P.C. (Paras 12-13)

For Appellant : Mr. Debidutta Mohapatra, Amicus Curiae
For Respondent : Mr. P. K. Mohanty, A.S.C.

JUDGMENT Date of Hearing : 22.08.2024 : Date of Judgment : 04.09.2024

BY THE BENCH

The Appellant, namely, Purna Bhatra, by filing this Appeal from inside the jail, has assailed the judgment of conviction and order of sentence dated 26th October, 2021 passed by the learned Sessions Judge, Nabarangpur in C.T. No.12 of 2019 arising out of G.R. Case No.724 of 2018, corresponding to Nabarangpur P.S. Case No.215 of 2018 of the Court of learned Sub-Divisional Judicial Magistrate (S.D.J.M), Nabarangpur.

The above noted Appellant, by the impugned judgment of conviction, has been convicted for commission of offence under section 302 of Indian Penal Code, 1860 (in short, 'the IPC') and has been sentenced to undergo imprisonment for life and pay fine of Rs.5,000/- (Rupees Five Thousand), in default to undergo rigorous imprisonment for 1 (one) month for commission of the said offence.

Prosecution Case :-

2. On 24.10.2018 around 8.00 a.m., when the accused was taking paddy from the field of Sada Bhatra, protest was made from the side of said Sada Bhatra and then the accused assaulted Sada by means of an iron rod and stone. Said Sada, receiving the injuries, fell down on the ground and lost his sense. Thereafter, Sada, being taken to the Hospital, was declared dead by the Medical Officer, who examined him.

A written report to the above effect, being lodged by Bhuban Bhatra (Informant-P.W.2), who happens to be the son of Sada (deceased), namely, Bhuban Bhatra before the Inspector-inCharge (I.I.C.) of Nabarangpur Police Station, he treated the same as FIR (Ext.1) and upon registration of the case, directed the SubInspector (S.I.) of Police (P.W.20) to take up the investigation.

3. In course of investigation, the Investigating Officer (I.OP.W.20) examined the informant (P.W.2) and other witnesses and recorded their statements under section 161 Cr.P.C. He (P.W.20), visiting the spot, prepared the spot map (Ext.12).

From the spot, the I.O. (P.W.20), after having seized sample earth under seizure list (Ext.8), proceeded to District Headquarters Hospital, Nabarangpur, where the dead body of the deceased was lying. There, he (P.W.20) held inquest over the dead body of the deceased and prepared the report to that effect (Ext.2) and then sent the dead body for post mortem examination by issuing necessary requisition. The wearing apparels of the deceased and accused were seized by the I.O. (P.W.20) under seizure lists marked as Exts.6 & 3 respectively. On the same day, i.e., on 24.10.2018, the I.O. (P.W.20) apprehended the accused and it is stated that he, while in police custody, stated to have kept concealed an iron rod and a piece of stone under the ridge of the land of ne Rajmohan Bhatra of Village-Nisnahandi and further told that if he would be taken to that place, he would give recovery of the same. Pursuant to the said statement, which was recorded vide Ext.4, the accused, having led the I.O. (P.W.20) and others to said place, he is said to have given the recovery of the iron rod and piece of stone, which were seized under seizure list (Ext.5). The seized incriminating articles were sent for chemical examination through Court. On completion of the investigation, the I.O. (P.W.20) submitted the Final Form placing this accused to face the Trial for commission of offence under section 302 of the IPC.

4. Learned S.D.J.M., Nabarangpur, having received the Final Form as above, took cognizance of the offence under section 302 of the IPC and after observing the formalities, committed the case to the Court of Sessions for trial. That is how the Trial commenced against the accused by framing the charge for the said offence against the accused.

5. In the Trial, prosecution in total has examined twenty (20) witnesses. As already stated P.W.2, who happens to be the son of the deceased, is the informant and had lodged the FIR (Ext.1) being scribed by P.W.1. P.Ws.3 and 4 are the wife and younger sister of the deceased respectively and the post occurrence witnesses. P.Ws.5, 6, 7, 15 & 17 are the co-villagers of the accused as well as deceased and they too are the post occurrence witnesses. P.W.9 is a witness to the statement of the accused before the I.O. (P.W.20), while in police custody in leading them to the place and giving recovery of the iron rod and stone. The Doctor, who had conducted autopsy over the dead body of the deceased, has been examined as P.W.19 whereas the I.O, at the end, has come to the witness box as P.W.20.

Besides leading the evidence by examining the above witnesses, the prosecution has also proved several documents which have been admitted in evidence and marked Ext.1 to Ext.17. Out of those, the important are the FIR (Ext.1), Inquest Report (Ext.2), confessional statement of the accused (Ext.4), Spot Map (Ext.12) and the Post Mortem Report (Ext.10). The Chemical Examiner's Report which has been admitted in evidence and marked as Ext.17. Some of the incriminating articles having been produced during Trial, those have been marked as Material Objects (M.O.-I to M.O.-VIII) and out of those, that iron rod is (M.O.I) whereas M.O.II is the piece of stone, which are said to have been used in causing the injuries upon the deceased leading to his death.

6. The accused, being called upon, has not tendered any evidence in support of his plea of denial and false implication.

7. Mr. Debidutta Mohapatra, learned Counsel for the Appellant (accused) submitted that the entire case of the prosecution is resting upon the solitary testimony of the son of the deceased, who has been examined as P.W.2. Taking us through the deposition of P.W.2, he contended that the Trial Court, without examining the evidence of P.W.2 in a just and proper manner, has committed the error in accepting the same in holding that the son of the deceased (P.W.2) is a reliable witness and his version to be trustworthy.

It was submitted that P.W.2, being the son of the deceased, his evidence ought to have been strictly scrutinized and when he has given prevaricating statements with regard to the happenings in the incident, the Trial Court is not right in relying upon the version of P.W.2 to fasten the guilt upon the accused. He further submitted that when the evidence of P.W.14 is of no significance so as to establish the nexus between any act of the accused with the injuries received by the deceased, said evidence is of no aid to the prosecution case. He, therefore, submitted that the conviction recorded by the Trial Court basing upon the evidence of P.Ws.2 & 14 and those of other witnesses cannot be sustained.

It was alternatively submitted by the learned Counsel for the Appellant (accused) that even accepting the prosecution case, the Trial Court ought not to have convicted this accused for commission of offence under section 302 of the IPC and instead ought to have held him liable for commission of offence under section 304-II of the IPC.

8. Mr. P. K. Mohanty, learned counsel for the RespondentState while supporting the finding of guilt against the accused, as has been recorded by the Trial Court, submitted that in so far as the role played by this accused and the act done by him in the said incident upon the deceased, the evidence of the son of the deceased (P.W.2) stands rock solid. Inviting our attention to the evidence of P.W.2, first of all, he contended that merely because he is the son of the deceased, since he is a natural witness to the occurrence and no material has been elicited to throw any doubt as regards his presence at the relevant time at the incident, nor when he is said to have given an exaggarated version of the incident, the same is not required to approached with suspicion and as such not liable to be rejected. He, however, submitted that reading the evidence of P.W.2 in its entirety, it would appear that he has remained firm in his version that the accused assaulted the deceased by means of an iron rod and then by a stone for which the deceased lost his sense. He thus submitted that the accused is not coming with any plea that it was the deceased, who was the aggressor and it was either a case of threat to his person or property at the instance of the deceased for which the accused had to respond in that way and when it has been proved from the side of the prosecution that in the said incident, the heart of the deceased was ruptured resulting from blunt trauma over the chest area on account of striking of the stone, the conviction of the accused under section 302 of the IPC is not liable to be interfered with.

9. Keeping in view the submissions made, we have carefully read the impugned judgment passed by the Trial Court. We have also gone through the evidence of the prosecution witnesses i.e. P.W.1 to P.W.20 and have perused the documents admitted in evidence and marked Ext.1 to Ext.17.

10. Before proceeding to address the rival submission as regards the acceptability of the son of the deceased, who has been examined as P.W.2, we feel it appropriate to have a glance at the evidence of the Doctor (P.W.19), who had conducted the post mortem examination over the dead body of the deceased (Sada Bhatra). The external injuries such as abrasion with ecchymosis over middle of the chest of the size of 2" X 1" and abrasion over supra clavicular area of size 1cm X 1cm have been noticed during post mortem examination. On dissection, the Doctor (P.W.19) has noticed the pericardia to have ruptured over upper part and also the rupture of the heart. He has stated that the death of the deceased was on account of rupture of the heart resulting from blunt trauma over the chest wall, which may be on account of striking of the stone upon the chest wall. His positive evidence is that the above injuries have resulted the death of the deceased. There is no challenge to the above from the side of the defence. The I.O. (P.W.20) has noted all these injuries in his report (Ext.2) besides the witnesses, P.W.2 & others, having stated to have notified said external injuries upon the deceased. Thus, we find that the death of Sada Bhatra has been established through evidence to be homicidal.

11. Next as regards the authorship of such injuries, the evidence of the son of the deceased (P.W.2) matters much. He has stated that the incident took place on their paddy field in VillageNishahandi and at that time, he had gone to the field with his father (deceased) to bring paddy. His further evidence is that when the accused arrived there, he, staking his demand over the land, asked them to take the paddy staking his demand over the land. He further states that when they protested, the accused assaulted his father by means of a stone and receiving that blow by means of the stone from the accused, his father lost the sense. However, we do not find the defence to have taken the plea that the land in question had been cultivated by the accused and he had grown the paddy, over there which the deceased and his son (P.W.2) were taking. But, then it appears from the evidence of P.W.2 that when they had gone to bring the paddy from the field, the accused asked them that he would take the paddy as it is his land. During cross-examination, he has, however, stated that the accused was taking the paddy by using "Bhara" made of "Suli Danga" to which the deceased protested. He further states that the accused had shifted six bundles of paddy. So, analyzing the evidence of P.W.2, a doubt arises in mind as to the accused coming and asking the deceased and P.W.2 to take paddy and that part of the evidence of P.W.2, according to us, cannot be safely relied upon. But then we find P.W.2 to have stated that the accused assaulted the deceased by means of a stone. He does not state as to how the deceased assaulted, whether he did so by throwing from distance or directly threshing at the chest of the deceased being closer.

P.W.14, who is a co-villager, has stated that when he with some other villagers arrived at the place, they found the deceased lying with bleeding injuries and the accused standing there holding an iron rod and the accused then fled away from the spot. Despite searching cross-examination, we, however, find the role of the accused in causing the injuries on the chest of the deceased by means of a stone, as has been stated by the son of the deceased (P.W.2), stands unshaken. The said evidence of P.W.2 to some extent receives corroboration from the evidence of P.W.14, who had seen the accused near the deceased at the relevant time when he soonafter arrived at the spot hearing the occurrence.

Thus, with the available evidence on record, we are of the considered view that the prosecution has successfully established its case that the accused in the said incident had assaulted the deceased by means of a stone, which had caused the injuries on his chest area leading to rupture of the heart etc. resulting the death.

12. This, now takes us to address the submission relating to alteration of the conviction. The evidence of P.W.2 and other witnesses clearly show that a land dispute was prevailing between the accused on one hand and the deceased on the other. Although we find the evidence to be not so specific that the dispute was in relation to the land over which the incident took place, yet, as it has been stated by P.W.2, the demand of the accused over the paddy was based on his claim over the said land. It is not the evidence of P.W.2 or other witnesses that the accused had gone carrying the stone with him rather it has been stated by P.W.2 that some stone pieces were lying near the threshing floor. He also does not state that the accused had gone to the place with the iron rod. How the strike with that stone was made on the frontal part of the body of the deceased is not forthcoming in the evidnece.

13. Cumulatively viewing all these circumstances appearing in the entire evidence as above discussed, we are of the view that the offence could be properly categorized as one punishable under section 304-II of the IPC. In that view of the matter, the accused is liable for commission of offence punishable under section 304-II of the IPC. Accordingly, he is to be visited with the sentence commensurate the act done by him in committed the offence as aforesaid.

14. In the result, the Appeal stands allowed in part. The conviction recorded against the accused Purna Bhatra under section 302 of the IPC is altered to one under section 304-II of the IPC. Consequentially, we are of the considered opinion that imposition of the sentence upon the accused to undergo rigorous imprisonment for a period of six (06) years would be just and proper in the interest of justice serving its end.

15. With the above alteration of the judgment of conviction and modification of the sentence dated 26th October, 2021 passed by the learned Sessions Judge, Nabarangpur in C.T. No.12 of 2019, the Appeal stands disposed of.

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2024 (III) ILR-CUT-363

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

W.P.(C) NO. 31638 OF 2022

BIBOL TOPPO & ORS. ….Petitioners

V.

STATE OF ODISHA (REVENUE & DISASTER MANAGEMENT DEPT) & ORS. ….Opp.Parties

(A) RIGHT TO FAIR COMPENSATION AND TRANSPARENCY IN LAND ACQUISITION, REHABILITATION AND RESETTLEMENT ACT, 2013 – Sections 2(2)(b), 41 – As per the Social Impact Assessment Report most of the people from three affected villages did not oppose the acquisition – Whether this fulfils the requirement of consent of 80% of the affected family as required U/s. 2(2)(b) of the Act? – Held, Yes. (Para 22)

(B) RIGHT TO FAIR COMPENSATION AND TRANSPARENCY IN LAND ACQUISITION, REHABILITATION AND RESETTLEMENT ACT, 2013 – Section 24-A – The Opp.Party No. 7 is the holder of mining lease over the concerned land – The Opp.Party is empowered to enter the land on which the lease has been granted and carry out the mining operation – Whether the Opp.Party No. 7 is liable to give compensation to the land owner? – Held, Yes – The Opp.Party No. 7 is duly entitled to get the surface right over the concerned land for having under taken to pay the compensation to the occupier as would be fixed by the State Government, which too owes the legal obligation in that regard. (Paras 16 - 17)

(C) CODE OF CIVIL PROCEDURE, 1908 – Order 1, Rule 8 r/w Section 11(i), 19(i) of Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation & Resettlement Act, 2013 r/w Constitution of India, 1950 – Article 226 – The petitioners have failed to provide any material in support of the fact that they are the land losers – Whether the writ application filed in representative capacity is maintainable? – Held, No – The provisions contained under the Order 1, Rule 8 of the Code have not been compiled with as mandatorily required – So, the petitioners have no *locus standi* to initiate the instant proceeding before this Court by filing the writ application challenging the Acquisition Proceeding. (Paras 10 - 11)

(D) INTERPRETATION OF STATUTES – Doctrine of Compliance – Discussed with reference to case laws. (Para 25)

Case Laws Relied on and Referred to :-

1. (1999) 9 SCC 105 : Ramchander Dunda & Anr. -versus-Union of India.
2. AIR 2016 Orissa 63 : Nutanga Gram Panchayat-versus-State of Orissa.
3. (1995) 2 SCC 402 : State of Tamil Nadu-versus-MPP Kavery Chetty.
4. (2010) 13 SCC 98 : May George -versus- Special Tahasildar & Ors.

For Petitioners : Mr.Rudra Prasad Kar, Sr. Adv.
M/s.Balakrishna Rao, A.K. Minz & S. Dungdung.

For Opp.Parties : Mr.Ashok Parija, Advocate General,
Mr.Nikhil Prata, ASC (O.Ps.1 to 6)
Mr.S.P. Mishra, Sr. Adv., M/s.S.P.Sarangi, P.K. Dash, A.Pattanaik & A. Das (O.P. 7)
Mrs.Pami Rath, Sr. Adv., M/s.J.Mohanty, S.Gumansingh, P.Mohanty (O.Ps.8 & 9).

JUDGMENT Date of Judgment : 06.09.2024

D. DASH, J.

These twelve (12) Petitioners, by filing this writ petition, have prayed to quash the land acquisition proceeding initiated by the State of Odisha, the Opposite Party No.1 in respect of the lands measuring Ac.269.475 in three villages of the District of Sundergarh, which are Kukuda, Lanjiberna and Bihabandha.

2. <u>Case of the Petitioners</u>

A. The Petitioners who are the residents of Villages-Kukuda, Bihabandha and Lanjiberna in the District of Sundergarh (Odisha) claim to have their landed properties in the area, which have been recorded jointly either in the name of their great grandfathers or grandfathers (either maternal or paternal).

The Opposite Party No.7, a Company registered under the Indian Companies Act, 1956, submitted a proposal in Form-A under section 2(1) of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (in short, called as 'the RFCTLAR & R Act') for acquiring land situated in the said revenue villages for carrying out mining activities. The revenue villages, in which the Petitioners claim to be having their lands are Kukuda, Bihabandha coming under Kukuda and Katang Gram Panchayat. The land measuring Ac.236.84 decimals, Ac.27.51 decimals and Ac.09.22 decimals situated in Village-Kukuda and Bihabandha were included within the total area of land sought to be acquired by the Opposite Party No.7-Company and the administrative approval in that regard had been accorded by Government Order dated 23.08.2017.

By letter dated 06.01.2020, the Opposite Party No.4 (Sub-Collector, Sundergarh) asked the Opposite Party No.8 (Sarpanch, Kukuda Gram Panchayat) and Opposite Party No.9 (Sarpanch, Katang Gram Panchayat) to conduct Special Grama Sabha on 26.01.2020 for holding discussion and gathering/opinion/ suggestion on the proposal of the Opposite Party No.7-Company for acquisition of the land for expansion of mining activity of Lanjiberna Limestone and Dolomite Mines.

B. It is stated that proviso (i) of sub-section-2 of section-2 of the RFCTLAR & R Act mandates for obtaining of the consent of 80% (eighty percent) of the affected family for the land sought to be acquired for a Private Company. The Petitioners, in that regard, have pleaded as under:-

> "The Petitioners verily believe that no such prior consent from 80% of the family has been obtained in the case" (Para-7 of the Writ Petition).

> It is stated that sub-rule-4 of rule-21 of the Odisha Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Rules, 2016 (for short, called as the 'ORFCTLAR & R Rules') provides that affected persons shall file their consent in Form-J and the photocopy of the said consent duly countersigned by the Land Acquisition Collector shall be handed over to the affected family. In this regard, the Petitioners have pleaded the following:-
>
> "The Petitioners verily believe that the said provision has been violated in the instant case, as has been revealed from the information supplied under the Right to Information Act, 2005 in respect of at least Lanjiberna Village" (Second Sub-Para of Para-7 of the Writ Petition)"

C. It is stated that in the Special Grama Sabha Meeting of both Kukuda and Katang Gram Panchayat being held on 26.01.2020, the proposal in question stood rejected.

After that, the Opposite Party No.4 (Sub-Collector, Sundergarh) issued one Notification dated 18.03.2021 stating therein that draft Social Impact Assessment Report (for short, 'the SIA Report') prepared by the Opposite Party No.6 (Odisha State Social Impact Assessment Unit of Naba Krushna Choudhury Centre of Development Studies, Bhubaneswar), for the land acquisition is required to be discussed by the villagers belonging to the Gram Panchayat of Kukuda and Katang likely to be affected and the hearing date was fixed under that notification on 16.04.2021. Thereafter, by a separate letter dated 13.04.2021, the Opposite Party No.8 (Sarpanch, Kukuda Gram Panchayat) and Opposite Party No.9 (Sarpanch, Katang Gram Panchayat) have expressed their unwillingness to hold public meeting/hearing on 16.04.2021 due to prevalence of Covid-19 Pandemic as both were also busy and discharging the responsibility, for the time being had also been conferred with Magisterial power. It is stated that no notice for public hearing has been issued by the Opposite Party No.8 (Sarpanch, Kukuda Gram Panchayat) and Opposite Party No.9 (Sarpanch, Katang Gram Panchayat) nor any such public hearing was conducted as contemplated under sub-rule-2 of rule-14 of the ORFCTLAR & R Rules.

D. When the matter stood thus, the Opposite Party No.5 (Land Acquisition Officer, Sundergarh) issued letter dated 24.06.2021 to serve the declaration dated 22.06.2021 issued under sub-section-2 of section 8 of RFCTLAR & R Act on the Opposite Party No.8 (Sarpanch, Kukuda Gram Panchayat) and Opposite party No.9 (Sarpanch, Katang Gram Panchayat), which in its Clause-VI found mention of conducting public hearing in the affected villages, which these Petitioners claim to be untrue.

E. The above declaration under sub-section-2 of section-8 of the RFCTLAR & R Act was followed by preliminary notification dated 06.07.2021 under sub-section-1 of section 11 of the RFCTLAR & R Act, for the acquisition of the land as under:-

VILLAGE	**NAME OF G.P.**	**EXTENT OF LAND**
Kukuda	Kukuda	Ac.232.945
Lanjiberna	Katang	Ac.27.26
Bihabandha	Kukuda	Ac.9.11

By the said notification, objection to the acquisition of the land was called for to be filed within sixty days. It is stated that issuance of such notification is violative of the provisions contained in sub-section-3 of section-41 of the RFCTLAR & R Act since no prior consent had been obtained from Kukuda and Gram Panchayat. It is further stated that there has been violation of the provisions of sub-section-3 of section-8 of the RFCTLAR & R Act in as much as Form-J had not been obtained from the Petitioners nor in respect of at least those concerned with Village-Lanjiberna. It is further stated that issuance of the notification under sub-section-1 of section-11 of the RFCTLAR & R Act is in violation of rule-41 of the ORFCTLARR Rules, which mandate obtaining of consent of concerned Grama Sabha and Gram Panchayat situated in the Scheduled Areas of the State in Form-M prior to the issuance of such notification. So, it is said that there has been patent violation of rule-41 of ORFCTLAR & R Rules. It is next stated that some of the affected villagers along with the Petitioners filed objections to the preliminary notification dated 06.07.2021.

One Expert Committee has prepared an appraisal report on 08.06.2021 concerning said land acquisition. The Petitioners believe that this report has been prepared under section-7 of the RFCTLAR & R Act. They state that the representative of Opposite Party No.7-Company since had attended the Expert Committee Meeting held on 08.06.2021, that vitiates the land acquisition proceeding. Although section-7(2)(b) of the RFCTLAR & R Act requires two representatives belonging to the affected Gram Panchayat to be present in the Expert Committee Meeting; only one representative appears to have been there in the meeting held on 08.06.2021, which is in violation of law.

F. Some of the affected villagers including three out of the present Petitioners filed a writ petition before this Court, which was numbered as W.P.(C) No.25730 of 2021. The said Writ Petition stood disposed of by order dated 30.09.2021 directing the Authorities to pass one reasoned order taking into account the objection filed by affording opportunity of hearing. In pursuance of the said direction passed by this Court in W.P.(C) No.25730 of 2021, the objections were heard on 16.10.2021 and 18.10.2021 for Katang and Kukuda Gram Panchayat respectively. It is stated that when the Petitioners and others filed their written version, although the hearing was conducted by the Opposite Party No.5 (Land Acquisition Collector, Sundergarh), the order ultimately was passed by the Opposite Party No.3 (Collector, Sundergarh). Thus, it is said that the hearing so done is in violation of the directing and the outcome is nonest.

G. Thereafter, three final declarations were issued by the Opposite Party No.3 (Collector & District Magistrate, Sundergarh) on 03.11.2021.

It is stated that except few, most of the affected villagers have not received the compensation offered to them and they have been resisting the acquisition. The Petitioners claim that the land acquisition proceeding in respect of the land situated in Village-Kukuda, Katang and Bihabandha are bad in law and as such cannot be

legally sustained. They state that their lands as well as the lands of similarly situated persons are thus being illegally acquired by the State for the Opposite Party No.7-Company bypassing the statutory procedures; the Petitioners and others are being deprived of their valuable property in exercising their rights over the same.

3.A. The response of the Opposite Party Nos.1 to 5 runs as follows:-

> "On 29.01.1997, one Mining lease was executed by the State Government in favour of Opposite Party No.7 for 2208 acres of land in terms of rule 31 of Mineral Concession Rules, 1960 (in short, 'the M.C. Rules'). On 09.12.2015, the Opposite Party No.7 under Rule-3 of ORFCTLAR & R Rules submitted its proposal in Form-A prescribed in the said rule for the land measuring 236.84 acre in Village-Kukuda, 27.51 acres in Village-Lanjiberna and 09.22 acres in Village-Bihabandha for acquisition under section 2(1) of RFCTLAR & R Act. The State, in adherence to the provision contained in Section-8A of the Mines Minerals Development Regulation Act, 2016 (in short, 'MMDR Act') executed a supplementary lease deed extending the Mining lease of Opposite Party No.7 up to 29.02.2040. The Opposite Party thus is the lease of the said land and the ownership of the minerals underneath the said land rests with the State Government. The lessee pays the royalty to the State for the privilege to win minerals over lands owned by the State Government. The Mining lease and as per the provision of MMDR Act and the Rules made thereunder allows the lessee to pay the occupier of the surface of the lease area, the compensation guided by the RFCTLAR & R Act, which can be seen from the table of relevant provisions of the MMDR act and Rules made thereunder."

3.B The State Government, in the Department of Steel and Mines, on 23.08.2017, as per rule-3 of the ORFCTLAR & R Rules, issued the administrative approval of acquisition of 280.51 acres of land. Thereafter, on 24.02.2020, the State Government issued notification for commencement of consultation and for the Social Impact Assessment (SIA) study by Nabakrushna Choudhury Centre for Development Studies at Bhubaneswar (Opposite Party No.6) for the three villages under Kukuda and Katang Gram Panchayat under section 4(1) and (2) of the RFCTLAR & R Act. The process for obtaining consent by way of Form-J was initiated during the SIA study. Rule 21(1) of the ORFCTLAR & R Rules requires the Collector to initiate the process of obtaining consent of affected families. The design of the RFCTLAR & R Act and Rules made thereunder has left this process open-ended and continuing. The reasons is that it is impossible for the State to ascertain all project affected families at the threshold of the acquisition when the entire acquisition process is time bound. On 18.03.2021, the State Government, under section 5 of the RFCTLAR & R Act issued the notice for conducting public hearing on 16.04.2021 for discussion of the draft SIA report. On 16.04.2021, the State Government, having ensured that a public hearing was held at the villages in the affected area to ascertain the views of the affected families; those views were recorded and being included in the report have been duly addressed. Thereafter on 03.06.2021, the State Government published SIA study report. The independent Multi-Disciplinary Expert Group then again scrutinized the report as per section 7(5) of the RFCTLAR & R Act on 08.06.2021 and recommended that the said land be acquired. As per section 8(2) of the RFCTLAR & R Act, the State Government examined the report of the Collector and that of the Expert Group on SIA Report and

thereafter on 22.06.2011, recommended for acquisition of the land by way of declaration under section 8(2) of the RFCTLAR & R Act. On 06.07.2021, under section 11(1) of the RFCTLAR & R Act, the Collector published the preliminary notification stating inter alia the details of the land, name of the Requiring Body, Summary of SIA Report. Objections were called for from tenants and their legal heirs.

3.C. When the matter stood thus, on 11.08.2021, some Petitioners filed writ petition, which were numbered as W.P.(C) Nos.23979 & 25730 of 2021. The prayers therein were for quashing the followings:-

> "i. the final SIA Report;
> ii. declaration under section 8(2) of the RFCTLAR & R Act, 2013;
> iii. the Preliminary Notification under section 11; and
> iv. the Gram Sabha meeting on 16.04.20212."

It would be pertinent to mention here that two out of the present Petitioners were Petitioner Nos.2 & 9 in W.P.(C) No.25730 of 2021 whereas the present Petitioner Nos.1, 4, 8 and 10 were the Petitioners in W.P.(C) No.23979 of 2021. The Petitioner Nos.3, 5, 6 & 7 were then not in picture.

By orders dated 27.09.2021 and 30.09.2021, this Court, without accepting the prayers, disposed of the Writ Petitions granting liberty to the Petitioners only to file objections under section 15(1) of the RFCTLAR & R Act before the Appropriate Authority in accordance with law with the observation that in that event the Appropriate Authority would dispose of the said objections with a reasoned order.

On 05.10.2021, the Petitioners raised objections before the Collector, Sundergarh under section 15(1) of the RFCTLAR & R Act. Receiving the said objections, on 16.10.2021 and 18.10.2021, the Collector held the hearing where some of the Petitioners appeared in person. After hearing the objections, the Collector on 22.10.2021, submitted a detailed and reasoned report to the State Government addressing the contentions of the Petitioners. The State Government, after considering the report, on 03.11.2021, issued a declaration for acquisition of the said land measuring 269.475 acres of land. Pursuant to the same, on 18.11.2021, the Collector published the notice stating that the Government intends to take possession of the land indicating therein the claims for compensation and rehabilitation and resettlement of all the persons, and those having interest over such land may further advance before him. The Collector then inquired into the objections received from the interested persons under section 21 of the RFCTLAR & R Act as regards the measurement and market value of the land and provided the opportunity of hearing to them. As none appeared, the Collector passed the award on 23.12.2021 and 31.12.2021 computing the total compensation payable for said acquisition at Rs.13,41,86,175/-

4. The case of the Opposite Party No.7 is that the contentions of the Petitioners in seeking the relief, as noted above, are baseless, misplaced and without any cogent, legal or logical reasoning.

It is stated that the Petitioners have no locus standi nor are authorized to approach this Court. The rights of the Opposite Party No.7 are crystalized under the Mines and Minerals (Development and Regulation Act (for short, 'the MMDR Act'). The provisions in the RFCTLAR & R Act have been substantially complied with. The SIA report captures all the relevant facts and circumstances, which negate the claim of the Petitioners.

5.(A) Mr.R.P.Kar, learned Senior Counsel for the Petitioners centering round the violation of the statutory provision of the RFCTLAR & R Act and Rules made thereunder, submitted that when the land acquisition proposal had been rejected by the Gram Sabha, Kukuda and Katang Gram Panchayat as would be evident from Annexurs-7 & 8, it was not fair and proper on the part of the State to go ahead with the said land acquisition and issue the preliminary and final notification for the purpose. In this connection, he invited the attention to paragraphs-9 & 10 of the Counter Affidavit filed by the Opposite Party No.2.

(B) He next submitted that the provision contained in section 41(3) of the RFCTLAR & R Act read with Rule 41 of ORFCTLAR & R Rules, which mandate prior consent of concerned Gram Sabha or Gram Panchayat in Form-M before publication of the preliminary notification under section 11(1) of the RFCTLAR & R Act have been violated. It was further submitted that when as per section 2(2)(b) proviso (i) read with section 8(3)of the RFCTLAR & R Act requires for obtaining prior consent of at least eight (80) percent of the affected families in Form-J for the lands sought to be acquired for a Private Company and the administrative approval of acquisition was required to be given subject to obtaining said prior consent, that is wanting here in the given case. He contended that there was no public hearing on the draft SIA report on 16.04.2021, in compliance of section 5 of RFCTLAR & R Act. He also questioned the composition of the Independent Multi Disciplinary Group to be in violation of the provision contained in section 7(2)(b) of the RFCTLAR & R Act. In view of the above violation of the statutory provisions contained in the Act and the Rules made thereunder, he urged that the prayers advanced in the writ Petition are to be allowed.

6. Mrs.Pami Rath, learned Senior Counsel for the Opposite parties 8 & 9 reiterated the above submissions placed from the side of the Petitioners, which run at par with the affidavit filed by them.

7.(A) Mr.Ashok Parija, learned Advocate General for the Opposite Parties 1 to 5 submitted that the Petitioners have no locus standi to file the writ petition with the prayer as advanced therein. Besides raising the technical point as regards the defect in the affidavit of the Petitioner No.1 without further indicating that he has been so authorized by other Petitioners and land losers as the ground to dismiss the writ petition, he contended that the Petitioners, having not shown that they are the land owners in respect of the acquisition proceeding in three villages, the writ petition at their instance is liable to be dismissed for want of locus. In this case, it is stated that when the affidavit of the Petitioner No.1 is not in consonance with Rule-3 of

Chapter-VI of Part-II of the Rules of High Court of Orissa, 1948 and as the said affidavit does not indicate that the Petitioner No.1 had also been authorized by other Petitioners and the land losers in the said acquisition in filing the writ petition as also when it is not stated that the approach of the Petitioners was to serve the common interest of the land owners, the writ petition at the instance of these Petitioners was submitted to be only with the object to frustrate the approach in furtherance of private designs and serve the personal interests of the Petitioners.

(B) He further submitted that the State's action of land acquisition is an exercise of the said right to eminent domain and the process of acquisition only commences upon publication of the primary notification under section 11 of the RFCTLAR & R Act and any procedural defect in preparing SIA report would not vitiate acquisition proceeding. He contended that the State Government has substantially complied with the provision of RFCTLAR & R Act and the ORFCTLAR & R Rules. It was next submitted that the object behind preparation of the SIA as required to be carried out under section 4 to 10 of the RFCTLAR & R Act is to assess, the proportionality of the social impact to be caused by the proposed acquisition to assess if any lesser disruptive alternatives are available and to recommend ameliorative measures for addressing the social impact. So, once the SIA report is prepared and apprised by the Expert Committee and examined by the State Government, the acquisition commences, which in the present case, has been followed and thereafter when the notification under section 11 of the RFCTLAR & R Act has been published, the first step in the process of acquisition has commenced. He submitted that it is not that an SIA report would result in any acquisition notification under section 11 of the RFCTLAR & R Act, the purpose of said section is to notify the persons in the area of acquisition, inform them about the SIA report and call for their objection to the proposed acquisition when section 15 of the RFCTLAR & R Act reads that any person with interest in land is at full liberty to raise objections regarding the finding of the SIA report and thereafter, the Government, hearing the objections, surveying would determine the area proposed to be acquired in preparing the Rehabilitation and Resettlement Scheme and it is only after the conclusion of all the above, the Collector publishes the public notice under section 21 of the RFCTLAR & R Act stating that the Government intents to take possession of the land and that claims to compensation and Rehabilitation Resettlement for all having interests in such land may be made to him. He, therefore, submitted that keeping the above in the backdrop, the challenge made to the land acquisition proceeding in the instant writ petition has to be appreciated.

(C) He then submitted that the prior consent of at least 80% of the affected families is only to gather views of the land losers and their participation in the finalization of the report, which do not lead to the conclusion and mean that if consent of 80% of the affected families is not obtained, the land acquisition proceeding would be illegal when here in the given case the fact remains that the SIA study takes into account the social impact of the project; its purpose is served and it cannot be challenged on technical grounds such as the requirement of consent of 80% of the affected families.

8.(A) Mr.S.P. Mishra, learned Senior Counsel for the Opposite Party No.7 submitted that the Petitioners have no locus standi or authorization to file this writ petition. He submitted that the Petitioners have failed to provide any material in support of the fact that they are the land losers, their names being mentioned in the notification issued under section 11(1) or 19(1) of the RFCTLAR & R Act. He further submitted that such a writ petition filed in representative capacity is not maintainable as no leave has been obtained under Order-1, Rule-8 of the Code of Civil Procedure, 1908 and no publication in this behalf was affected.

(B) He next contended that the rights of the Opposite Party No.1 are crystalized under the MMDR Act. He submitted that the history of the present land under acquisition traces back to the pre-independence era of the year 1916. The current mining lease which includes the land acquisition area was part of a huge mining block initially granted to M/s.Bisra Stone and Lime Company Ltd. through a mining lease with Raja Bhawani Sankar Dev, Ruler of Banki Estate for 6400 acres from 13.10.2016 to 12.10.1946.

The Opposite Party No.7 established the Cement unit at Rajgangpur to supply Cement for construction of Hirakud Dam in 1950. So, the State Government furnished/subleased the same to Opposite Party No.7 with effect from 02.05.1951 in order to enable the Opposite Party No.7 to fulfil the requirement by supplying limestone for the cement plant. Subsequent thereto, a directly mining lease was granted in favour of Opposite Party No.7 over an area of 893.55 hectares with effect from 01.03.1990 to 01.03.2010, for a period twenty years. The mining lease was executed on 29.01.1997. Thereafter, on 14.01.2009 on an application being submitted by the Opposite Party No.7 for renewal of the original mining lease, the Opposite Party No.7 continued with the mining operation as permitted under the erstwhile under rule 24-A (6) of the M.C. Rules read with section 8 of the MMDR Act. In view of amendment of MMDR Act, 1947 by introduction of section 8-A, vide Mines and Minerals (Development and Regulation) Amendment Act, 2015, the validity period of the lease stood extended to 29.02.1940 over the originally granted area of 893.55 hectares. Supplementary lease deed has been executed on 15.07.2016 and thereafter on 15.12.2017 an amended lease deed was executed by revising the mining lease area 873.057 hectares with effect from 17.10.2011 after accepting the part surrender proposal of Opposite Party No.7 over an area of 20.493 hectares. So, currently the Opposite Party no.7 as the lessee has the surface right and operation over 335.96 hectares out of to 873.057 hectares of land. He further submitted that the rights of Opposite Party No.7 for mining operation over the entire mining lease area under the amended lease deed stand crystalized under section 24-A(1) of the MMDR Act read with rule-52 of the Mineral (Other than Atomic and Hydro Carbon Energy Minerals) Concession Rules, 2016, which is in pari materia with the rule-72 of the erstwhile MCR Rules, 1960. It was submitted that holder of the mining lease thus is empowered to enter upon the land on which lease has been granted and carry out the mining operation. The holder of the mining lease is, however, obliged to compensate the land owner for any loss or damage that would be so caused by the

said operation. As per the original mining lease deed, the rights and powers of Opposite Party No.7 have been clearly stated. So, the purpose of the present land acquisition has to be understood that it was in the context of only to secure surface right over the land for which mining lease had already been granted in favour of Opposite Party No.7. He thus submitted that the present land acquisition proceeding is complimentary in nature towards the grant of said mining lease and it cannot be equated with any other project. He, therefore, submitted that in that view of the matter, the provisions of RFCTLAR & R Act cannot be read/construed to defeat or run in the negating the rights under the very mining lease which was granted prior to the said Act coming into force. He, therefore, submitted that the provisions of the RFCTLAR & R Act are applicable to determine the quantum of compensation when as per the original mining lease deed, the Opposite Party No.7 is duly entitled to get the surface right over the concerned land having obligation to pay the compensation to the occupiers as would be fixed by the State Government.

(C) He next submitted that the provisions of RFCTLAR & R Act do not apply to thirteen (13) enactments mentioned in Schedule-IV of the said Act. However, keeping in view for the interest of the land owner's, the Central Government vide Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement (Removal of Difficulties) Order, 2015 has extended the beneficial advantage relating to the determination of compensation, Rehabilitation and Resettlement under the RFCTLAR & R Act even for the land acquisition proceeding under the said thirteen (13) enactments. So, it was submitted that the similar principle is applicable in the present case wherein for determining compensation payable to the land owner, the provisions of that RFCTLAR & R Act shall prevail over MMDR Act as being more beneficial.

(D) Under Rule 52 of the MCR, 2016, the land owners are entitled to receive only annual compensation based on (1) in case of agricultural land; the average annual net income from cultivation of similar land and (2) in case of non-agricultural land average annual let in value of similar land for previous three years. Provision of section 28 of the RFCTLAR & R Act makes it abundantly clear that several factors are taken into consideration by the Collector while determining the compensation. Further under section 30 of the RFCTLAR & R Act apart from total compensation, the Collector also imposes a solatium amount equivalent to 100% of the compensation amount.

Accordingly, it was submitted that the Opposite Party No.7 has already deposited the compensation amount determined under the RFCTLAR & R Act. Therefore, the interest of the land owners have been duly taken care of in the best possible manner, which is the sole objective of the said RFCTLAR & R Act. He, therefore, submitted that the challenges made by the Petitioners in this writ petition to the very land acquisition proceeding are wholly untenable.

(E) It was then submitted that the provisions of RFCTLAR & R Act have been substantially complied with and the allegations as to violation of section 22-B read

with section 83 of the RFCTLAR & R Act have no leg to stand as here, the State Government acquires the land under section 2(1) of the RFCTLAR & R Act and for that there is no requirement to obtain prior consent from 80% (eighty percent) affected family. He further submitted that the Opposite Party No.7 submitted this application in Form-A under Rule-3 of ORFCTLAR & R Rules. Therefore, obtaining consent from the 80% (eighty percent) of the affected family under section 22-B of the RFCTLAR & R Act is not the legal mandate since here in the given case, the land is always going to be held and controlled by the State Government under section 2(1)(b)(ii) of the Act and only the surface right is going to be granted to the Opposite Party No.7 that too, for a particular period to fructify and effectuate the mining lease already granted in favour of the lessee and to fulfil the legal obligation of the State in that regard. He further submitted that the Government in the Department of Steel and Mines in its letter dated 23.08.2017 issued the administrative approval for acquisition of land of 280.51 acres in village Kukuda, Bihabandha and Lanjiberna subject to the condition that the lands so acquired shall be leased out to Opposite Party No.7 confining to the period as to the duration of the validity of the mining lease after which it shall revert to the State Government. He submitted that the section is a misquoting in the said letter is thus of no significance and that cannot be taken to govern/create or affect the rights of the parties.

(F) Without prejudice to the above contentions, it was submitted that during SIA study, a total of 442 affected houses were identified by the Opposite Party No.6 and as on 22.01.2024, 482 affected persons have given their consent for the land acquisition as can be seen from the Counter Affidavit filed on behalf of the Opposite Party Nos.2 to 5. He submitted that the argument from the side of the Petitioner that the exercise of taking consent in Form-J must have been completed before the issuance of notification under section 8(1) of the RFCTLAR & R Act is erroneous and dehors the scheme of the Act and Rules made thereunder. According to him, section 11(5) of the RFCTLAR & R Act read with rule-20 of the RFCTLAR & R Rules clearly state that after the issuance of preliminary notification under section 11(1), the said notification will be shared with the concerned Tahasildar for updating the land record and therefore, without updating the land record, the effective families can never be identified and the exercise of obtaining consent cannot be completed.

(G) Coming to the alleged violation of section 5 of the Act, it was contended that the allegations made are contrary to the SIA report and, therefore, it being a disputed question of fact cannot be adjudicated in this writ petition. Replying the alleged violation of section 7 of the RFCTLAR & R Act, it was submitted that there is no prohibition under the RFCTLAR & R Act for the representative of Opposite Party No.7 to attend the said meeting and when section 7(2)(d) of the Act requires that the Expert Committee shall consists of Technical Expert relating to the project, it was very much necessary for a representative of Opposite Party No.7 to be present in the said meeting to provide explanation and technical expertise in relation to the mining project. That apart the District Level Independent Multi-Disciplinary Expert

Meeting was attended by the Sarpanch of Katang Gram Panchayat-Opposite Party No.9, Naib Sarpanch of Kukuda Gram Panchayat and they then had not raised any objection/objections during the said meeting.

(H) Next coming to the alleged violation of hearing under section 15 of the RFCTLAR & R Act, it was submitted that the objections were heard by the Collector on 15.10.2021 for Lanjiberna village and on 18.10.2021 for Bihabandha and Kukuda village and the report has been prepared under the signature of the Collector, which carries a presumption as to the correctness. Therefore, it was argued that the contentions of the Petitioners are misplaced and nothing but an attempt to mislead.

He then invited our attention to the relevant pages of the SIA Report which gives the picture as under:-

> "that no alternative site is considerable;
>
> that as none of the affected families are displaced, the question of rehabilitation and resettlement plan does not arise;
>
> that the amount of private land being acquired for the project being marginal, such loss of land would not affect the project affected family;
>
> that no public and community properties are being acquired so as to affect the community way of life;
>
> that the land acquisition is rational step in the State;
>
> that no person is willing to lose any residential house for the project; and that most of the people from three affected villages had no opposition to give their lands to Opposite Party No.7 in lieu of proper compensation along with other facilities including employment opportunity with the Opposite Party No.7-Company and the objection was from some of PESA Activists present in each village."
>
> With all these above contentions, he submitted that the writ petition is liable to be dismissed."

9. Keeping in view the submissions made, we have carefully read the averments taken in the writ petition as also the counter affidavits, the rejoinders. We have also perused all the documents annexed thereto. The written notes of submission filed by the parties have been gone through.

10. It be stated first that indisputably, the present Land Acquisition Proceedings have been undertaken by the State Government in order to grant Surface Rights to the Opposite Party No.7 over which the Opposite Party No.7 has the lease for mining and as such the right thereunder and flowing therefrom to win the minerals underneath by extracting the same and to deal with the minerals from the said land. The Opposite Party No.7 already has a mining lease over 873.057 Ha of land and the land involved under the acquisition proceeding are situated within the said leased out area. The current mining lease which includes the current areas of land under acquisition was part of a huge mining block initially granted to M/s. Bisra Stone and Lime Company Limited under a mining lease with Raja Bhabani Shankar Deo, the then Ruler of Gangpur State for 6400 acre from 13.10.1916 to 12.10.1946. The

Opposite Party No.7 in the year 1950 established a Cement unit at Rajgangpur for supply of Cement for construction of Hirakud Dam. Therefore, the State Government subleased the same to the Opposite Party No.7 with effect from 02.05.1951 so as to enable the Opposite Party No.7 to fulfill the requirement of obtaining the lime stone for its Cement Plant for onward production of Cement and supply for construction of Hirakud Dam. Subsequent thereto, a directly mining lease was granted to Opposite Party No.7 over an area of 893.55 Ha with effect from 01.03.1990 having the life till 01.03.2010, for a period of 20 years. That mining lease was executed on 29.01.1997. The Opposite Party No.7 thereafter on 14.01.2009 applied for renewal of original mining lease and continued to so carry out the mining operation as permitted under the erstwhile rule 24-A(6) of the M.C. Rules read with section 8 of the MMDR Act. In view of section 8-A of the MMDR Act, which came to be introduced by the Amendment Act, 2015, the validity of the period of lease stood extended till 29.02.2040 over the originally granted area of 893.55 Ha. It was so done by a Supplementary lease deed dated 15.07.2016 and subsequent thereto, upon acceptance of the part surrender proposal of Opposite Party No.7 over 20.493 Ha, an amended lease deed was executed for revising the mining lease area to 873.057 Ha with effect from 17.10.2011. The Opposite Party No.7 thus is having the mining lease over the land of 873.057 Ha, has the right to win minerals from the leased area and as such to enforce the lease hold rights and so is entitled to obtain surface rights for carrying out the mining operation over 335.96 Ha of land. The instant land acquisition proceedings have been under- taken by the State to obtain surface right over a part of the remaining mining lease area of 269.475 Ha for allowing/ensuring the Opposite Party No.7 to enforce its right accruing under the mining lease deed executed in his favour, which is in force till 29.02.2040 unless otherwise determined in accordance with law.

11. All these above being the background facts for the initiation of the land acquisition proceeding, the challenge from the side of the Opposite Party No.2 to 5 as well as the Opposite Party No.7 as to the locus standi and authorization of the Petitioner No.1 to approach this Court in filing the writ petition stands first for being addressed.

The case of the Petitioners is that they are related to the recorded tenants whose names find mention in the Record of Right which have been furnished under Annexure-1 (series) of the writ petition. It is seen that all the Petitioners save and except the averment taken in that regard, despite the challenge on that score, have not furnished any other material to support their claim as regards their relationship with the recorded tenants. Although the writ petition appears to have been filed in representative capacity, yet the provisions contained under the Order-1 Rule-8 of the Code of Civil Procedure, 1908 (for short, 'the Code') have also not been complied with as mandatorily required.

In case of ***Ramchander Dunda and another –versus-Union of India; (1999) 9 SCC 105,*** it has been held that a writ petition filed in representative capacity is not maintainable where no application for leave under Order-1 Rule-8 of the Code of Civil Procedure, 1908 has been filed and obtained and no publication in this behalf was effected.

It has again been held in case of ***Nutanga Gram Panchayat-versus-State of Orissa; AIR 2016 Orissa 63*** that a writ petition is not maintainable in representative capacity in the absence of any authorization. In the present instant case, the Petitioners have not obtained the leave of this Court under Order-1 Rule-8 of the Code nor any publication in that regard has been issued.

It is however seen that the name of the Petitioner No.6 has been mentioned as a recorded tenant under the said Record of Right under the Annexure-29 of the rejoinder filed by the Petitioners to the counter affidavit filed by the Opposite Party No.2 to 5. Perusal of that affidavit then reveals that the same has not been sworn by the Petitioner No.6 but by Petitioner No.1 and that too without any proof as to the authorization from any other Petitioner, more importantly, the Petitioner No.6. In view of all what have been said above, we find force with the submission of the Opposite Party Nos.1 to 5 and 7 that these Petitioners have no locus standi to initiate the instant proceeding before this Court by filing the writ petition challenging the Acquistion Proceeding.

12. Next coming to the merit concerning the challenges made by the Petitioner to the initiation of the Land Acquisition Proceedings, the contentions raised according to us would stand for appreciation so as to be duly addressed only in the backdrop of the background facts as stated in the foregoing paragraphs.

The process of acquisition of land commences only once the State Government publishes the preliminary notification in the Official Gazette. Under the old regime, when Land Acquisition Act, 1894 (for short, 'the LA Act) was in place, it was by way of a notification under section 4 of the said Act. The RFCTLAR & R Act was enacted in the year 2013 which came into force on 01.01.2014 in replacing the LA Act. The legislative purpose in coming out with such replacement of the statute, appears to be loud and clear that it was with a view to make the acquisition process consultative and at the same time to provide guarantee to the land losers/owners who are ultimately going to lose their property for ever, in receiving fair and equitable compensation by taking into account all the surrounding economic and social factors.

13. The object of RFCTLAR & R Act at this stage need be placed for proper appreciation.

The same reads as under:-

> *"An Act to ensure, in consultation with institutions of local self-government and Gram Sabhas established under the Constitution, a humane, participative, informed and transparent process for land acquisition for industrialization, development of essential infrastructural facilities and urbanization with the least disturbance to the owners of the land and other affected families and provide just and fair compensation to the affected families whose land has been acquired or proposed to be acquired or are affected by such acquisition and make adequate provisions for such affected persons for their rehabilitation and resettlement and for ensuring that the cumulative outcome of compulsory acquisition should be that affected persons become partners in development leading to an improvement in their post acquisition social and economic status and for matters connected therewith or incidental thereto."*

14. The process of acquisition of land commences upon publication of a preliminary notification under section-11 of RFCTLAR & R Act. Chapter-II of the RFCTLAR & R Act deals with Social Impact Assessment (SIA) and Chapter-III on Food Security prior to publication of preliminary notification. Thus SIA report is required to be prepared prior to the commencement of the acquisition. As provided in section 4 of the RFCTLAR & R Act, the preparation of social impact study must assess *if the proposed acquisition serves public purpose and whether the absent of land proposed for acquisition is the absolute bare minimum exchange needed for the project and whether acquisition at an alternative place has been considered and found not feasible.(Emphasis Supplied).*

The SIA report must weigh the cost of addressing the Social Impact of the project with the benefits thereunder. What have been stated in sub section 5 of section 4 of the RFCTLAR & R Act being instructive of the purport of SIA study, the same is therefore extracted herein below.

> *"while undertaking a Social Impact Assessment study under sub-section (1), the appropriate Government shall, amongst other things, take into consideration the impact that the project is likely to have on various component such as livelihood of affected families, public and community properties, assets and infrastructure particularly roads, public transport, drainage, sanitation, sources of drinking water, sources of water for cattle, community ponds, grazing land, plantations, public utilizes such as post offices, fair price shops, food storage godowns, electricity supply, health care facilities, schools and educational or training facilities, anganwadis, children parks, places of worship, land for traditional tribal institutions and burial and cremation grounds."*

15. Thus it appears that the very object of social impact assessment carried out under section 4 to section 10 of the RFCTLAR & R Act is to assess the proportionality of the social impact caused by a proposed acquisition, to assess if any lesser destructive alternatives are available and to recommend ameliorative measures for addressing said social impact. Once the SIA report is prepared and apprised by an Expert Committee and examined by the appropriate Government, the acquisition commences. The appropriate Government only after having examined, apprised and approved the SIA report, publishes the preliminary notification under section 11 of the RFCTLAR & R Act.

The notification is published only when *it appears to the appropriate Government that the land in any area is required or likely to be required for any public purpose. So the SIA report will result in an acquisition notification under section 11 of the RFCTLAR & R Act. Then the purpose of the notification is to notify the persons in the area of acquisition so as to inform them about the SIA report and call for their objection to the proposed acquisition. (Emphasis Supplied)*

Under section 15 of the RFCTLAR & R Act, any person with interest in the land is at liberty to raise objection regarding the finding of the SIA report. As per the scheme of the RFCTLAR & R Act, the Government has to hear the objection/s received from the persons interested in the acquisition, survey and determine the area proposed to be acquired as also to prepare the Rehabilitation and Resettlement

Scheme. It is only after the conclusion of all these above, the Collector publishes the public notice under section 21 of the RFCTLAR & R Act that *the Government intends to take possession of the land and that claims to compensation and rehabilitation and resettlement for all interest in such lands may be made to him. In the touch stone of the above context, now the challenges made by the Petitioners to the acquisition proceeding are required to be appreciated.*

16. It would be apposite at this juncture even at the risk of repetition to take note that the rights of the Opposite Party No.7 for mining operation over the entire mining lease area under the amendment lease Deed stand crystallized under section 27-A (1) of the MMDR Act read with Rule-52 of the Mineral (other than Atomic and Hydro Carbon Energy Mineral) Concession Rules, 2016 in pari materia with the Rule-72 of the erstwhile MC Rules.

At this juncture, it would be apt to refer to the decision in case of ***State of Tamil Nadu-versus-MPP Kavery Chetty; (1995) 2 SCC 402*** wherein the Hon'ble Apex Court has held that as per section 24-A of the MMDR Act, the holder of a mining lease is empowered to enter the land on which the lease has been granted and carry out the mining operation. He is however obliged to compensate the land owner for any loss or damage, that the operations as would be so carried out may cause.

Adverting to the original mining lease deed in favour of Opposite Party No.7, it reveals that the following rights and powers have been conferred upon in relation to the mining area.

> "i. Opposite Party No.7 has the liberty and power at all times to enter upon the said lands and to search for mine, bore, dig, drill for, win, work, dress, process, convert, carry away and dispose of the said mineral/minerals.
>
> Opposite Party No.7 shall hold and enjoy the rights and premises demised for and during the term, without any unlawful interruption from or by the State Government, or any person rightfully claiming under it.
>
> i. In the event, a surface right owner refuses to give his consent to Opposite Party No.7 for the purposes of mining then the amount of compensation offered by the Opposite Party No.7 is required to be deposited with State Government and upon such deposit Opposite Party No.7 is allowed to enter upon the mining area for the purpose of carrying out mining operations. It is pertinent to note here that State Government in assessing the amount of such compensation would be governed by the principles of Land Acquisition Act."

17. As already stated, thus the rights of the Opposite Party No.7 having been crystallized under the MMDR Act, the purpose of the present land acquisition proceeding are only to grant and secure surface rights over the land for which mining lease has already been granted in favour of Opposite Party No.7. So the land acquisition proceedings at hand are complementary in nature to finally effectuate the grant of said mining lease which had been granted prior to the coming into force of the RFCTLAR & R Act. Thus in our view, the provisions of RFCTLAR & R Act has accordingly to be read and construed so as not to defeat the very grant of mining lease conferring the rights upon the Opposite Party No.7 (lessee) prior to the coming

into force of RFCTLAR & R Act, keeping in view the huge legal ramifications. In accordance with the original mining lease deed, the Opposite Party No.7 is duly entitled to get the surface right over the concerned land for having under taken to pay the compensation to the occupiers as would be fixed by the State Government, which too owes the legal obligation in that regard.

The provisions of RFCTLAR & R Act when do not apply to the 13 (thirteen) enactments enlisted in Schedule-IV of the Act, it is however in the interest of land owners, the Central Government by an Order i.e. RFCTLAR & R Act (Removal of Difficulty Order, 2015) has extended the ***beneficial advantages relating to determination of Compensation, Rehabilitation and Resettlement under the RFCTLAR & R Act even for the Land Acquisition Proceedings under those 13 (thirteen) enactments.*** The purpose behind the extension is quite evident as per those enactments and the objective is loud and clear that when a land owner is being deprived of using his land; notwithstanding the purpose of acquisition, there should not be any differential/inequal treatment in the matter of payment of Compensation, Rehabilitation and Resettlement. Therefore, similar principles would be applicable in the present case wherein for determining the Compensation payable to the land owners, the provisions of RFCTLAR & R Act shall and have to prevail over the MMDR Act, being more beneficial. Since when under Rule-52 of the Mineral Concession Rules, 2015, the land owners are entitled to receive only annual compensation based on:-

> "(i) In case of agricultural land; Average annual net income from cultivation of similar land for previous three years; or
>
> (i) In case of non-agricultural land average annual letting value of similar land for previous three years."

as provided under section 28 of the RFCTLAR & R Act, several factors are taken into consideration by the Collector while determining the award; And over and above the same as mandated under section 30 of the RFCTLAR & R Act, apart from total compensation Solatium would be imposed equivalent to the 100% of the compensation amount as determined for being paid to the land looser.

18. The State Government in the present case, in the facts and circumstances as narrated above, is found to be acquiring the said land for its own use, hold and control. The land acquisition is one under section 2(1)(b)(iii) of the RFCTLAR & R Act. Thus, in the given case, the requirement to obtain prior consent from the affected family does not stand as the legal need. The State Government being the owner of the minerals under the surface is acquiring the land to obtain surface rights and grant the same to the lessee here the Opposite Party No.7, for carrying out the extraction of the minerals of its own in fulfilling its legal obligations undertaken as per the mining lease deed. The Opposite Party No.7 is, therefore, only becoming a temporary holder of the surface right so as to win/extract minerals in terms of the mining lease deed, which is valid up to 29.02.2040 and is legally obliged thereunder to pay royalty, tax, cess etc. to the State for said privilege to win over the minerals under the land whereas the paramount ownership would rest with the State. The

rights of the lessee are subject to the provisions of MMDR Act and the Rules made thereunder. The lease deed does not grant unlimited right, absolute title and possession in perpetuity to the lessee over the said land. After expiry/ termination/ suspension/ lapse of the mining lease standing in favour of the Opposite Party No.7, the State will resume possession of the said land and said land shall be subject to the action as envisaged under section 8(A) of the MMDR Act read with the Rules made thereunder.

By the instant acquisition of the lands, the State is being clothed with the right, title, interest of the said land involved in acquisition and it is not being so clothed or conferred upon the Private Party/Company, here the Opposite Party No.7. Therefore, in the instant case, the mandatory requirement as for the acquisition of land for Private Companies requiring prior consent of at least 80% (eighty percent) of the affected family as provided in section 2(2)(b) of the RFCTLAR & R Act does not arise.

19. Be that as it may, the Government in the Department of Steel and Mining vide letter dated 23.08.2007 has issued the administrative approval for land acquisition of total 280.51 acres of land in village Kukuda, Lanjiberna and Bihabandha subject to the condition that the land so acquired shall be leased out to the Opposite Party No.7 only for the duration till the validity of the mining lease after which it shall revert to the State Government. No doubt, the State Government in its letter has mentioned that such land shall be acquired under section 2(2)(b) of the RFCTLAR & R Act, but on admitted factual background and in the backdrop of the initiation of the process for acquisition of the land after submission of application in Form-A under rule 3 of the ORFCTLAR & R Rules, 2015 that nomenclature clearly appears to be nothing but misquoting and thus cannot stand to guide all such actions as conclusive when the intention is very much clear from what have been aforestated.

The instant acquisition proceeding being referable to section 2(1) of the RFCTLAR & R Act, the nomenclature as under section 2(2)(b) of the Act as indicated in the letter, which appears to be a misquoting would neither create nor affect the rights of the parties and all others, having the interest. That apart, the limited nature of right of Opposite Party No.7, who is the lessee over the land covered under the mining lease and the dominant out right of the State as the lessor is further evinced from a bare reading of the provisions of the MMDR Act, Mineral Concessions Rules (M.C. Rules) and Minerals (other than Atomic and Hydro Carbon Energy Mineral) Concession Rules, 2016 as well as the Transfer of Property Act, 1882. Those are culled out from what have been quoted herein below being relevant for our appreciation.

1. Mines and Mineral (Development and Regulation) Act. 1957		
Sl No.	**Section/Rules**	**Particulars**
1.	Section 2(ac)	Definition of leased area.
2.	Section 2(c)	Definition of Mining Lease.

3.	Section 4	No person shall undertake mining operations except in accordance with terms of Mining Lease ('ML')
4.	Section 4A(1)	State may make a pre-mature termination of the ML for reasons of expediency.
5.	Section 4A(4)	The ML shall lapse on failure of the lease to commence production and dispatch of minerals of discontinuance of the same.
6.	Section 8A	All MLs before the commencement of the MMDR Act shall be deemed to have been granted for a period of 50 years. On expiry of the lease period, the lease shall be put up for auction.
7.	Section 9	Lessee shall pay royalty in respect of minerals.
8.	Section 9A	Lessee shall pay yearly dead rent to the State Government.
9.	Section 17A	Central Government on consultation with the State Government may reserve any area under any mining lease.
10	Section 24	Power of entry and inspection.
11.	Section 24A(2)	ML holder shall be liable to pay compensation to surface land occupants.

2. Minerals Concession Rules, 1960		
Sl No.	**Section/Rules**	**Particulars**
1.	Rule 28	Lapsing of leases on non-commencement of discontinuance of production and dispatch
2.	Rule 30	The lessee shall have right of mining operations on the leased land.
3.	Rule 11	Lease to be executed within six months of the order of the grant of lease and upon failure to do so the State may revoke the grant of lease.
4.	Rule 37	Lease shall not be transferred without State's approval.
5.	Rule 72	Payment of compensation to occupier of the land or owner of surface rights.
6.	Form K-Part II and III	Lessee shall pay rent and royalty for minerals (CL.1) Lessee shall commence operation within one year from date of execution of ML (CL.3) Lessee shall secure all pits, shafts and workings in the leased land (CL.5)
7.	Form K-Part VII	The State Government shall order the occupier of land to allow the lessee to enter and carry out operations subject to compensation. In assessing such compensation, the State Government shall be guided by Land Acquisition Act.

3. MINERAL CONCESSION RULES, 2016		
Sl No.	**Section/Rules**	**Particulars**
1.	Rule 12(1)(a),(b)	Lessee shall pay royalty and surface rent
2.	Rule 12(1)(c)	Lessee shall commence mining operations within two years from the date of execution of the ML.
3.	Rule 12(10)	On default in payment of royalty or dead rent, the State may terminate the lease deed after providing notice.
4.	Rule 12 A	For the first two years after execution of a new lease, the holder of mining lease shall maintain such level of production so as to ensure minimum dispatch of 80% of the annual production average for the previous years.

5.	Rule 18	State Government shall conduct auction of expiring ML.
6.	Rule 20	The ML shall lapse on failure of the lessee to commence production and dispatch of minerals or discontinuance of the same for a period of two years.
7.	Rule 52	Payment of compensation to occupier of the land or owner of surface rights.
8.	Schedule VII Cl.2	THE STATE grants ML for conducting mining operations for a period of 50 years. The lease to be held subject to payment of royalties and other payments.
9.	Schedule VII Cl.3	Lessee shall comply with the terms of the lease and make payment of royalties.

4. TRANSFER OF PROPERTY ACT, 1882		
Sl No.	**Section/Rules**	**Particulars**
1.	Section 105	Lease defined as "….*transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised…* *(…)* *The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent."*
2.	Section 108	Rights and liabilities of a lessor and lessee.
3.	Section 111	Determination of lease.

20. At this stage, it would not be out of place to indicate that the Petitioners have not challenged the Collector's report dated 22.10.2021, wherein the Collector has decided the very same issues raised by the Petitioners in the instant writ petition after publication of the preliminary notification under section-11 of the RFCTLAR & R Act. Some Petitioners herein had filed WP(C) No.23979 of 2021 and 25730 of 2021 seeking the following reliefs:-

"a) quashing the final SIA report;

b) quashing Declaration under Section 8(2) of the LA Act, 2013;

c) quashing the Preliminary Notification under Section 11 of the LA Act, 2013; and

d) challenging the Gram Sabha meeting held on 16.04.2021."

This Court, without considering the prayers, disposed of the same simply granting the liberty to the Petitioner to file objection under section 15(1) of the RFCTLAR & R Act before the Authority, who was directed to dispose of the same with a reasoned order.

Pursuant to the direction, the Petitioners raised their objections before the Collector, who conducted personal hearing on those for the objections received and some Petitioners too had appeared there in person. The Collector then has submitted a detail reasoned report on 22.09.2021 addressing the contentions of the Petitioners as placed under Annexure-21 of the writ petition. Subsequently, after enquiring into the objection received from the interested person under section 21 of the RFCTLAR & R Act and giving the opportunity of hearing, the Collector has passed the award for the said land under section 23 of the RFCTLAR & R Act which have not been

challenged by the Petitioners in the present writ petition. So, when many of the issues raised by the Petitioners herein, have already been addressed by the Collector in its report dated 22.10.2021 and the Petitioners did not challenge the said report and had approached this Court without seeking any prayer to set aside/quash the said report, thus as a result thereof, the same has attained finality leading the land acquisition proceedings also to attain the finality.

21. For a moment, even assuming that consent of 80% (eighty percent) of the affected family was the mandatory requirement for acquisition, it needs to be kept in mind that such process of obtaining consent has to be taken to be a continuing process.

The case of the Petitioners is that State did not take prior consent of 80% (eighty percent) of the affected family as required under section 2(2)(b) of the RFCTLAR & R Act. The 'affected family' is defined in section 2(c)(i) of the RFCTLAR & R Act as the "family whose land and other immovable property has been acquired" and the 'family' is defined in section 2(m) of the RFCTLAR & R Act as 'a person', his/her spouse, minor children, minor brothers and minor sisters, dependant on him. On a conjoint reading of these provisions, it is evident that an affected family, consist of a person, whose land has been acquired (land owner) and his spouse and minor dependants. As already stated such a process is taken to be an ongoing one and takes place through various phases of acquisition proceeding without determining the land owners of the affected areas. It is thus may not be possible to obtain the consent of the affected families in one go when it even so happens that because of non-updation of the revenue records, the transfer of ownership within the family through inheritance and/or transfer of property to other through legally permissible means/ways as also execution of document/instrument, it is not possible to ascertain all the land owners at the threshold of the acquisition proceeding.

The legislature was well aware of the above facts, which would be evident from the provisions contained in:-

> "(i) Section 4 of the RFTLAR & R Act that the SIA study only *estimate the project affected family;*
>
> *(ii) Section 11(5) that once the acquisition proceedings have commenced under section 11, the Collector updates the land record;*
>
> *(iii) Rule-20 of the* ORFCTLAR & R Rules that the Tahasildar shall update the land record after the Section 11 notification;
>
> (iv) Rule-21 of the ORFCTLAR & R Rules that the Collector prepares a list of affected family from whom consent shall be sought for after updation of the land record by the Tahasildar;
>
> (v) Rule-20 of ORFCTLAR & R Rules that the Tahasildar shall update the land records after section 11 notification;
>
> (vi) Section 21 that the Collector once again to issue public notice calling for person interested to make their claims for compensation; and
>
> (vii) Section 23 that the Collector should determine the persons interested and land owners before the awards."

A conjoint reading of all these above and culling out the legislative intent behind the same; it stands that the process of obtaining the consent as envisaged in the RFCTLAR & R Act read with the Rules made thereunder is an on-going process which commences from the stage of Social Impact Assessment (SIA) and continues till all the land owners/persons interested are identified at the stage of the award.

It is, therefore, in the above context in our considered view, the consent noted in section 2(2)(b) of the RFCTLAR & R Act has to be construed. During this process, it is not unlikely to be discovered that the figures of the affected family as the estimation set out in the SIA Report may not stand freezed. This is best demonstrated from the facts that the Petitioners themselves have claimed to be affected families when their names do not find place in the revenue records. The Scheme of the RFCTLAR & R Act itself recognizes the above and the provisions for instances where ascertainments of affected family may not be possible or may be disputed.

To highlight, a few regarding the recognition of such impossibility, we feel it apposite to refer to:-

> "(i) Section 64 of the RFCTLAR & R Act which states that a person interested may apply to the Collector for referring the matter to the LA Authority in case of any dispute pertaining to whom the award is payable;
>
> (ii) Section 65 of the RFCTLAR & R Act that the Collector while making a reference to the LA Authority is required to mention the names of persons, whom he has reason to think to be interested in the land; and
>
> (iii) Section 77(2) in relation to reference pertaining to dispute concerning the title over the land or if no person is competent to alienate the land, the Collector is to deposit the compensation with the LA Authority."

22. Adverting to the case at hand, we find that the SIA report, finds the estimation that around 442 families would lose agricultural land but none of them would lose residential house. As on 22.01.2024, in total 482 affected persons had given their consent in Form-J for land acquisition out of whom 13 (thirteen) from Lanjiberna, 88 (eighty-eight) from Bihabandha and 381 (three hundred eighty-one) from Kukuda. As of now, the total number of signatures of affected persons obtained under Form-J of ORFCTLAR & R Rules is 535 (five hundred thirty five) as stated in the counter affidavit of Opposite Party No.2 to 5. Therefore, this also satisfies the requirement of consent of 80% (eighty percent) of affected family. The SIA report further reveals that most of the people from three affected villagers did not oppose the acquisition.

23. The doctrine of compliance is an equitable doctrine designed to avoid hardship in cases where a party does all that can reasonably be expected of it, but failed and faulted in some minor or inconsequential aspects which cannot be described as the essence or the substance of the requirement, then that would have no adverse consequence at all.

24. It has been held ***in case of "Commissioner of Central Tax-versus- Hari Chand Shri Gopal and others ; (2011) 1 SCC 236,***

"32….. Court should determine whether the statute has been followed sufficiently so as to carry out the intent for which the statute was enacted and not a mirror image type of strict compliance. Substantial compliance means "actual compliance in respect to the substance essential to every reasonable objective of the statute" and the court should determine whether the statute has been followed sufficiently so as to carry out the intent of the statute and accomplish the reasonable objectives for which it was passed."

"34….. The test for determining the applicability of the substantial compliance doctrine has been the subject of a myriad of cases and quite often, the critical question to be examined is whether the requirements relate to the "substance" or "essence" of the statute, if so, strict adherence to those requirements is a precondition to give effect to that doctrine. On the other hand, if the requirements are procedural or directory in that they are not of the "essence" of the thing to be done but are given with a view to the orderly conduct of business, they may be fulfilled by substantial, if not strict compliance. In other words, a mere attempted compliance may not be sufficient, but actual compliance of those factors which are considered as essential."

25. Further, the law is also well-settled that a provision is only mandatory if its non-compliance would render the entire proceeding invalid. In **May George - versus- Special Tahasildar & Others; (2010) 13 SCC 98**, the Hon'ble Supreme Court held:

"25. The law on this issue can be summarised to the effect that in order to declare a provision mandatory, the test to be applied is as to whether non-compliance of the provision could render entire proceedings invalid or not. Whether the provision is mandatory or directory, depends upon the intent of Legislature and not upon the language for which the intent is clothed. The issue is to be examined having regard to the context, subject matter and object of the statutory provisions in question. The Court may find out as what would be the consequence which would flow from construing it in one way or the other and as to whether the Statute provides for a contingency of the non-compliance of the provisions and as to whether the non-compliance is visited by small penalty or serious consequence would flow therefrom and as to whether a particular interpretation would defeat or frustrate the legislation and if the provision is mandatory, the act done in breach thereof will be invalid.

26. Coming to the challenge on the ground of non-compliance of the provisions of section-14 of the RFCTLAR & R Act carrying the contention of the Petitioners that the State Government has not obtained consent of Gram Sabha of the three villages under Form-M as provided in RFCTLAR & R Rules, the appreciation has to be again in the context of section 41 of the RFCTLAR & R Act and the Form-M must be read in that light and direction.

Section 41 of the RFCTLAR & R Act carries the burden which are important as the same is in the form of stipulation. It says "***as far as possible*** ", no acquisition of said shall be made in the Scheduled Area and where such acquisition does take place, it shall be done only as a demonstrable last resort. In view of that, the requirement of prior consent of Gram Sabha or the Panchayat or the Autonomous District Councils as stated under section 41(3) of the RFCTLAR & R Act, must draw the colour from the terms used, i.e., "as far as possible" and "demonstrable last resort" as find place in section 41(1) and 41(2) of of the RFCTLAR & R Act respectively.

In the given case as already stated, the instant land acquisition proceedings have been taken up by the State only for the purpose of mining of the mineral ores pursuant to the mining lease standing in favour of the Opposite Party No.7 remaining in force till the year 2040. The minerals underneath the surface are owned by the State. It is, therefore, permissible to infer that the State undertook the acquisition as the last demonstrable resort.

A careful reading being given, sub section 41 of the RFCTLAR & R Act, does not give rise to a construction that the same stand as the mandatory provision for being complied with in all and every case as of legal necessity. Its compliance, therefore, necessarily be read in the context of the entire RFCTLAR & R Act and also in the backdrop of the background facts leading to the present land acquisition proceedings.

27. The intent of the legislature in coming out with the legislation i.e. RFCTLAR & R Act in replacing the earlier LA Act is to see that the entire land acquisition proceedings are done in a humane participative, informed and transparency process. In the given case, with the obtained facts and circumstances, it appears to us that the State has followed the mandate of law and complied with the provisions by preparing a comprehensive SIA report, inter alia providing fair compensation to the land losers, timely publication of section-11 notification and more importantly allowing the land losers to raise their objection and hearing them. Therefore, the State in our considered view has substantially complied with the mandate of the provisions of RFCTLAR & R Act as required for the given purpose.

That apart, section 41 of the RFCTLAR & R Act does not provide any consequence for non-obtaining the prior consent of the Gram Sabha. Thus, any such strict interpretation as regards the requirement of consent under section 41 in frustrating the entire land acquisition proceeding at a belated/later stage appears to us to be running contrary to the very intent behind the said legislation.

In this connection, we may refer to one decision of the High Court of Uttarakhand ***in case of Hira Singh-versus-State of Uttarakhand (M/s. Mandal 2364 of 2015 decided on 04.03.2022)***. It has been held that the use of the term **as far as possible** as provided in section 41 of the RFCTLAR & R Act and the protection granted thereunder is directory in nature and not mandatory. This stands in support of view taken.

28. The SIA report records that the site selected falls under the Scheduled Areas as per the 5th Schedule of the Constitution of India. But here no alternative site could have been considered since it is a site specific existing mining project having the tenure till the year 2040 when all such necessary statutory clearances and permission under the various enactments and rules of the Government of India and State Government have been obtained as would reveal from Annexure-F/7 of the counter affidavit filed by the Opposite Party No.7 and conditions imposed therein have to be followed all throughout. The Block Development Officers of Rajgangpur as well as Kutra as would reveal from Annexure-3/5 of the counter affidavit of the Opposite

Party No.7 have submitted a detail report of the Gram Sabha proceeding held on 26.01.2020, which clearly finds mention that a large number of villagers submitted their written consent supporting the Land Acquisition Proceedings in stating that they could not place in the Gram Sabha out of fear of reprisal. All these being the official acts of the concerned officers in discharge of their official duties; those carry with them, the presumption as to have been legally so done, which in the given case is not seen to have been dislodged.

29. That apart, the provision contained in section 4 of the Panchayat Extension to Scheduled Areas Act, 1996 (PESA Act) when puts total restriction for grant of mining lease for "minor minerals" without the recommendation of the Gram Sabha or the Panchayat at the appropriate level and makes such recommendation as the mandatory precondition, the same is confined to the grant of mining/exploitation of minerals in the Schedules Areas only in respect of the minor minerals and not the major minerals with which we are concerned in the present case as here it is lime stone, which is major mineral.

30. Proceeding to address the submission from the side of the Petitioner touching upon the violation of the provision contained in section 7(2) of the RFCTLAR & R Act that one representative of the Opposite Party No.7 was an attendee of the Appraisal Committee, the same according to us is untenable when sub section 2 of section 7 of the RFCTLAR & R Act is read. It says that Expert Group constituted under sub section (1) shall include two non-official scientists (b) two representatives of Panchayat, Gram Sabha, Municipality or Municipal Corporation, as the case may be (c) two experts on Rehabilitation (d) a technical expert in the subject relating to the project. The above abundantly make it clear that the list of members of the Expert Group is not exhaustive and it is only illustrative. That Expert Group may very well include other member apart from the said list having technical expertise and of some other backgrounds so as to serve the very purpose behind the constitution of the Expert Group and the assistance sought for when it says that the technical expert on the subject area relating to the project, it does not put a bar for inclusion of any technical expert from the project proponent; here the Opposite Party No.7 so long as, such a member is a technical expert, more-so when it is said that the Appraisal Committee did have the representative of the villagers. For all the aforesaid, we find that the said challenge has no factual as well as legal base to stand on. The District Level Independent Multi Disciplinary Expert Committee was held on 08.06.2021 in virtual mode which was attended by the Sarpanch, Katang and Kukuda Gram Panchayat in virtual mode as we find from Annexure-s/5 of the counter affidavit of the Opposite Party No.7.

31. Next it is said that the provision of section 5 of the RFCTLAR & R Act was not followed inasmuch as notice was not issued by the Opposite Party No.8 and 9 and public hearing did not take place. The contention stands repelled when we go through the SIA report where the views of the participants have been recorded. We also find from the official record that the public hearing was held in accordance with

section 5 of the RFCTLAR & R Act in village Kukuda, Bihabandha and Lanjibarna. When such state of affairs emerging from the official record, the challenge made to the same is found to be having no factual base to stand upon.

In view of the foregoing discussion and reasons, we find the present writ petition to be devoid of merit.

32. In the result, the Writ Petition stands dismissed and, in the facts and circumstances, without cost.

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2024 (III) ILR-CUT-388

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

JCRLA NO. 150 OF 2004

MAHENDRA MOHANTA ….Appellant

V.

STATE OF ORISSA ….Respondent

(A) THE INDIAN EVIDENCE ACT, 1872 – Section 106 – Burden of proof – The appellant/accused has explanation that his wife has committed suicide – The case of suicidal hanging is not at all made out from the evidence of the Doctor – There is also evidence that the accused was insisting to burn the dead body without reporting the same fact before the police – These evidence have remained un-impeached as there has been no attempt to bring out any material to support the stand that those are after thoughts or later development – Whether the prosecution has discharged its burden? – Held, Yes – Prosecution has established the foundational facts in discharging the burden of proof to the extent that not only the accused has failed to repeal such burden of proof laying heavily on his shoulder satisfactorily but also has come up with a false explanation/plea. (Para 16)

(B) MEDICAL JURISPRUDENCE – Observation regarding "strangulation" – Discussed. (Para - 11)

Case Laws Relied on and Referred to :-

1. 1956 SCR 199 : Shambu Nath Mehra -V- State of Ajmer

For Appellant : Mr. B.S. Rayaguru.

For Respondent : Mr.P.K. Mohanty, A.S.C.

JUDGMENT Date of Hearing : 03.09.2024 : Date of Judgment : 01.10.2024

D. DASH, J.

The Appellant, by filing this Appeal from inside the jail, has assailed the judgment of conviction and order of sentence dated 9th August, 2004 passed by the learned Additional Sessions Judge, Rairangpur in S.T. Case No. 26/142 of 2003

arising out of G.R. Case No.28 of 2003 (T.C. No.283 of 2003) corresponding to Tiring P.S. Case No.04 of 2003 of the Court of the learned Sub-Divisional Judicial Magistrate, Rairangpur.

The Appellant (accused) having faced the trial being charged for commission of offence under sections 498-A/304/302 of the Indian Penal Code, 1860 (for short, 'the IPC') and section 4 of the Dowry Prohibition Act (D.P. Act) has been held guilty for committing the offence under section 302 of the I.P.C. in intentionally causing the death of his wife-Indumati. Accordingly, he has been sentenced to undergo imprisonment for life with fine of Rs.2,000/- with the default stipulation to undergo rigorous imprisonment for one month.

2. PROSECUTION CASE:-

The accused had married Indumati (deceased) on 05.05.2001 and they were staying in the house of the accused situated at village Kendua under the jurisdiction of Tiring Police Station.

On 21.01.2003 around 3 p.m. one Dasaratha Mahanta (P.W.11) went to the father's house of Indumati at village Kanchanda and informed them that their daughter Indumati had committed suicide. Responding to the said information, uncles of Indumati (P.W.1 and P.W.7) and some other villagers (P.W.4 and P.W.6) came to village Kendua and arrived in the house of the accused. They found Indumati lying dead on a Palanka with black marks on both sides of her neck. The accused present there informed them that in his absence Indumati committed suicide by hanging herself with the saree she was wearing from the wooden rafter. The accused lodged a written report with Jharadihi Police Out Post informing about such unnatural death of his wifeIndumati. The uncles of the deceased and others (P.W.1, P.W.7, P.W.4 and P.W.6) then returned to their village in the evening. They again came to the house of the accused on the following morning and in their presence, inquest over the dead body of the deceased was held by the police personnel in presence of the Executive Magistrate. All these acts were carried out on the basis of the report of the accused leading to the registration of Tiring P.S. U.D. Case No.1 of 2003.

On 22.01.2003 around 5.30 p.m., the uncle of the deceased (P.W.1) lodged a written report at Jharadihi Police Out-Post alleging therein that since marriage, the quarrel was going on between Indumati and accused and the accused was demanding Motorcycle and a sum of Rs.5,000/- and that she had informed about the same when she had been to her father's place and also on 25.12.2002 when the accused had threatened her with dire consequences in case she failed to bring those articles. Suddenly on 05.01.2003, the accused took Indumati to his house. It was stated that for the aforesaid reason some foul play was suspected. Receiving said report, regular case was registered and investigation commenced. In course of investigation, Post Mortem Report came to be received which revealed the cause of death to be throttling. Thereafter, investigation having proceeded in that direction, ultimately Final Form was submitted placing this accused to face the trial for

commission of offence under sections 498-A/302/304-B of the IPC read with section 4 of the D.P. Act.

3. Learned S.D.J.M., Rairangpur having received the Final Form as above, took cognizance of the said offence and after observing the formalities committed the case to the Court of Sessions for trial. That is how the trial commenced by framing the charges for the said offences against the accused.

4. In the trial, the prosecution has examined in total fifteen (15) witnesses. As already stated, P.W.1 and P.W.7 were the uncles of the deceased whereas P.W.2 and P.W.3 are her parents. The co-villagers of P.W.2 and P.W.3 who had gone to the house of the accused hearing the death news of the wife of the accused have been examined as P.W.4 and P.W.6. The co-villagers of the accused have been examined as P.W.5, P.W.8 and P.W.11. P.W.9, P.W.10 and P.W.12 are the seizure witnesses whereas P.W.13 is the Doctor who had conducted the autopsy over the dead body of the deceased. The two Investigation Officers (I.Os.) are P.W.14 and P.W.15.

The prosecution besides leading the evidence by examining the above witnesses has also proved several documents which have been admitted in evidence and marked Ext.1 to Ext. 9. Out of those, the important are F.I.R. (Ext.2), the inquest report (Ext.1), the Post Mortem Examination Report (Ext.8), spot map and seizure list are P.W.5 and P.W.9 respectively.

5. The plea of the defence is that of denial. The accused in support of his defence has examined one witness, i.e., D.W.1 who is his co-villager. The plea of the defence is that of denial. The accused in support of his defence has examined one witness, i.e., D.W.1 who is his co-villager.

6. The Trial Court upon examination of the evidence and their evaluation has found the prosecution to have failed to establish the charges under sections 498-A, 304-B of the IPC and section 4 of the D.P.Act. While doing so based on the facts and circumstances emerging from the evidence on record the Trial Court has, however, held the prosecution to have established the fact that it was the accused who had throttled his wife to death. Accordingly, the Trial Court having returned the conviction against the accused for commission of offence under section 302 of the IPC has held him guilty thereunder and sentenced as aforestated.

7. Learned counsel for the Appellant (accused) submitted that with the available evidence of the Doctor (P.W.13) and in the absence of any other circumstances to provide support thereto, the Trial Court ought not to have rendered the conclusive finding that the wife of the accused had been throttled to death. In this connection, he has placed the deposition of the Doctor (P.W.13), who has stated that the cause of death is due to asphyxia probably as a result of throttling.

He next submitted the Trial Court even if is said to be right to conclude that the death was due to throttling, still when the prosecution has failed to establish the fundamental surrounding facts leading clear, cogent and acceptable evidence ought not to have said that the burden of proof of the facts as to how it all happened with

the deceased had shifted unto the accused and then keeping in view the provision of section-106 of the Evidence Act ought not to have held the accused guilty of murder simply for the reasons that the deceased is the wife of the accused and the version of the accused that it was a case of suicidal hanging is false. He submitted that the circumstances as have been projected by the prosecution are not enough to conclude that the chain of events is complete in every respect so as to give rise to an irresistible conclusion that it was the accused who had caused the death overruling all the hypothesis other that of the guilt of the accused.

He, therefore, urged for setting aside the judgment of conviction.

8. Learned Counsel for the State in response submitted all in favour of the findings of the Trial Court. He contended that here the accused is said to have murdered his wife, when the burden of proof shifting upon the accused having been sought to be discharged by projecting his absence as seen factually found to be false, there is no infirmity in the impugned judgment of conviction warranting interference.

9. Keeping in view the submissions made, we have carefully read the judgment of conviction passed by the Trial Court. We have also gone through the depositions of the witnesses, P.Ws. 1 to 15 examined from the side of the prosecution and have perused the documents admitted in evidence and marked Exts.1 to Ext.9.

10. The prosecution has come up with the case that the wife of the accused had been throttled to death. As per the evidence of the Doctor (P.W.13), throttling was perhaps the cause of death; the accused has all along asserted that his wife committed suicide and was hanging when he saw her on his return to the house.

The Doctor (P.W.13) who had conducted postmortem examination over the dead body of the wife of the accused has noted the following features:-

> "I. bruises below the mendible right side of size 2.5 x 3.5 c. present on the right side and on left side of the size of 1.5 x 1.5 cm."

On dissection, the Doctor (P.W.13) has found the fracture of greater cornua of thyroid bone and displaced inward lyrangeal cartilage found to be fractured. He has, however, found the scalp, brain, lungs, heart and small intestine and large intestine were intact. His evidence is to the effect that all the injuries were antemortem in nature.

Banking upon the evidence of the Doctor (P.W.13) that the death was on account of asphyxia "probably" resulting from strangulation, it was urged that there cannot be a conclusive finding that the deceased met a homicidal death.

11. Reference being made to the Lyon's Medical Jurisprudence for India, 10th Edition at page 358, we find the following to be the observations.

In case of strangulation by manual pressure, i.e., throttling; first of all, it has been said that the modes of the death in strangulation are the same as in hanging without a drop. It has been said that in strangulation the constriction of the throat is produced by means other than the weight of the body. The means used may be a

ligature, the hand (throttling), some hard object as per instance, a billet of wood etc. It is also stated therein that the modes of death in strangulation are the same as in hanging without a drop; hence the post mortem appearances are also very similar. More so coming to the strangulation by manual pressure, the followings have been stated:-

> "The mark left on the throat in throttling are dark in colour and corresponding to the shape of the finger. If one hand only is used several bruises are found on one side of the leg and at a somewhat higher level on the other side a single bruise caused by the pressure of the thumb. If both the hands are employed, as would very often the case, several marks would be seen on both side of the throat. These marks may or may not become parchmentised, according as the force used has or has not been sufficient to abrade the skin, which is seldom the case. It has next been observed that if no marks of violence, either external or internal, are to be found on the neck, strangulation is very strongly but not positively contra-indicated. A ligature mark, on the neck corresponding in appearance to a strangulation mark, cannot of itself be taken as the evidence of death by strangulation. Such a mark may be the result of application of a ligature to the neck after the death or has been accidentally produced by pressure of a tight fitting article of dress or be the result of putrefactive swelling against a string tied loosely round the neck. Hence, even when ligature mark is found on the neck corresponding in appearance to a strangulation mark to establish the fact that the death was due to strangulation requires proof that the pressure of such ligature was the cause of death. Such proof may be afforded by presence of the general post mortem appearances of death by strangulation".

12. In the medical jurisprudence and toxicology by Dr.Barnad Kinght, 5th Edition at page 259, it has been mentioned:-

> "In strangulation by a ligature, the level of the ligature is often such that it is well below the hyoid bone and fracture are thus less frequent than in manual strangulation where the grip is usually higher. At page 260-It has been mentioned that in Manual Strangulation-the external appearance are vital. In place of the ligature mark described earlier, the neck will almost invariably show abrasions and bruises caused by the fingers of the assailant and again sometimes of the victim, where attempts at removing the compression have been made. In page 261-It has been mentioned that the internal appearances are basically similar to strangulation with a ligature, but due to the pincer-like effect of throttling fingers, the possibility of a fractured hyoid and especially thyroid cornuae, is greater……Internally, the laryngeal horns are more likely to be fractured than with a ligature, as stated above. There will be bruising in the subcutaneous tissues and muscles corresponding to the external bruises, though this might be very superficial."

In the background of above medical opinion of experts, when we again scanned the evidence of the Doctor (P.W.13), we find him to have noticed bruises below mandible present on the right side, which is slightly more than the bruise found present on the left side. No ligature mark has at all been noticed. Thus, it clearly appears to be a case of external pressure being exerted on the neck, more importantly, it would be evident as there was fracture of the greater cornua of hyoid bone and displaced inward lyrangeal cartilage was also found to be fractured, which overrule the possibility of a case of hanging with a drop, which the accused assertively suggested. The Doctor (P.W.13) having noted all those above features

during Post Mortem Examination, not a single of those is stated therein so as to be remotely suggestive/indicative of a case of suicidal hanging. Had there been any such feature; the same would have stood on our way to conclude that the death had occasioned on account of throttling. Therefore, the evidence of P.W.13 that it was a case of death on account of asphyxia probably due to throttling does not pose any such difficulty in concluding that the death was on account of throttling. Thus, we find that the prosecution has established its case that the death of the deceased was on account of asphyxia resulting from throttling and the plea of the accused that it was suicidal hanging which he having detected had attempted to save her is false.

13. Having held the death of the deceased to be homicidal due to asphyxia resulting from throttling, now we are called upon to examine the evidence in ascertaining the complicity of the accused and thereby judging the sustainability of the finding of the Trial Court on that score.

14. At the cost of brevity, it be stated that admittedly the deceased was the wife of the accused and at the relevant time both were staying together under one roof. It has been the specific statement of the accused recorded under section 313 of the Cr.P.C. and also the information given before the P.W.15, the ASI of Jharadihi Police Out-Post that his wife had committed the suicide by hanging in his house having further stated during his statement recorded in the Trial that he having found her in a hanging condition had attempted to save her by bringing her down. It is, of course, stated by him that he having returned after taking bath from outside saw the deceased to have committed the suicide by hanging. The witness D.W.1 has stated about arrival of accused at home during noon hours and raising hullah and to have seen Indumati hanging. It is nowhere found in the evidence that anyone other than the deceased and the accused was living in the said house.

Ordinarily when the husband and wife remain within the four walls of the house and a death by homicide takes place, it will be for the husband to explain the circumstances in which she might have died. Such a circumstance although is considered to be a strong one but that by alone in the absence of any evidence of violence on the deceased cannot be held to be conclusive. It may be difficult to arrive at a conclusion in that event that the husband and the husband alone was responsible therefor.

15. While addressing the first contention of the learned counsel for the Accused as regards the nature of death, we have already held that the explanation of the accused that his wife committed suicide is false.

Furthermore, we find the evidence of P.W.1, who is the father of the deceased that on his asking accused immediately replied that Indumati committed suicide by hanging herself with her saree from a wooden rafter, which according to the observation of P.W.1 was at a height of a standard man. This statement of P.W.1 has not been impeached. He has also stated that the accused had insisted to burn the dead body to which he did not agree and wanted to report the matter to the Police

Station. It is further stated that the accused thereafter went to the Police Station first to inform that it was a case of suicide.

P.W.4 who had gone to the house of the accused getting the information about the death of Indumati has also stated that on inquiry, accused told that Indumati committed suicide by hanging herself on the wooden rafter by means of a wearing saree.

The case of suicidal hanging is not at all acceptable as would be evident from the evidence of the Doctor (P.W.13). More importantly, P.W.5 who is a co-villager of the accused states that hearing the weeping sound, he came to the house of the accused and saw the dead body of Indumati lying on a Palanka. She does not state the accused to have told her anything about the cause of such death, which is contrary to normal conduct. P.W.6 has also stated to have seen the dead body of Indumati lying on a Palanka and the accused disclosed that she committed suicide by hanging herself on a wooden beam by means of her wearing saree. His further evidence is that the accused was insisting not to report the fact at the Police Station and burn the dead body.

In the same light, it has been said by P.W.7 that the accused told that Indumati committed suicide and therefore, the dead body should be burnt. Such conduct of the accused is unusual haste as found from the above discussed evidence is admissible under section 8 of the Evidence Act. Had it been a case of suicide; (which we have found to be false), there was no reason for the accused to insist in not informing the Police and burning the dead body without giving any information to the Police. Above evidence have remained unimpeached as there has been no attempt to bring out any material to support the stand that those are afterthoughts or later developments.

16. We are not oblivious of the judgment of the Apex Court in the case of **Shambu Nath Mehra -V- State of Ajmer** reported in **1956 SCR 199** that section 106 of the Evidence Act does not absolve the prosecution of its primary duty of discharging the initial burden.

Keeping in view such dictum, we are of the considered view that the prosecution has established the foundational facts in discharging the burden of proof to the extent that not only the accused has failed to repeal such burden of proof lying heavily on his shoulder satisfactorily but also has come up with a false explanation/plea.

Therefore, we find that the Trial Court has rightly convicted the accused for committing the offence under section 302 of the IPC in intentionally causing the death of his wife, Indumati. In that view of the matter, we confirm the judgment of conviction and order of sentence impugned in this Appeal.

17. In the result, the Appeal stands dismissed. The accused, being on bail, is directed to surrender before the Trial Court forthwith to serve out the sentence.

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2024 (III) ILR-CUT-395

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

W.P.(C) NO.11429 OF 2024

UNION OF INDIA & ORS. ….Petitioners

V.

ANUSUYA DASH & ANR. ….Opp.Parties

(A) CENTRAL CIVIL SERVICES (CLASSIFICATION, CONTROL AND APPEAL) RULES, 1965 ─ Rule 16(b) ─ The disciplinary authority imposed penalty upon the civil servant without causing an inquiry ─ The penalty was confirmed by the Appellate Authority ─ The authority referred to Rule 16 of the 1965 Rules which does not make it mandatory on the part of Disciplinary Authority to conduct inquiry before imposing a minor penalty ─ Whether inquiry is a mandate U/R 16 of 1965 Rules or it is merely a discretion vested in the Disciplinary Authority? ─ Held, it is no doubt true that unlike Rule 14, the proceeding U/R 16 does not contemplate mandatory inquiry before imposing penalty but the discretionary power left with the authority is not to be construed as discretion based on whims and caprices ─ The Disciplinary Authority would have done well to cause an inquiry against the delinquent officer before imposing the penalty which was likely to affect his post-retirement entitlement. (Para 4)

(B) DISCIPLINARY PROCEEDING ─ Whether it is legal and reasonable to allow recovery from the family pension of the widow of delinquent officer? ─ Held, No ─ The widow (wife) should not be allowed to suffer financial deprivation after the death of the civil servant. (Para 5)

Case Laws Relied on and Referred to :-

1. (2011) 10 SCC 86 : Asha Sharma -Vrs.- Chandigarh Admn.
2. (1991) 1 SCC 212 : Shrilekha Vidyarthi (Kumari) -Vrs.- State of U.P.
3. (2001) 9 SCC 180 : O.K. Bhardwaj -Vrs.- Union of India
4. (2011) 11 SCC 702 : PEPSU RTC -Vrs.- Mangal Singh

For Petitioners : Mr. Biswajit Maharana, Central Govt. Counsel

For Opp.Parties : None (For O.Ps. 1 & 2)

JUDGMENT Date of Argument : 02.09.2024 : Date of Judgment : 10.09.2024

S.K. SAHOO, J.

The present writ petition has been filed by the petitioners with a prayer to quash the impugned order dated 01.05.2023 passed in O.A. No.222 of 2020 by the learned Central Administrative Tribunal, Cuttack Bench, Cuttack (for short, "Tribunal") under Annexure-1 in which the O.A. filed by applicant Ramakanta Mishra for quashing the order of punishment dated 24.10.2019 imposed by the Disciplinary Authority so also the order passed by the Appellate Authority dated 09.04.2020 was allowed.

Factual Matrix of the Case :

2. The case of the petitioners, in short, is that the late husband of the opp. party no.1, namely, Ramakanta Mishra (hereinafter 'the applicant') filed the aforesaid O.A. before the learned Tribunal to quash the orders under Annexure-A/1 dated 20.02.2019, Annexure-A/9 dated 24.10.2019 and AnnexureA/12 dated 09.04.2020 with a further direction to the respondents (present petitioners) to refund the amount illegally recovered from his salary with 12% interest. The applicant while working as Superintendent of Post Offices, Rayagada Division, was served with a minor penalty charge sheet, proposing action under Rule 16 of Central Civil Services (Classification, Control & Appeal) Rules, 1965 (hereafter, '1965 Rules'), vide memo dated 20.02.2019 on the allegation that he allowed one Sri Aditya Kumar Majhi, Sub Postmaster, Joypatna SO, to work as Sub Postmaster, Bhawanipatna Stadium SO on deputation without TA/TP from 18.08.2013 to 16.07.2015 vide SPO's Kalahandi Division Memo No.B-629 dated 12.08.2015 in violation of the instruction contained in para-4(v)(ii) of Directorates Memo No. 141-141/2013-SPM-11 dated 31.01.2014 and not allowing the official transferred to the said office to be relieved from Division office for which Sri Majhi got ample scope to commit fraud to the extent of Rs.25,59,500/-.

On receipt of the memorandum of charges, the applicant submitted his defence representation stating that the delinquent official worked on deputation in the previous tenure and not regularly posted for which the charge of over tenure is not correct. Further regarding the second charge, he submitted that due to urgent administrative exigencies, the transferred official could not be relieved from Divisional Office. Along with this, he also submitted regarding non-supply of documents by RO Berhampur and other ruling position regarding technicality of the memorandum of charges.

After receipt of the said defence representation, the Disciplinary Authority imposed punishment of recovery of a sum of Rs.2,00,000/-(rupees two lakhs) vide memo dated 24.10.2019.

Being aggrieved with such order of the Disciplinary Authority, the late applicant preferred an appeal to the D.G. Posts. During pendency of the said appeal, the applicant filed O.A. No.821 of 2019 to dispose of the said appeal. The said appeal was considered and rejected vide memo No.32-24/2019 Vig dated 09.04.2020. Being aggrieved, the applicant filed O.A. No.222/2020 impugning the penalty imposed upon him.

The petitioners filed their counter affidavit in the O.A. wherein it is stated that claim of the opposite parties is not justified and tenable and therefore, the O.A. should be dismissed.

After hearing the arguments from both the sides, the learned Tribunal vide order dated 01.05.2023 held as follows:-

> "..... Since the basic question arises before the authorities as to whether the posting of Sri Majhi was in violation of the instruction contained in Para-4(v)(ii) of Directorates Memo

No.141141/2013-SPM-11 dated 31.01.2014, and as to whether the recovery of the loss/fraud committed by another person is in contravention of the DG Post letter no.15-9/74-Inv dated 10.02.1975 with Rule 204 and 204 (A) of P & T Manual Volume-II are the factual in nature and, therefore, by applying the ratio of the decision in the case of **O.K. Bhardwaj -Vrs.- U.O.I. & Others reported in 2002 SCC (L & S) 188**, the respondents department ought to have made an inquiry in the manner which has been followed in case of proceedings initiated under Rule 14. In such peculiar facts and circumstances, the impugned order of punishment dated 24.10.2019 imposed by the DA and the order of AA dated 09.04.2020 are hereby quashed. In ordinary circumstances, this matter would have been referred to the authority concerned to cause an inquiry by granting adequate opportunity to the employee concerned, but as the employee concerned is no more, for the ends of justice, the respondents are hereby directed to refund the already recovered amount to the present applicant, namely Anusuya Dash, widow of Ramakanta Mishra, ex-Superintendent of Post Offices, Rayagada Division, within a period of thirty days from the date of receipt of a copy of the order."

Challenging the aforesaid order dated 01.05.2023 of the learned Tribunal, the petitioners have approached this Court by filing this writ petition.

Contentions :

3. Mr. Biswajit Maharana, learned Central Government Counsel appearing for the Union of India-petitioners contended that the learned Tribunal without considering the contentions of the present petitioners allowed the O.A. basing upon the previous judgments which is completely against the statutory provisions governing the field. Learned counsel further argued that after perusal of documents, the applicant submitted his defence representation dated 22.03.2019 and therefore, he has been provided all related documents and opportunity to defend himself. After going through all connected records, the Chief Postmaster General, Odisha Circle, Bhubaneswar taking a lenient view has ordered for recovery of rupees two lakhs only which is proportionate amount of loss as mentioned in the memorandum of charges and the said order of recovery was decided on the basis of the gravity of offence/negligence committed by the applicant and it was established that he was responsible for such pecuniary/contributory loss and therefore, rejected the appeal of the applicant. Learned counsel argued that the learned Tribunal has interfered in the finding of disciplinary proceedings even if there is no violation in natural justice and the lapses on the part of the applicant has been fully proved basing on documentary evidences after following all due procedure in accordance with rules. The reference judgments of the Hon'ble Supreme Court as indicated by the learned Tribunal in the impugned order dated 01.05.2023 are all implying towards holding of inquiry even in the cases of minor penalty but in the instant case, all the related documents were supplied to the applicant for perusal and he has never desired for inquiry as per provisions contained in Rule-16 and therefore, no question of violation of natural justice arises. Learned counsel further argued that the punishment order dated 24.10.2019 has been issued with utmost procedural fairness strictly in accordance with the Departmental rules and guidelines providing the applicant adequate opportunity by supplying him every relevant documents. The learned Tribunal has violated the references made by itself in the said impugned order dated 01.05.2023

as the manner of the proceeding, the procedural justification and compliance of rules of natural justice in the instant case has been overlooked by the learned Tribunal and therefore, the order dated 01.05.2023 should be quashed.

Whether the imposition of penalty against the applicant without inquiry is sustainable in the eyes of law? :

4. The imputations against the applicant roves around the allegation that he being the Superintendent of Post Offices, Rayagada allowed Sri Aditya Kumar Majhi to continue as SPM Bhawanipatna Stadium SO beyond his tenure and not allowing the official transferred to the said office to be relieved from Division office for which Sri Majhi got scope to commit fraud to the extent of Rs.25,59,500/-. Thus, it is clear that the said pecuniary loss occasioned on account of the act of Sri Majhi and the applicant was not directly involved in the commission of such fraud. However, charges were framed against him on the ground of 'contributory negligence' as due to his omission to relieve Sri Majhi as SPM Bhawanipatna Stadium SO, the latter got ample opportunity to commit the fraud. It is further averred that the applicant failed to maintain 'devotion to duty' as prescribed under Rule 3(1)(ii) of the Central Civil Services (Conduct) Rules, 1964. Therefore, taking into account such dereliction in duty on the part of the applicant, the Disciplinary Authority resorted to the procedure laid down under Rule 16 of the 1965 Rules and imposed a 'minor penalty' for recovery of Rs.2,00,000/-(rupees two lakhs) from the pension of the applicant.

While impugning the penalty imposed by the Disciplinary Authority, which was confirmed by the Appellate Authority, it was argued on behalf of the opposite party no.1 that the authority erred in penalizing the applicant without causing an inquiry to be made against him. On the other hand, the petitioners refuted such argument and referred to Rule 16 of the 1965 Rules which does not make it mandatory on the part of the Disciplinary Authority to conduct inquiry before imposing a minor penalty, rather it has been made discretionary upon the authority to hold the same if it is of the opinion that such inquiry is necessary. It was the contention of the petitioners that the applicant omitted to claim an inquiry to be caused against him and after such omission during the stage of Rule 16, he cannot be permitted to claim the same while impugning the penalty order. While setting aside the imposition of penalty upon the applicant, the learned Tribunal held that the Disciplinary Authority ought to have conducted an inquiry against the applicant as disputed questions of facts were involved in the case which could only have been resolved through an inquiry.

The important question that crops up for consideration is whether inquiry is a mandate under Rule 16 of the 1965 Rules or it is merely a discretion vested in the Disciplinary Authority. To answer this legal quandary, we may profitably refer to the relevant portion of Rule 16 itself, which reads as follows:

> "16.(1) Subject to the provisions of sub-rule (5) of rule 15, no order imposing on a Government servant any of the penalties specified in clause (i) to (iv) of rule 11 shall be

made except after –

(a) informing the Government servant in writing of the proposal to take action against him and of the imputations of misconduct or misbehaviour on which it is proposed to be taken, and giving him reasonable opportunity of making such representation as he may wish to make against the proposal;

(b) holding an inquiry in the manner laid down in sub-rules (3) to (24) of rule 14, in every case in which the disciplinary authority is of the opinion that such inquiry is necessary;

(c) taking the representation, if any, submitted by the Government servant under clause (a) and the record of inquiry, if any, held under clause (b) into consideration;

(d) consulting the Commission where such consultation is necessary. The Disciplinary Authority shall forward or cause to be forwarded a copy of the advice of the Commission to the Government servant, who shall be required to submit, if he so desires, his written representation or submission on the advice of the Commission, to the Disciplinary Authority within fifteen days; and

(e) recording a finding on each imputation or misconduct or misbehavior."

[Emphasis supplied]

From the plain reading of Rule 16(1)(b), it is clear that holding of an inquiry is subject to the opinion of the authority that such inquiry is necessary for imposing the proposed minor penalty. Needless to mention that the opinion of the authority has to be qualified by the standards of logic, reasonableness and non-arbitrariness. While recording such opinion, the authority is needed to assign reason as to why it came to the conclusion that an inquiry is necessary or why it is superfluous. Whether the pecuniary loss occurred due to any fault on the part of the applicant is a question which can only be answered by examining the factual matrix of the case leading to the imposition of penalty. It was alleged that the applicant, while working as the Superintendent of Post Offices, Kalahandi Division, allowed Sri Aditya Kumar Majhi, Sub Postmaster, Joypatna SO to work as Sub Postmaster, Bhawanipatna Stadium SO on deputation without TA/TP from 18.08.2013 to 16.07.2015, which was in violation of the instruction contained in Para 4(v)(ii) of Directorates Memo No.141-141/2013-SPM-11 dated 31.01.2014. It was further asserted that the applicant being in the position of a supervisor, faulted in allowing Sri Majhi as the Sub Postmaster, Bhawanipatna Stadium SO on deputation which in turn facilitated the latter to commit fraud, resulting in pecuniary loss to the government exchequer.

It is no doubt true that unlike Rule 14, the proceeding under Rule 16 does not contemplate mandatory inquiry before imposition of penalty but the discretionary power left with the Disciplinary Authority is not to be construed as discretion based on whims and caprices. In this context, the following observation made by a Division Bench of the Hon'ble Supreme Court in the case of **Asha Sharma -Vrs.- Chandigarh Admn. reported in (2011) 10 Supreme Court Cases 86** may be relied upon:

"14. Action by the State, whether administrative or executive, has to be fair and in consonance with the statutory provisions and rules. Even if no rules are in force to govern executive action still such action, especially if it could potentially affect the rights of the parties, should be just, fair and transparent. Arbitrariness in State action,

> even where the rules vest discretion in an authority, has to be impermissible. The exercise of discretion, in line with principles of fairness and good governance, is an implied obligation upon the authorities, when vested with the powers to pass orders of determinative nature . The standard of fairness is also dependent upon certainty in State action, that is, the class of persons, subject to regulation by the Allotment Rules, must be able to reasonably anticipate the order for the action that the State is likely to take in a given situation. Arbitrariness and discrimination have inbuilt elements of uncertainty as the decisions of the State would then differ from person to person and from situation to situation, even if the determinative factors of the situations in question were identical. This uncertainty must be avoided." **[Emphasis supplied]**

The Hon'ble Supreme Court in the case of **Shrilekha Vidyarthi (Kumari) -Vrs.- State of U.P. reported in (1991) 1 Supreme Court Cases 212**, while explaining the true import of arbitrariness, has held as follows:

> "36. The meaning and true import of arbitrariness is more easily visualized than precisely stated or defined. The question, whether an impugned act is arbitrary or not, is ultimately to be answered on the facts and in the circumstances of a given case. An obvious test to apply is to see whether there is any discernible principle emerging from the impugned act and if so, does it satisfy the test of reasonableness. Where a mode is prescribed for doing an act and there is no impediment in following that procedure, performance of the act otherwise and in a manner which does not disclose any discernible principle which is reasonable, may itself attract the vice of arbitrariness. Every State action must be informed by reason and it follows that an act uninformed by reason, is arbitrary. Rule of law contemplates governance by laws and not by humour, whims or caprices of the men to whom the governance is entrusted for the time being. It is trite that 'be you ever so high, the laws are above you'. This is what men in power must remember, always." **[Emphasis supplied]**

The argument advanced from the side of the petitioners that the applicant ought to have claimed for an inquiry to be caused in case he had grievances against the order of penalty without institution of inquiry is concerned, such contention deserves hardly any merit. The very language of Rule 16 of the 1965 Rules vests the power of inquiry upon the Disciplinary Authority and not as a matter of right upon the delinquent employee.

Notwithstanding the fact that the nature of the penalty imposed upon the applicant, if he denies the charges against him, the Disciplinary Authority should have instituted an inquiry. This proposition of law is no more res integra as has been briefly yet clearly laid down in the case of **O.K. Bhardwaj -Vrs.- Union of India reported in (2001) 9 Supreme Court Cases 180**:

> "3…..Even in the case of a minor penalty, an opportunity has to be given to the delinquent employee to have his say or to file his explanation with respect to the charges against him. Moreover, if the charges are factual and if they are denied by the delinquent employee, an enquiry should also be called for. This is the minimum requirement of the principle of natural justice and the said requirement cannot be dispensed with."

Given the factual contradictions, the Disciplinary Authority would have done well to cause an inquiry against the applicant before imposing the penalty which was likely to affect his post-retirement entitlement. This is more so when the

applicant has denied the charges framed against him which are factual in nature, veracity of which can only be ascertained through a well-conducted inquiry.

Whether it is legal and reasonable to allow deduction from the pension of widow of the applicant? :

5. It is time and again reiterated by the Hon'ble Supreme Court as well as by various High Courts that the State is a model employer and unlike private entities, it is expected to be fair and reasonable while dealing with its employees. In the case in hand, the Disciplinary Authority as well as the Appellate Authority has imposed a penalty upon the applicant which resulted in pecuniary deduction from the pensionary benefits. Pension is not a gratuitous or benevolent payment made to an employee; rather it is paid to him as an instrument of social security and financial stability of his family after his superannuation, which is due to him for his decades of hard work and dedication to the public service. The Hon'ble Apex Court in the case of **PEPSU RTC -Vrs.- Mangal** Singh reported in **(2011) 11 Supreme Court Cases 702** has held as follows:

> "49. To sum up, we state that the concept of pension has been considered by this Court time and again and in a catena of cases, it has been observed that the pension is not a charity or bounty nor is it a conditional payment solely dependent on the sweet will of the employer. It is earned for rendering a long and satisfactory service. It is in the nature of deferred payment for the past services. It is a social security plan consistent with the socio-economic requirements of the Constitution when the employer is State within the meaning of Article 12 of the Constitution rendering social justice to a superannuated government servant. It is a right attached to the office and cannot be arbitrarily denied."

When it is already held that the Disciplinary Authority ought to have conducted an inquiry against the delinquentapplicant before imposing the penalty of recovery of money from the pension, it is corollary that his widow wife should not be allowed to suffer financial deprivation after his death. Furthermore, as held above, the State being a model employer should not keep on pestering for recovery of money when it is likely to defeat the social security measures envisioned by the Constitution of India as well as by the public laws.

6. In view of the foregoing discussions, we find no infirmity or illegality in the order dated 01.05.2023 passed by the learned Tribunal in O.A. No.222 of 2020 vide Annexure-1. The petitioners were directed by the learned Tribunal to refund the already recovered amount to the opposite party no.1 Anusuya Dash, widow of Ramakanta Mishra, ex-Superintendent of Post Offices, Rayagada Division within a period of thirty days from the date of receipt of the copy of the order. If the same has not yet been carried out, the petitioners shall refund the amount as directed by the learned Tribunal within fifteen days from today.

Accordingly, the writ petition merits no consideration and the same is hereby dismissed.

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2024 (III) ILR-CUT-402

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

JCRLA NO. 04 OF 2020

ETUA MUNDARI @ BADKA ….Appellant

V.

STATE OF ODISHA ….Respondent

CRIMINAL TRIAL – The appellant was charged and convicted under Section 302 of IPC – Absence of Motive – Whether mere absence of motive weakens the prosecution case when an eyewitness is available? – Held, No – The absence of a proven motive does not invalidate the testimony of a reliable eyewitness – While motive may strengthen a case based on circumstantial evidence, it is not essential when credible direct evidence exists – Conviction confirmed. (Para 20)

Case Laws Relied on and Referred to :-

1. [2024] 4 S.C.R. 94 : Chandan vs. The State (Delhi Admn.)
2. AIR 1973 SC 55 : Shivaji Genu Mohite v. State of Maharashtra
3. (2003) 12 SCC 616 : Bikau Pandey v. State of Bihar
4. (2017) 11 SCC 120 : Rajagopal v. Muthupandi
5. (2017) 11 SCC 195 : Yogesh Singh v. Mahabeer Singh

For Appellant : Mr. Sougat Dash.

For Respondent : Smt. Sushama Rani Sahoo, A.S.C

JUDGMENT Date of Judgment : 03.10.2024

CHITTARANJAN DASH, J.

1. The Appellant, namely Etua Mundari @ Badka, faced the trial on the charges under Section 302 of the Indian Penal Code (in short, hereinafter referred to as "IPC") before the learned First Addl. Sessions Judge, Rourkela in S.T. No. 12 of 2017 for committing murder of one Pradeep Kullu @ Dipu, wherein the learned Court found him guilty for the offence charged as above, convicted and sentenced him to undergo imprisonment for life and to pay a fine of ₹10,000/- (Rupees ten thousand only), in default, to undergo further Rigorous Imprisonment for 2 (two) years.

2. The prosecution case in brief is that, on 04.10.2016 at about 11:15 a.m., one Ranjit Kullu (P.W.1), the Informant, who is a resident of village Jhunmur under P.S. Raibaga in the district of Sundargarh, submitted a written report before the Chhend P.S., Rourkela, informing that while his elder brother namely Pradeep Kullu @ Dipu (hereafter referred to as the "deceased"), a resident of Hatat Basti, Chhend, Rourkela, on the previous evening, between 9.00 p.m. to 10.00 p.m., was taking dinner in the house of one Sushila Kujur (P.W.3), the Appellant rushed to the house of Sushila and started assaulting his brother Pradeep Kullu by means of a bamboo stick. When Sushila tried to intervene, the Appellant threatened to assault her too, if she attempts to scream. One Chandan, a co-resident of the Basti saw the occurrence while passing in front of Sushila's house and raised *hullah* alerting the residents of the *Basti*. Soon after, the residents of the *Basti* gathered at the spot and, on seeing

the condition of Pradeep, took him to RGH for treatment in an autorickshaw. However, around 11.00 p.m. that night while receiving treatment, the deceased succumbed to the injuries. The Informant further reported that he came to know about the incident by receiving a telephonic information from P.W.2, one of his cousins, who is a resident of *Hatat Basti*. He then came to Rourkela the next day and lodged the FIR. As the report revealed a cognizable offence, the IIC, Gagan Bihari Biswal (P.W.12) treated the report as FIR and registered the same vide Chhend P.S. Case No. 97 of 2016, vide Ext. 1/3, and took up the investigation.

3. In course of the investigation, P.W.12, the Investigating Officer (I.O.), examined the informant and recorded his statement under Section 161 of the Cr.P.C. The I.O. then proceeded to the RGH morgue, held inquest over the deceased's body and sent the same for post-mortem examination in the presence of witnesses. The I.O. also visited the spot and prepared a spot map, vide Ext.11. He apprehended the Appellant on 4.10.2016, and arrested him later on the same day at about 11.30 p.m. On 5.10.2016, the Appellant was forwarded to the Court. In the meantime, the I.O. examined other witnesses, recorded their statements under Section 161 of the Cr.P.C., seized incriminating articles and sent the same for chemical examination. Finally, on completion of the investigation, the I.O. submitted the charge-sheet against the Appellant for commission of an offense punishable under Section 302 of the IPC.

4. The case of the defence is one of complete denial and false accusations.

5. To bring home the charge, the prosecution examined 12 witnesses in all. P.W.1 is the Informant being the brother of the deceased; P.W.2 is the scribe of the FIR and a post-occurrence witness; P.W.3 is the sole eye-witness of the occurrence; P.W.4 is a preoccurrence witness; P.Ws. 5, 9 & 10 are post-occurrence witnesses; P.Ws.6 and 7 are seizure witnesses; P.W.8 is the medical officer who conducted the post-mortem examination; P.W.11 is the scientific officer who furnished the spot visit report and held examination of the seized materials; and finally P.W.12 is the I.O.

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. Mr. Sougat Dash, learned counsel for the Appellant contended that the prosecution has failed to establish the case beyond all reasonable doubts. He argued that the testimony of P.W.3, the prime eyewitness, is unreliable due to inconsistencies in her evidence and possible personal bias, as the deceased used to visit her house frequently for meals, raising questions about her impartiality. The credibility of P.W.3 is further doubtful, as her testimony remains uncorroborated by other crucial witnesses. Notably, Chandan, a co-resident of the Basti, who was specifically mentioned by P.W.3 as having witnessed the assault and called for help, was not examined by the prosecution, which leaves a significant gap in the case of

the prosecution, especially when the prosecution claims there was another witness at the scene. He further asserted that, the absence of any motive for the Appellant to commit such a grievous offense weakens the prosecution's case. The alleged accusation regarding the theft of a hen is trivial and insufficient to provoke a premeditated attack of such brutality. The testimony of P.W.4, while purportedly corroborating the incident, is questionable as he admits to not having witnessed the actual assault, making his testimony based on hearsay. Additionally, the forensic evidence, particularly the post-mortem report while showing severe injuries, does not conclusively link the Appellant to the weapon of offense or to the alleged crime. Mr. Dash concluded his argument that in the absence of clear and cogent evidence directly implicating the Appellant, the benefit of the doubt must be extended in favour of the Appellant, and the conviction under Section 302 IPC should be set aside.

8. Ms. Sushama Rani Sahoo, learned Addl. Standing Counsel for the State, argued that the prosecution has successfully established the Appellant's guilt beyond reasonable doubt through credible and formidable evidence. According to her, P.W.3, the solitary eyewitness, narrates a detailed account of the incident, clearly identifying the Appellant as the assailant and the manner in which he brutally attacked the deceased with a stick. Her testimony is corroborated by P.W.4, who although not an eyewitness to the actual assault, has confirmed seeing the Appellant in possession of the same stick used in the attack and proceeding towards the house of P.W.3, as the deceased had accused him of stealing hen. The medical evidence provided by P.W.8, the medical officer, further supports the prosecution's case, as the nature and extent of the injuries described in the post-mortem report are consistent with the version of the eyewitness. The forensic evidence including the bloodstained stick (MO-I) and the blood type matching with the deceased, links the weapon used in the assault to the crime. Ms. Sahoo, learned ASC asserted that the argument of the defence to the effect that there is no motive behind the alleged murder sufficient to undermine the prosecution's case is flawed, as there is the overwhelming direct and corroborative evidence. The direct evidence of the witnesses is not only consistent with their previous statements recorded under section 161 Cr.P.C. but to the overall circumstances as well as the medical evidence and the evidence so adduced by the prosecution which could not be demolished in any manner. She finally concluded that, given the strength of the eyewitness testimony, medical evidence and the corroborative circumstances, the conviction under Section 302 IPC is fully justified and the appeal is liable to be dismissed.

9. Having regard to the arguments advanced by the learned counsel for the respective parties, this Court, before adverting to the culpability of the Appellant on the charge of murder, at first felt it expedient to deal with the nature of death of the deceased.

10. In this context, the post-mortem examination report proved by P.W.8, vide Ext. 7, provides clear medical findings pointing to the intentional and repeated violent attacks as the cause of death. P.W.8 observed several antemortem injuries,

all of which were inflicted before the death of the deceased, indicating that the deceased had sustained significant trauma while still alive. The key findings of the post-mortem report are as follows:

> i) antemortem lacerated wound of size 4" × 1/2" bone deep over the left parieto frontal area of scalp
>
> ii) antemortem lacerated wound of size 6" × 1" bone deep over left parieto occipital area of left scalp
>
> iii) antemortem lacerated wound of size 10" × 1" bone deep over left occipital area of scalp
>
> iv) open fracture of skull bone of size 4" × 3" brain matter deep on left side of the skull, upon removal of haematoma
>
> v) brain matter haematoma of size 10" × 6" on left side of the brain parenchyma, upon opening of skull bones
>
> vi) antemortem lacerated wound of size 2" × 1" over left nostril. Nasal bones completely fractured into small pieces. Presence of 2 antemortem lacerated wound of size 3" × 2" bone deep and another size of 2" × 2" bone deep over occipital area of scalp

11. P.W.8's assessment in the post-mortem report makes it clear that the injuries were inflicted with force sufficient to break the skull and fracture the nasal bones, indicating a clear intent to cause grievous bodily harm, leading to death. The nature of the injuries observed multiple stitches to the head aligns with the use of a blunt object, as opined by the fact that P.W.8 later examined the bamboo stick (MO-I) and confirmed that the injuries sustained by the deceased could indeed be caused by such an object. The cause of death was determined by P.W.8 to be coma due to head injury, resulting from the repeated blunt force trauma.

12. Furthermore, P.W.11, the Scientific Officer of the RFSL, Rourkela testifies forensic corroboration to the medical evidence under Ext. 8 that further reinforces the medical findings and adds clarity to the homicidal nature of the crime. It is also noted that the injuries inflicted upon the deceased as explained by P.W.3 in her sworn testimony, matches with that of the injuries detected in the post-mortem examination report.

Moreover, the time since death, assessed as being within 12 to 24 hours prior to the spot visit, correlates with the time of the incident as described by witnesses. P.W.11's forensic assessment of the bamboo stick (MO-I) as the weapon of offense, with visible blood stains on its surface, also connects the weapon to the injuries and to the deceased. Based on the medical and forensic evidence, it is conclusively established that the death of the deceased was indeed homicidal in nature. It is also apposite to note that the defence has not disputed the nature of the death.

13. Coming to the authorship of the crime, the sworn testimonies of P.W.3 and P.W.4 provide a detailed and coherent narrative of the events leading up to the fatal assault on the deceased, that aligns a consistent case of the prosecution into the pre-occurrence scenario and the eyewitness account of the attack.

14. In her sworn testimony, P.W.3 provides a vivid account of the events as they unfolded inside her house as the eyewitness to the attack. She describes how the deceased, who referred to her as "Didi" (elder sister), had come to her house for dinner on the night of the incident. At around 9.00 p.m., the Appellant barged into her house and began shouting accusations at the deceased about the alleged theft of Anita's hen. This immediately escalated into a physical attack, where the Appellant repeatedly assaulted the deceased with a stick, inflicting about 10-15 blows directly to his head. P.W.3's description of the attack is consistent with the medical findings provided by P.W.8, who confirmed that the deceased sustained severe head injuries that were fatal. P.W.3 further describes how she was threatened by the Appellant when she attempted to intervene, forcing her to remain silent and watch the assault unfold. Her fear and helplessness during the attack add emotional weight to her testimony, highlighting the violent and intentional nature of the Appellant's actions. P.W.3 also deposed that one Chandan, a co-resident of the Basti, witnessed the incident from outside the house and shouted for help, which prompted the arrival of other residents of the Basti, who later helped to transport the injured-deceased to the hospital. Withdrawal of the examination of the said person, namely Chandan does not in any manner pose abortive to the case of the prosecution as the evidence of the post-occurrence witnesses sufficiently suggest their presence at the scene of occurrence, upon hearing Hullah. The fact that P.W.3 identifies the stick (MO-I) used in the assault linking directly to the Appellant substantially corroborates the kind of weapon used in the crime so also the medical findings presented by P.W.8.

15. P.W.4's testimony in sequel offers significant insight into the events just prior to the assault on the deceased. He describes being near a temple with his friends Tapan Sahoo, Bichitra and Muna, when they observed the Appellant in an inebriated state. The Appellant was verbally abusing the deceased for having been accused of stealing one Anita's hen. He also mentioned that he was going to kill the deceased. This confrontation sets the tone for the impending violence, as the Appellant was clearly agitated and armed with a bamboo stick, later identified as the weapon used in the crime as MO-I. P.W.4, along with his companions attempted to intervene at this stage by confronting the Appellant and even removing the stick from his possession, temporarily diffusing the situation. However, despite the intervention, the Appellant left the scene with the stick only to later to commit the murder.

The fact that P.W.4's version is consistent to his previous statement recorded under Section 161 Cr.P.C. so also to the substratum of versions of others who were present with him such as Tapan Sahoo and Muna strengthens the reliability of his version of events. This collective statement indicates that there was prior animosity between the Appellant and the deceased, thereby establishing a motive for the attack. The confrontation over the alleged theft of hen, the Appellant's drunken state and his possession of the weapon, all foreshadow the violence that soon followed.

16. It is pertinent to note that, although P.W.4 was not an eyewitness to the assault itself, his testimony provides crucial corroboration of P.W.3's testimony, particularly in establishing the pre-occurrence sequence of events and linking the Appellant to the weapon, MO-I. While P.W.4 admits in the cross-examination that he was at his own house at the time of the actual occurrence and did not witness the assault, he confirms that he saw the Appellant in possession of the stick prior to the incident going towards the deceased with an intention to kill him. His observation of the Appellant's agitated behaviour and possession of the weapon ties the Appellant to the crime that followed thereupon. Moreover, P.W.4's testimony is strengthened by the corroborative statements of the individuals who were with him near the temple.

17. The testimonies of P.W.3 and P.W.4, when read in conjunction with the medical and scientific reports, significantly fortify the prosecution's case against the Appellant. It directly establishes the violent and deliberate nature of the assault, confirming the presence and aggressive behaviour of the Appellant before the attack.

18. To reiterate, these testimonies are further corroborated by the medical findings of P.W.8, which describe the severe and fatal head injuries sustained by the deceased, consistent with a brutal assault using a blunt object. P.W.11's forensic examination, as per Ext. 8, along with the RFSL report in Ext.14, confirms the presence of bloodstains at the crime scene matching the blood type of the deceased, reinforcing P.W.3's statement of the assault taking place inside her house. The alignment between the eyewitness accounts, the nature of the injuries, and the forensic evidence leaves little room for doubt.

P.W.11's expert opinion aligns with the findings of P.W.8, the medical officer, regarding the cause of death, was the violent impact by a hard object on the vital parts of the deceased's body, specifically the head, unequivocally establishes the medical officer's assessment of the injuries. The location and nature of the bloodstains, as well as the condition of the body upon P.W.11's examination, suggests a violent confrontation, confirming that the victim had been attacked with considerable force, consistent with the injuries described by P.W.8. The nature of injury reciprocates the fact that the attacker wanted the deceased to do away with his life. The deliberate and sustained nature of the assault, as described by P.W.3 paralleled by the forensic and medical evidence, conclusively points to the Appellant's guilt in the murder of the deceased.

19. The Apex Court in the matter of **Chandan vs. The State (Delhi Admn.)** reported in **[2024] 4 S.C.R. 94**, has held that –

> "In **Shivaji Genu Mohite v. State of Maharashtra, AIR 1973 SC 55**, it was held that it is a well-settled principle in criminal jurisprudence that when ocular testimony inspires the confidence of the court, the prosecution is not required to establish motive. Mere absence of motive would not impinge on the testimony of a reliable eyewitness. Motive is an important factor for consideration in a case of circumstantial evidence. But when there is direct eye witness, motive is not significant. This is what was held:

> "In case the prosecution is not able to discover an impelling motive, that could not reflect upon the credibility of a witness proved to be a reliable eye-witness. Evidence as to motive would, no doubt, go a long way in cases wholly dependent on circumstantial evidence. Such evidence would form one of the links in the chain of circumstantial evidence in such a case. But that would not be so in cases where there are eye-witnesses of credibility, though even in such cases if a motive is properly proved, such proof would strengthen the prosecution case and fortify the court in its ultimate conclusion. But that does not mean that if motive is not established, the evidence of an eye-witness is rendered untrustworthy"
>
> The principle that the lack or absence of motive is inconsequential when direct evidence establishes the crime has been reiterated by this Court in **Bikau Pandey v. State of Bihar, (2003) 12 SCC 616; Rajagopal v. Muthupandi, (2017) 11 SCC 120; Yogesh Singh v. Mahabeer Singh, (2017) 11 SCC 195."**

20. In the above decisions, the Hon'ble Supreme Court clarifies that the absence of a proven motive does not invalidate the testimony of a reliable eyewitness. While motive may strengthen a case based on circumstantial evidence, it is not essential when credible direct evidence exists. Even though the exact motive, i.e. the theft of the hen, may not be fully proven, or be looked as trivial, as argued by the learned counsel for the Appellant, the overwhelming evidence leaves no room for doubt that the attack was premeditated, and the Appellant is conclusively proven to be the author of the crime. Therefore, the conviction by the trial Court under Section 302 IPC is fully justified.

21. In view of the discussions as above, in our considered view, the prosecution has been able to prove its case beyond all reasonable doubt. The judgment and order of conviction dated 11.12.2019 passed by the learned Court of the First Addl. Sessions Judge, Rourkela in Sessions Trial No.12 of 2017 is found to be legal and justified and the conviction of the Appellant is confirmed thereof. Since the sentence awarded is in accordance with law, there is nothing to interfere therewith.

22. As a result, the Appeal stands dismissed being devoid of merit.

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2024 (III) ILR-CUT-408

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

W.P.(C) NO. 14616 OF 2021

Dr. KANISHKA DAS .....Petitioner

V.

UNION OF INDIA & ORS. .....Opp.Parties

(A) CONSTITUTION OF INDIA, 1950 – Article 226 – Scope of interference at the stage of show-cause – Held, Writ Courts should be slow in disturbing the regular procedure and seizing statutory powers from the competent authorities – However, it is clarified that this Court is not incapacitated to interfere when it is pleaded, supported by clear and undisputed *prima facie* facts, that the very issuance of show-

cause is *per se* arbitrary and is of *mala fide* character or has been issued by an authority which is not empowered to do the same under the law – In a very rare and exceptional case, the High Court can quash a show-cause notice if it is found to be wholly without jurisdiction. (Para 7-A)

(B) CENTRAL CIVIL SERVICES (CLASSIFICATION, CONTROL AND APPEAL) RULES, 1965 – Rule 14 – Whether a civil servant has a chance to cross-examine the witness and be given an opportunity for hearing at the stage of inquiry conducted by the fact finding committee – Held, No – It is a settled position that a fact finding inquiry is an administrative mechanism instituted for gathering and ascertaining the relevant and correct state of affairs – The nature of such inquiry is preliminary and not penal – Thus, in this nature of the inquiry there is no need for granting hearing to the petitioner as well as any opportunity for cross-examination. (Para 7-B)

(C) WORDS & PHRASES – "SHOW-CAUSE" – The literal meaning of the term 'showcause', as used in the legal parlance, may be considered for better adjudication of the case in hand. According to Black's Law Dictionary, the term means "*against a rule nisi, an order, decree, execution, etc., is to appear as directed, and present to the court such reasons and considerations as one has to offer why it should not be confirmed, take effect, be executed, or as the case may be*." From the dictionary meaning, it is deducible that when a 'show-cause notice' is issued to someone, he is called upon to show reasons as to why a proposed action should not be taken against him. In other words, show-cause notice requires the noticee to render an explanation against a proposed action/sanction/punishment. (Para 7-A)

Case Laws Relied on and Referred to :-

1. (2010) 13 Supreme Court Cases 427 : Oryx Fisheries Pvt. Ltd. -Vrs.- Union of India & Ors.
2. (1989) 1 Supreme Court Cases 764 : H.L. Trehan & Ors. -Vrs.- Union of India & Ors.
3. (2011) 14 Supreme Court Cases 770 : State of Punjab -Vrs.- Davinder Pal Singh Bhullar
4. (2007) 13 Supreme Court Cases 270 : Union of India -Vrs.- VICCO Laboratories
5. (1987) 2 Supreme Court Cases 179 : State of U.P. -Vrs.- Brahm Datt Sharma
6. (2013) 4 Supreme Court Cases 301 : Nirmala J. Jhala -Vrs.- State of Gujarat
7. (2007) 1 SCC 283 : Kendriya Vidyalaya Sangathan -Vrs.- Arunkumar Madhavrao Sinddhaye
8. 1963 SCC Online SC 42 : Champaklal Chimanlal Shah -Vrs.- Union of India

For Petitioner : Mr. Subir Palit, Sr. Adv.

For Opp.Parties : Mr. P.K. Parhi, DSGI, Mr.B.S.Rayaguru, CGC
Mr. S.K. Sarangi, Sr. Adv (for Intervenor)
Mr. D. Lenka (O.P. Nos.2 & 3)

JUDGMENT Date of Hearing : 25.09.2024 : Date of Judgment : 04.10.2024

S.K. SAHOO, J.

In this writ petition, the petitioner Dr. Kanishka Das seeks to challenge the order dated 12.03.2021 passed by the learned Central Administrative Tribunal, Cuttack Bench, Cuttack (hereinafter, 'the Tribunal') in O.A. No.129 of 2021 under Annexure-10 whereby the learned Tribunal while declining to interfere with the show-cause notice dated 04.02.2021, observed that the authorities considering the relevancy and necessity of the documents sought for by the petitioner in Annexure-A/12, may supply the same to him as per Rules/law. Further, the petitioner has also challenged the show-cause notice dated 04.02.2021 issued by the opposite party no.2 as well as the Fact Finding Committee (for short, 'the F.F.C.') report dated 23.09.2020 under Annexure-9 as illegal, arbitrary and in violation of Central Civil Service (Classification, Control and Appeal) Rules, 1965 (hereinafter 'CCS (CC & A) Rules').

2. The factual matrix of the case in hand is that the petitioner, who is working as Professor in the Department of Paediatrics Surgery in AIIMS, Bhubaneswar, joined as Professor in the said Department in March 2018. After his joining, the petitioner along with other members of the Department, began to organize the academic activities and patient care protocols, whereby a schedule was finalized and responsibilities were divided among the members of the Department, but one Dr. Manoj K. Mohanty, who is one of the members of the Department, insisted on two separate units from the very day of his joining and because of such misunderstanding, there was hitch between the petitioner and Dr. Manoj K. Mohanty, but during the early December 2018, the said Department was divided into two units. The petitioner vide his e-mail dated 05.12.2018 under Annexure-3 series had cautioned the administration that such division of the Department would lead to fragmented protocols and confusion in training of the students, which would adversely impact patient care and ultimately the reputation of the institute. After the bifurcation of the unit, the petitioner as the Head of the Department continued to take clinical and teaching rounds, but the patient care appeared to be grossly inappropriate/non-standard/dangerous. According to the petitioner, at the instance of Dr. Manoj K. Mohanty, complaints were lodged before the administration by the patient attendants. While the matter stood thus, the opposite party no.2 issued order dated 15.05.2020 (Annexure-8) wherein out of the two bifurcated units of the Department of Paediatrics Surgery, one unit was headed by the petitioner and another unit was headed by Dr. Manoj K. Mohanty and both the incumbents were directed to report independently to the Director for all administrative and academic matters of their respective units in place of the petitioner as the Head of the Department. Challenging such bifurcation, the petitioner moved the Tribunal in O.A. No. 451 of 2020, which is still subjudice.

While the matter stood thus, a F.F.C. under the Chairmanship of Dr. Sandeep Agarwala, Professor, Department of Paediatrics Surgery, AIIMS, New Delhi, was constituted to ascertain the facts regarding the complaints submitted by some faculty members about the alleged unprofessional conduct of the petitioner.

The F.F.C. submitted its report on 23.09.2020 basing on which the show-cause notice dated 04.02.2021 under Annexure-9 was issued to the petitioner.

Challenging such show-cause notice along with the report of the F.F.C., the petitioner moved the learned Tribunal in O.A. No.129 of 2021. After hearing the learned counsel for both the parties, the learned Tribunal vide impugned order dated 12.03.2021 under Annexure-10, while declining to interfere with the show-cause notice as well as the report of the F.F.C., disposed of the Original Application observing that the opposite party no.2 may supply the documents to the petitioner as sought for in Annexure-A/12 considering the relevancy and necessity of the documents. The said order of the learned Tribunal dated 12.03.2021 under Annexure-10, inter alia, show-cause notice issued by the opposite party no.2 as well as the F.F.C. report under Annexure-9 are under challenge in this writ petition.

3. Pursuant to the notice, the opposite parties nos.1 to 3 have filed preliminary counter affidavit stating therein that the writ petition is not maintainable in the eyes of law on the ground that the same has been filed basing on the misrepresentation of facts without any substantive grounds or point of law entitling the petitioner to get the relief.

While denying the averments made by the petitioner regarding the e-mail communications vide Annexures-1 to 5, it is stated that those communications were relating to internal administration and day-to-day activities of the department and the same were no way related to the issues involved in the writ petition. It is further stated that vide office order dated 05.11.2018 issued by the Medical Superintendent, AIIMS, Bhubaneswar, two other departments, namely, Department of ENT & Department of Neurosurgery were also bifurcated into two units along with Department of Paediatrics Surgery. The allegation of the petitioner regarding the conscious effort by the administration and Dr. Manoj K. Mohanty (Head Unit-II of the Department) to isolate him from the entire department by spreading false rumours and fabricated stories were also denied. It is stated that since the petitioner had raised question with regard to the validity of the appointment of Dr. Manoj K. Mohanty as Additional Professor in the Department of Paediatrics Surgery, but he has not impleaded Dr. Manoj K. Mohanty as a party to the proceeding, thus, the petitioner has no locus standi to challenge the same. It is also stated that the appointment of Dr. Manoj K. Mohanty was made with due adherence to the Recruitment Rules prescribing qualification and teaching experience for Faculty Posts and Dr. Manoj K. Mohanty was declared provisionally eligible basing on the teaching experience certificate submitted by him in the Faculty Recruitment of 2015 at AIIMS, Bhubaneswar. It is further stated that the Standing Selection Committee, as had been constituted by the then Minister of Health & Family Welfare, Govt. of India, being the then President of the Institute, verified the Teaching Experience Certificate and recommended Dr. Manoj K. Mohanty as eligible to be appointed as Additional Professor in Department of Paediatrics Surgery. It is also stated that such appointment of Dr. Manoj K. Mohanty as Additional Professor of the Department of Paediatrics Surgery at AIIMS, Bhubaneswar has been challenged before this Court

in W.P.(C) (PIL) No.16885 of 2021 as well as before the Tribunal in O.A. No. 451 of 2020, which are pending for adjudication. It is further stated that keeping in view Regulation 11 of AIIMS Regulations, 1999, the Director, opposite party no.2 has the power to bifurcate the Department of Paediatrics Surgery for better and smooth administration of the Department.

It is further stated in the counter affidavit that basing on some complaints made by the faculty members of the Department of Paediatrics Surgery and other Departments about the unprofessional conduct of the petitioner, F.F.C. was constituted under the Chairmanship of Prof. Sandeep Agarwala, Department of Paediatrics Surgery, AIIMS, New Delhi and other members vide office orders dated 15.05.2020 and 22.05.2020 under Annexure-C/2 series. It is stated that the F.F.C. was an administrative mechanism to ascertain the facts of the matter to help the Competent Authority to take some decisions. The F.F.C. inquiry is not an inquiry under the CCS (CC & A) Rules and therefore, the provisions of CCS (CC & A) Rules will not be applicable. It is further stated that the F.F.C. submitted its report on 23.09.2020 to the competent authority after ascertaining the facts in issue and thereby made recommendations and actions to be taken for smooth management of the Department of Paediatrics Surgery in AIIMS, Bhubaneswar. It is further stated that the Governing Body also noted that the above findings of the F.F.C. about the petitioner are very serious in nature and needs initiation of disciplinary action in accordance with the Rules. The Governing Body accepted the report of the F.F.C. as the preliminary inquiry report and approved to issue show-cause notice to the petitioner by the Competent Authority. The petitioner submitted his reply to the show-cause notice dated 04.02.2021 and the Disciplinary Authority considered the reply of the petitioner and finding the same to be unsatisfactory, directed for issuance of article of charges along with statement of imputations to the petitioner. The petitioner also submitted his written statement of defence to the charges framed against him in the disciplinary proceeding. The Disciplinary Authority directed for inquiry into the imputation of charges against the petitioner, with appointment of Inquiry Officer and Presenting Officer under Rule 14 of CCS (CC & A) Rules. The Disciplinary Proceeding is pending for further inquiry, before the Inquiring Authority at present in respect of the charges imputed against the petitioner. It is further stated that since the petitioner has not approached this Court with clean hands and has suppressed the material facts with ulterior motive, the petitioner is not entitled to get any relief.

4. In reply to the counter affidavit, the petitioner has filed rejoinder affidavit reiterating that the bifurcation of other departments, namely, E.N.T and Neurosurgery was effected without any formal, prior communication from the Director at that point of time. Thereafter, the Department of Neurosurgery has been remerged into a single department on 20.01.2020 since the said bifurcation was a failed and unsuccessful experiment. The averment regarding non-joinder of Dr. Manoj K. Mohanty as a party to the writ petition, the petitioner has stated that he did not specifically challenge the appointment of Dr. Manoj K. Mohanty in this writ

petition, but the issue of validity of appointment of Dr. Manoj K. Mohanty has been alluded in the writ petition with the sole intention to point out that the petitioner being the seniormost has been removed from the post of HoD and that Dr. Manoj K. Mohanty did not have requisite teaching experience/eligibility as per the prescribed norms. It is further stated in the rejoinder affidavit that the JLN Hospital and Research Centre, Bhilai clearly denied having issued an experience certificate to Dr. Manoj K. Mohanty, while he produced a certificate given by one Dr. Ashok Ghorpade, Director (M&HS and Coordinator of DNB studies), probably given in his personal capacity, apparently at the individual's request as stated therein. It is further stated that the said centre did not comprise of a medical college or a department of Paediatrics Surgery or run a post-graduate course in Paediatrics Surgery and thus, the said experience does not fulfill the teaching experience required for the post of Addl. Prof., Paediatrics Surgery. The petitioner has further stated in the rejoinder affidavit that the F.F.C. has ignored his repeated requests for supply of documents, statements recorded and opportunity to cross-examine the witnesses whose statements have been recorded and an opportunity to cross-examine such witnesses as requested by him in para-7 of his reply dated 01.02.2022 to the charge sheet. It is further stated that the requests of the petitioner for an authenticated copy of the F.F.C. report signed by all the members was not provided to him, instead the petitioner was supplied with a copy signed by only three members which is conspicuous in nature due to absence of signature of the Chairman. It is further stated that the showcause notice reads like a statement of imputation/indictment against the petitioner and clearly exhibits a completely closed mind of the authorities even at the stage of issuance of showcause.

5. Mr. Subir Palit, learned Senior Advocate appearing for the petitioner contended that the show-cause notice issued by the opposite party no.2 is bad in the eyes of law as the same has been done based on findings recorded by the F.F.C. A mere reading of the show-cause would demonstrate that the same is a facsimile of the F.F.C. report and it would also reflect that the mind of the authority was already closed at that stage. The very language in which the show-cause has been worded clearly establishes that the authorities were biased against the petitioner from the very inception and formation of F.F.C. The issuance of show-cause was only a mere formality to bring home the pre-judged guilt of the petitioner. He further challenged the constitution of the F.F.C. and the report furnished by it on the ground that the same was in contravention of the CCS (CC & A) Rules. It is his submission that F.F.C. had recommended disciplinary action against the petitioner, which is undisputedly beyond the scope of the F.F.C., pursuant to which the disciplinary authority framed charges against the petitioner and issued show-cause notice to him. It is argued that it was no part of the mandate of the F.F.C. to recommend a punishment on punitive measure against the petitioner. Learned Senior Counsel further argued that the petitioner has not been granted an opportunity to cross-examine the witnesses whose statements were recorded by the F.F.C. The learned counsel placed reliance in the case of **Oryx Fisheries Pvt. Ltd. -Vrs.- Union of**

India and others reported in **(2010) 13 Supreme Court Cases 427** and argued that the post-decisional hearing would not provide adequate remedy to the petitioner in the present case. He placed reliance in the case of **H.L. Trehan and others -Vrs.- Union of India and others** reported in **(1989) 1 Supreme Court Cases 764** wherein it has been held that the authority who embarks upon a post-decisional hearing would naturally proceed with a closed mind and there will be no reasonable opportunity or opportunity at all for representation at such a stage. While concluding his argument, Mr. Palit argued that since the impugned show-cause notice does not stand the test of law, as a natural consequence, the entire proceedings arising out of it stand vitiated and in support of such contention, he has placed reliance on the decision of the Hon'ble Supreme Court in the case of **State of Punjab -Vrs.- Davinder Pal Singh Bhullar** reported in **(2011) 14 Supreme Court Cases 770**.

6. Mr. B.S. Rayaguru, learned Central Government Counsel, on the other hand, submitted that the F.F.C. is an administrative mechanism to ascertain facts before initiating a full-scale inquiry against an employee and the same has not been contemplated under the CCS (CC & A) Rules. He argued that the F.F.C. not being an entity under the said Rules, its inquiry and report cannot be said to be against the Rules. Learned counsel also refuted the contention of the petitioner that the disciplinary action has been initiated against the petitioner by the opposite party no.2 without obtaining necessary permission from the appropriate authority and contended that necessary permission has been obtained and only thereupon, the showcause notice has been issued to the petitioner and thus, the same cannot be said to be illegal, arbitrary or mala fide. He further supported the impugned order passed by the learned Tribunal which granted opportunity to the petitioner to call for necessary documents but the petitioner has tactfully not availed the opportunity so as to linger the proceeding. He concluded his argument with the submission that the writ petition being devoid of merits should be dismissed particularly when the examination of witnesses in the inquiry is at a concluding stage.

7. Adverting to the contentions raised by the learned counsel for the respective parties, the questions that cropped up for consideration are as follows:

(i) Whether the 'Show-Cause Notice' issued to the petitioner is justified?

(ii) Whether the report of the F.F.C. is in violation of CCS (CC & A) Rules and hence, deserves to be quashed?

Whether the 'Show-Cause Notice' issued to the petitioner is justified? :

7-A. It is a settled position of law that Writ Courts must show a reasonable degree of restraint while interfering at the stage of 'show-cause'. The literal meaning of the term 'showcause', as used in the legal parlance, may be considered for better adjudication of the case in hand. According to **Black's Law Dictionary**, the term means "*against a rule nisi, an order, decree, execution, etc., is to appear as directed, and present to the court such reasons and considerations as one has to offer why it should not be confirmed, take effect, be executed, or as the case may be*." From the dictionary meaning, it is deducible that when a 'show-cause notice' is

issued to someone, he is called upon to show reasons as to why a proposed action should not be taken against him. In other words, show-cause notice requires the noticee to render an explanation against a proposed action/sanction/punishment. Needless to say, the noticee, more often than not, is required to furnish his response based upon and considering the facts which have been alleged against him and also which he believes are in his favour. Issuance of showcause notice is therefore the first step in the staircase of a proposed disciplinary action and not the whole staircase itself. This first step involves complex questions of disputed facts and as is ingrained in the constitutional as well as service jurisprudence, the Writ Courts are not the appropriate forums to adjudicate questions of facts, much less penetrating into the domain of disputed facts.

The scope of interference at the nascent stage of show-cause has lucidly been discussed in the case of **Union of India -Vrs.- VICCO Laboratories** reported in **(2007) 13 Supreme Court Cases 270**, wherein while speaking for the Bench of the Hon'ble Supreme Court, Hon'ble Dr. Justice Arijit Pasayat (as His Lordship then was) held as follows:

> "31. Normally, the writ court should not interfere at the stage of issuance of show-cause notice by the authorities. In such a case, the parties get ample opportunity to put forth their contentions before the authorities concerned and to satisfy the authorities concerned about the absence of case for proceeding against the person against whom the show-cause notices have been issued. Abstinence from interference at the stage of issuance of show-cause notice in order to relegate the parties to the proceedings before the authorities concerned is the normal rule. However, the said rule is not without exceptions. Where a show-cause notice is issued either without jurisdiction or in an abuse of process of law, certainly in that case, the writ court would not hesitate to interfere even at the stage of issuance of show-cause notice. The interference at the show-cause notice stage should be rare and not in a routine manner. Mere assertion by the writ petitioner that notice was without jurisdiction and/or abuse of process of law would not suffice. It should be prima facie established to be so. Where factual adjudication would be necessary, interference is ruled out." **[Emphasis supplied]**

In the case of **State of U.P. -Vrs.- Brahm Datt Sharma** reported in **(1987) 2 Supreme Court Cases 179**, the Hon'ble Supreme Court, while explaining the scope of interference at the stage of 'show-cause', held as follows:

> "9. The High Court was not justified in quashing the show-cause notice. When a showcause notice is issued to a Government Servant under a statutory provision calling upon him to show-cause, ordinarily the Government Servant must place his case before the authority concerned by showing cause and the courts should be reluctant to interfere with the notice at that stage unless the notice is shown to have been issued palpably without any authority of law. The purpose of issuing show-cause notice is to afford opportunity of hearing to the Government Servant and once cause is shown, it is open to the Government to consider the matter in the light of the facts and submissions placed by the Government Servant and only thereafter a final decision in the matter could be taken. Interference by the Court before that stage would be premature, the High Court in our opinion ought not have interfered with the showcause notice."

There is no dearth of precedents reiterating the aforesaid stance where it has been categorically held that Writ Courts should be slow in disturbing the regular

procedure and seizing statutory powers from the competent authorities. However, it is clarified that this Court is not incapacitated to interfere when it is pleaded, supported by clear and undisputed prima facie facts, that the very issuance of show-cause is per se arbitrary and is of mala fide character or has been issued by an authority which is not empowered to do the same under the law. In a very rare and exceptional case, the High Court can quash a show-cause notice if it is found to be wholly without jurisdiction. A show-cause notice does not give rise to any cause of action as it does not amount to an adverse order which affects the rights of any party. It is quite possible that, after considering the reply to the show-cause notice, the authority concerned may drop the proceedings and/or hold that the allegations are not established. A show-cause notice does not infringe the rights of anyone. It is only when a final order imposing some punishment, or otherwise adversely affecting a party, is passed that the said party can be said to have any grievance. Of course, where the threat of a prejudicial action is wholly without jurisdiction, a person cannot be asked to wait for the injury to be caused to him before seeking the Court's protection. If, however, the authority has the power in law to issue the show-cause notice, it would not be open to the person, asked to show-cause, to approach the Court under Article 226 of the Constitution at the stage of notice. The jurisdiction of the High Court, under Article 226 of the Constitution, should not be permitted to be invoked in order to challenge a show-cause notice, unless accepting the facts in the show-cause notice to be correct, the show-cause notice is, ex facie, without jurisdiction, i.e., the notice is ex-facie a 'nullity' or ‘non-est’ in the eyes of the law for absolute want of jurisdiction of the authority to even investigate into the facts or totally ‘without jurisdiction’ in the traditional sense of that expression i.e., even the commencement or initiation of the proceedings, on the face of it and without anything more, is totally unauthorised. In all other cases, it is only appropriate that the party shows cause before the authority concerned and takes up the objection regarding jurisdiction therein. Mere assertion by the petitioner that a notice is without jurisdiction would not suffice. It should, prima facie, be established to be so. Where factual adjudication is necessary, interference is ordinarily ruled out. Whether the show-cause notice is founded on any legal premise is a jurisdictional issue which can be urged by the recipient of the notice and such issues can also be, initially, adjudicated by the authority issuing the very notice before the aggrieved can approach the Court.

Though the learned counsel for the petitioner placed reliance in the case of **Oryx Fisheries Pvt. Ltd.** (*supra*), but in the said decision, it has been held that a show-cause proceeding is meant to give the person proceeded against a reasonable opportunity of making his objection against the proposed charges indicated in the notice. At the stage of show-cause, the person proceeded against must be told the charges against him so that he can take his defence and prove his innocence. The show-cause notice cannot be read hyper technically and it is to be read reasonably. An opportunity to deny his guilt and establish his innocence, which he can only do if he is told what the charges levelled against him are and the allegations on which

such charges are based. If on a reasonable reading of a show- cause notice a person of ordinary prudence gets the feeling that his reply to the show-cause notice will be an empty ceremony and he will merely knock his head against the impenetrable wall of prejudged opinion, such a show-cause notice does not commence a fair procedure especially when it is issued in a quasi-judicial proceeding under a statutory regulation which promises to give the person proceeded against a reasonable opportunity of defence.

A disciplinary authority has to keep a broad mind while issuing show-cause notice. No doubt at the stage of issuance of show-cause notice, the delinquent employee should not be given an impression that he is going to be indicted or a finding of guilt has been pre-determined.

It appears that the issuance of show-cause notice to the petitioner is based on the findings of F.F.C. Report and thus, it cannot be said to be arbitrary or mala fide in character. There is nothing on record that the authority lacks jurisdiction to issue the show-cause notice. The Governing Body of the AIIMS, Bhubaneswar accepted the F.F.C. report as the preliminary enquiry report and approved to issue show-cause notice to the petitioner by the competent authority.

In the present case, though it has been alleged by the petitioner that the show-cause notice is an exact facsimile of the F.F.C. report, but it is not the case of the petitioner that an opportunity of hearing has been denied to him to counter the charges made against him. The F.F.C. is an administrative mechanism which is usually constituted for ascertaining the facts and it is on the basis of these facts that a show-cause notice is issued. Therefore, if there are some similarities in the report of the F.F.C. and the show-cause notice, there is hardly any reason to doubt the impartiality of the disciplinary authority and the F.F.C. being genus and the issuance of show-cause notice being the species, it is but normal to have some analogous character.

Thus, we are of the humble view that there is no such illegality in the issuance of show-cause notice to the petitioner and the authority is quite justified in issuing such notice on the basis of the report of the F.F.C.

Whether the report of the F.F.C. is in violation of CCS (CC & A) Rules and hence, deserves to be quashed? :

7-B. The office order dated 15.05.2020 reads as follows:-

"**OFFICE ORDER**

Subject: Fact Finding Committee to look into the complaints of the some faculty members of the Department of Paediatrics Surgery and other Departments about alleged professional conduct of the Prof. Kanishka Das as the HoD, Paediatrics Surgery.

The President, AIIMS, Bhubaneswar has constituted the following Fact Finding Committee to ascertain the facts of several complaints submitted by some faculty members of the Department of Paediatrics Surgery & other Departments about alleged unprofessional conduct of Dr. Kanishka Das as the HoD of the Department of Paediatrics Surgery and to examine whether Dr. Das has failed to provide guidance and

leadership expected of an Head of the Department besides a cohesiveness and team spirit that is expected in any Department.

1. Chairman- Prof. Sandeep Agarwala
Dept. of Paediatrics Surgery
AIIMS, New Delhi

2. Member- Prof. Madhabananda Kar
HoD, Dept. of Surgical Oncology
AIIMS, Bhubaneswar

3. Member-Convenor-
Prof. Sachidanand Mohanty
Medical Superintendent
AIIMS, Bhubaneswar

The F.F.C. shall take into consideration all the complaints as available in the file and summon any one in AIIMS, Bhubaneswar connected with the case and record their evidences as felt necessary. The F.F.C. may also recommend about the measures to be taken for future smooth management of the Department of Paediatric Surgery.

The F.F.C. shall submit its report at the earliest.

(P.K. Ray)
Dy. Director (Admn.)
AIIMS, Bhubaneswar."

Therefore, the F.F.C. was authorised not only to consider all the available complaints, record the evidence of any one connected with the case as would be felt necessary, but also to recommend about the measures to be taken for future smooth management of the Department of Paediatrics Surgery.

The report of the F.F.C. indicates that the petitioner sighting high moral and ethical grounds has preached the fundamental working ethos and has been making rounds and counseling patients and their attendants even of the other units. He has made adverse comments and written alternate treatment plans in the patients' case records. He has tried to impose clinical decisions regarding surgery and management on other faculty members. He has failed to acknowledge other faculty members during the department's data presentations in the National Academic Forums including patient data. He has also failed to provide leadership in research and created impediments in the research work of the faculty and thesis being guided by them which was already in progress before he joined as HoD. He has failed to provide leadership and guidance to the Department members, thereby hampering the Department and faculty members progress. He has felt that all these bickering and insubordination by the faculty members of his Department was at the behest of Dr. Manoj K. Mohanty so also the AIIMS Administration, without realizing that it was his actions that had created a poor working condition with an atmosphere distorts and lack of confidence. His attitude and method of functioning was not conducive to teaching, learning and over-all progress of either the Department or the Departments' faculty members. The F.F.C. came to hold that it would be detrimental for the Department if the petitioner continued as HoD or even has continued interaction with other faculty members. Accordingly, the F.F.C. suggested various

alternative actions against the petitioner in the interest of peace in the Department and its continued growth which are as follows:

> (i) It seems that the petitioner is still on deputation from his parent department at St. Johnes in Bangalore. If this is a fact, he may be sent back to his Institution;
>
> (ii) He may be removed from leadership of the Department and the Director takes over as the administrative HoD for five years and senior most faculty carries out the day-to-day functioning of the Department.
>
> He be allowed to continue in the Department, but he needs to be isolated. He could be allocated restricted privileges like some time in the OPD, a few beds and a OT/or some operating time to work as Paideitric Surgeon. He should be debarred from attending any rounds or any teaching activities or common departmental activities;
>
> (iii) He may be removed from headship of the Department and the second senior most faculty be made the Head of the Department for five years and give this time to the petitioner for introspection and rectification of his nature.
>
> In this time, the petitioner be allowed to continue in the Department but he needs to be isolated. He could be allocated restricted privileges like some time in the OPD, a few bed and a OT/or some operating time to work as Paediatrics Surgeon. He should be debarred from attending any rounds or any teaching activity or common departmental activities.
>
> Even with this arrangement, if he will not change his stubbornness and continue to jeopardize the growth and create a poor working atmosphere in the Department, then he should be debarred from the headship permanently; (iv) He may be altogether removed from the faculty position at AIIMS, Bhubaneswar now or he may be given an option to resign and leave.

After receipt of the report of the F.F.C., the Governing Body of the AIIMS, Bhubaneswar took a serious note of such findings on various alleged misconduct of the petitioner and emphasized to ensure discipline and expected work standards from all the faculty members of the Institute. The Governing Body accepted the F.F.C. report as the preliminary enquiry report and approved to issue show-cause notice to the petitioner by the competent authority as to why disciplinary action as per the provisions of CCS (CC & A) Rules would not be taken against him based on the report of the F.F.C. and to give the petitioner a reasonable opportunity of defence as principles of natural justice. Accordingly, show-cause notice was issued to the petitioner.

8. There should be not even an iota of confusion between a 'disciplinary inquiry' and a 'fact-finding inquiry'. Both are neither analogous nor can be used interchangeably. A factfinding inquiry, as the name suggests, is conducted to ascertain the facts of the matter. It is not a full-fledged disciplinary inquiry. Only after gathering the facts and after getting a report from the fact-finding committee, if the said facts require initiation of a disciplinary action, then only a disciplinary proceeding is undertaken. By its very nature, a fact-finding inquiry is not of penal character nor does it prescribe any penalty. Otiose to mention, a fact-finding inquiry is not an 'inquiry' contemplated under Rule 14 of the CCS (CC & A) Rules. For better understanding, it may further be stated that report of the F.F.C. provides a prima facie factual under-pinning on the basis of which the disciplinary authority

considers either to initiate a further 'disciplinary inquiry' as provided under Rule 14 of the CCS (CC & A) Rules for imposing major penalties or to drop the proceedings all together. The fact-finding inquiry is at best can be said be in the nature of a 'preliminary inquiry'. The following observations made by the Hon'ble Supreme Court in the case **Nirmala J. Jhala -Vrs.- State of Gujarat** reported in **(2013) 4 Supreme Court Cases 301** can be relied upon to underline the true purport of a preliminary inquiry:

> "47. The preliminary enquiry may be useful only to take a prima facie view, as to whether there can be some substance in the allegation made against an employee which may warrant a regular enquiry.
>
> 48. A prima facie case does not mean a case proved to the hilt but a case which can be said to be established if the evidence which is led in support of the case were [to be] believed. While determining whether a prima facie case had been made out or not, the relevant consideration is whether on the evidence led it was possible to arrive at the conclusion in question and not whether that was the only conclusion which could be arrived at on that evidence."

In the case of **Kendriya Vidyalaya Sangathan -Vrs.- Arunkumar Madhavrao Sinddhaye** reported in **(2007) 1 Supreme Court Cases 283**, the Hon'ble Supreme Court set aside the order of a High Court which had treated a preliminary inquiry/fact-finding inquiry as a disciplinary inquiry and held as follows:

> "17. As shown above, the nature of enquiry conducted against the respondent was merely a preliminary or fact-finding enquiry and no formal full-scale departmental enquiry had been conducted against the respondent. In fact, the enquiry officer had himself recommended that disciplinary action be taken against the respondent. However, the authorities chose not to hold a disciplinary enquiry against the respondent and did not serve him with any article of charges or take any further steps in that regard. Instead they chose to exercise power under the terms and conditions of the appointment order. The termination order is wholly innocuous and does not cast any stigma upon the respondent nor it visits him with any evil consequences. The High Court seems to have proceeded on a wholly wrong basis and has treated the enquiry which was only a preliminary or fact-finding enquiry into a regular disciplinary enquiry, which was not the case here. In these circumstances, the judgment of the High Court is wholly erroneous in law and has to be set aside."

Therefore, the very nature of fact-finding inquiry makes it permissible to be held ex-parte and even without granting any opportunity of hearing to the concerned employee, which is imperative only in a disciplinary inquiry. In the case of **Champaklal Chimanlal Shah -Vrs.- Union of India** reported in **1963 SCC OnLine SC 42**, the Hon'ble Supreme Court held as follows:

> "13…In short a preliminary enquiry is for the purpose of collection of facts in regard to the conduct and work of a government servant in which he may or may not be associated so that the authority concerned may decide whether or not to subject the servant concerned to the enquiry necessary under Article 311 for inflicting one of the three major punishments mentioned therein. Such a preliminary enquiry may even be held ex parte, for it is merely for the satisfaction of government, though usually for the sake of fairness, explanation is taken from the servant concerned even as such an enquiry. But at

> that stage he has no right to be heard for the enquiry is merely for the satisfaction of the government and it is only when the government decides to hold a regular departmental enquiry for the purpose of inflicting one of the three major punishments that the government servant gets the protection of Article 311 and all the rights that that protection implies as already indicated above. There must therefore be no confusion between the two enquiries and it is only when the government proceeds to hold a departmental enquiry for the purpose of inflicting on the government servant one of the three major punishments indicated in Article 311 that the government servant is entitled to the protection of that Article." **[Emphasis supplied]**

In view of the foregoing discussions and the law laid down by the aforesaid precedents, we are of the view that the contention of the petitioner that the constitution so also the report of the F.F.C. is contrary to the CCS (CC & A) Rules deserves no merit. It is a settled position that a fact-finding inquiry is an administrative mechanism instituted for gathering and ascertaining the relevant and correct state of affairs. The nature of such inquiry is preliminary and not penal. Thus, given the nature of the inquiry, there is no need for granting even hearing to the petitioner, much less any opportunity for crossexamination. It is only at the stage of inquiry that is contemplated under Rule 14 of the CCS (CC & A) Rules that an opportunity of hearing has to be granted. As the F.F.C. merely produced the facts for consideration before the disciplinary authority, the ball is sent to the court of such authority to take an appropriate call and to grant reasonable opportunity of hearing to the petitioner.

Mr. Palit, learned Senior Advocate contended that post-decisional hearing will render the entire proceeding inimical to the petitioner. To substantiate his contention, he has relied upon the decision of the Hon'ble Supreme Court in the case of **H.L. Trehan** (supra). However, such reliance on the judgment as well as the contention itself is misplaced. In the instant case, there is no question of post-decisional hearing as the disciplinary authority had given adequate opportunity to the petitioner to submit his show-cause and also put forward his stance by way of cross-examination of the witnesses. When the show-cause of the petitioner has been taken on record before the Inquiring Authority so also reasonable opportunity of hearing and crossexamination have been given to him, it will be vague to hold that the authority has made the petitioner defenceless stripping him out of armour and proceeding in the inquiry ex parte.

In the case of **Davinder Pal Singh** (supra), it has been held that if the initial action is not in consonance with law, all subsequent and consequential proceedings would fall though for the reason that illegality strikes at the root of the order. However, in the present case, we are of the humble view that the show-cause notice is not a tainted one only because it was issued basing upon the facts discovered in the report of the F.F.C. As we have already held that the show-cause notice is just and proper in the eyes of law, the bedrock of the proceeding is quite strong and therefore, there is no question of falling of the super structure. Thus, the disciplinary proceeding and the consequent inquiry are good in the eyes of law.

9. When a query is made during hearing to the learned counsel for the petitioner as to whether in terms of the impugned order, the petitioner pursued supply of any documents from the opposite party, the answer was in negative.

An affidavit has been filed by the AIIMS which is dated 20.08.2024 wherein it is indicated that the status of the enquiry is at regular hearing stage. In the said enquiry, out of 22 witnesses from both the sides, 13 witnesses (i.e. 7 witnesses from the prosecution side and 6 witnesses from defence side) have already adduced their evidence before the Inquiring Authority. Examination in-chief/cross-examination of all 13 witnesses have already been carried out and that the evidence of remaining 9 witnesses would be carried out on 21.08.2024 as fixed by the Inquiring Authority. Learned counsel for opposite parties nos. 2 and 3 by filing a synopsis with date chart on 25.09.2024 indicated that out of total number of 22 witnesses from both the sides, 21 witnesses have already been examined and cross-examined and last witness could not appear and requested the Inquiring Authority to submit his evidence in writing, which is under consideration. The request of the petitioner for re-examination of two witnesses is also pending for consideration by the Inquiring Authority. The learned counsel for the petitioner has not disputed this position. Thus, it seems that the inquiry is almost at the concluding stage.

10. In view of the foregoing discussions, we do not find any infirmity in the show-cause notice dated 04.02.2021 so also any illegality in the impugned order dated 12.03.2021 passed by the learned Central Administrative Tribunal, Cuttack Bench, Cuttack under Annexure-10 and therefore, it would not be appropriate and incumbent to disturb the statutory procedure and to superficially interfere at the fag end of the disciplinary proceeding.

11. Accordingly, the writ petition being devoid of merits, stands dismissed. It is made clear that we have not expressed any opinion as to whether the petitioner has been provided full opportunity in the entire disciplinary proceeding or on the merits of the disciplinary proceeding and the findings of such proceeding shall obviously be based on the oral as well as documentary evidence adduced by the respective parties.

With the dismissal of the writ petition, the interim orders passed earlier stand vacated.

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2024 (III) ILR-CUT-422

K.R. MOHAPATRA, J.

W.P.C. NO. 28440 OF 2023

JAGANNATH VIHAR UNNAYAN COMMITTEE, CUTTACK ……..Petitioner

V.

THE INSPECTOR GENERAL OF REGISTRATION, ODISHA, CUTTACK & ORS. ……..Opp.Parties

(A) REGISTRATION ACT, 1908 ─ Clause-12 of Part II of Article-A of the Table of fees ─ It came to the notice of petitioner that the name of Petitioner/Committee (the vendee) was not properly described in the sale deed ─ There was also a typographical error in the plot number of northern boundary of the case land ─ The District Sub-Registrar levied a stamp duty of ₹ 34,200/- so also registration fee of ₹ 13,656/- on rectification deed ─ Whether the levies imposed upon the rectification deed admissible? ─ Held, No ─ The rectification deed does not create, transfer, limit, extend, extinguish on a record, right, title, interest or liability – It is only a deed to rectify the inadvertent error in the original sale deed. (Para -7)

(B) INDIAN STAMP ACT, 1899 ─ Section 4 ─ Stamp duty on the original sale deed as per Schedule-I has already been paid ─ Subsequent deed of rectification is filed to complete the transaction ─ Whether imposition of stamp duty of ₹ 34,200/- is justified? ─ Held, No ─ A stamp duty of ₹ 1.00/- leviable as per Section 4 of the Act. (Para - 9)

For Petitioner : Mr. Chandra Madhab Singh.
For Opp.Parties : Mr. Swayambhu Mishra, A.S.C.

JUDGMENT Heard & Disposed of : 19.09.2024

K.R. MOHAPATRA, J.

1. This matter is taken up through hybrid mode.

2. The Petitioner in this writ petition seeks for a direction to the District Sub-Registrar, Cuttack to levy stamp duty as per Clause-12 of Part-II of Article-A of the Table of Fees under the Registration Act, 1908 (for brevity 'the Table of Fees') and to refund the excess registration fees as well as stamp duty collected on the Rectification deed (Annexure-4).

3. It is submitted by Mr. Singh, learned counsel that a sale deed executed in favour of the Petitioner was presented before District Sub-Registrar, Cuttack-Opposite Party No. 3 by one Sri Purna Chandra Sahu, the vendor, on 26th March, 2021 for registration in respect of Plot No.3197 to an extent of Ac.0.03 dec. & 414 links under Khata No.341 of mouza Gopalpur under Cuttack Tahasil in the district of Cuttack (for short 'the case land'). Accordingly, the sale deed (Annexure-3) was registered by the District Sub-Registrar, Cuttack on payment of requisite stamp duty and registration fee. Subsequently, it was found that the vendee, namely, the Petitioner-Committee, was not properly described in the sale deed as one Hari Jeeban Das was described as 'Marfatdar' of the Committee. In fact, he was the President of the Petitioner-Committee. Further, there was also a typographical error in the plot number of northern boundary of the case land. The northern boundary of the case land was inadvertently stated to be revenue Plot No. 3207 in place of Plot No.3202 as would be apparent from the sketch map appended to the sale deed under Annexure-3. Hence, a rectification deed under Annexure-4 was presented on 12th

July, 2023, which was registered on 14th July, 2023. However, the District Sub Registrar, Cuttack levied a stamp duty of Rs.34,200/-, so also registration fee of Rs.13,656/- on the rectification deed, which is contrary to the provision of the Indian Stamp Act, 1899 as well as Registration Act, 1908 and the Rules framed thereunder. Hence, this writ petition has been filed for refund of the excess stamp duty as well as registration fee.

4. Taking into consideration the case of the Petitioner, this Court vide order dated 25th April, 2024 directed learned State Counsel to file an affidavit clarifying the position. Accordingly, counter affidavit has been filed by the District Sub-Registrar, Cuttack stating *inter alia* that the original deed is a personal deed in which it has been mentioned in the recital that '*the Vendee and after his death, the legal heirs shall be the owner of the property'*. But, in the rectification deed, the term of the recital has been changed as 'the Committee and its Members shall be the owner of the property'. Mr. Mishra, learned Additional Standing Counsel referring to the counter affidavit also submits that in the original deed, northern boundary of the case land is stated to be Plot No.3207, but, in the rectification deed, northern boundary of the case land has been altered as Plot No.3202. The original deed was prepared basing upon the resolution of the Committee dated 18th March, 2021. But, there was no such resolution so far as rectification deed is concerned. Thus, there are changes in the rectification deed, which are material in nature for which the aforesaid stamp duty and registration fee have been levied. It is his submission that when the rectification deed brings in material changes in the ownership as well as description of the land, an *ad valorem* court fee of the consideration amount of the rectification deed is leviable. As such, there is no illegality in levying the aforesaid stamp duty as well as registration fee.

5. Heard learned counsel for the parties. Perused the materials on record. Para-11 of Article-A of the Table of Fees under the Registration Act, 1908 reads as under:

> *"11. The registration fee on a document purporting to rectify an error in a document previously registered –*
>
> *(a) Which by itself creates, transfer, limits, extends, extinguishes on a record, right, title interests or liability shall –*
>
> *(i) Where consideration or value is expressed, be levied at ad valorem as prescribed in Part I on the amount of consideration or value so expressed, subject to maximum Rs.100.00.*
>
> *(ii) Where no consideration or value is expressed the fee shall be as prescribed in (a) (ii) above.*
>
> *(b) Which does not create, transfer, limit, extend, extinguish or record any right, title, interest or liability shall –*
>
> *(i) Where consideration or value is expressed the fee shall be levied on the amount of consideration so expressed as in Part I of this Article, subject to a maximum of Rs.100.00.*
>
> *(ii) Where no consideration or value is expressed the fee shall be the same as leviable on the value of the original document subject to a maximum of Rs.100.00"*

6. Para-11 (a) specifically states that the registration fee on a document purporting to rectify an error in a document previously registered, which by itself creates, transfers, limits, extends, extinguishes on a record, right, title, interest or liability, shall where consideration or value is expressed, be levied at *ad valorem* as prescribed in Part-I on the amount of consideration or value so expressed, subject to maximum of Rs.100/-. Thus, it is to be examined as to whether the rectification deed falls under Clause-(a) of Para-11 of the Table of Fees under the Registration Act, 1908 or not.

7. In the instant case, it appears that the name of the Vendee, namely, the Petitioner-Committee, is not changed. Since the Committee is a juristic person, it is represented by its President. Inadvertently it was stated to be the Marfatdar of the Committee. But, in the rectification deed, it is stated that the Committee is represented by its President. It further appears that northern boundary of the case land has been described as Plot No.3207 in place of Plot No.3202. A sketch map has been attached to the original sale deed (Annexure-3), which clearly discloses that northern boundary of the case land is Plot No.3202. As such, description of northern boundary in the body of the original sale deed (Annexure-3) was an inadvertent error, which does not change the description of the case land. The same was sought to be rectified in the rectification deed (Annexure-4). It is further clear that the rectification deed does not create, transfer, limit, extend, extinguish on a record, right, title, interest or liability. It is only a deed to rectify the inadvertent error in the original sale deed. Thus, registration fee leviable squarely falls under Clause (a) of Part-11 of the Table of Fees under the Registration Act, 1908.

8. Likewise, Section 4 of the Indian Stamp Act, 1899 reads as under:

> ***"4. Several instruments used in single transaction of sale, mortgage or settlement —*** *(1) Where, in the case of any sale, mortgage or settlement, several instruments are employed for completing the transaction, the principal instrument only shall be chargeable with the duty prescribed in Schedule I, for the conveyance, mortgage or settlement, and each of the other instruments shall be chargeable with a duty of one rupee instead of the duty (if any) prescribed for it in that Schedule.*
>
> *(2) The parties may determine for themselves which of the instrument so employed shall, for the purposes of sub-section (1), be deemed to be the principal instrument:*
>
> *Provided that the duty chargeable on the instrument so determined shall be the highest duty which would be chargeable in respect of any of the said instruments employed."*
>
> *(3) Notwithstanding anything contained in subsections (1) and (2), in the case of any issue, sale or transfer of securities, the instrument on which stampduty is chargeable under section 9A shall be the principal instrument for the purpose of this section and no stamp-duty shall be charged on any other instruments relating to any such transaction."*

9. In the instant case, stamp duty on the original sale deed as per Schedule-I has already been paid. Since subsequent deed of rectification is filed to complete the transaction, a stamp duty of Rs.1.00 is leviable as per Section 4 of the Indian Stamp Act.

10. In view of the above, the submission of Mr. Mishra, learned Additional Standing Counsel is not acceptable.

11. Thus, on a cumulative assessment of facts and circumstances and discussion made above, this writ petition is allowed with a direction to the Opposite Parties to refund the excess stamp duty as well as registration fee paid by the Petitioner-Committee on the rectification deed. The entire exercise shall be completed within a period of four weeks from the date of communication of this order.

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2024 (III) ILR-CUT-426

B.P. ROUTRAY, J.

W.P.C. NO. 6923 OF 2024

SUJEET KUMAR PRADHAN .....Petitioner

V.

STATE OF ODISHA (REVENUE & DISASTER MANAGEMENT DEPT) & ORS. .....Opp.Parties

ODISHA LAND REFORMS ACT, 1960 – Section 22(1) – The petitioner is the auction purchaser of the case land & to that extent sale certificate has been executed between the petitioner & the Bank as per the terms of the SARFAESI Act – After sale proceed, the petitioner applied for mutation of the land in his favour – However, the authority/Opp.Parties pleaded that since the land was belonging to a scheduled caste person, execution of the sale deed is hit by the provision contained in section 22(1) of OLR Act and the same was also confirmed in appeal – Thus in this present Writ petition the question crops up that once the property acquired through auction purchase made under the provisions of the SARFAESI Act, whether the bar provided under section 22 of the OLR Act is applicable? – Held, No – A bare reading of Clause (a) of Sub-section (6) of Section 22 reveals that any transfer made by way of mortgage executed in favour of any Scheduled Bank, the bar under Sub-section (1) shall not apply. (Para 5)

For Petitioner : Mr. Amitav Das.
For Opp.Parties : Mr. S.Ghose, A.G.A, Mr. T.Sahu (Counsel for O.P. No.4)

JUDGMENT Date of Judgment : 07.08.2024

B.P. ROUTRAY, J.

1. Heard Mr. A. Das, learned counsel for the Petitioner, Mr. T. Sahu, learned counsel for Opposite Party No.4 (Bank) and Mr. S. Ghose, learned AGA for State – Opposite Parties.

2. The order of the Tahasildar under Annexure-4, confirmed in appeal by the Sub-Collector under Annexure-5, rejecting the prayer of the Petitioner for mutation is challenged in the present writ petition.

3. The admitted facts remain that the Petitioner is the auction purchaser of the case land, i.e. Plot No.644 measuring Ac.0.24 dec. under Khata No.243/193 of Mouza Palasa, in terms of the provisions of the SARFAESI Act. The Sale Certificate is at Annexure-3. After the deed of certificate executed between the bank (O.P. No.4) and the Petitioner under Annexure-1, the Petitioner applied for mutation of the case land in his favour and the Tahasildar by the impugned order held that since the land was belonging to a scheduled caste person, execution of the sale deed is hit by the provisions contained in Section 22(1) of the OLR Act without and in absence of written permission from the competent authority. The matter was then carried in appeal to the court of Sub Collector who also confirmed the order of the Tahasildar taking the same view. Both the orders of the Tahasildar and Sub-Collector are subject matter of challenge here.

4. Section 22 of the OLR Act reads as under:-

> "22. Restriction on alienation of land by Scheduled Tribes.
>
> (1) Any transfer of holding or part thereof by a raiyat, belonging to a Scheduled Tribe shall be void except where it is in favour of –
>
> (a) a person belonging to a Scheduled Tribe; or
> (b) a person not belonging 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 belonging 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 of 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 belonging to the Scheduled Caste.
>
> (6) Nothing in this section shall apply –
>
> (a) to any sale in execution of a money decree passed, or to any transfer by way of mortgage executed, in favour of any Scheduled Bank or in favour of any Bank to which the Orissa Co-operative Society Act, 1962 (2 of 1963) applies; and
>
> (b) to any transfer by a member of a Scheduled Tribe within a scheduled area.]"

5. A bare reading of Clause (a) of Sub-section (6) of Section 22 reveals that any transfer made by way of mortgage executed in favour of any Scheduled Bank, the bar under Sub-section (1) shall not apply. Such provision under Sub-section (6) is without any ambiguity and the same is clear as it is. Both the authorities, i.e. Tahasildar and the Appellate court have failed to appreciate said provision under Sub-section (6) of Section 22 on the admitted facts that the case land was mortgaged in a scheduled bank (O.P. No.4) and the Petitioner is the auction purchaser of the case land as per the provisions of the SARFAESI Act. It is further seen that the recorded tenant of the case land was though noticed by the Tahasildar (as per his order dated 31st May, 2023), but he did not turn up. The transaction being the resulted transfer of the property in favour of the Petitioner through auction in terms of the provisions contained in SARFAESI Act, it is held that the embargo under Sub-Section (1) of Section 22 of the OLR Act will not be attracted for such transaction. As such, the impugned order under Annexure-4 and 5 are set aside and the Tahasildar, Tangi-Choudwar (O.P. No.3) is directed to correct the RoR in favour of the Petitioner within a period of two months from the date of receipt of certified copy of this order.

6. The writ petition is disposed of.

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2024 (III) ILR-CUT-428

B.P. ROUTRAY, J.

W.P.(C) NO. 8749 OF 2015

G. KTESWAR RAO ….Petitioner

V.

G.ADILAXMI & ANR. ….Opp.Parties

MAINTENANCE AND WELFARE OF PARENTS AND SENIOR CITIZENS ACT, 2007 – Section 23(1) – Pre-requisite for applicability of sub section 1 of Section 23 – No specific condition has been mentioned in the gift deed – A bare perusal of such recitals mentioned in gift deed reveals that the donor has believed the recipient to maintain her with peace and happiness by serving her in all respect till her death – Whether the alleged condition mentioned in gift deed can be interpreted in terms of sec 23(1) of the Act? – Held, No – Effecting transfer subject to a condition of providing the basic amenities and need to the senior citizen is the sine qua non for applicability of sec 23(1) of the Act – However, the obligation of the petitioner as a son of Opp.Party No. 01 to maintain her would not wipe away and he will always be with the obligations to look after her to the best of his ability. (Para 13)

Case Laws Relied on and Referred to :-

1. 2022 SCC Online SC 1684 : Sudesh Chhikara vs. Ramti Devi & Anr.

For Petitioner : Ms. D. Mohapatra, Advocate
For Opp.Parties : Mr. K.K.Rout (O.P.1)

JUDGMENT Date of Judgment : 05.09.2024

B.P. ROUTRAY, J.

1. Heard Ms.D.Mohapatra, learned counsel for the Petitioner and Mr. K.K.Rout, learned counsel for Opposite Party No.1.

2. Order dated 27th March 2015 of the Maintenance Tribunal-cum-Sub-Collector, Chatrapur passed in Maintenance Case No.01 of 2014 under the Maintenance and Welfare of Parents and Senior Citizens Act, 2007 (the Act) is challenged in present writ petition.

3. Present Opposite Party No.1 is the mother of present Petitioner. She filed the complaint to initiate Maintenance Case No.01 of 2014 against the Petitioner on the premises that the Petitioner has failed to maintain her and also tortured her. Therefore, the gift deed executed by her on 20th January 2012 in favour of the Petitioner may be revoked. Though this prayer has not been specifically stated in the complaint, but the Sub-Collector has interpreted the same in that light.

4. The Sub-Collector upon adjudication declared Gift Deed No.333 dated 20th January 2014 as null and void in terms of the provisions contained in Section 23 of the Maintenance and Welfare of Parents and Senior Citizens Act, 2007. This order of the Sub-Collector is subject matter of challenge in present writ petition.

5. Ms. Mohapatra, learned counsel submits on behalf of the Petitioner that in absence of specific condition in the gift deed to maintain the mother, such observation of the Sub-Collector to declare the gift deed as null and void is illegal. She further submits that the contents of the gift deed under Annexure-2 dated 20th January 2012 cannot be interpreted in such a way to put the obligation on the son to maintain the mother as the recipient of the property.

6. On the other hand, Mr.Rout, learned counsel for Opposite Party No.1 supports the order of the Sub-Collector by referring to specific clause written in the gift deed that the Petitioner is bound to maintain Opposite Party No.1 as a condition of gift.

7. Before dealing with the rival contentions of both parties, some admitted background facts are needed to be described here. The late husband of Opposite Party No.1 was an inspector of police and they had three sons and one daughter including the Petitioner, who is the eldest son. Two properties were there in the name of the family members. One two storey house is at Bhaskar Rao Petta Street in Chatrapur, and the other property is the house at Church Road Street in Chatrapur. The property at Bhaskar Rao Street is recorded jointly in the name of all the family members whereas the property at Church Road Street is recorded in the name of Opposite Party No.1. Before the deed of gift dated 20th January 2012 was executed in favour of the Petitioner, he had executed a deed of relinquishment in favour of his

other two brothers in respect of the property at Bhaskar Rao Petta Street on 12th March 2010. The property situating at Church Road Street which was in the name of mother was gifted to the Petitioner as the elder son to the extent of one half, and the other half was retained by the mother herself. These are the admitted facts.

Here it is contended by the Petitioner that the deed of relinquishment in favour of other two brothers was the part of family settlement between all the members, whereas the same is disputed by Opposite Party No.1 saying that the deed of relinquishment was executed in lieu of consideration of Rs.22,000/- including the mother.

8. Section 23 of the Maintenance and Welfare of Parents and Senior Citizens Act, 2007 reads as under:-

> **"23.Transfer of property to be void in certain circumstances-**
>
> (1) Where any senior citizen who, after the commencement of this Act, has transferred by way of gift or otherwise, his property, subject to the condition that the transferee shall provide the basic amenities and basic physical needs to the transferor and such transferre refuses or fails to provide such amenities and physical needs, the said transfer of property shall be deemed to have been made by fraud or coercion or under undue influence and shall at the option of the transferor be declared void by the Tribunal.
>
> (2) Where any senior citizen has a right to receive maintenance out of an estate and such estate or part thereof is transferred, the right to receive maintenance may be enforced against the transferee if the transferee has notice of the right, or if the transfer is gratuitous; but not against the transferee for consideration and without notice of right.
>
> (3) If, any senior citizen is incapable of enforcing the rights under sub-sections (1) and (2), action may be taken on his behalf by any of the organization referred to in Explanation to sub-section (1) of section 5.

9. Hon'ble Supreme Court in **Sudesh Chhikara vs. Ramti Devi & Anr., 2022 SCC Online SC 1684** have observed that the effecting transfer subject to a condition of providing the basic amenities and needs to the senior citizen, is sine qua non for applicability of sub-section (1) of Section 23. The relevant observation is reproduced below:-

> **"12.** Sub-section(1) of Section 23 covers all kinds of transfers as is clear from the use of the expression "by way of gift or otherwise". For attracting sub-section(1) of Section 23, the following two conditions must be fulfilled:
>
> a. The transfer must have been made subject to the condition that the transferee shall provide the basic amenities and basic physical needs to the transferor; and
>
> b. the transferee refuses or fails to provide such amenities and physical needs to the transferor.
>
> **13**. If both the aforesaid conditions are satisfied, by a legal fiction, the transfer shall be deemed to have been made by fraud or coercion or undue influence. Such a transfer then becomes voidable at the instance of the transferor and the Maintenance Tribunal gets jurisdiction to declare the transfer as void.
>
> **14**. When a senior citizen parts with his or her property by executing a gift or a release or otherwise in favour of his or her near and dear ones, a condition of looking after the senior citizen is not necessarily attached to it. On the contrary, very often, such transfers

are made out of love and affection without any expectation in return. Therefore, when it is alleged that the conditions mentioned in sub-section(1) of Section 23 are attached to a transfer, existence of such conditions must be established before the Tribunal.

15. Careful perusal of the petition under Section 23 filed by respondent No.1 shows that it is not even pleaded that the release deed was executed subject to a condition that the transferees (the daughters of respondent no.1) would provide the basic amenities and basic physical needs to be respondent no.1. Even in the impugned order dated 22nd May 2018 passed by the Maintenance Tribunal, no such finding has been recorded. It seems that oral evidence was not adduced by the parties. As can be seen from the impugned judgment of the Tribunal, immediately after a reply was filed by the appellant that the petition was fixed for arguments. Effecting transfer subject to a condition of providing the basic amenities and basic physical needs to the transferor-senior citizen is sine qua non for applicability of sub-section (1) of Section 23. In the present case, as stated earlier, it is not even pleaded by respondent no.1 that the release deed was executed subject to such a condition."

10. In the instant case, it is mentioned in the gift deed at Clause-II as the condition of gift that the recipient of the gift being the eldest son of the donor has been maintaining her with peace and happiness during her old age by serving her and it is believed that the recipient will continue as such to serve the donor till her death. Accordingly, the gift deed is executed in favour of the recipient without any ill-teaching of others. Said condition as recited in vernacular is reproduced below:-

"(II) ସର୍ତ୍ତ : ନିମ୍ନ ତୃତୀୟ ପାରାରେ ଦର୍ଶାଯାଇଥିବା ସମ୍ପତି ମୁଁ ଛତ୍ରପୁର ରେଜିଷ୍ଟ୍ରୀ ଅଫିସ ଏକ ପୁସ୍ତକ ୭୦୨ ଭାଗ ୭୫ ଠାରୁ ୭୬ ପୃଷ୍ଠା ୨୯୭୯/୧୯୭୩ ନମ୍ବର ବିକ୍ରୟ ପତ୍ର ଦ୍ୱାରା କ୍ରୟଲଭି ମୋର ସ୍ୱାର୍ଜିତ ସମ୍ପତି ହୋଇ ମୋ ନାମେ ପଟ୍ଟା ହୋଇଥାଇ ମୋର ହକ, ସ୍ୱାଧୀନ, ଅନୁଭୋଗ ନିଜ ଦଖଲରେ ଅଛି | ଏହି ସମ୍ପତି ଉପରେ ମୋ ବ୍ୟତୀତ ଅନ୍ୟ କାହାରି ହକ, ଭାଗ, ଦାବୀ, ସମ୍ବନ୍ଧ ନାହିଁ ଓ ଅନ୍ୟ କୌଣସି ବନ୍ଧା, ତନଖା, ତଗାଇଦା ନଥାଇ ନିରାପଦ ସମ୍ପତି ଅଟେ | ତୁମ୍ଭେ ଗ୍ରହିତା ମୋର ବଡ ପୁତ୍ର ଅଟ | ତୁମ୍ଭେ ମୋର ବୃଦ୍ଧାବସ୍ଥାରେ ମୋର ସମସ୍ତ ପ୍ରକାର ସେବା ସୁଶୃଶା ଆଦି କରି ମୋତେ ଶାନ୍ତି ଓ ଆନନ୍ଦରେ ଚଳାଇଆଣୁଅଛ | ଏପରି ମୋର ଜୀବନ ଶେଷ ପର୍ଯନ୍ତ ଚଳାଇ ଆଣିବ ବୋଲି ତୁମ୍ଭ ଉପରେ ମୋର ସମ୍ପୂର୍ଣ ବିଶ୍ୱାସ ଅଛି | ତୁମ୍ଭର ସେବା ସାହର୍ଯରେ ମୁଁ ସନ୍ତୁଷ୍ଟ ହୋଇ ଆଜିଦିନ ମୋର ସନ୍ତୋଷ ଚିତ୍ତରେ ଅନ୍ୟ କାହାରି କୁଶିକ୍ଷା କୁମନ୍ତ୍ରଣା ବଳାତ୍କାର ଆଦି ନଥାଇ ଟ. ୨,୩୯,୨୪୪/- ଙ୍କା (ଦୁଇ ଲକ୍ଷ୍ୟ ଅଣଚାଳିଶ ହଜାର ଦୁଇ ଶହ ଚଉରାଳିଶ ଟଙ୍କା) ମୂଲ୍ୟର ସମ୍ପତି ତୁମ୍ଭଙ୍କୁ ଦାନ କରିଦେଇ ଏହି ଦାନପତ୍ର ତୁମ୍ଭନାମରେ ରେଜିଷ୍ଟ୍ରୀ ସମ୍ପାଦନ କରିଦେଇ ନିମ୍ନ ବିବରଣ ସମ୍ପତିରେ ମୋର ଥିବା ସମସ୍ତ ପ୍ରକାର ହକ, ସତ୍ୱ, ପରିତ୍ୟାଗ କରିଦେଇ ଦଖଲ ଦେଇ ମୁଁ ବେଦଖଲ ହେଲି | ଏହି ଦାନପତ୍ର ଦ୍ୱାରା ନିମ୍ନ ବିବରଣ ସମ୍ପତିରେ ତୁମ୍ଭେ ସର୍ବସତ୍ୱାବନ ହେଲ | "

11. It is true that Opposite Party No.1 had earlier preferred C.S. No.87 of 2013 before the Civil Judge (Senior Division), Chatrapur for cancellation of the gift deed, which was dismissed on merit and against the same First Appeal was preferred in the Court of the Additional District Judge. The said First Appeal was also dismissed and during pendency of the suit present complaint was lodged to the Sub-Collector, besides a case under the Prevention of Women from Domestic Violence Act was filed by the mother wherein the order preventing the Petitioner from causing any domestic violence against Opposite Party No.1 has been passed by the learned Magistrate in Misc No.35 of 2014.

12. In such background facts, the question is, whether the alleged condition mentioned in the gift deed can be interpreted in terms of Section 23(1) of the Maintenance and Welfare of Parents and Senior Citizens Act, 2007 ?

13. A bare perusal of such recitals mentioned in the gift deed reveals that the donor has believed the recipient to maintain her with peace and happiness by serving her in all respect till her death. It is true that the condition to maintain the donor by the recipient has not been directly mentioned in the gift deed. As stated above, the donor has believed that the Petitioner will maintain and serve her till her death. In other words, it is expected on the part of the transferee to maintain his mother with comfort till her death. As held by the Hon'ble Supreme Court the condition to maintain the transferor is pre-requisite for applying Section 23(1) of the Senior Citizens Act. Therefore, looking to the language used in Section 23(1) and other provisions of the Act, it can safely be said that revocation of the gift or transfer in terms of section 23(1) is in a sense of strict applicability. At the same time the obligation on the part of children to maintain their parents cannot be denied also.

In the case at hand, if the background facts are looked into, specifically the deed on relinquishment executed in favour of the other sons of Opposite Party No.1, the contention that there was a family settlement between all the members is found substantiated. The deed of gift seen as a whole along-with the deed of relinquishment, the former can be construed as a part of family settlement and therefore, the strict liability to maintain the transferor (mother) as a condition of the gift cannot be concluded. Moreover, as stated earlier the language of recitals of the gift deed is not that direct to reveal the condition of maintaining the transferor strictly. Nonetheless, by this, the obligation of the Petitioner as the son of Opposite Party No.1 to maintain her would not wipe away and he will always be with the obligations to look after her to the best of his ability.

14. In the premises stated above and for the reasons discussed, the impugned order is set aside and the writ petition is disposed of as allowed.

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2024 (III) ILR-CUT-432

MISS. SAVITRI RATHO, J.

BLAPL NO. 7724 OF 2024

TAPAN BEHERA .....Petitioner

V.

STATE OF ODISHA .....Opp.Party

CODE OF CRIMINAL PROCEDURE, 1973 — Section 439 — Petitioner's application for bail has been rejected earlier with a liberty to move the same before the learned Court below — In the report dated 28.08.2024 it has been stated that seven out of forty nine witnesses have been examined till 05.08.2024 and the case is posted to 11.09.2024 for examination of other witnesses — Can it be said that there is a change

in the fact situation or in law? — Held, No — As barely one month had elapsed after dismissal of his previous bail application, not inclined to release petitioner on bail. (Paras 12 & 13)

Case Laws Relied on and Referred to :-

1. (2001) 7 SCC 673 : State of M.P. vs. Kajad
2. (2001) 1 SCC 169 : 2001 SCC (Cri) 113 : Hari Singh Mann v. Harbhajan Singh Bajwa
3. (2005) 2 SCC 42 : Kalyan Chandra Sarkar vs. Rajesh Ranjan

For Petitioner : Mr. Amlan Shakti Paul.
For Opp.Party : Mr. S.S. Mohapatra, A.S.C.

JUDGMENT Date of Judgment : 06.09.2024

SAVITRI RATHO, J.

This is the third application under Section 439 of Cr.P.C. filed in connection with Barkote P.S. Case No. 93 of 2023 corresponding to S.T. Case No. 92/17 of 2023 pending in the court of the learned Addl. Sessions Judge, Deogarh where charge sheet dated 19.07.2023 has been submitted against the petitioner for commission of offences punishable under Sections 498-A, 304-B, 306 of IPC and Section 4 of the D.P. Act.

2. The earlier application BLAPL No. 10577 of 2023 filed by the petitioner had been dismissed on 04.10.2023 by this Court granting liberty to the petitioner to move the learned trial Court for bail after examination of the relatives of the deceased.

BLAPL No. 3645 of 2024 filed by the petitioner had been dismissed on 21.05.2024 by this Court granting liberty to the petitioner to move the learned Court below for bail if there is undue delay in examination of the witnesses.

3. Thereafter, the petitioner has moved the learned Court below for bail and the prayer has been rejected by the learned Addl. Sessions Judge, Deogarh on 22.06.2024.

4. The prosecution allegation in brief is that the deceased Jayashree Behera was married to the petitioner on 09.03.2023 and on 27.03.2023 at 8.00 P.M. the deceased had informed her mother that the petitioner had assaulted her and on 28.03.2023, the deceased intimated her mother that the petitioner and his parents had forcibly given her poison and disconnected the phone call. Post mortem report reveals that the cause of death is asphyxia due to hanging. Chargesheet has been filed only against the petitioner under Sections 498(A)/ 304-B/306 of IPC read with Section 4 of D.P. Act.

5. I have heard the learned counsel for the parties and perused the case diary, the depositions of P.W.1 to P.W.6 annexed to the bail application, the order passed by the learned trial Court on 22.06.2024 rejecting the prayer for bail of the petitioner and the report dated 28.08.2024 of the learned Addl. District and Sessions Judge, Deogarh.

6. Mr. Amlan Shakti Paul, learned counsel for the petitioner submits that the petitioner is in custody since 30.03.2023 and till date out of 49 charge sheet witnesses, only seven witnesses have been examined in the trial. He further submits that P.W.4 Mamata Behera who is the neighbour of the petitioner, during cross examination has stated that the deceased and the petitioner were living happily after the marriage and she has not kept physical relationship with her husband after the marriage and she has stated that her marriage has been solemnized with the petitioner against her will and she was sad about the marriage and she wanted to commit suicide but the deponent had tried to convince her not to do so. He also submits that he has annexed the copy of the post mortem report and perusal of that would reveal that there is no bodily injury on the deceased and the cause of death has been opined to be asphyxia due to hanging. He further submits that considering the period the petitioner has remained in custody and in view of the nature of materials available against him, he may be released on bail. He further submits that the offence under Section 304-B of IPC is not be made out against the petitioner as there is no allegation that the deceased was subjected to cruelty soon before her death.

7. Mr. S.S. Mohapatra, learned Additional Standing Counsel for the State submits that P.W.4 during investigation has stated that she had heard that on account of unfulfilled the demand of dowry, the deceased was being tortured physically and mentally and for that reason her family members have come to the house of the accused on 18.03.2023 in order to convince the accused persons. On 28.03.2023, on hearing that the deceased committed suicide, she came to the spot and found that the deceased has committed suicide using a rope and while she held her legs, the petitioner cut the rope in order to bring her down and made her lie down on the bed. Opposing the prayer for bail, he submits that the victim has died within 17 days of her marriage and since there are allegations that she was being tortured on account of not bringing a fridge, a case under Section 304-B of IPC is squarely made out against the petitioner who is the husband. He further submits that as the trial is going on, it cannot be said that there is undue delay in completion of the trial for which the petitioner does not deserve to be released on bail. He has submitted that six out of forty nine witnesses have been examined. As trial is in progress and many material witnesses including the Investigating Officer and the Medical Officers remain to be examined, any observation on merits of the case may influence the learned trial court.

8. P.W.1 brother of the petitioner has stated about physical assault on the deceased by the petitioner. P.W.3 Ambar Behera brother in law of the deceased has stated about quarrel between the petitioner and deceased for a fridge. P.W.4 Mamata Behera has stated in cross examination that Jayshree had told her that her marriage with the petitioner was against her will for which she was sorrowful and had contemplated suicide. But during investigation she has stated that the petitioner used to beat the deceased for non-fulfillment of the demand for a fridge and unable to tolerate the torture she committed suicide.

9. Ketaki Dhibar a neighbour in her statement recorded under Section – 161 Cr.P.C. has stated about the torture of the deceased on account of non-fulfillment of demand for dowry and that the accused was not keeping physical relations with the deceased for the same reason for which she was always despondent. During investigation, other witnesses have also stated in similar manner. Only six out forty nine witnesses have been examined in the trial. The deceased has died an unnatural death seventeen days after her marriage. There is allegation that she has been assaulted by the petitioner on account of non-fulfillment for demand of a fridge. She has died seventeen days after her marriage.

10. The Supreme Court in the case of ***State of M.P. vs. Kajad : (2001) 7 SCC 673*** has held that successive bail applications are maintainable but in changed circumstances. The relevant paragraph is extracted below :-

> *"8. It has further to be noted that the factum of the rejection of his earlier bail application bearing Miscellaneous Case No. 2052 of 2000 on 5-6-2000 has not been denied by the respondent. It is true that successive bail applications are permissible under the changed circumstances. But without the change in the circumstances the second application would be deemed to be seeking review of the earlier judgment which is not permissible under criminal law as has been held by this Court in* ***Hari Singh Mann v. Harbhajan Singh Bajwa: [(2001) 1 SCC 169 : 2001 SCC (Cri) 113*** *and various other judgments."*

In the case of ***Kalyan Chandra Sarkar vs. Rajesh Ranjan : (2005) 2 SCC 42***, the Supreme Court has held as follows:-

> *"though there is room for filing a subsequent bail application in cases where earlier applications have been rejected, the same can be done if there is a change in the fact situation or in law which requires the earlier view being interfered with or where the earlier finding has become obsolete."*

11. While dismissing BLAPL No. 3645 of 2024 filed by the petitioner on 21.05.2024, liberty had been granted to the petitioner to move the learned Court below for bail if there is undue delay in examination of the witnesses. By that time, the six witnesses whose depositions are annexed with this bail application, had already been examined. The petitioner has moved the learned trial Court for bail one month thereafter and the learned trial court has rejected his prayer for bail on 22.06.2024.

12. In the report dated 28.08.2024, it has been stated that seven out of forty nine witnesses have been examined till 05.08.2024 and the case is posted to 11.09.2024 for examination of other witnesses. So it cannot be said that there has been undue delay in examination of witnesses has can it be said that there is a change in the fact situation or in law as barely one month had elapsed after dismissal of his previous bail application.

13. I am therefore not inclined to release the petitioner on bail at this stage, for which the BLAPL is dismissed.

14. It is made clear that the observations in this order have been made for the purpose of deciding this bail application and should not be construed as an expression on the merits of the case and should not influence the learned Trial Court which should decide the case on the basis of evidence adduced during trial.

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2024 (III) ILR-CUT-436

R.K. PATTANAIK, J.

W.P(C) NO. 11103 & W.P(C) NO. 11104 OF 2017

DIRECTOR, M/s. NILACHALA REFRACTORIES LTD., DHENKANAL ….Petitioner

V.

THE CERTIFICATE OFFICER, DHENKANAL & ORS. ….Opp.Parties

(A) INDUSTRIAL DISPUTES ACT, 1947 – Section 33(2) – The Petitioner challenged the realization and recovery of amounts vide Certificate Case Nos. 345 & 346 of 2014-15 initiated under the Orissa Public Demands Recovery Acts, 1962, which are without jurisdiction.

(B) Whether the Writ Petition is maintainable as the impugned order is appealable in nature? – Held, No – Considering the plea denying the liability by the Management with reference to the BIFR order cannot be the basis to claim that opposite party No.1 did not have any jurisdiction at all – Such authority has been exercised by and in course of the certificate proceedings by opposite party No.1 upon receiving the requisitions from the Government and hence, is not a case of absence of jurisdiction. (Para 11)

(C) The plea of the Petitioner-Management vis-à-vis exercise of jurisdiction by opposite party No.1 referring to the BIFR order or any such grounds is liable to be rejected leaving it the option to avail such other remedy as permissible under law- Writ Petitions stand dismissed.

(D) References made to decisions of *Harbanslal Sahnia and another Vrs. Indian Oil Corporation Ltd. and Others, (2003) 2 SCC 107* and *Godrej Sara Lee Ltd. Vrs. Excise and Taxation Officer-cum-Assessing Authority and Others, 2023 SCC OnLine SC 95 and Whirlpool Corporation Vrs. Registrar of Trade Marks, (1998) 8 SCC 1*. (Paras 7 & 8)

Case Laws Relied on and Referred to :-

1. (2003) 2 SCC 107 : Harbanslal Sahnia & Anr Vrs. Indian Oil Corporation Ltd. & Ors.
2. 2023 SCC OnLine SC 95 : Godrej Sara Lee Ltd. Vrs. Excise & Taxation Officer-cum-Assessing Authority & Ors.
3. (1998) 8 SCC 1 : Whirlpool Corporation Vrs. Registrar of Trade Marks
4. 1958 SCR 595 : State of Uttar Pradesh Vrs. Mohd. Nooh
5. 1994 LAB. I.C. 57 : A.M. Sainalabdeen Musaliar Vrs. The District Collector, Kollam & Ors.

6. AIR 2001 SC 291 : Karnataka Power Transmission Corptn. Ltd. & Anr. Vrs. Amalgamated Electricity Co. Ltd. & Ors.
7. 1977 SCC (2) 508 : State of Orissa & Anr. Vrs. N.N. Swamy & Ors.
8. 2007 (II) OLR 788 : Shri Dillip Kumar Samal Vrs. State of Orissa & Anr.

For Petitioner : M/s. B.P. Tripathy & Associates.
For Opp.Parties : Mr. Sasanka Sekhar Sahoo,
M/s. Satyabrata Mohanty & Associates. (O.P.Nos. 4 & 5)
Mr. H.K. Panigrahi, A.S.C.

JUDGMENT Date of Judgment : 02.09.2024

R.K. PATTANAIK, J.

1. In the case has hand, the dispute happens to be nearly two decades old and is between the petitioner, hence called as the Management and opposite party Nos.4 and 5 being the workmen and presently, it is confined to a proceeding commenced in terms of Section 33C(2) of the Industrial Disputes Act, 1947 (hereinafter referred to as 'the ID Act') and culminated followed by an action under the Orissa Public Demands Recovery Act, 1962 (shortly as, 'the OPDR Act') initiated vide Certificate Case Nos.345 and 346 of 2014-15 by opposite party No.1 on the requisitions received from the State Labour Commissioner, Odisha, namely, opposite party No.2 towards realization and recovery of the amounts from the former as the Certificate Debtor and payable to the latter challenged with an objection and on the premise that the proceedings are without jurisdiction denying the liability in absence of any employer and employee relationship between them.

2. The impugned orders as at Annexure-1 are at the behest of opposite party No.1 and towards realization of the sum payable to the workmen rejecting the objection received from the Management, according to which, such liability is not to be borne by it in view of the order of the Board for Industrial and Financial Reconstruction (BIFR) and the Sanctioned Scheme (SS) formulated in connection with Case No.8 of 2002 with a plea that the work force of the earlier establishment of M/s. Nilachala Refractories Limited (NRL) was reduced to three employees only, after introduction of the Voluntary Retirement Scheme (VRS) except the workmen, who were terminated along with three others and in so far as, the cash and Bank balance as on 31st March, 2005 is concerned, it was to be utilized to clear the dues of earlier employees, who opted for the VRS and have not claimed their dues till such date. As per the Management, after an auction sale was held later to the earlier NRL declared to be a sick industrial company as defined under Section 3(1)(o) of the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA), hence, was to utilize the cash and Bank balance available only to pay back the dues of such employees of erstwhile company, who had not claimed it till 31st March, 2005 after having opted for the VRS. Hence, the Management contends that it is not required to discharge any such liability vis-à-vis the workmen and the same shall have to be limited to the BIFR order and not beyond.

3. The record reveals that earlier NRL after being declared a sick unit as per the SICA, a proceeding was initiated vide Case No.8 of 2002 and with the participation of all the stakeholders and after inviting suggestions and/or objections to the Draft Rehabilitation Scheme (DRS), the SS was prepared with the result that the Management was taken over laying down the terms and conditions in respect thereof, referring to which, it is claimed that the Management is not liable to pay and disburse the dues determined by the learned Labour Court, Bhubaneswar in Misc. Case No.174 of 2004 in absence of any such understanding and agreement excepting the SS and disbursement of the dues payable to only such employees having opted for the VRS and had not been paid with such dues as on 31st March, 2005. On the contrary, the workmen demand such payments from the Management on the ground that the latter is not absolved from any such liability after having stepped into the shoes of the erstwhile NRL and in view of Section 18(3)(c) of the ID Act being the successor or the assignee. Furthermore, the claim of the workmen is that due to the demand for such entitlements and the proceedings under Section 33(C)(2) of the ID Act, the earlier establishment of NRL terminated their services with three others, with whom, the Management had a settlement later taking a plea that one cannot escape from such liability and in view of the orders of the learned Labour Court, Bhubaneswar, opposite party No.1 was duty bound to ensure its realization and recovery from the Management as per the provisions of the OPDR Act.

4. Heard Mr. Tripathy, learned counsel for the Management and Mr. Mohanty, learned counsel for the workmen besides Mr. Panigrahi, learned ASC for the State.

5. Mr. Tripathy, learned counsel for the Management, in course of hearing, reiterated the facts described hereinbefore and contends that the alleged demand by the workmen cannot be enforced against the Management which has no any responsibility to discharge the liability save and except to utilize the cash and Bank balance available for clearing the dues of earlier employees, who had availed the VRS. The contention of Mr. Tripathy, learned counsel is that opposite party No.1 lost sight of the BIFR order and the SS and rejecting such a plea denying the liability by the Management and proceeded to pass the impugned orders under Annexure-1. While claiming so, Mr. Tripathy, learned counsel refers to a copy of the BIFR order vis-à-vis a proceeding in Case No.8 of 2002 and the terms and conditions arrived at when the earlier NRL was taken over by a transfer as per the provisions of the SICA. The further contention is that the workmen do not have any entitlements to claim in view of the award of the learned Industrial Tribunal, Bhubaneswar in I.D. Case No.4 of 2010 while dealing with a reference under Section 10 of the ID Act received for a decision, whether, the termination of their services and others with effect from 31st March, 2005 by the Management to be legal and/or justified with a definite finding that the workmen are not entitled to any relief in absence of clear indication in the SS regarding such liability to be borne by the Management. It is further stated that the reference was disposed of on 6th January, 2012 with the above conclusion and observation that in absence of the erstwhile Management, it is not desirable to thrash out, whether, the termination of services of all such workmen is otherwise lawful.

Mr. Tripathy, learned counsel further submits that the decision in I.D. Misc. Case No.174 of 2004 under Section 33C(2) of the ID Act as at Annexure-B/4 to the counter affidavit is under challenge at the instance of the Management in W.P.(C) No.21179 of 2016 and unless and until, any such liability under question is finally determined and decided, the proceedings under the OPDR Act with the requisitions received from the Government by and at the behest of opposite party No.1 would not be proper and justified.

6. Mr. Panigrahi, learned ASC for the State justifies the action initiated under the OPDR Act against the Management in view of the orders in I.D. Misc. Case No. 174 of 2004 in order to ensure payment of the outstanding dues in favour of the workmen. As per Mr. Mohanty, learned counsel for the workmen, the Management took over the erstwhile establishment and currently running the unit successfully and in so far as, three other employees besides the workmen are concerned, they have been paid the entitlements, which, rather, revealed the discriminatory attitude of the Management. It is further submitted by Mr. Mohanty, learned counsel that the BIFR order clearly stipulates that all the statutory dues are to be disclosed and the new promoters need to undertake due diligence and to ensure that there are no cases pending before the taking over of the company into their fold and in so far as, the cash balance of Rs.55.79 lac available for clearing the dues of the earlier employees, who opted for the VRS, out of the same, surplus is still lying in the hands of the Management and when such dues determined vis-à-vis the workmen under Section 33C(2) of the ID Act having not been paid, it has conspicuously revealed the unequal treatment meted out to such employees once engaged and worked for the establishment. The contention of Mr. Mohanty, learned counsel is that with the hearing held in I.D. Misc. Case No.174 of 2004 under Section 33C(2) of the ID Act, learned Labour Court, Bhubaneswar passed the order dated 16th August, 2012 to pay the computed amount to the workmen within a period of three months, failing which, it shall carry interest at the rate of 10% per annum till actual payment and since, the Management did not take any step to pay the same, the certificate proceedings were initiated on receiving requisitions from opposite party No.2 and after hearing both the sides, opposite party No.1 directed it to deposit the certificate amount with interest, otherwise, to face action under Section 37 of the OPDR Act. It is stated that due to such non-payment, notice under Section 6 of the OPDR Act as at Annexure-2 was issued for recovery of the same with interest within a stipulated period. It is alleged that the Management did not disburse the amount or deposit it before opposite party No.1, rather, obtained a stay order in force since 2017. It is informed to the Court that one of the workmen is suffering from spinal cord injury and confined to bed being paralyzed and presently, aged about 65 years and in so far as the proceedings under the OPDR Act are concerned, as the show cause notices issued were challenged, this Court by orders in W.P.(C) Nos.3734 and 3735 of 2016 directed opposite party No.1 to dispose it of after a hearing of the parties providing the Management an opportunity to defend and thereafter, to take a decision and action according to law. It is reiterated by Mr. Mohanty, learned counsel that the

orders in I.D. Misc. Case No.174 of 2004 and subsequent order later to a modified requisition received from opposite party No.2 is enforceable against the Management in view of Section 18(3)(c) of the Act being the successor with respect to the erstwhile establishment to which the dispute relates and hence, it is bound to discharge the obligation.

7. A preliminary objection is raised with regard to maintainability of the writ petition at the behest of the Management with a plea that the impugned orders under Annexure-1 to be appealable in nature. According to Mr. Panigrahi, learned ASC for the State, such a decision in the proceedings under the OPDR Act may be challenged in appeal by the Management, which instead approached this Court, hence, the writ petition is not to be entertained. It is submitted by Mr. Panigrahi, learned ASC that the Management should avail the statutory remedy. In reply and response to the above, Mr. Tripathy, learned counsel for the Management submits that writ jurisdiction could be exercised in spite of availability of an alternate remedy and as such, there is no bar, especially when, opposite party No.1 did not have the jurisdiction in view of the BIFR order and a restricted liability emerged therefrom. In support of such contention, Mr. Tripathy, learned counsel relies on the following decisions, such as, **Harbanslal Sahnia and Another Vrs. Indian Oil Corporation Ltd. and Others (2003) 2 SCC 107 and Godrej Sara Lee Ltd. Vrs. Excise and Taxation Officer-cum-Assessing Authority and Others 2023 SCC OnLine SC 95.** The contention of Mr. Tripathy, learned counsel for the Management is that any such exclusion of writ jurisdiction is a rule of discretion and may well be exercised notwithstanding existence of alternate statutory remedy.

8. Referring to an earlier decision in **Whirlpool Corporation Vrs. Registrar of Trade Marks (1998) 8 SCC 1**, the Apex Court in **Harbanslal Sahnia (supra)** reaffirmed that the writ jurisdiction may have to be exercised in the following contingencies, such as, for enforcement of any of the fundamental rights; on failure of principles of natural justice; where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged. In fact, the conclusion reached at in the case of **Whirlpool Corporation** has been restated by the Apex Court in **Harbanslal Sahnia** (supra), wherein, it was of the view that the termination of dealership to be illegal as it infringed upon the fundamental rights and breached the principles of natural justice for being a decision based on irrelevant and a non-existent cause. In **Godrej Sara Lee Ltd.** (supra), the Apex Court elaborated further and observed that the power to issue prerogative writs under Article 226 is plenary in nature; any limitation on the exercise of such power must be traceable in the Constitution itself; Article 226 does not, in terms, impose any limitation or restraint on the exercise of power to issue writs; it is axiomatic that there lies a discretion, whether, to entertain a writ petition or otherwise is to depend on the facts of each particular case; one of the self-imposed restrictions on the exercise of powers under Article 226 that has evolved through judicial precedents is to the effect that it should normally not be entertained, where an effective alternative remedy is available; at the same time, it must be remembered that mere availability of an alternative remedy

of appeal or revision, which the party invoking the jurisdiction under Article 226 has not pursued, would not oust the jurisdiction and render a writ petition not maintainable; in a long line of decisions, it has been made clear that availability of an alternative remedy does not operate as an absolute bar to the maintainability of a writ petition and that, the rule, which requires a party to pursue the alternative remedy provided by a statute, is a rule of policy, convenience and discretion, rather than, a rule of law.

9. The maintainability of a matter and its entertainability, as according to the decision in **Godrej Sara Lee Ltd**. (supra), are distinct concepts as the former goes to the root of the jurisdiction, whereas, in the latter case, an element of discretion is involved to consider, whether, any such writ jurisdiction is to be exercised due to existence of an alternate remedy. In fact, the decision in **State of Uttar Pradesh Vrs. Mohd. Nooh 1958 SCR 595** referred to in the case of **Godrej Sara Lee Ltd**. outlined the considerations while dealing with the writ jurisdiction.

10. In view of the above decisions and ratio laid down by the Apex Court discussed herein above, law is well settled that exclusion of writ jurisdiction due to existence of alternate remedy is not readily to be inferred. Such exercise of jurisdiction is extraordinary in nature and whether to invoke powers under Article 226 of the Constitution of India or otherwise is to be left to the discretion of the Court. In **Harbanslal Sahnia** and **Whirlpool Corporation** (supra), at least four of the contingencies have been highlighted upon to be taken judicial notice of at the time of exercising writ jurisdiction. It depends on the facts and circumstances of a particular case to determine, whether, the jurisdiction is to be invoked even when alternate statutory remedy is in place. As pointed out by the Apex Court, in the aforementioned decisions, there is no bar or restriction in exercise of writ jurisdiction. The writ powers may not be exercised in a given set of facts but shall have to consider an objection as to maintainability of an action, which hits to the root of the matter as lucidly stated by the Apex Court in **Godrej Sara Lee Ltd**. (supra). An objection to the exercise of jurisdiction on maintainability excludes the authority, it shall be a reason to intervene and interfere, notwithstanding, a statutory remedy available challenging the same. If a matter, which is decided and can very well be taken cognizance of by the statutory authority being an alternate remedy, under such circumstances, the writ jurisdiction is not to be exercised. However, in case, where there is no other equally efficacious remedy and it relates to one of the contingencies (understood to be not exhaustive) enumerated in **Harbanslal Sahnia** and earlier discussed in **Whirlpool Corporation** (supra) by the Apex Court and having due regard to the Constitution Bench decision in **Mohd. Nooh**, wherein, it reminded that there is no rule with regard to certiorari, as is with mandamus that it would lie when there is no other effective remedy, the writ powers shall have to be invoked in order to do ex debito justitiae. In other words, to ensure complete justice, even where alternate statutory remedy is available, unless it hits to the authority or jurisdiction, writ powers shall have to be exercised instead of driving the parties to such remedy, which in most cases found to be a futile exercise.

11. Turning to the arguments advanced by both the sides, the Court is required to take a call as to if alternate remedy under the OPDR Act could well be a reason not to exercise the writ jurisdiction vis-à-vis the action initiated by opposite party No.1 upon receiving the requisitions from the Government. Referring to the plea that the Management is not liable to discharge the obligation in view of BIFR order, Mr. Tripathy, learned counsel submits that the proceedings initiated under the OPDR Act and action by opposite party No.1 to realize the outstanding dues payable to the workmen is without authority and jurisdiction and hence, in view of the decision in **Harbanslal Sahnia** and **Whirlpool Corporation** (supra), as one of the contingencies has been fulfilled, with regard to absence of jurisdiction, the impugned orders under Annexure-1 and legality thereof shall have to be examined exercising the writ jurisdiction even though the same are held to be appealable in nature. The Court is not in agreement with the contention of Mr. Tripathy, learned counsel for the Management, since due process has been followed all along to ensure realization of the outstanding dues of the workmen and the certificate proceedings and initiation of it are the means to achieve and ensure the recovery. It is not a case where infringement of fundamental right is alleged or for that matter, there is failure of principles of natural justice. It is not that the Management did not have opportunity to defend and that opposite party No.1 failed to observe fairness before passing the impugned orders under Annexure-1. The Management has had opportunity to participate. So therefore, it cannot be said that the principles of audi alteram partem have not been observed and hence, the Management is in a way prejudiced. As regards, the absence of jurisdiction, according to Mr. Tripathy, learned counsel for the Management, opposite party No.1 lacked any such authority and hence, without powers for the BIFR order and the SS. The Court is of the considered view that such a plea must have to fail. It cannot be assumed or held that opposite party No.1 did not possess the jurisdiction to deal with the certificate proceedings with such a plea. In fact, the earlier requisition and a modified one received later from opposite party No.2 is the foundation to realize and recover the outstanding dues with interest payable to the workmen. The learned Labour Court while entertaining request and an application under Section 33C(2) of the ID Act held the Management to pay back the entitlements to the workmen, subsequent to which, the requisitions were received by opposite party No.1. It can, therefore, be said that with the order of the learned Labour Court in place, for having received the requisitions and thereafter, all such defences since available to be raised by the Management as per Section 8 of the OPDR Act, it is to be held that due process has been followed. To claim that opposite party No.1 did not have any jurisdiction for the certificate proceedings with a contention that there is no liability against the Management in view of the order of the BIFR does not make it a case to fall in one of the contingencies as endorsed in the decision of **Harbanslal Sahnia** (supra). To elaborate further, the Court is to hold that it is not a case to claim the proceedings before opposite party No.1 as 'wholly without jurisdiction'. If an authority has no powers or a statute does not allow it to exercise any such jurisdiction or a law forbids it to do so or where the vires of any such law is a subject matter of challenge,

under such circumstances, writ jurisdiction shall have to be invoked despite an alternate remedy. In the instant case, considering the plea denying the liability by the Management with reference to the BIFR order cannot be the basis to claim that opposite party No.1 did not have any jurisdiction at all. Such authority has been exercised by and in course of the certificate proceedings by opposite party No.1 upon receiving the requisitions from the Government and hence, is not a case of absence of jurisdiction. With regard to the liability, whether the same is to be discharged by the Management, it shall have to be challenged independently and now stated to be pending decision in W.P.(C) No.21179 of 2016 and hence, to allege that opposite party No.1 is, therefore, having no powers cannot be a ground and a reason to reach at a conclusion as to lack of jurisdiction under law. It is to be held that any such plea with denial of liability by the Management is beyond the domain and purview of opposite party No.1, who has no other option, as he cannot go behind the orders of the learned Labour Court except to honour the requisitions received from the Government and enforce it ensuring recovery of the outstanding dues payable to the workmen.

12. Mr. Mohanty, learned counsel for the workmen has referred to the following decisions, such as, **A.M. Sainalabdeen Musaliar Vrs. The District Collector, Kollam and Others 1994 LAB. I.C. 57; Karnataka Power Transmission Corporation Ltd. and Another Vrs. Amalgamated Electricity Co. Ltd. and Others AIR 2001 SC 291; State of Orissa and Another Vrs. N.N. Swamy & Others 1977 SCC (2) 508** and finally**, Shri Dillip Kumar Samal Vrs. State of Orissa and Another 2007 (II) OLR 788** to contend that the Management as a successor or assignee shall have to bear the burden and discharge the liability of the erstwhile establishment. As earlier discussed, a reference has been made to Section 18(3)(c) of the ID Act by Mr. Mohanty, learned counsel for the workmen to claim that the Management cannot shirk its responsibility hiding itself behind the veil of BIFR order but according to the Court, all such aspects and legality of the decision of the learned Labour Court are needed to be examined in W.P.(C) No.21179 of 2016. It is further to be observed that the decision with respect to the reference under Section 10 of the ID Act by the learned Industrial Tribunal, Bhubaneswar is a matter to be gone into for a decision by this Court in W.P.(C) No.12381 of 2012 stated to be pending disposal. Whether the workmen is entitled for the dues in juxtaposition to the reference under Section 10 of the Act with the decision of the learned Industrial Tribunal and whether it was legally justified for the learned Labour Court to compute the dues receivable by the workmen against the background facts, such as, declaration of the unit as sick company and its auction sale with the BIFR order and the SS in place is to be dealt with and adjudicated upon in W.P.(C) No.12381 of 2012 and W.P.(C) No.21179 of 2016. Though, it is contended by Mr. Mohanty, learned counsel for the workmen that the Management as the successor employer shall have to discharge the liability relying on the case laws cited, at this juncture, this Court while dealing with a matter in relation to the certificate proceedings cannot consider the same in view of a decisions awaited vis-à-vis the orders in I.D.

Misc. Case No.174 of 2004 and decision on the reference under Section 10 of the ID Act with an award dated 6th January, 2012 having been challenged by the workmen in the meantime. In view of the above, the Court refrains itself from expressing any opinion or view either way on the plea of the respective parties due to pendency of W.P.(C) No.12381 of 2012 and W.P.(C) No.21179 of 2016 as it is concerned with legality of the orders under Annexure-1 and exercise of jurisdiction by opposite party No.1 under the OPDR Act simpliciter. It is also to be held that the Management cannot deny any such realization and recovery though it depends on the decision with respect to orders in I.D. Misc. Case No.174 of 2004 in W.P.(C) No.21179 of 2016 besides W.P.(C) No.12381 of 2012 filed against the award dated 6th January, 2012. Unless, there is any restriction against recovery through the certificate proceedings against the orders in I.D. Misc. Case No.174 of 2004, realization and recovery under the OPDR Act cannot be withheld.

13. One more contention is advanced by Mr. Tripathy, learned counsel for the Management that order dated 16th August, 2012 stands superseded by a fresh order of the learned Labour Court dated 18th April, 2015, hence, the action with notice in the certificate proceedings is without jurisdiction. In fact, it is made to understand that initially a requisition was received and thereafter, a modified one, so revealed from the impugned order under Annexure-1 in Certificate Case No.346 of 2014-15, as it has been claimed that upon disposal of W.P.(C) No.29005 of 2013 challenging the order dated 16th August, 2012 of the learned Labour Court, this Court remitted the matter back by order dated 12th March, 2015 directing a fresh disposal of the proceeding in I.D. Misc. Case No.174 of 2004, which led to the passing of a final order dated 18th April, 2015. Though, the order of the learned Labour Court dated 16th August, 2012 appears to have merged with the final order dated 18th April, 2015 passed in I.D. Misc. Case No.174 of 2004, consequent upon receipt of a modified requisition, the certificate proceeding was initiated with an order dated 17th May, 2017 passed in Certificate Case No.346 of 2014-15 and against such a backdrop, any such objection from the Management with a plea that the order dated 16th August, 2012 no more existed having been superseded cannot be entertained as upholding such objection would lead to a miscarriage of justice. If it is alleged by the Management that after the matter was remitted back with the disposal of W.P.(C) No.29005 of 2013 and followed by an order dated 18th April 2015 without hearing, the Court is not inclined to entertain any such plea at present, in absence of any material revealed and discernable from the record. In any case, the defence of the Management relying on BIFR order is a matter alien to the issue at hand concerning the certificate proceedings. So therefore, the impugned orders under Annexure-1 as opposed by the Management with the above plea on record cannot be sustained as it is not an exercise wholly without jurisdiction. Thus, the final conclusion of the Court is that the plea of the Management vis-à-vis exercise of jurisdiction by opposite party No.1 referring to the BIFR order on any such grounds is liable to be rejected leaving it the option to avail such other remedy as permissible under law.

14. Hence, it is ordered.

15. In the result, for the reasons stated and observations made herein above, the writ petitions stand dismissed.

16. In the circumstances, however, there is no order as to costs.

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2024 (III) ILR-CUT-445

R.K. PATTANAIK, J.

CRLREV NO. 181 OF 2023

LIPIKA SWAIN @ PATRA ….Petitioner

V.

STATE OF ODISHA & ORS. ….Opp.Parties

(A) CODE OF CRIMINAL PROCEDURE, 1973 – Sections 397 & 401 r/w Sections 12, 19(8) & 22 of The Protection of Women from Domestic Violence Act, 2005 – Revision filed assailing the impugned judgment dated 14th February, 2023 passed by the 3rd Additional Sessions Judge, Cuttack in Criminal Appeal No. 30 of 2020.

(B) Learned JMFC (R) Cuttack in Crl. Misc. Case No. 93 of 2016 on 26th February, 2020 allowed ₹ 2000/- and ₹ 3000/- towards house rent and maintenance respectively, which stood modified to ₹ 4000/- each and the learned Additional Sessions Judge allowed ₹ 50,000/- as compensation under Section 22 of the Protection of Women from Domestic Violence Act, 2005.

(C) Can the decision in Criminal Appeal No. 30 of 2020 be quashed or required to be modified? – Held , No – Since the petitioner is alleged of a victim of domestic violence, while being in a domestic relationship with opposite party Nos. 2 to 5, apart from any such reliefs, monetary as well as ancillary, she is entitled to receive back all the articles which are exclusively owned by her – The inevitable conclusion is that both the Courts below failed to discharge the statutory obligation in not dealing with the plea for return of stridhan or such other property claimed to have been received by opposite party No.2 to 5 at the time of her marriage – It is concluded that the learned J.M.F.C.(R), Cuttack, apart from considering enhancement of maintenance and other sums on monetary relief(s) is needed to exercise jurisdiction under Section 19(8) of the D.V. Act vis-à-vis the return of the articles claimed to have been possessed by the petitioner lying in the custody and enjoyment of opposite party Nos. 2, 4 and 5 and if necessary, for the said purpose, to direct enquiry and inventory to be held and carried out, in the manner, it is considered just and expedient. (Para 20)

(D) While dealing with matrimonial disputes, it is to be kept in mind that any such order towards maintenance and such other relief(s) should not be disproportionate and disadvantageous to the respondents, who must have the means to provide the same befitting the status of aggrieved person in a domestic relationship with them – A balance can be maintained provided all such material evidence is lying at the disposal of the Court dealing with the application under Section 12 of the D.V Act. (Para 16)

(E) Judgment dated 14th February, 2023 passed in Criminal Appeal No.30 of 2020 and dated 26th February, 2020 passed in Crl. Misc. Case No. 93 of 2016 are set aside – Direction issued for expeditious disposal.

(F) Case Laws in *Rajnesh Vrs. Neha & Another, (2021) 2 SCC 324, Pratibha Rani Vrs. Suraj Kumar* and *Another, AIR 1985 SC 628 and Maya Gopinathan Vrs. Anoop S.B. & Another in SLP (C) No. 13398 of 2022 decided on 24th April, 2024* discussed.

Case Laws Relied on and Referred to :-

1. (2021) 2 SCC 324 : Rajnesh Vrs. Neha & Anr.
2. AIR 1985 SC 628 : Pratibha Rani Vrs. Suraj Kumar & Anr.
3. SLP(C) No. 13398 of 2022 : Maya Gopinathan Vrs. Anoop S.B. & Anr.

For Petitioner : Mr. B.K. Routray.

For Opp.Parties : Mr. H.K. Panigrahi, ASC (O.P. No.1)
Mr. U.C. Dora (O.P.Nos. 2 to 5)

JUDGMENT Date of Judgment : 02.09.2024

R.K. PATTANAIK, J.

1. Instant revision petition under Sections 397 and 401 Cr.P.C. is at the behest of the petitioner assailing the impugned judgment dated 14th February, 2023 passed in Criminal Appeal No.30 of 2020 by learned 3rd Additional Sessions Judge, Cuttack, whereby, the decision of the learned J.M.F.C.(R), Cuttack dated 26th February, 2020 in connection with Crl. Misc. Case No.93 of 2016 stood modified allowing Rs.4000/- each towards house rent and maintenance and a sum of Rs.50,000/- (Rupees Fifty Thousand) payable to her as compensation under Section 22 of the Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as 'the D.V. Act') thereby enhancing the said amounts from Rs.2000/- and Rs.3000/- respectively on the grounds inter alia that the same is not to be legally tenable and hence, liable to be interfered with and set aside with consequential orders.

2. As informed, petitioner No.3 has expired in the meantime and hence, the relief and direction sought for by the petitioner is now directed against opposite party Nos.2, 4 and 5 only.

3. According to the petitioner, the impugned judgment as at Annexure-1 is illegal, perverse and unjustified, hence, to be modified or quashed as deemed necessary. The contention of the petitioner is that the learned Appellate Court failed

to consider the material evidence with a plea that the relief was confined to the quantum of maintenance on the basis of a concession of the learned counsel engaged by the petitioner. It is pleaded that the learned Appellate Court, instead of appreciating the unrebutted oral evidence of the witnesses overwhelming and conclusive in nature to prove the financial status of the opposite parties, ignored the same, hence, has led to allowing meagre amount of maintenance and on other heads and instead, it was swayed away considering the disability of opposite party No.2, namely, husband of the petitioner. It is further pleaded that there is no justifiable reason to not direct opposite party Nos.2 to 5 to return the cash of Rs.70,000/- (Rupees Seventy Thousand) with gold ornaments and other articles, which belong to the petitioner exclusively and therefore, the impugned decision in appeal is liable to be set aside with fresh directions issued.

4. Heard Mr. Routray, learned counsel for the petitioner; Mr. Panigrahi, learned ASC for the State and Mr. Dora, learned counsel for opp.party Nos.2, 4 & 5.

5. Mr. Routray, learned counsel for the petitioner reiterated the facts described herein above and contended that the petitioner is substantially prejudiced in view of the impugned decision under Annexure-1, which has arrived following the order dated 15th December, 2022 in CRLREV No.407 of 2022, by which, the matter was remanded back for a fresh decision by the learned Appellate Court, which while entertaining Criminal Appeal No.30 of 2020, dismissed the same as against the order of maintenance and other relief(s) allowed by the Court of 1st instance. The contention of Mr. Routray, learned counsel for the petitioner is that not only the house rent and maintenance allowed under Sections 19 and 20 of the D.V. Act to be inadequate, learned Appellate Court was required to consider a reasonable sum for compensation instead fixed at Rs.50,000/- (Rupees Fifty Thousand) only. According to Mr. Routray, learned counsel, learned Appellate Court issued no direction with regard to return of cash, gold ornaments and other items against opposite party Nos.2 to 5 in spite of relief sought for in that regard. It is further contended that a case of domestic violence is prima facie made out against the in-laws of the petitioner including her husband, namely, opposite party No.2 and the petitioner having no source of independent income, whereas, opposite party No.2 husband is a Pathology Technician earning not less than Rs.45,000/- (Rupees Forty-Five Thousand) per month and brother-in-law being a Software Engineer earns more than Rs.1,00,000/- (Rupees One Lakh) a month, hence, befitting her living standard and status, learned Courts below and in particular, learned Appellate Court ought to have considered the same and all such other issues involved but unfortunately, there has been a lip service only with paltry amounts allowed towards house rent and maintenance at Rs.4000/- each and compensation with a sum of Rs.50,000/-.

6. Noted down the submission of Mr. Panigrahi, learned counsel for the State.

7. Mr. Dora, learned counsel appearing for opposite party Nos.2, 4 & 5 submits that learned Appellate Court enhanced the maintenance amount so also the sum towards house rent and further allowed a compensation of Rs.50,000/- (Fifty

Thousand) and in so far as opposite party No.2 is concerned, he is a person with disability, the fact which is borne out of the record after having been taken judicial notice of by the Court in appeal. In so far as allegations against the private opposite parties are concerned, according to Mr. Dora, learned counsel, the same are false, fabricated and concocted one, therefore, in absence of any such clear and positive evidence with regard to any domestic violence, any such directions issued by the learned Courts below are unjustified, inasmuch as, no further relief in favour of the petitioner could be granted considering any such plea as presently put forth.

8. Undisputed facts are briefly stated herein below.

9. As revealed from the record, the petitioner filed an application under Section 12 of the D.V. Act before the Court of learned J.M.F.C.(R), Cuttack registered as Crl. Misc. Case No.93 of 2016 being the aggrieved person seeking the Court's indulgence to pass necessary orders of restraint under Section 18 of the D.V. Act with the alternative accommodation as per Section 19 besides monetary relief sought for in terms of Section 20 thereof including compensation. In the said proceeding, the petitioner examined herself and another witness and proved a copy of the FIR, whereas, none of the private opposite parties adduced any evidence. Considering the pleadings of both sides, learned J.M.F.C.(R), Cuttack proceeded to examine the evidence led from the side of the petitioner and being satisfied that she is married to opposite party No.2 and since has been subjected to mental torture and hence, domestic violence having been committed during the existence of such marital relationship and that the parties do fall within the purview of domestic relationship sharing a household as defined in Sections 2(f)&(s) of the D.V. Act held and concluded that the private opposite parties have to be restrained from committing any such domestic violence and directed payment of a sum of Rs.2000/- towards alternative accommodation in case the restraint order fails and also maintenance at Rs.3000/- per month as per Section 20 of the D.V. Act. As mentioned before, CRLREV No.407 of 2022 was disposed of on 15th December, 2022 followed by a remand since the appeal was dismissed being oblivious of the fact that learned J.M.F.C.(R), Cuttack did allow maintenance and granted such other relief(s), which was not challenged thereafter. On remand of the matter by this Court with the disposal of CRLREV No.407 of 2022, the learned Appellate Court after a fresh hearing passed the judgment under Annexure-1. Being further aggrieved, the petitioner knocked the portals of this Court with the present revision seeking enhancement of maintenance, sum towards rental accommodation with such other expenses payable at every month from the date of the application under Section 12 of the D.V. Act filed. The compensation amount is also sought to be enhanced with a specific direction to opposite party Nos.2,4 & 5 to return Rs.70,000/- (Rupees Seventy Thousand), gold ornaments and other valuable articles received by them, as the same are exclusively belonging to the petitioner.

10. The question is, whether, the decision in Criminal Appeal No.30 of 2020 vide Annexure-1 is liable to be quashed or is required to be modified?

11. As earlier stated, the petitioner adduced oral evidence by claiming that opposite party No.2 is a Pathology Technician earning not less than Rs.45,000/-. It was also pleaded by the petitioner before the Court of learned J.M.F.C.(R), Cuttack that opposite party No.3, namely, deceased father-in-law being a retired employee was then receiving a sum of Rs.20,000/- per month towards pension and brother-in-law, namely, opposite party No.5, a Software Engineer having handsome salary of more than Rs.1,00,000/-. With respect to such claim, save and except, the oral testimony with affidavits filed, the petitioner submitted no any documentary evidence. Admittedly, none of the respondents, against whom the relief(s) have been sought for, contested such plea and ever adduced any rebuttal evidence. Considering the materials available on record, the learned J.M.F.C.(R), Cuttack passed the order dated 26th February, 2020, while disposing of the application filed under Section 12 of the D.V. Act.

12. In fact, the Apex Court in **Rajnesh Vrs. Neha & Another (2021) 2 SCC 324,** while dealing with a domestic dispute, elaborately considering the issues involved with overlapping jurisdictions, issued series of directions to be carried out by the parties involved by filing affidavits disclosing their assets and liabilities for determination of the quantum of maintenance payable to the aggrieved person taking into account the criteria enumerated therein. In the case at hand, though the decision in **Rajnesh** (supra) has been referred to by the learned Appellate Court, at no point of time, the parties have ever been directed to file affidavits as per the mandate. The decision in **Rajnesh** (supra) arrived later to the final order of the learned J.M.F.C.(R), Cuttack disposed of in the month of February, 2020. But such a direction could have been issued by the learned Appellate Court being a Court of facts and law as the private opposite parties contested the appeal even though did not participate earlier in the DV proceeding. In other words, in adherence to the directions issued in **Rajnesh** (supra), the learned Appellate Court ought to have directed the private opposite parties including the petitioner to file affidavits disclosing individual rights and liabilities with respect to the assets possessed by them for a decision on such monetary and other relief(s), however, no such exercise has indeed taken place.

13. In the considered view of this Court, the law enunciated by the Apex Court in the case of **Rajnesh** (supra) has not been sincerely applied by the learned Appellate Court while disposing of the appeal. In absence of any such affidavits, it is always difficult for a Court to examine and appreciate the claim and defence of both the sides while dealing with matrimonial dispute especially considering monetary relief(s) and therefore, the learned Appellate Court should have directed the parties to file affidavits in accordance with the above decision of the Apex Court. The Court is of the further view that the learned Appellate Court has had an option to direct the learned J.M.F.C.(R), Cuttack to further consider the claim of the petitioner for enhanced maintenance and other relief(s) with a direction to opposite party Nos.2 to 5 to furnish all such materials with affidavits filed in confirmity with the aforesaid decision. Neither the learned Appellate Court did bother to receive any such evidence

directing opposite party Nos.2 to 5 or issue any such direction for the learned J.M.F.C.(R), Cuttack to carry out in the light of the settled law decided in **Rajnesh** (supra). With the evidence on record, as available, the Court is of the conclusion that both the learned Courts below had a guesswork so to say in determining the maintenance amount and granting other monetary relief(s) based on oral evidence of the petitioner. The Court is of the further view that such exercise is really needed and to be worked out at the ground level with a direction to the learned J.M.F.C.(R), Cuttack to reconsider the quantum of maintenance and other relief(s) without disturbing the order in appeal to the extent maintaining the amount of Rs.4000/- each under Sections 19 and 20 of the D.V. Act payable to the petitioner provisionally till a final order is passed at the end. Any such compensation amount as has been challenged by the petitioner to be disproportionate is also to be duly examined besides the plea for return of cash and articles, for which, the proceeding under Section 12 of the D.V. Act is required to be restored to file in the interest of justice.

14. For better appreciation and guidance of the learned J.M.F.C.(R). Cuttack, the relevant directions issued by the Apex Court in **Rajnesh** (supra) and extracts thereof are reproduced herein below:

> "In view of the foregoing discussion as contained in Part B–I to V of this judgment, we deem it appropriate to pass the following directions in exercise of our powers under Article 142 of the Constitution of India:
>
> **(a) Issue of overlapping jurisdiction**
>
> To overcome the issue of overlapping jurisdiction, and avoid conflicting orders being passed in different proceedings, it has become necessary to issue directions in this regard, so that there is uniformity in the practice followed by the Family Courts/District Courts/Magistrate Courts throughout the country. We direct that:
>
> (i) where successive claims for maintenance are made by a party under different statutes, the Court would consider an adjustment or set-off, of the amount awarded in the previous proceeding/s, while determining whether any further amount is to be awarded in the subsequent proceeding;
> (ii) it is made mandatory for the applicant to disclose the previous proceeding and the orders passed therein, in the subsequent proceeding;
> (iii) if the order passed in the previous proceeding/s requires any modification or variation, it would be required to be done in the same proceeding.
>
> **(b) Payment of Interim Maintenance**
>
> The Affidavit of Disclosure of Assets and Liabilities annexed as Enclosures I, II and III of this judgment, as may be applicable, shall be filed by both parties in all maintenance proceedings, including pending proceedings before the concerned Family Court/District Court/Magistrates Court, as the case may be, throughout the country.
>
> **(c) Criteria for determining the quantum of maintenance**
>
> For determining the quantum of maintenance payable to an applicant, the Court shall take into account the criteria enumerated in Part B-III of the judgment.
>
> The aforesaid factors are however not exhaustive, and the concerned Court may exercise its discretion to consider any other factor/s which may be necessary or of relevance in the facts and circumstances of a case.

(d) Date from which maintenance is to be awarded

We make it clear that maintenance in all cases will be awarded from the date of filing the application for maintenance, as held in Part B-IV above.

(e) Enforcement/Execution of orders of maintenance

For enforcement/execution of orders of maintenance, it is directed that an order or decree of maintenance may be enforced under Section 28A of the Hindu Marriage Act, 1956; Section 20(6) of the D.V. Act; and Section 128 of Cr.P.C., as may be applicable. The order of maintenance may be enforced as a money decree of a civil court as per the provisions of the CPC, more particularly Sections 51, 55, 58, 60 read with Order XXI."

15. At the cost of repetition, it is concluded that the learned J.M.F.C.(R), Cuttack shall have to proceed with the matter in order to determine the quantum of maintenance and other sums payable towards monetary relief in favour of the petitioner regard being had to the above directions and keeping in view the criteria stated therein followed by appropriate orders. In fact, this Court is really handicapped to consider the enhancement of maintenance and other amounts besides compensation, as has been pleaded by the petitioner due to absence of documentary evidence and hence, refrained itself considering same again by resorting to a guess work.

16. At the same time, while dealing with matrimonial disputes, it is to be kept in mind that any such order towards maintenance and such other relief(s) should not be disproportionate and disadvantageous to the respondents, who must have the means to provide the same befitting the status of aggrieved person in a domestic relationship with them. A balance can be maintained provided all such material evidence is lying at the disposal of the Court dealing with the application under Section 12 of the D.V. Act. It is of course at the liberty of the Court to grant any such relief in favour of the aggrieved person, if in case the respondents do not file any such affidavits needed for the purpose and in such an eventuality, it shall have the powers to grant maintenance and other monetary relief(s) based on the materials made available by the aggrieved person, who may not have all the means and resource to collect information and inputs which always remain within the knowledge of the other side and hence, difficult to be furnished. Since, opposite party No.2 in particular appears to have participated in the appeal and did not challenge the order of maintenance and other reliefs granted, it would, therefore, be proper to direct both the sides to bare it all the rights and liabilities as per the decision in **Rajnesh** (supra) in order to enable the learned J.M.F.C.(R), Cuttack to reconsider every such plea in favour of and against for a final order.

17. In so far as return of the cash and gold ornaments besides other articles as demanded by the petitioner is concerned, the same having been allegedly received by opposite party No.2, being the husband and parents-in-law, namely, opposite party Nos.3 & 4, the same has not been taken into consideration by both the learned Courts below. Mr. Routray, learned counsel for the petitioner refers to list of the gold ornaments with other valuables described by the petitioner and submits that a direction is required to be issued to the opposite parties to return the same. So far as

the power of a Magistrate to deal with such articles is concerned, it emanates from Section 19(8) of the D.V. Act which stipulates that the respondents may be directed to deliver back possession of stridhan property or any other property or valuable security to which the aggrieved person is entitled to. At this juncture, it would be profitable to quote a judgment of the Apex Court in **Pratibha Rani Vrs. Suraj Kumar and Another AIR 1985 SC 628 and Maya Gopinathan Vrs. Anoop S.B. & Another** in SLP(C) No.13398 of 2022 decided on 24th April, 2024, wherein, it has been held that stridhan property does not become a joint property of the wife and in-laws and, as such, the husband has no title or independent domain over the property as owner thereof. In fact, such a view has been expressed with the conclusion as above in **Maya Gopinathan** (supra), while dealing with a matrimonial appeal against an order of a Family Court.

18. In **Pratibha Rani** (supra), the Apex Court observed that the stridhan property of a married woman, even if placed in the safekeeping of her husband or in-laws, the latter would be considered to be trustees and therefore, are destined to return the same when commanded by her. Such was the decision in connection with a criminal case, wherein, the husband and inlaws were prosecuted for an offence of criminal breach of trust.

19. As to what rights women do have in respect of any such stridhan and other property while being a domestic relationship has been elaborately discussed by the apex Court in **Pratibha Rani** (supra). To facilitate the learned J.M.F.C.(R), Cuttack to reach at a proper decision, the Court is inclined to reproduce the relevant extract of the said decision and the same is as follows:

> "This now brings us to a brief discussion of the nature, character and concomitants of stridhan. In the instant case, we are mainly concerned with that part of stridhan which is the absolute property of a married women during coverture. Sir Gooroodas Banerjee in 'Hindu Law of Marriage and Stridhan' while describing the nature of stridhan quoted Katyayana thus:
>
> "Neither the husband, nor the son, nor the father, nor the brother, has power to use or to alien the legal property of a woman. And if any of them shall consume such property against her own consent he shall be compelled to pay its value with interest to her, and shall also pay a fine to the king... Whatever she has put amicably into the hands of her husband afflicted by disease, suffering from disease, or sorely pressed by creditors, he should repay that by his own freewill. "
>
> At another place while referring to the nature of a husband's rights over stridhan during coverture, the author referring to Manu says thus:
>
> "...and by the law as expounded by the commentators of the different schools, the unqualified dominion of the husband is limited to only some descriptions of the wife's property, while as regards the rest he is allowed only a qualified right of use under certain circumstances specifically defined."
>
> Similarly, while describing the nature of stridhan generally, which is known as saudayika, the author says thus:
>
> "First, take the case of property obtained by gift. Gifts of affectionate kindred, which are known by the name saudayika stridhana, constitute a woman's absolute property, which

she has at all times independent power to alienate and over which her husband has only a qualified right, namely, the right of use in times of distress."

The entire classical text on the subject has been summarised by N.R. Raghavachariar in 'Hindu Law' (5th Edn) at page 533 (section 487) where the following statement is made:

"487. Powers During Coverture.

Saudayika, meaning the gift of affectionate kindred, includes both Yautaka or gifts received at the time of marriage as well as its negative Ayautaka. In respect of such property, whether given by gift or will, she is the absolute owner and can deal with it in any way she likes. She may spend, sell or give it away at her own pleasure by gift or will without reference to her husband and property acquired by it is equally subject to such rights. Ordinarily, the husband has no manner of right or interest in it. But in times of extreme distress, as in famine, illness or imprisonment, or for the performance of indispensable duty the husband can take and utilise it for his personal purposes, though even then he is morally bound to restore it or its value when able to do so. But this right is purely personal to him and cannot be availed of by a holder of a decree against the husband, and if the husband dies without utilising the property for the liquidation of his debts, his creditors cannot claim to proceed against it in the place of her husband."

To the same effect is Maines' treatise on Hindu Law at page 728. The characteristics of Saudayika have also been spelt out by Mulla's Hindu law at page 168 (Section 113) which gives a complete list of the stridhan property of a woman both before and during coverture, which may be extracted thus:

"113. Manu enumerates six kinds of stridhan:

1. Gifts made before the nuptial fire, explained by Katyayana to mean gifts made at the time of marriage before the fire which is the witness of the nuptial (adhyagni).

2. Gifts made at the bridal procession, that is, says Katyayana, while the bride is being led from the residence of her parents to that of her husband (adhyavanhanika).

3. Gifts made in token of love, that is, says Katyayana, those made through affection by her father-in-law and mother-in-law (pritidatta), and those made at time the of her making obeisance at the feet of elders (padavan danika).

4. Gifts made by father.

5. Gifts made by mother.

6. Gifts made by a brother."

It is, therefore, manifest that the position of stridhan of a Hindu married woman's property during coverture is absolutely clear and unambiguous; she is the absolute owner of such property and can deal with it in any manner she likes-she may spend the whole of it or give it away at her own pleasure by gift or will without any reference to her husband. Ordinarily, the husband has no right or interest in it with the sole exception that in times of extreme distress, as in famine illness or the like, the husband can utilise it but he is morally bound to restore it or its value when he is able to do so. It may be further noted that this right is purely personal to the husband and the property so received by him in marriage cannot be proceeded against even in execution of a decree for debt."

20. In view of the above decision, the aggrieved person has a right to receive back her property. As earlier discussed, a Magistrate does have the jurisdiction to ensure it exercising powers under Section 19(8) of the D.V. Act. So, therefore, in the present case, since the petitioner is alleged of a victim of domestic violence, while

being in a domestic relationship with opposite party Nos.2 to 5, apart from any such reliefs, monetary as well as ancillary, she is entitled to, receive back all the articles which are exclusively owned by her. The inevitable conclusion is that both the Courts below failed to discharge the statutory obligation in not dealing with the plea for return of stridhan or such other property claimed to have been received by opposite party Nos.2 to 5 at the time of her marriage. It is well settled law that a pure and simple entrustment of stridhan property or such other property to the husband without creating any right in his favour except for its safekeeping do not confer on him, the right to use it to the detriment of the wife, which has been clearly elucidated by the Apex Court in **Pratibha Rani** (supra). If there was any legal necessity, which may have compelled the husband or in-laws to deal with any such property or cash received at the time of marriage not being detrimental to the interest of the wife, as is also well settled, shall have to be taken judicial notice of by the Courts while dealing with the plea for its return. One is also to bear in mind that the articles received at the time of marriage by the husband and in-laws not for any such exclusive use by the wife shall have to be excluded from the list of items while entertaining the plea for return in any such proceeding while exercising powers under Section 19(8) of the D.V. Act. Having stated so, the Court is of the conclusion that the petitioner since requested both the Courts below to return the articles and to direct the private opposite parties accordingly and the same having not been attended to and addressed, a further direction is necessary in that regard as this Court is unable to undertake such an exercise, which requires due enquiry. It is, hence, to be concluded that the learned J.M.F.C.(R), Cuttack, apart from considering enhancement of maintenance and other sums on monetary relief(s) is needed to exercise jurisdiction under Section 19(8) of the D.V. Act vis-à-vis the return of the articles claimed to have been possessed by the petitioner lying in the custody and enjoyment of opposite party Nos.2, 4 and 5 and if necessary, for the said purpose, to direct enquiry and inventory to be held and carried out, in the manner, it is considered just and expedient.

21. Hence, it is ordered.

22. In the result, the revision petition stands allowed. As a logical sequitur, the impugned judgment dated 14th February, 2023 passed in Criminal Appeal No.30 of 2020 by learned 3rd Additional Sessions Judge, Cuttack and the decision of the learned J.M.F.C.(R), Cuttack dated 26th February, 2020 in connection with Crl. Misc. Case No.93 of 2016 are hereby set aside with a direction to the private opposite parties to continue payment of monthly maintenance @ Rs. 4000/- to the petitioner with similar amount towards alternate rental accommodation during the interregnum till disposal of the proceeding under Section 12 of the D.V. Act, which is, hence, restored for its disposal on merit in the light of the directions issued and settled law discussed herein above. It is further directed that learned J.M.F.C.(R), Cuttack shall ensure such enquiry as has been directed with the necessary evidence received from the both sides for considering the enhancement of monetary relief(s) including compensation and to conclude the aforesaid exercise with the disposal of

Crl. Misc. Case No.93 of 2016 as soon as possible preferably within a period of three months from the date of receipt of a copy of this order.

23. In the circumstances, however, there is no order as to costs.

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2024 (III) ILR-CUT-455

SASHIKANTA MISHRA, J.

W.P(C) NO. 5531 OF 2022

SMITISNIGDHA BISWAL ….Petitioner

V.

STATE OF ODISHA & ORS. ….Opp.Parties

(A) SERVICE LAW – Advertisement/Notification for selection – There is no provision for relaxation of the terms and conditions in the advertisement – Whether the authority has the power to relax the terms and conditions of the advertisement? – Held, No.

(B) In the present case the ADM had disengaged the petitioner by violating the terms and condition of the advertisement i.e. "A candidate must produce all original certificates at the time of verification". – Admittedly though Opposite Party No. 5 had possessed the death certificate of her husband, the same had not been produced before the selection committee at the time of document verification – However, the same was produced before the ADM in the appeal – The ADM disengaged the present petitioner from the post of Anganwadi Worker and passed the appointment order in favour of Opp. Party No. 5 as she secured highest mark being a widow – But the present petitioner being next to Opp. Party No. 5 challenged her appointment order on the ground whether the ADM can relax the terms and condition of the advertisement and can disengage her? – Held, No – The service of the petitioner is reinstated. (Paras 11, 12 & 13)

Case Laws Relied on and Referred to :-

1. (2011) 12 SCC 85 : Bedanga Talukdar v. Saifudaullah Khan.

For Petitioner : Mr. Binaya Kumar Mohanty & J. Sahu.

For Opp.Parties : Mr. A.R. Dash, Addl. Govt. Adv.
M/s. B.B. Swain, A.K. Pattnayak & S.K. Swain [O.P. No. 5]

JUDGMENT Date of Judgment : 09.08.2024

SASHIKANTA MISHRA, J.

The petitioner in the present writ application challenges the order dated 28.01.2022 passed by the Addl. District Magistrate, Jagatsinghpur in Anganwadi Appeal No. 04/2021, whereby her appointment as Anganwadi Worker was set aside and the present opposite party No.5 was directed to be engaged in her place.

2. The facts of the case are that pursuant to an advertisement issued by the CDPO, Raghunathpur for engagement of Anganwadi Workers of different Anganwadi Centers including Gopalpur (Ka) Anganwadi Center, the petitioner and private opposite party No.5 submitted their applications along with others. Of the 8 applicants, 4 appeared before the selection committee and produced their documents. Though opposite party No.5 claimed to be a widow, she could not produce the death certificate of her husband. As such, the petitioner having secured more marks than her in the matriculation examination was selected for engagement. The engagement order was also issued in her favour on 02.12.2021 pursuant to which she joined as Anganwadi Worker in the Center. Her selection and engagement was challenged by the opposite party No.5 in Anganwadi Appeal No. 4/2021 before the ADM, Jagatsinghpur. It is stated that the ADM without hearing the petitioner allowed the appeal by rejecting her engagement and by directing the CDPO to engage the private opposite party in her place. The ADM passed such order on the ground that the opposite party No.5 was a widow for which 10 marks were to be added to the marks secured by her in the matriculation examination which would make her the most meritorious candidate. According to the petitioner, such order is bad in law as the opposite party No.5 had failed to produce the original death certificate of her husband at the time of selection.

3. Counter affidavit has been filed by the private opposite party. It is stated that she had submitted her application online as required and had uploaded all her testimonials including the death certificate of her husband. Further, at the time of selection she had also submitted copy of the death certificate of her husband. Therefore, there was no dispute with regard to her status as widow but the same was ignored by the selection committee and the petitioner was wrongly selected for engagement. It is further stated that she had secured 59.46% marks in HSC Examination and by adding 10 points the same is to be treated as 69.46%, which is more than what the petitioner had secured. Moreover, she has been engaged as Anganwadi Worker pursuant to the impugned order and has been discharging duties continuously since then.

4. Heard Mr. B.K. Mohanty, learned counsel for the petitioner, Mr. A.R. Dash, learned Addl. Government Advocate for the State and Mr. B.B. Swain, learned counsel appearing for the opposite party No.5.

5. Mr. Mohanty would argue that as per the terms of the advertisement, the candidates are required to apply online by uploading all the relevant documents but the originals of the said documents are to be produced before the selection committee at the time of selection. There is no dispute that the opposite party No.5 despite claiming to be a widow failed to produce the original death certificate of her husband at the time of selection, taking note of which the selection committee rightly discarded her candidature. It is the settled position of law that the terms and conditions of the advertisement cannot be done away with. The ADM has acted contrary to the law and therefore, the impugned order warrants interference.

6. Learned State Counsel submits that the advertisement stipulates that the original documents are to be produced by the candidates at the time of selection. In the case at hand, the minutes of the meeting of the selection committee reveals that the opposite party No.5 could not produce the original death certificate of her husband. However, she produced the original during hearing of the appeal.

7. Mr. B.B. Swain argues that there is no dispute that the opposite party No.5 is a widow and her husband died in a road accident. Accordingly, a death certificate was issued on 08.07.2016 by the Medical Officer, CHC, Parjang. She had uploaded said certificate along with her online application form. She had also produced the original certificate before the ADM. As such, she is entitled to 10 points over and above the marks secured by her in the matriculation examination. According to Mr. Swain, the impugned order passed by the ADM is correct and does not warrant any interference.

8. Reference to the advertisement dated 02.11.2021 reveals that 18.11.2021 was fixed for verification of the applications and documents. The candidates were instructed to remain present for verification of their original documents. It is specifically mentioned that if the original documents are not verified by the stipulated date, the application shall not be taken into consideration. In the format enclosed for application under the heading 'Necessary Documents' (ଆବଶ୍ୟକୀୟ କାଗଜପତ୍ର) Clause-6 refers to widows and mentions the document as death certificate of the husband. In the copy of the attendance sheet of 8 candidates prepared by the selection committee, copy enclosed as Annexure-2, it is endorsed against the name of the opposite party No.5- "Xerox death certificate uploaded. Original certificate not produced during the verification." Further, reference to the tabulation sheet, copy of which has been enclosed as Annexure-5 also reveals that the same endorsement is made against the name of the opposite party No.5. In the proceeding of the meeting of the selection committee held on 02.12.2021, the same thing has been mentioned. Thus, it is undisputed that the opposite party No.5 had uploaded Xerox copy of the death certificate and had not produced the original during verification by the selection committee. The guidelines for selection of Anganwadi Workers issued by the Government on 02.05.2007 provides under the heading 'Procedure' at Clause 'c' as follows:

> *"(c) On the 16th day the CDPO will verify the documents of the applicants in their presence and will notify the name of the applicants in her office notice board and at the village, GP and Panchayat Samiti level. In case 16th day is a holiday then verification and notification of applicants will be done on the next working day."*

9. Thus, on a conjoint reading of the guidelines and the advertisement it is crystal clear that the candidates are required to submit original documents at the time of selection by the dates specified. Neither the guidelines nor the advertisement provides for any relaxation in this regard. It is well settled that the selection procedure as stipulated has to be scrupulously followed and unless provided specifically the terms and condition of the advertisement cannot be relaxed.

10. In the case of **Bedanga Talukdar v. Saifudaullah Khan**[1], the Supreme Court observed as follows:

> ***"29.*** *We have considered the entire matter in detail. In our opinion, it is too well settled to need any further reiteration that all appointments to public office have to be made in conformity with Article 14 of the Constitution of India. In other words, there must be no arbitrariness resulting from any undue favour being shown to any candidate. Therefore, the selection process has to be conducted strictly in accordance with the stipulated selection procedure. Consequently, when a particular schedule is mentioned in an advertisement, the same has to be scrupulously maintained. There cannot be any relaxation in the terms and conditions of the advertisement unless such a power is specifically reserved. Such a power could be reserved in the relevant statutory rules. Even if power of relaxation is provided in the rules, it must still be mentioned in the advertisement. In the absence of such power in the rules, it could still be provided in the advertisement. However, the power of relaxation, if exercised, has to be given due publicity. This would be necessary to ensure that those candidates who become eligible due to the relaxation, are afforded an equal opportunity to apply and compete. Relaxation of any condition in advertisement without due publication would be contrary to the mandate of equality contained in Articles 14 and 16 of the Constitution of India."*

11. Reading of the impugned order reveals that a stand was taken on behalf of the opposite party No.5 that the Xerox copy of the death certificate was uploaded along with online application form and the original was produced at the time of verification. This is contrary to what the selection committee has endorsed in the attendance sheet, tabulation sheet and in its minutes of the meeting. Obviously no malafides can be attributed to the members of the selection committee so as to even imagine that they would have deliberately and falsely mentioned that the original certificate was not produced before them. The ADM has further observed that during hearing, the petitioner (present opposite party No.5) showed the original death certificate of her husband. Assuming that she did, in the absence of a plausible explanation being offered as to why the same was not produced earlier if it was in her possession all along, such observation of the ADM can have no sanctity. Obviously, the ADM has no power to relax the terms and conditions of the advertisement which mandate that the original certificate ought to be produced by 18.11.2022. The opposite party No.5, for whatever reason chose not to produce the original certificate on the specified date. As such, her candidature was rightly discarded.

12. From what has been narrated hereinbefore, it is evident that the ADM has acted in a manner contrary to the terms and conditions of the advertisement read with the guidelines dated 02.05.2007 by arrogating to himself a power which he does not possess, that is, of relaxation of the terms of the advertisement. In such view of the matter, the impugned order cannot be sustained.

13. For the foregoing reasons therefore, the writ application is allowed, the impugned order under Annexure10 is hereby quashed. The CDPO, Raghunathpur is directed to reinstate the petitioner in service forthwith. It is made clear that the period between the date of disengagement and her reinstatement shall only be notionally counted for the purpose of continuity in service without grant of any financial benefits.

1. (2011) 12 SCC 85 —— o ——

2024 (III) ILR-CUT-459

SASHIKANTA MISHRA, J.

RSA NO.74 OF 2013

RABINDRA @ SAMARU BHOI & ANR. .....Appellants

V.

RABINDRA KUMAR BAG & ORS. .....Respondents

(A) ADVERSE POSSESSION – Plaintiff filed the suit for confirmation of possession and mandatory injunction – Defendants claimed adverse possession on the plea that the mother of the defendants encroached upon a portion of suit land and constructed a house thereon – The defendants neither pleaded nor proved the essential ingredients of their possession adverse to the Plaintiff – No pleading and evidence to substantiate the date of possession, date of construction etc. – Whether the defendants' plea of adverse possession is maintainable? – Held, No. – In absence of such necessary pleadings and evidence, mere electricity bills, water supply bill etc. cannot prove adverse possession. (Para 14)

(B) PROPERTY LAW – Validity of sale deed – Whether Registered Sale Deed is invalid and nominal for the reason that consideration money was not paid – Held, No. – A sale transaction which culminated in registration of the deed, cannot be invalidated on the ground of non-payment of consideration amount – Further dispute regarding non-payment of consideration is to be raised by the vendor, not by any stranger who claims possession. (Para 13)

(C) APPRECIATION OF EVIDENCE – Whether the Trial Court was justified by making out a third case regarding the income of the purchaser? – Held, No – It goes without saying that such a course of action is not permissible in law. (Para 13)

For Appellants : Mr.P.K.Rath, Sr. Adv with Ms. Shradha Das.

For Respondents : Mr. Debasis Tripathy.

JUDGMENT Date of Judgment : 28.08.2024

SASHIKANTA MISHRA, J.

The Defendants have filed this appeal against a reversing judgment passed by the learned Addl. District Judge, Balangir in R.F.A.No.53/29 of 2005-07 on 22.12.2012 followed by decree whereby the judgment dtd.30.7.2005 followed by decree passed by learned Civil Judge (Sr. Division), Balangir, in C.S. No.88/2003 was set aside and the suit of the Plaintiff was decreed.

2. For convenience, the parties are referred to as per their respective status before the trial Court.

3. The Plaintiff had filed the suit for declaration of his right, title, interest, confirmation of possession over the suit land and permanent injunction against the Defendants. The case of the Plaintiff is that the suit land was originally recorded jointly in the names of Dhanu Sahu and Kala Sahu. By a registered deed of sale executed on 23.9.1948, the said joint owners transferred 10,000 sqft. of land in favour of Brajabasi Bedbak and Mitradeb Nanda under a common registered deed of sale. Brajabasi Bedbak purchased 6000 sqft. while Mitradeb Nanda purchased 4000 sqft. Mitradeb Nanda subsequently died issueless and without any successor. On 23.5.1955 Brajabasi Bedbak transferred 4000 sqft (equivalent to Ac. 0.089 dec.) out of his 6000 sqft of land to one Dibakar Mishra vide R.S.D. dtd.23.5.1955. The Plaintiff purchased the said land vide R.S.D. dtd.16.8.2002 from the sons of said Dibakar Mishra for a consideration of Rs.68,000/- and possessed the same. At that time, it was found that Defendants 1 and 2, who had been inducted as tenant on monthly rent by Dibakar Mishra in the year 1987 were in occupation of the property. The Plaintiff requested them to vacate the suit land but they and the sons of Dibakar Mishra requested to continue the tenancy. On good faith, the Plaintiff allowed them to continue as tenants in the house over the suit land on monthly rent of Rs.500/- with the understanding that they shall vacate the house upon finding suitable accommodation. As such, the defendants have no manner of right, title or interest over the suit land except as tenants. It is the further case of the plaintiff that the mothers of Defendant Nos.1 and 2 purchased some other lands under a fake deed of sale from Defendant No.3 and adopted son of one Kapila Das. The father of Defendant No.3-Harihar Das and Jayadeb Das had earlier purchased said land from Brajabasi Bedbak on 23.12.1949. Since the plot numbers mentioned in the sale deed were incorrect and the deed was executed on a single stamp paper, the settlement authorities did not entertain the document during current settlement and did not record the same in the names of Harihar and Jayadeb. Therefore, in the year 1978 Defendant No.3, an adopted son of Kapila Das, transferred the land under two registered deeds of sale in favour of the mothers of Defendant Nos.1 and 2. Such acquisition of the adjacent land was not valid in the eye of law. Therefore, the Defendants have no manner of right either over the purchased land or the suit land. Since they refused to vacate the suit house, the plaintiff filed the suit claiming the relief as aforesaid.

4. Of the three defendants, Defendant Nos.1 and 2 contested the suit by filing written statement. The averments relating to original ownership of the suit land of Dhanu Sahu and Kala Sahu was admitted and so also the sale of 10,000 sqft. in favour of Brajabasi Bedbak. It was also admitted that the suit land was recorded in the name of Dibakar Mishra, but it was specifically denied that the Plaintiff had ever purchased the same from the sons of Dibakar Mishra. They also denied the plea of tenancy raised by the Plaintiff. According to the Defendants, though the suit land was purchased and owned by Dibakar Mishra yet, by the time his sons executed the sale deed in favour of the plaintiff, they had already lost their title. Brajabasi Bedbak had sold the adjoining land to Harihar Das, father of Defendant No.3, and one Kapila

Das after whose death their legal heirs transferred such land in favour of their mothers. After such purchase, the mothers of Defendants 1 and 2 encroached upon portions of the suit land, which were lying vacant. Some portion was also encroached by one Jatindra Mohan Pathi. According to the Defendants, such encroachment and construction of house by their mothers was within the knowledge of Dibakar Mishra and their possession being thus open continuous with hostile animus, they have perfected their title by way of adverse possession. Therefore, according to the defendants, the Plaintiff has not derived any title on the basis of the fake sale deed.

5. Basing on the rival pleadings, the trial Court framed the following issues for determination;

(1) Whether the plaintiff has cause of action to file this suit?

(2) Whether the plaintiff acquired valid title over the suit land by virtue of his purchase of suit land from the sons of Dibakar Mishra by registered sale deed?

(3) Whether the Defendant No.1 and Defendant No.2 have acquired title by way of adverse possession over the suit land?

(4) Whether the plaintiff has got right, title interest and possession over the suit land?

(5) Whether the suit is undervalued?

(6) Whether the plaintiff is entitled to the relief prayed for?

Issue Nos.2, 3 and 4 were important issues, which were taken up together.

6. After analyzing the oral and documentary evidence on record, the Trial Court held that the sale of the suit land in favour of the plaintiff was not accompanied by delivery of possession. Further, the plaintiff could not adduce proof that that he was financially sound enough to purchase the suit land for consideration of Rs.68,000/-. The sale deed did not mention about the existence of any residential house over the suit land though the R.O.R. shows that there was a house thereon. The trial Court therefore, believed the plea of the defendants that they had constructed house over the suit land taking electricity, water supply and were in continuous possession by encroaching upon the suit land. The trial Court therefore, found that the Defendants being in continuous possession at least from 1984 onwards for more than the statutory period of 12 years, had perfected their title by way of adverse possession and consequently the Plaintiff had not acquired any title. On such findings, the suit was dismissed.

7. Being aggrieved, the Plaintiff carried the matter in appeal to the district Court. The 1st Appellate Court, after considering the grounds raised observed that the point to be decided in the appeal is, whether the Defendants have acquired title by adverse possession. The 1st Appellate Court disapproved the approach of the trial Court in entering into the authenticity and legitimacy of the sale deed even though the same was not in dispute. Passing of title being a matter between vendor and vendee cannot be agitated at the mere asking of a 3rd party. Moreover, even if consideration is found to have not passed the validity of the document cannot be negatived even at the instance of the vendor much less by a stranger. On the question

of adverse possession, the 1st Appellate Court found that the sale deed in question (Ext.6) mentions the suit land as 'Meladiha' whereas the R.O.R. marked Ext.7 shows the existence of a house. But the 1st Appellate Court took note of the admission made by the vendor that the suit property was so described as vacant land only to avoid stamp duty. Therefore, there is nothing wrong in holding that Dibakar Mishra had constructed a house over the suit land.

8. Such being the case, the question of encroachment of different portions of the suit land by mother of the Plaintiff does not arise. Moreover, there is no pleading as to when the mothers of the defendants constructed house over the encroached portions of the suit property. The 1st Appellate Court did not place any reliance on the holding tax receipts, electricity bills and water tax etc. as they are not adequate to prove adverse possession. Basically on such findings, the 1st Appellate Court found that the necessary ingredient to prove acquisition of title by adverse possession was absent. On the contrary, the Plaintiff clearly proved his acquisition of title on the basis of the sale deed. On such findings, the judgment of the trial Court was set aside and the right, title, interest and possession of the Plaintiff over the suit land was declared and other reliefs as claimed were granted.

9. Being aggrieved, the defendants have filed the instant Second Appeal, which was admitted on the following substantial question of law;

> *"Whether the plea of title and as well as the plea of adverse possession taken the Defendants by (Appellants) simultaneously over the suit land for the dismissal of the suit of the Plaintiff vide C.S. No.88 of 2003 is sustainable under law?*

Further, at the time of hearing the following additional substantial question of law was framed;

> *"Whether the judgment and decree passed by the learned lower Appellate Court decreeing the plaintiff's suit by taking note of defendant's claim of adverse possession ignoring the other findings and materials available on record relating to plaintiff's claim of title on the basis of an invalid Sale Deed without any house relating to a vacant land and evidences of existence of a house over the suit land thereby the findings and conclusions arrived at by the learned lower Appellate Court suffers from perversity of not considering the materials available on record."*

10. Heard Mr. P.K.Rath, learned Senior Counsel, with Ms. Shradha Das, for the Defendants-Appellants and Mr. Debasis Tripathy, learned counsel for the Plaintiff Respondents.

11. Assailing the findings of the 1st Appellate Court Mr.Rath would argue that the trial Court clearly found that the sale deed relied upon by the plaintiff has no legal sanctity inasmuch as the same materially differs from the ROR regarding description of the suit property. Elaborating his argument Mr. Rath has taken the Court through the recitals of the sale deed marked Ext.6 wherein the suit land has been described as 'Meladiha' which means, open space for homestead whereas, the R.O.R.(Ext.7) shows the presence of a house over the suit land. That apart, the trial Court found from the evidence on record that the Plaintiff was a mere betel shop

owner with no financial capacity to pay the consideration amount of Rs.68,000/-. Therefore, the sale deed was rightly held by the trial Court a nominal document without delivery of possession or payment of consideration. Mr. Rath would further argue that on the other hand, the defendants clearly proved that their mothers had encroached upon the suit property to the extent of 1625 sqft. and 1500 sqft. respectively and had also constructed houses thereon. Such encroachment and construction of houses was within the knowledge of the true owner Dibakar Mishra. This was in 1984. Therefore, by the time the plaintiff claims to have purchased the suit property from the successors of Dibakar Mishra, his vendors had lost their title over it because of lapse of the statutory period of 12 years. According to Mr. Rath therefore, the 1st Appellate Court did not consider the maintainability of the suit being filed long after the period provided under Article 64 of the Limitation Act.

12. Per contra, Mr. Debasis Tripathy would argue that the vendors of the Plaintiff never objected that the consideration money had not been paid by him. The trial Court made out a third case altogether which is not permissible. The trial Court further placed the burden of proof on the Plaintiff negatively to rebut the plea of the Defendants regarding adverse possession, which is contrary to law. The Defendants, on the hand, could not prove the necessary ingredients to maintain the plea of adverse possession by adducing evidence as to the exact time and nature of the possession. According to Mr.Tripathy therefore, the 1st Appellate Court rightly found that the trial Court erroneously ignored the legal effect of the sale deed marked Ext.6 in favour of the Plaintiff and thereby, wrongly decided the suit.

13. It is borne out from the evidence that in 1936 settlement, 10,000 sqft of land was recorded jointly in the names of Dhanu and Kala. They transferred 6000 sqft to Brajabasi Bedbak and 4000 sqft to Mitradeb Nanda. The present dispute relates only to the portion sold to Brajabasi Bedbak. Brajabasi Bedbak admittedly sold 4000 sqft. to Dibakar Mishra vide R.S.D dtd.23.5.1955 which corresponds to Ac 0.089 decs. Said land was subsequently sold by his sons Somanath, Biswanath and Manoranjan to the Plaintiff Rabindra Baug vide R.S.D dtd.16.8.2002 (Ext.6). The Plaintiff's claim of title is based on the above sale transaction. Before examining the merit of the claim of Defendant Nos.1 and 2 of adverse possession, it would be apposite to examine whether there is any infirmity in the acquisition of title by the Plaintiff. The Defendants have raised an objection that the recitals of Ext.6 mentions the suit property as 'Meladiha' but the R.O.R. marked Ext.7 shows the presence of a house on it. Firstly, this Court would observe that such a discrepancy, per se, cannot nullify a valid sale transaction if all other ingredients are found to have been established. Secondly, as held by the 1st Appellate Court and according to this Court, rightly so, a plausible explanation has been given for the discrepancy inasmuch one of the vendors himself (P.W.3) admitted that the suit property was so described only to avoid stamp duty. Another objection has been raised by the trial Court that no consideration had passed as the Plaintiff being a betel shop owner with meager income did not possibly have the source to purchase the property. This Court has perused the written statement filed by the Defendants 1 and 2. There is absolutely no

whisper in this regard by them, rather they have positively claimed that the Plaintiff's income is more than Rs.12,000/- for which more court fees ought to have been paid. Thus, even though it was nobody's case, the trial court came up with a third case altogether. It goes without saying that such a course of action is not permissible in law. Even otherwise, non-payment of consideration, if at all, is a dispute to be raised by the vendor. In the instant case, no such dispute has been raised by any of the vendors. Therefore, the finding of the trial court that nonpassing of the consideration renders the sale deed a nominal one is untenable because of the settled position of law that a sale transaction cannot be invalidated only on such ground. As has been held by the 1st Appellate Court, the sale deed is a registered document carrying with it a presumption of correctness. The argument that the R.O.R. having mentioned the existence of a house falsifies the sale deed is actually counterproductive for the defendants as has been held by the 1st Appellate Court inasmuch if according to them there was already a house constructed by the owner Dibakar Mishra, then obviously, the question of construction of further houses over the suit land by the mothers of Defendants 1 and 2 appears to be difficult to believe.

14. Coming to the plea of adverse possession raised by the Defendants, as already stated, it is claimed that the mothers of Defendant Nos.1 and 2 purchased the adjoining land vide R.S.D marked Exts.A and L. The adjoining land relates to the balance 2000 sqft land available with Brajabasi Bedbak which he sold to Harihar Das and Jayadeb Das on 23.12.1949 vide R.S.D. marked Ext.33 and to Rama Ch. Das vide R.S.D. marked Exts.34 and 35. It is claimed that the mothers of Defendant Nos.1 and 2 encroached 1625 sqft. and 1500 sqft upon the suit land and constructed their houses to the knowledge of the true owner Dibakar Mishra. This Court has perused the written statement filed by the Defendants and finds that there is no specific pleading as to when they entered into the suit land and constructed the houses. As has been rightly held by the 1st Appellate Court, mere production of the holding tax receipts or electricity bills and water tax cannot be conclusive proof of possession in the absence of the plot numbers of the exact extent of land under occupation. Unless the Defendants come up with a clear case of having entered upon the suit land from a particular date expressing hostile animus to the true owner and further of being in continuous open and peaceful possession for the entire duration of the statutory period of 12 years, they cannot be said to have perfected their title by way of adverse possession. In this regard, this Court finds force in the argument advanced by Mr.Tripathy, learned counsel for the Plaintiff, that the trial Court appears to have wrongly placed the burden of proving the negative on the Plaintiff. In other words, adverse inference has been drawn against the Plaintiff for his inability to rebut the claim of the Defendants that they were in possession for 12 years. It must be mentioned that the trial Court has not done so in so many words, but instead of examining the plea of adverse possession on its own strength, the trial Court has dwelt upon the weaknesses in the Plaintiff's case, which needless to mention, is not a correct approach at all in the facts of the case.

15. For the foregoing reasons therefore, this Court finds that none of the grounds advanced by the defendants to assail the impugned judgment are valid enough to persuade this Court to take a different view than the 1st Appellate Court. Thus, the substantial questions of law as framed are answered against the defendants. This Court holds that the judgment passed by the 1st Appellate Court does not warrant any interference.

16. In the result, the appeal fails and is therefore, dismissed but without any costs.

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2024 (III) ILR-CUT-465

V. NARASINGH, J.

BLAPL NO. 8067 OF 2024

SANIA @ DEBASHIS DAS ….Petitioner

V.

STATE OF ODISHA ….Opp.Party

CODE OF CRIMINAL PROCEDURE, 1973 ─ Section 438 r/w Article 21 of the Constitution of India and Section 37(1)(b)(ii) of the N.D.P.S. Act ─ The petitioner sought for release on bail on the ground of procrastination of trial ─ Petitioner is in custody since 18.12.2022 on the allegation that he along with co-accused was involved in transportation of contraband to the tune of 258.62 grams ─ Whether the petitioner is entitled to bail in view of the bar U/s. 37(1)(b)(ii) of the N.D.P.S. Act? ─ Held, Yes ─ The right to speedy trial as guaranteed under Article 21 has to be given precedence over the statutory bar and such right cannot be negated because of antecedents even under the special statute. (Para - 14)

Case Laws Relied on and Referred to :-

1. 2024 INSC 739 : V. Senthil Balaji vs. The Deputy Director, Directorate of Enforcement
2. (2001) 7 SCC 673 : State of Madhya Pradesh vs. Kajad
3. SLP(Crl.) No(s).8137 of 2022 : State by the Inspector of Police vs. B. Ramu
4. (2022) 10 SCC 51 : Satender Kumar Antil vrs. Central Bureau of Investigation & Anr.
5. AIR 2023 SC 1648 : Muslim alias Hussain vs. State (NCT of Delhi)
6. 2023 SCC OnLine SC 1109 : Rabi Prakash vs. The State of Odisha

For Petitioner : Mr. B. Das.
For Opp.Party : Mr. G.N. Rout, A.S.C.

JUDGMENT Date of Judgment : 27.09.2024

V. NARASINGH, J.

1. Heard Mr. B. Das, learned counsel for the Petitioner and Mr. G.N. Rout, learned Additional Standing Counsel for the State.

2. The Petitioner is an accused in connection with C.T. Case No.424 of 2022 pending on the file of learned Additional District & Sessions Judge, Jagatsinghpur arising out of **Jagatsinghpur P.S. Case No.851 of 2022** for commission of offence alleged under Sections 21(C) and 29 of the NDPS Act.

3. Learned counsel, on instruction, submits that except the present BLAPL, no other bail application of the Petitioner relating to the aforementioned P.S. case is pending in any other Court.

4. Being aggrieved by the rejection of his application for bail U/s.483 of the Bharatiya Nagarik Suraksha Sanhita (BNSS) by the learned Addl. District Judge, (I/C) Jagatsinghpur by order dated 23.07.2024 in the aforementioned case, the present BLAPL has been filed.

5. This is the third journey of the Petitioner to this Court. Earlier bail application of the Petitioner i.e. BLAPL No.11043 of 2023 was rejected by this Court by order dated 19.01.2024. Thereafter, Petitioner had moved this Court in BLAPL No.4614 of 2024 which was rejected by order dated 21.05.2024.

6. It is submitted by the learned counsel that the Petitioner is in custody since 18.12.2022 on the allegation that he along with co-accused were involved in transportation of contraband (brown sugar) to the tune of 258.62 grams.

7. Learned counsel seeks release of the Petitioner primarily on the ground of procrastination of trial and to fortify his submission, he relies on the latest judgment of the Apex Court in the case of **V. Senthil Balaji vs. The Deputy Director, Directorate of Enforcement, 2024 INSC 739**.

8. To ascertain the veracity of the submission regarding the procrastination of trial, a report was called for from the learned Court in seisin. The said report is extracted hereunder;

> *"xxx xxx xxx*
>
> *With reference to the subject and reference cited above, I am to submit that the case record in C.T. No. 424 of 2022 arising out of Jagatsinghpur PS Case No. 851 of 2022 was received from the learned District & Sessions Judge, Jagatsinghpur on transfer on dtd 17.06.2023. Charge was framed against the accused persons with respect to the offences punishable u/ss. 29(1)/21(C) of N.D.P.S Act on dtd 08.04.2024. Out of 24 C.S witnesses, only one witness have already been examined, cross examined and discharged on dtd 13.05.2024. At present, the Court of the Additional Sessions Judge, Jagatsinghpur is lying vacant since dtd. 29.06.2024 as the P.O has been transferred. Now, the case is posted to 21.09.2024 for evidence.*
>
> *xxx xxx xxx"*

9. An affidavit has been filed at the behest of the Petitioner indicating that the Petitioner has following six criminal antecedents;

> *I. Kujang P.S. Case No-316/2013 offence U/s. 379 IPC.*
>
> *II. Kujang P.S. Case No.118/2014 offence U/s.341, 294, 354-A(1), 506, 34 IPC.*

III. Kujang P.S. Case No.169/2015 offence U/s364 of IPC.

IV. Kujang P.S. Case No.155/2015 offence U/s364 of IPC.

V. Kujang P.S. Case No.273/2019 U/s-21(b) NDPS Act.

VI. Kujang P.S. Case No.367/2022 U/s-21(b) NDPS Act.

It is stated in the said affidavit that Petitioner has been acquitted in four cases which are at serial Nos. (i) to (iv) of the above and in the case at serial Nos. (v) to (vi), he is on bail.

10. Learned counsel for the Petitioner submits with vehemence that since release of the Petitioner is sought on the ground of procrastination of trial, the criminal antecedent ought not to deter this Court from considering his bail application on merits.

11. Learned counsel for the State, Mr. Rout, ASC & Public Prosecutor opposes the prayer and submits that the Petitioner has admittedly six criminal antecedents and referring to the bar contained in Section 37(1)(b)(ii) of the NDPS Act, submits that merely because of procrastination of trial, the statutory restriction cannot be over looked.

He also relies on the judgment of the Apex Court in the case of **State of Madhya Pradesh vs. Kajad reported in (2001) 7 SCC 673** and order of the Apex Court in the case of **State by the Inspector of Police vs. B. Ramu** in SLP(Crl.) No(s).8137 of 2022 dated 12.02.2024.

11-A. Section 37(1)(b)(ii) of the NDPS Act reads thus;

> *"**37.Offences to be cognizable and nonbailable**- (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),-*
> *(a) xxx xxx xxx*
> *(b) no person accused of an offence punishable for [offences under section 19 or section 24 or section 27-A and also for offences involving commercial quantity] shall be released on bail or on his own bond unless-*
> *(i) xxx xxx xxx*
> *(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.*
> *xxx xxx xxx*

12. It is apposite to state that this Court is not oblivious of the special features of consideration of bail in a case under the NDPS Act as enunciated by the Apex Court in the case of **Kajad (supra)**. The relevant extract of the said judgment is culled out hereunder;

> *"The purpose for which the Act was enacted and the menace of drug trafficking which intends to curtail is evident from its scheme. A perusal of Section 37 of the Act leaves no doubt in the mind of the court that a person accused of an offence, punishable for a term of imprisonment of five years or more, shall generally be not released on bail. Negation of bail is the rule and its grant an exception under sub clause (ii) of clause (b) of Section 37(1)....."* *(Emphasized)*

12-A. In the case of **B. Ramu (supra)**, while dealing with an order granting anticipatory bail U/s.438 Cr.P.C., during currency of investigation, in an accusation under the NDPS Act of alleged possession of contraband to the tune of 232.5 kgs of ganja, the Apex Court held thus;

> *"14. The fact that after investigation, the charge-sheet has been filed against the respondent-accused along with other accused persons, fortifies the plea of the State counsel that the Court could not have recorded a satisfaction that the accused was prima facie not guilty of the offences alleged."*

12-B. It is apt to note that in both the aforementioned cases, relied upon by the learned counsel for the State, the rights of the accused for speedy trial and breach thereof was not the subject matter of consideration.

13. Right to be released on bail due to prolonged incarceration on account of non-progress in trial is asserted on the anvil of violation of Article 21 of the Constitution.

As such, this Court is of the considered view that twin statutory prescriptions enjoined in section 37(1)(ii) of the NDPS Act as extracted above pales into insignificance.

On this aspect, respectful reference is made to the judgment of the Apex Court in the case of **Satender Kumar Antil vrs. Central Bureau of Investigation and another** reported in **(2022) 10 SCC 51, Mohd. Muslim alias Hussain vs. State (NCT of Delhi)** reported in **AIR 2023 SC 1648** and **Rabi Prakash vs. The State of Odisha** reported in **2023 SCC OnLine SC 1109**.

13-A. In the case of **Satender Kumar Antil (supra)**, the Apex Court dealt with the offences governed by Special Act like the NDPS Act as in the case at hand and noted that the provisions contained in Section 436A of the Code would apply to the Special Acts as well in the absence of any specific provision and held that the rigor, as provided under Section 37 of the NDPS Act, would not come in the way in such a case while dealing with the liberty of a person and further noted that "*more the rigor, the quicker the adjudication ought to be*".

For convenience of ready reference Section 436A of the Code of Criminal Procedure, 1973 is extracted hereunder;

> ***436-A. Maximum period for which an undertrial prisoner can be detained**.- Where a person has, during the period of investigation, inquiry or trial under this Code of an offence under any law (not being an offence for which the punishment of death has been specified as one of the punishments under that law) undergone detention for a period extending up to one-half of the maximum period of imprisonment specified for that offence under that law, he shall be released by the Court on his personal bond with or without sureties:*
>
> *Provided that the Court may, after hearing the Public Prosecutor and for reasons to be recorded by it in writing, order the continued detention of such person for a period longer than one-half of the said period or release him on bail instead of the personal bond with or without sureties:*

Provided further that no such person shall in any case be detained during the period of investigation, inquiry or trial for more than the maximum period of imprisonment provided for the said offence under that law.

13-B. Such view was reiterated in the case of **Mohd. Muslim alias Hussain (supra);**

"……. Grant of bail on ground of undue delay in trial, cannot be said to be fettered by Section 37 of the Act, given the imperative of Section 436A which is applicable to offences under the NDPS Act too.".

13-C. In the case of **Rabi Prakash (supra)**, the Apex Court considering the delay in trial held thus;

"……..The prolonged incarceration, generally militates against the most precious fundamental right guaranteed under Article 21 of the Constitution and in such a situation, the conditional liberty must override the statutory embargo created under Section 37(1)(b)(ii) of the NDPS Act."

14. The sum and substance of the aforementioned judgments of the Apex Court is that the right to speedy trial as guaranteed under Article 21 has to be given precedence over the statutory bar and such right cannot be negated because of antecedents even under the special statute.

15. Yet one has to bear in mind the caveat time and again reiterated by the Apex Court that in the matter of consideration of bail each case has to be judged on its own merit and more significantly its peculiar facts. There cannot be any straightjacket formula. Precedents can at best be illustrative. Though there can never be any absolute embargo on the Constitutional Courts from granting bail to an accused.

16. The Petitioner is in custody since 18.12.2022, there is no progress in trial, as noted. It is stated at the Bar that the Petitioner has his home and hearth within the territorial jurisdiction of the learned Court in seisin.

17. Considering his right to speedy trial and inter play between such sacred right and statutory prescription of the special Act as reiterated by the Apex Court discussed above, this Court directs the Petitioner to be released on bail on such terms to be fixed by the learned Court in seisin.

18. Keeping in view his criminal proclivity, additionally, it is directed that the Petitioner shall appear before the jurisdictional police station twice every week on such date and time to be fixed by the learned Court in seisin till conclusion of trial. Certification of such appearance shall be submitted to the Court in seisin.

19. Accordingly, the BLAPL stands disposed of.

20. In view of the disposal of the BLAPL, I.A. No.1254 of 2024 stands disposed of.

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2024 (III) ILR-CUT-470

BIRAJA PRASANNA SATAPATHY, J.

W.P.(C)(OAC) NO.1792 OF 2017

PADMACHARAN PUJARI .....Petitioner

V.

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

(A) SERVICE LAW – Appointment – In the advertisement dated 18.07.2013 the authority mentioned that one post was reserved for candidates belonging to partial deaf – The petitioner qualified the written as well as viva voice test – At the time of document verification relying upon the resolution dated 03.12.2013 his disability certificate was not accepted as the disability of petitioner was temporary – Whether the resolution is applicable in respect of selection of the petitioner? – Held, No – The resolution dated 03.12.2013 was not in force at the time of advertisement – Therefore, resolution cannot be made applicable to the case of the petitioner – The opp. party should provide appointment to the petitioner – writ petition allowed.

(Paras 9.2 & 9.3)

(B) INTERPRETATION OF STATUTE – When a rule or law can be constructed as retrospective – Discussed with reference to case laws.

(Para 7.1)

Case Laws Relied on and Referred to :-

1. 1994 (5) SCC 450 : Union of India vs. Tushar Ranjan Mohanty
2. (2021) 10 SCC 210 : Assistant Excise Commissioner, Kottayam & Ors. Vs. Esthappan Cherian & Anr.
3. 2021 SCC OnLine Del 5148 : Anmol Kumar Mishra (Minor) Vs. Union of India & Ors.
4. 2023 SCC OnLine SC 640 : Sree Sankaracharya University of Sanskrit & Ors. Vs. Dr. Manu & Anr.

For Petitioner : Mr. M.K. Mohanty.

For Opp.Parties : Mr. M.K. Balabantaray, AGA
Mr. A. Behera, (Opp. Party No. 2)

JUDGMENT Date of Hearing & Judgment : 21.08.2024

BIRAJA PRASANNA SATAPATHY, J.

1. This matter is taken up through hybrid mode.

2. Heard Mr. M.K. Mohanty, learned counsel appearing for the Petitioner, Mr. M.K. Balabantaray, learned Addl. Govt. Advocate appearing for the State and Mr. A. Behera, learned counsel appearing for Opp. Party No. 2. Learned Addl. Govt. Advocate produced copy of letter dt.20.08.2024 so issued by the Dept. of Higher Education. The same be kept in record.

3. Petitioner has filed the present writ petition inter alia with the following prayer:-

> *"In view of the facts mentioned in Para-6 above, the applicant prays for the following relief(s):-*
>
> *The Hon'ble Tribunal may be graciously pleased to allow the Original Application, quash the recommendation agaisnt the post of physically handicapped vide Notice No. 1497 dated 14.03.2017 under Annexure-6 and further direct the respondent No. 2 to recommend the name of the applicant for the post of Junior Lecturer in Odia in O.E.S. (Group-B) Service as partially deaf candidate pursuant to the advertisement No. 6 of 2013-14 and pass such other further order/orders as are deemed just and proper."*

4. Learned counsel for the Petitioner contended that pursuant to the advertisement issued under Annexure-1 by Odisha Public Service Commission (in short 'Commission') Petitioner made his application as against the post of Junior Lecturer in the discipline Odia.

4.1. It is contended that in the advertisement in question as against the discipline Odia, 42 posts were advertised and out of those 42 posts, one post was reserved for candidate belonging to Partial Deaf (PD).

4.2. It is contended that Petitioner with having the certificate that he belongs to Partial Deaf category, made his application and participated in the selection process. Petitioner was allowed to take part in the written examination pursuant to the admission certificate issued by the Commission under Annexure-3.

4.3. It is contended that Petitioner having come out successful in the written examination, he was allowed to take the viva-voce test vide notice issued on dtd.14.02.2017 under Annexure-4. But thereafter when case of the Petitioner was not recommended as against the discipline Odia under PD category, while recommending 42 candidates in different categories vide notice dtd.14.03.2017 under Annexure-6, the present writ petition was filed with the prayer as indicated hereinabove.

4.4. Learned counsel for the Petitioner contended that since in the advertisement in question one post was reserved for candidates belonging to Partial Deaf and no such candidate was recommended while recommending all 42 candidates in the discipline Odia, such action of the Commission is not sustainable in the eye of law and Petitioner's case should have been recommended as Petitioner was allowed to take part in the selection process by appearing the written test and viva voce as having belong to PD category. It is accordingly contended that appropriate direction be issued to the Commission to recommend his name as against the post reserved for Partial Deaf in the advertisement issued under Annexure-1 vide Advertisement No. 06/2013-14.

4.5. It is also contended that the Tribunal while issuing notice of the matter vide order dtd.26.07.2017 passed an interim order to the effect that any appointment made shall be subject to result of the O.A./present writ petition.

5. Mr. A. Behera, learned counsel appearing for the Commission on the other hand made his submission basing on the stand taken in the counter affidavit. It is

contended that Petitioner while making the application submitted the disability certificate showing his disability to the extent of 45% temporary. But at the time of verification of documents, Petitioner submitted the document enclosed vide Annexure-2 to the present writ petition, wherein disability of the Petitioner was indicated at 60% temporary with the stipulation that the condition is likely to improve.

5.1. It is contended that since by the time the selection process was undertaken, a fresh resolution was already issued by the Govt. in the G.A. Department vide Resolution dtd.03.12.2013 under Annexure-A/2 to the counter affidavit, placing reliance on the said resolution, claim of the Petitioner was not recommended as the disability of the Petitioner was temporary as reflected in Annexure-2.

5.2. It is contended that since in terms of the resolution issued on 03.12.2013, only candidates with having permanent disability were made eligible to get the benefit under PH category, claim of the Petitioner was not recommended, even though he qualified in the written examination and viva voce and also called for verification of documents. The stand taken in the Para 6 of the counter affidavit reads as follows:-

> *"6. That the Petitioner applied under the UR (PWD-HH) category. i.e., partially deaf category and submitted a disability certificate with 45% disability at the time of online application form. However, at the time of document verification, the Petitioner submitted another disability certificate with 60% (HH) disability containing the remark as 'This condition is Likely to Improve (TEMPORARY)'. Hence, his case could not be considered under the physically challenged category. In this connection, the copy of the relevant portion of the Resolution of Govt. in GA & PG Department bearing No.34450/Gen, dt.03.12.2013 is annexed herewith and marked as AnnexureA/2."*

5.3. It is accordingly contended that in view of the stipulation contained in Resolution dt.03.12.2013 under Annexure-A/2, Petitioner's name was not recommended in PD category, while recommending all 42 candidates in the discipline Odia. It is accordingly contended that no illegality has been committed by the Commission in not recommending the name of the Petitioner. Learned counsel appearing for Opp. Party No. 2 also contended that since none of the recommended candidate has been impleaded as a Party to the writ petition, the writ petition suffers from non-joinder of necessary party and not entertainable.

6. To the stand taken in the counter, Mr. Mohanty, learned counsel for the Petitioner made further submission basing on the stand taken in the rejoinder affidavit. It is contended that since the resolution dtd.03.12.2013 was not in force by the time the advertisement in question was issued by the Commission on 18.07.2013 under Annexure-1, non-recommendation of the case of the Petitioner basing on the said resolution is not just and proper and Petitioner's case should have been recommended as Petitioner qualified both the written and viva-voce test and called for verification of documents.

6.1. In support of his aforesaid submission, Mr. Mohanty relied on the provisions contained under Rule 4 & 6 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Odisha Rules, 2003. Sub-Rule 5(i) & (ii) of Rule 4 & Rule 6 of the Rules reads as follows:-

> *"(5) The Medical Authority, after due examination-*
>
> *(i) shall give a permanent disability certificate in case where there are no chances of variation, over time, in the degree of disability,*
>
> *(ii) shall indicate the period of validity in the certificate in cases where there is any chance of variation, over time, in the degree of disability; and*
>
> ***6. Certificate issued under rule 4 to be generally valid for all purposes:*** *A certificate issued under rule 4 shall render a person eligible to apply for facilities, concessions and benefits admissible under any scheme of Govemment or non- Government organisations, subject to such conditions as the central Government or the state Government may impose from time to time in this regard.]"*

6.2. Learned counsel for the Petitioner accordingly contended that by the time the advertisement under Annexure-1 was issued, provisions contained under the aforesaid Rules were governing the field and Petitioner was eligible to participate in the selection process and was also allowed by the Commission. It is contended that the ground indicated in the counter for not recommending the Petitioner so reflected in Para 6 of the counter of Opp. Party No. 2 is not sustainable in the eye of law. In support of his submission, learned counsel for the Petitioner relied on the following decisions:-

> ***1. Union of India Vs. Tushar Ranjan Mohanty, 1994 (5) SCC 450***
>
> ***2. Assistant Excise Commissioner, Kottayam & Ors. Vs. Esthappan Cherian & Anr., (2021) 10 SCC 210***
>
> ***3. Anmol Kumar Mishra (Minor) Vs. Union of India & Ors., (2021 SCC OnLine Del 5148)***

6.3. Hon'ble Apex Court in Para 13 & 14 of the Judgment in the case of ***Tushar Ranjan Mohanty*** has held as follows:-

> *"**13**. Finally this Court considered the effect of retrospective legislation on the vested rights of the affected persons in P.D. Aggarwal v. State of U.P. [(1987) 3 SCC 622 : 1987 SCC (L&S) 310 : (1987) 4 ATC 272] Under the U.P. Service of Engineers (Buildings & Roads Branch) Class II Rules, 1936, the Assistant Engineers substantively appointed against temporary vacancies became members of the service and were entitled to seniority on the basis of continuous length of service. The Rules were amended in the years 1969 and 1971 wherein it was provided that the Assistant Engineers would only become members when they are selected and appointed against the quota meant for them and their seniority would be determined only from the date of order of appointment in substantive vacancies. These amendments were made with retrospective effect thereby taking away the vested rights of the Assistant Engineers appointed against temporary posts. The High Court held the retrospective amendment of the rules to be arbitrary and unconstitutional. This Court upheld the judgment of the High Court on the following reasoning: (SCC p. 637, para 16; p. 638, para 18; p. 639, para 18)*

"It has been urged that Government has the power to amend rules retrospectively and such rules are quite valid. Several decisions have been cited of this Court at the bar. Undoubtedly, the Government has got the power under proviso to Article 309 of the Constitution to make rules and amend the rules giving retrospective effect. Nevertheless, such retrospective amendments cannot take away the vested rights and the amendments must be reasonable, not arbitrary or discriminatory violating Articles 14 and 16 of the Constitution .... As has been stated hereinbefore, the Assistant Engineers who have already become members of the Service on being appointed substantively against temporary posts have already acquired the benefit of 1936 Rules for having their seniority computed from the date of their becoming member of the service. 1969 and 1971 Amended Rules take away this right of these temporary Assistant Engineers by expressly providing that those Assistant Engineers who are selected and appointed in permanent vacancies against 50 per cent quota provided by Rule 6 of the Amended 1969 Rules will only be considered for the purpose of computation of seniority from the date of their appointment against permanent vacancies. Therefore the temporary Assistant Engineers who are not only deprived of the right that accrued to them in the matter of determination of their seniority but they are driven to a very peculiar position inasmuch as they are to wait until they are selected and appointed against permanent vacancies in the quota set up for this purpose by the amended Rule 6.... These amendments are not only disadvantageous to the future recruits against temporary vacancies but they were made applicable retrospectively from 1-3-1962 even to existing officers recruited against temporary vacancies through Public Service Commission. As has been stated hereinbefore that the Government has power to make retrospective amendments to the Rules but if the Rules purport to take away the vested rights and are arbitrary and not reasonable then such retrospective amendments are subject to judicial scrutiny if they have infringed Articles 14 and 16 of the Constitution." 1

14. *The legislatures and the competent authority under Article 309 of the Constitution of India have the power to make laws with retrospective effect. This power, however, cannot be used to justify the arbitrary, illegal or unconstitutional acts of the Executive. When a person is deprived of an accrued right vested in him under a statute or under the Constitution and he successfully challenges the same in the court of law, the legislature cannot render the said right and the relief obtained nugatory by enacting retrospective legislation."*

6.4. Similarly, Hon'ble Apex Court in Para 16, 17 & 22 of the Judgment in the case of ***Esthappan Cherian*** has held as follows:-

*"**16**. There is profusion of judicial authority on the proposition that a rule or law cannot be construed as retrospective unless it expresses a clear or manifest intention, to the contrary. In CIT v. Vatika Township (P) Ltd. [CIT v. Vatika Township (P) Ltd., (2015) 1 SCC 1] this Court, speaking through a Constitution Bench, observed as follows: (SCC pp. 21-22, paras 28-29)*

"28. Of the various rules guiding how legislation has to be interpreted, one established rule is that unless a contrary intention appears, legislation is presumed not to be intended to have a retrospective operation. The idea behind the rule is that a current law should govern current activities. Law passed today cannot apply to the events of the past. If we do something today, we do it keeping in view the law of today and in force and not tomorrow's backward adjustment of it. Our belief in the nature of the law is founded on the bedrock that every human being is entitled to arrange his affairs by relying on the existing law and should not find that his plans have been retrospectively upset. This principle of law is known as lex prospicit non respicit : law looks forward

not backward. As was observed in Phillips v. Eyre [Phillips v. Eyre, (1870) LR 6 QB 1] , a retrospective legislation is contrary to the general principle that legislation by which the conduct of mankind is to be regulated when introduced for the first time to deal with future acts ought not to change the character of past transactions carried on upon the faith of the then existing law.

29. The obvious basis of the principle against retrospectivity is the principle of "fairness", which must be the basis of every legal rule as was observed in L'Office Cherifien des Phosphates v. Yamashita-Shinnihon Steamship Co. Ltd. [L'Office Cherifien des Phosphates v. Yamashita-Shinnihon Steamship Co. Ltd., (1994) 1 AC 486 : (1994) 2 WLR 39 (HL)] Thus, legislations which modified accrued rights or which impose obligations or impose new duties or attach a new disability have to be treated as prospective unless the legislative intent is clearly to give the enactment a retrospective effect; unless the legislation is for purpose of supplying an obvious omission in a former legislation or to explain a former legislation. We need not note the cornucopia of case law available on the subject because aforesaid legal position clearly emerges from the various decisions and this legal position was conceded by the counsel for the parties. In any case, we shall refer to few judgments containing this dicta, a little later."

***17**. Another equally important principle applies: in the absence of express statutory authorisation, delegated legislation in the form of rules or regulations cannot operate retrospectively. In CIT v. M.C. Ponnoose [CIT v. M.C. Ponnoose, (1969) 2 SCC 351: (1970) 1 SCR 678] this rule was spelt out in the following terms: (SCC p. 354, para 5)*

5. ... The courts will not, therefore, ascribe retrospectivity to new laws affecting rights unless by express words or necessary implication it appears that such was the intention of the legislature. Parliament can delegate its legislative power within the recognised limits. Where any rule or regulation is made by any person or authority to whom such powers have been delegated by the legislature it may or may not be possible to make the same so as to give retrospective operation. It will depend on the language employed in the statutory provision which may in express terms or by necessary implication empower the authority concerned to make a rule or regulation with retrospective effect. But where no such language is to be found it has been held by the courts that the persons or authority exercising subordinate legislative functions cannot make a rule, regulation or bye-law which can operate with retrospective effect."

xxx xxx xxx

***22**. In these circumstances, and having regard to the principle that retrospectivity cannot be presumed, unless there is clear intention in the new rule or amendment, it is held that there is no infirmity with the judgment of the High Court."*

6.5. Hon'ble High Court of Delhi in Para 14 & 15 of the Judgment in the case of ***Anmol Kumar Mishra*** has held as follows:-

"14. The petitioner placed the entire matter before the IITs by way of correspondence prior to filling up his form or taking the JEE. He was advised that he was eligible under the PwD category, subject to a valid PwD certificate and other eligibility criteria. The validity of his certificate is not in issue. What is now being raised is that a temporary disability is a disqualification to avail of the reservation. The fact that the petitioner's disability was temporary and his certificate was valid only for a period of one year was disclosed by him in his correspondence. The position taken by the respondents in their response to his emails is, in my view, consistent with the Act and the Guidelines. To the contrary, the contention in the impugned communication dated 09.11.2021 is that he is not eligible for the very reason that he had disclosed to the respondents.

15. This is an unduly restrictive interpretation. The Act is a beneficial legislation. While dealing with an earlier legislation on the same subject2, the Supreme Court observed that the said Act was a social legislation for the benefit of PwDs and must be interpreted in order to fulfill its objectives3. The principle that beneficial legislations must be construed liberally with the objective of furthering their purpose is well settled4, and the same understanding must inform the interpretation of the Act. I am of the view that the impugned communication tends to adopt a restrictive interpretation which is not consistent with the object of the legislation. Of course, the benefits of the Act should be conferred upon those the legislature intended to be benefitted, but the Act does not make the distinction which the respondents have read into the legislative scheme."

6.6. With regard to the stand taken by the learned counsel appearing for the Commission regarding maintainability of the writ petition on the ground that non-joinder of the necessary party, learned counsel for the Petitioner contended that since no candidate was recommended in the category P.D. vide the impugned notice issued by the Commission on 14.03.2017 under Annexure-6, there was no necessity to implead any of the selectee as a Party to the writ petition.

7. Mr. A. Behera, learned counsel appearing for the Commission with regard to applicability of the resolution issued under Annexure-A/2 to the case of the Petitioner relied on a decision of the Hon'ble Apex Court in the case of ***Sree Sankaracharya University of Sanskrit & Ors. Vs. Dr. Manu & Anr. (2023 SCC OnLine SC 640).***

7.1. Hon'ble Apex Court in Para 46 of the said Judgment has held as follows:-

"46. In order to effectively deal with the aspect as to retrospective operation of the Government Order dated 29th March, 2001 it may be useful to refer to the following extract from the treatise, Principles of Statutory Interpretation, 11th Edition (2008) by Justice G.P. Singh on the sweep of a clarificatory/declaratory/explanatory provision:

"The presumption against retrospective operation is not applicable to declaratory statutes. As stated in Craies and approved by the Supreme Court: For modern purposes a declaratory Act may be defined as an Act to remove doubts existing as to the common law, or the meaning or effect of any Statute. Such acts are usually held to be retrospective.

[...] An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well settled that if a statute is curative or merely declaratory of the previous law, retrospective operation is generally intended. The language 'shall be deemed always to have meant' or 'shall be deemed never to have included' is declaratory and is in plain terms retrospective. In the absence of clear words indicating that the amending Act is declaratory, it would not be so construed when the amended provision was clear and unambiguous. An amending Act may be purely clarificatory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect and, therefore, if the principal Act was existing law when the constitution came into force, the amending Act also will be part of the existing law." [Emphasis by us]

8. Learned Addl. Govt. Advocate relying on the instruction provided by the Department vide letter dt.28.08.2024 contended that as agaisnt the 42 candidates recommended by the Commission in the discipline Odia, 41 candidates were issued with order of appointment vide Notification dt.10.07.2017.

9. Having heard learned counsel appearing for the Parties and considering the submissions made, this Court finds that in terms of the advertisement issued under Annexure-1, Petitioner made his application as against the post of Junior Lecturer in the discipline Odia. As found from the advertisement, as against the 42 posts so advertised, one post was kept reserved for candidates belonging to Partial Deaf category. It is not disputed that Petitioner belongs to that category and he made his application in that regard, which was duly accepted by the Commission. Since no candidate in the category P.D. was recommended by the Commission while issuing the impugned notice dtd.14.03.2017 under Annexure-6, this Court is unable to accept the contention of the learned counsel appearing for Opp. Party No. 2 regarding maintainability of the writ petition on the ground of non-joinder of necessary party.

9.1. It is also found from the record that Petitioner's application after being accepted, he was allowed to take part in the written test as well as in the viva-voce test. Petitioner after qualifying both written and the viva-voce test he was called for verification of documents. But his case was not recommended on the ground that Petitioner's disability is of temporary nature and in view of the resolution issued under Annexure-A/2 to the counter, he is not eligible to get the benefit of appointment.

9.2. This Court placing reliance on the decisions in the case of Tushar Ranjan Mohanty, Esthappan Cherian and Anmol Kumar Mishra and provisions contained under the 2003 Rules is of the view that Annexure-A/2 was not in force by the time the advertisement under Annexure-1 was issued. Therefore, resolution issued under AnnexureA/2 cannot be made applicable to the case of the Petitioner. The decision relied on by the learned counsel for the Petitioner as per the considered view of this Court is not applicable to the facts of the present case.

9.3. In view of the same and the fact that as against 42 candidates recommended by the Commission, 41 candidates have been provided with appointment vide Notification dtd.10.07.2017, this Court while disposing the writ petition, directs Opp. Party-Commission to recommend the name of the Petitioner as against the discipline Odia in the category Partially Deaf within a period of two (2) weeks from the date of receipt of this order. On such recommendation being made, Opp. Party No. 1 shall provide appointment to the Petitioner with issuance of notification within a period of 2 (two) weeks from the date of receipt of the recommendation.

10. The writ petition is disposed of accordingly.

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2024 (III) ILR-CUT-478

MURAHARI SRI RAMAN, J.

CRP NO. 32 OF 2022

SUBHRANSU KUMAR MOHAPATRA ….Petitioner

V.

RUKMUNI MOHAPATRA ….Opp.Party

CODE OF CIVIL PROCEDURE, 1908 ─ Order XXII, Rule 3 ─ Original Plaintiff died during pendency of the suit for declaration of registered gift deed executed in favour of one of her son as null and void and for permanent injunction ─ The legal heir of deceased plaintiff did not take any step for substitution ─ The daughter-in-law filed petition U/o XXII, Rule 3 for substitution in place of deceased plaintiff claiming her right under a Will to continue the suit to its logical end ─ Whether in absence of probate of Will taking aid of such Will can any right to sue by daughter-in-law survives substituting the deceased plaintiff in the suit? ─ Held, Yes ─ Probate would only reassert the title of the executor ─ The daughter-in-law would be entitled to decree if the grounds taken in the plaint stand proved – However, such decree shall be passed subject to grant of probate of the Will of the deceased plaintiff in favour of the Opp. Party daughter-in-law. (Paras 13-15)

Case Laws Relied on and Referred to :-

1. AIR 1962 SC 232 : Andhra Bank Ltd. Vrs. R. Srinivasan.
2. (2010) 2 SCC 162 : Suresh Kumar Bansal Vrs. Krishna Bansal.
3. (1993) 2 SCC 507 : Chiranjilal Shrilal Goenka (Deceased) through Lrs. Vrs. Jasjit Singh.
4. 65 (1998) CLT 212 : Surendra Chandra Jena Vrs. Laxmi Narayan Jena & Ors.
5. (2023) 9 SCC 734 : Meena Pradhan Vrs. Kamla Pradhan.
6. 1959 Supp (1) SCR 426 (3-Judge Bench) : H. Venkatachala Iyengar Vrs. B.N. Thimmajamma.
7. (1994) 5 SCC 135 (3-Judge Bench) : Bhagwan Kaur Vrs. Kartar Kaur.
8. (2003) 2 SCC 91(2-Judge Bench) : Janki Narayan Bhoir Vrs. Narayan Namdeo Kadam.
9. (2009) 4 SCC 780 (3-Judge Bench) : Yumnam Ongbi Tampha Ibema Devi Vrs. Yumnam Joykumar Singh.
10. (2021) 11 SCC 277 (3-Judge Bench) : Shivakumar Vrs. Sharanabasappa.
11. (1993) 2 SCC 507 = (1993) 2 SCR 454 : Chiranjilal Shrilal Goenka Vrs. Jasjit Singh.
12. (1963) 1 An WR (SC) 14 = AIR 1962 SC 232 = (1962) 3 SCR 391 : Andhra Bank Ltd. Vrs. R. Srinivasan.
13. (1983) 1 SCC 538 = 1983 SCC (Tax) 75 = AIR 1983 SC 188 : Official Liquidator Vrs. Parthasarathi Sinha.
14. AIR 1987 Pat 239 (FB) = 1987 PLJR 394 : Sudama Devi Vrs. Jogendra Choudhary.
15. (1953) 1 SCC 295 = AIR 1954 SC 280 : Ishwardeo Narain Singh Vrs. Smt. Kamta Devi.
16. ILR (1916) 43 Cal 694 = AIR 1916 PC 78 = 43 IA 91 : Sheoparsan Singh Vrs. Ramnandan Prasad Narayan Singh.
17. AIR 1933 Bom 469 = 35 BLR 998 = 147 IC 362 : Narbheram Jivram Purohit Vrs. Jevallabh Harjivan.
18. (2008) 7 SCR 734 = (2008) 8 SCC 521 : Jaladi Suguna Vrs. Satya Sai Central Trust.
19. (2010) 2 SCC 162 = (2009) 16 Addl.SCR 419: (SCC) : iii. Suresh Kumar Bansal Vrs. Krishna Bansal.
20. (2008) 8 SCC 521 : Jaladi Suguna Vrs. Satya Sai Central Trust.

21. (2008) 8 SCC 521 : Jaladi Suguna Vrs. Satya Sai Central Trust.
22. (2020) 1 SCR 132 : iv. Varadarajan Vrs. Kanakavalli.
23. (1998) 3 SCC 148 = (1998) 1 SCR 937 : V. Uthirapathi Vrs. Ashrab.
24. ILR (1932) 55 Mad 352 = AIR 1932 Mad 73 (FB) : Venkatachalam Chetti Vrs. Ramaswami Servai.
25. AIR 1965 SC 1049 = (1965) SCR 231 : Daya Ram Vrs. Shyam Sundari.
26. ILR 26 MAD 230 : Kadir Vrs. Muthukrishna Ayyar.
27. AIR 1981 P&H 130 : Mohinder Kaur Vrs. Piara Singh.
28. (2010) 1 SCC 277 : Dashrath Rao Kate Vrs. Brij Mohan Srivastava.
29. AIR 1995 AP 351 : Vijayalakshmi Jayaram Vrs. M.R. Parasuram.
30. AIR 1931 P&H 130 : Mohinder Kaur Vrs. Piara Singh.
31. 1987 SCC OnLine Ori 80 = AIR 1988 Ori 143 = 65 (1988) CLT 212 : v. Surendra Chandra Jena Vrs. Laxminarayan Jena.
32. AIR 1954 Pat 175 : Ramcharan Singh Vrs. Mst. Dharohar Kuer.
33. (2016) 13 SCC 253 : Vatsala Srinivasan Vrs. Shyamala Raghunathan.
34. 1961 SCC OnLine Guj 62 = AIR 1963 Guj 32 : Jadeja Pravinsinhji Anandsinhji Vrs. Jadeja Mangalsinhji Shivsinhji.
35. 1978 SCC OnLine Cal 153 = AIR 1978 Cal 559 : Bali Ram Dhote Vrs. Bhupendra Nath Banerjee.
36. 1986 SCC OnLine Cal 171 : Ashoke Mukherjee Vrs. Musha Khan.
37. AIR 1962 SC 1472 : Hem Nalini Vrs. Isolyne Sarojbashini.
38. 43 Indian Appeals 113 : S.M.K.R. Meyappa Chetti Vrs. Subramaniam Chetti.
39. AIR 1933 Calcutta 234 : Gopal Lal Chandra Vrs. Amulya Kumar Sur.
40. 1979 (2) Cal LJ 426 : Murari Mohan Dutt, J., in the case of Arijit Mullick Vrs. Corporation of Calcutta.
41. 54 CWN 667 : Bibhuti Bhusan Roy Vrs. Narendra Narayan Ghose.
42. AIR 1930 Mad 218 : Raja Rama Vrs. Fakruddin.
43. 1916 SCC OnLine PC 11 = (1915-16) 20 CWN 833 = (1915-16) 43 IA 113 = AIR 1916 PC 202 : Soona Mayna Kena Roona Meyappa Chitty Vrs. Soona Navena Suppramanian Chitty.
44. (1949) 1 All ER 609 : Chancery Division, Rees' Will Trusts, Williams Vrs. Hopkins.
45. (2010) 2 SCC 162 : Suresh Kumar Bansal Vrs. Krishna Bansal.

For Petitioner : M/s. Gopinath Mishra, Pragnya Paramita Mohanty & J.K. Pradhan.

For Opp.Party : M/s. Suvashish Pattnaik, Bishal Baivab, Soumya Priyadarshinee & A. Pattnaik.

JUDGMENT Date of Hearing : 10.09.2024 : Date of Judgment : 23.09.2024

MURAHARI SRI RAMAN, J.

THE CHALLENGE:

Questioning the propriety of order dated 14.12.2022 of the Senior Civil Judge, Bhubaneswar in suit, bearing CS No.1601 of 2020, passed in consideration of a petition filed at the behest of the petitioner-defendant under Order XXII, Rule 3, of the Code of Civil Procedure, 1908 ("CPC", for short), this civil revision petition has been preferred invoking provisions of Section 115 with the following prayer(s):

> *"Therefore, it is prayed that the revision may be admitted, LCR may be called for and after hearing the parties, the same may be allowed by setting aside the impugned order dated 14.12.2022;*
>
> *And for which act of kindness, the petitioner shall as in duty bound, ever pray."*

THE FACTS:

2. The facts as outlined by the petitioner-defendant in the revision petition reveal that the original plaintiff-Sarojini Mohapatra (be called "deceased plaintiff" for convenience), being dead during the pendency of the suit for declaration of registered gift deed dated 24.11.2017 executed in favour of the petitioner (one of her sons) null and void and for permanent injunction, a petition under Order XXII, Rule 3 of the CPC came to be filed by her daughter-in-law (namely, Rukmani Mohapatra) for substitution in place of the deceased plaintiff-Sarojini Mohapatra (hereinafter called "substituted plaintiff") claiming her right under a Will to continue with the aforenoted suit to its logical end.

2.1. The petitioner herein, being defendant in the suit, stated to have objected to such substitution and raised question of maintainability of the petition under Order XXII, Rule 3 of the CPC on the plea that deceased plaintiff left legal heirs behind her, who did not choose to participate in the suit and contest. It is the contention of the petitioner that Rukmani Mohapatra (substituted plaintiff) being not a successor of the deceased plaintiff, the petition under Order XXII, Rule 3 of the CPC is not liable to be allowed inasmuch as no legal right by dint of Will flows unless a Court of competent jurisdiction grants probate of such Will under which the right is claimed, or the legatee is granted the letters of administration with the Will or with a copy of an authenticated copy of the Will annexed thereto in terms of Section 213 of the Indian Succession Act, 1925.

HEARING OF THE CIVIL REVISION:

3. As no factual dispute arose but for involvement of question of law, whether in absence of probate of Will, taking aid of such Will can any right to sue by Rukmuni Mohapatra survives substituting her mother-in-law (deceased plaintiff) in the suit, on consent of the counsel for the parties, the matter is taken up for final hearing.

3.1. Heard Sri Gopinath Mishra, learned Advocate along with Ms. Pragnya Paramita Mohanty, learned Advocate appearing for the petitioner-defendant and Ms. Soumya Priyadarshinee, learned Advocate on behalf of Sri Suvashish Pattanaik, learned Advocate along with Sri Bishal Baivab, learned Advocate appearing for the opposite party.

3.2. Hearing being concluded on 10.09.2024, the matter is kept reserved for preparation of Judgment and delivery thereof.

ARGUMENTS OF COUNSEL FOR THE RESPECTIVE PARTIES:

4. Sri Gopinath Mishra, learned Advocate along with Ms. Pragnya Paramita Mohanty, learned Advocate appearing for the petitioner-defendant submitted that the Will alleged to have been executed in favour of the opposite party-substituted plaintiff having not been probated nor do the letters of administration being allowed, no legal right flows automatically stemming on the Will to pursue the suit by

stepping into the shoes of the deceased plaintiff. Placing reliance on Ground-B of the civil revision petition with support of provisions of Section 213 of the Indian Succession Act, 1925, the learned Advocate urged that on erroneous appreciation of law the learned Senior Civil Judge, Bhubaneswar allowed the petition for substitution filed by Rukmuni Mohapatra (daughter-in-law of the deceased plaintiff) inasmuch as neither there is devolution nor is the interest created in the suit schedule property, which had already got transferred with the execution of gift deed in favour of the petitioner, for no right accrues to the executor to step into the shoes of the testator unless and until the unregistered Will is probated.

4.1. It is also further urged by the learned counsel for the petitioner that though other legal heirs and successors of the deceased plaintiff are available, they have not come forward to substitute the deceased, Sarojini Mohapatra which presupposes the factum of transfer of title in the property in question in favour of the petitioner by virtue of gift deed executed by his mother Sarojini Mohapatra. Hence, the petition for substitution at the behest of daughter-in-law (Rukmuni Mohapatra, opposite party) should not have been allowed by the learned trial Court. It is alleged that she by pursuing the suit seeks to grab the property in question which stands devolved in favour of the petitioner.

4.2. Sri Gopinath Mishra along with Ms. Pragnya Paramita Mohanty, learned counsel sought to impress upon this Court that Rukmuni Mohapatra, substituted plaintiff, is a stranger. Pressing Ground-D of the revision petition learned counsel submitted that the opposite party is an "interloper" inasmuch as the existing "legal heirs" did not take any interest to get themselves substituted to continue with the civil proceeding.

5. Ms. Soumya Priyadarshinee, learned Advocate appearing for the opposite party with her not only well-structured but also compellingly articulated argument opposed the contentions of Sri Gopinath Mishra, learned Advocate urged that the grounds and the contentions of the petitioner run contrary to settled legal position. Using persuasive language and citing relevant precedents she has effectively reinforced their position and demonstrated that being the executor under the Will, the testator's title vests on the death of Sarojini Mohapatra-deceased plaintiff. Therefore, stemming on the statutory provision contained in Section 211 of the Indian Succession Act, 1925, she fortified her stance that the substituted plaintiff, namely Rukmuni Mohapatra, has every right to carry the civil proceeding in CS No.1601 of 2020 pending in the files of Senior Civil Judge, Bhubaneswar forward by way of recourse to Order XXII, Rule 3 of the CPC.

5.1. Ms. Soumya Priyadarshinee, learned Advocate with well-researched precedents to counter viewpoint of Sri Gopinath Mishra, learned counsel for the petitioner, reinforced her stance that it is not the "legal heir" who can get substituted in place of deceased plaintiff, but it is also the "legal representative", defined under Section 2(11) of the CPC, who can get substituted for the deceased plaintiff. The suit schedule property being bequeathed in her favour during the life time of

Sarojini Mohhapatra by a duly executed Will— in contrast to the gift deed in favour of the petitioner, which the deceased plaintiff asserted in the suit to have been obtained by practising fraud— the executor of the property, *viz.*, the opposite party falls within the connotation of the term "legal representative".

5.2. Ms. Soumya Priyadarshinee, learned Advocate objecting to the arguments advanced by Sri Gopinath Mishra, learned Advocate, asserted that it would not be appropriate to have reference to Section 213 alone, rather the provisions of Section 211 of the Indian Succession Act, 1925 have to be taken into consideration while deciding whether the opposite party can be treated to be "legal representative". It is, therefore, contended by learned Advocate for the opposite party that the learned Senior Civil Judge, Bhubaneswar is legally justified in allowing the petition under Order XXII, Rule 3 read with Section 2(11) of the CPC and directed substitution of the opposite party for deceased plaintiff in order to protect her interest created by virtue of the Will executed by Sarojini Mohapatra.

5.3. The counsel has submitted a suave presentation that effectively articulates the arguments in favor of the opposite party's position that in view of Section 211 read with Section 213 of the Indian Succession Act, there is no prohibition for legatee to continue with the suit in terms of Section 2(11) of the CPC as the original plaintiff-Sarojini Mohapatra has sought to declare the "registered gift deed dated 24.11.2017 executed by her in favour of this defendant-petitioner as null and void", which has unequivocally been admitted by the petitioner herein at paragraph 2 of the civil revision petition. Thus, she has laid emphasis on the concluding part of the impugned order dated 14.12.2022 passed by the learned Senior Civil Judge, Bhubaneswar, which reads as under:

> *"****
>
> *Apart from that it is clear from the plaint itself that there are sons and daughters of the deceased plaintiff other than the defendant. However, one of such natural heirs of the deceased plaintiff, ordinarily who are expected to substitute the deceased plaintiff have not come before the court to protect the interest of the plaintiff. In case of non-taking of any steps by the natural heirs of the deceased plaintiff usually the suit is to be abated after expiry of statutory period. However, in the present case, the petitioner namely Rukmuni Mohapatra has come before the Court to protect her interest created by virtue of the deed of Will executed by the deceased plaintiff in her favour in respect of the same schedule property. Accordingly, in view of the decisions as relied by the learned counsel for the petitioner so also the provisions under Section 2(11) of C.P.C. so also under Section 211 of Indian Succession Act, the legatee cannot be denied to protect the interest of executor and when none of the natural heirs of the deceased have not come before the Court then such legatee is bound to protect her interest may it be by way of substitution of impleadment as a party to the suit. It is also pertinent to mention here that the fate of the Will executed by the deceased plaintiff in favour of the petitioner Rukmuni Mohapatra squarely depends on the findings of present suit and accordingly, the petitioner daughter-in-law of the deceased plaintiff having a valid interest in the Will is the person interested in the case. Accordingly, the right to sue survives and the petitioner is liable to be substituted in place of the deceased plaintiff hence, the petition is allowed.*
>
> *Put up on 23.12.2022 for filing of consolidated plaint."*

5.4. Ms. Soumya Priyadarshinee, learned Advocate has effectively referred to judicial decisions to support her arguments which serve to illustrate the established legal principles and provide a framework for understanding the current case in the light of precedents. She has placed the decisions rendered in *Andhra Bank Ltd. Vrs. R. Srinivasan, AIR 1962 SC 232; Suresh Kumar Bansal Vrs. Krishna Bansal, (2010) 2 SCC 162; Chiranjilal Shrilal Goenka (Deceased) through Lrs. Vrs. Jasjit Singh, (1993) 2 SCC 507;* and *Surendra Chandra Jena Vrs. Laxmi Narayan Jena and others, 65 (1998) CLT 212* to buttress her arguments that the substituted plaintiff having the interest in the bequeathed suit schedule property under the Will, being legal representative, could not have been objected to by the petitioner-defendant from being substituted for the deceased plaintiff to pursue the civil suit in terms of provisions contained in Section 211 read with Section 213 of the Indian Succession Act.

5.5. Ms. Soumya Priyadarshinee, learned Advocate citing the authoritative pronouncements as referred to above, went on to argue that the probate proceeding under the Indian Succession Act, 1925 may be an independent proceeding, wherein only genuineness of the Will is required to be considered by the competent Court of law; nevertheless, she asserted that the right to sue would flow from executed Will, even if it is not probated.

5.6. She has, hence, fervently insisted to dismiss the petition.

RELEVANT PROVISIONS:

6. The Indian Succession Act, 1925:

PART I
PRELIMINARY

"2. Definitions.—

In this Act, unless there is anything repugnant in the subject or context,—

(a) "administrator" means a person appointed by competent authority to administer the estate of a deceased person when there is no executor;

(c) "executor" means a person to whom the execution of the last Will of a deceased person is, by the testator's appointment, confided;

(f) "probate" means the copy of a Will certified under the seal of a court of competent jurisdiction with a grant of administration to the estate of the testator;

(h) "Will" means the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death.

PART VIII
REPRESENTATIVE TITLE TO PROPERTY
OF DECEASED ON SUCCESSION

"211. Character and property of executor or administrator as such.—

(1) The executor or administrator, as the case may be, of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such.

(2) When the deceased was a Hindu, Muhammadan, Budhist, Sikh, Jaina or Parsi or an exempted person, nothing herein contained shall vest in an executor or administrator any property of the deceased person which would otherwise have passed by survivorship to some other person.

213. Right as executor or legatee when established.—

(1) No right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction in India has granted probate of the Will under which the right is claimed, or has granted letters of administration with the Will or with a copy of an authenticated copy of the Will annexed.

(2) This section shall not apply in the case of Wills made by Muhammadans or Indian Christians, and shall only apply—

(i) in the case of Wills made by any Hindu, Buddhist, Sikh or Jaina where such Wills are of the classes specified in clauses (a) and (b) of [1] [Section 57]; and

(ii) in the case of Wills made by any Parsi dying, after the commencement of the Indian Succession (Amendment) Act, 1962 (16 of 1962), where such Wills are made within the local limits of the ordinary-original civil jurisdiction of the High Courts at Calcutta, Madras and Bombay, and where such wills are made outside those limits, in so far as they relate to immovable property situate within those limits.

7. Definition of the term "legal representatives" as per clause (11) of Section 2 of the Code of Civil Procedure, 1908:

"2. Definitions.—

In this Act, unless there is anything repugnant in the subject or context,—

(11) "legal representative" means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued;

8. Order XXII of the Code of Civil Procedure, 1908 reads thus:

"ORDER XXII
DEATH, MARRIAGE AND INSOLVENCY OR PARTIES

1. No abatement by party's death if right to sue survives.—
The death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives.

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1. Section 57 of the Indian Succession Act, 1925 stands thus:

PART VI
TESTAMENTARY SUCCESSION
CHAPTER-I.— Introductory

[57. Application of certain provisions of Part to a class of Wills made by Hindus, etc.—

The provisions of this Part which are set out in Schedule III shall, subject to the restrictions and modifications specified therein, apply—

(a) to all Wills and codicils made by any Hindu, Buddhist, Sikh or Jaina, on or after the first day of September, 1870, within the territories which at the said date were subject to the Lieutenant Governor of Bengal or within the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Madras and Bombay; and

(b) to all such Wills and codicils made outside those territories and limits so far as relates to immoveable property situate within those territories or limits, and

(c) to all Wills and codicils made by any Hindu, Buddhist, Sikh or Jaina on or after the first day of January, 1927, to which those provisions are not applied by clauses (a) and (b):

Provided that marriage shall not revoke any such Will or codicil.]

2. Procedure where one of several plaintiffs or defendants dies and right to sue survives.—

Where there are more plaintiffs or defendants than one, and any of them dies, and where the right to sue survives to the surviving plaintiff or plaintiffs alone, or against the surviving defendant or defendants alone, the Court shall cause an entry to the effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants.

3. Procedure in case of death of one of several plaintiffs or of sole plaintiff.—

(1) Where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to the sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.

(2) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the Court may award to him the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff.

4. Procedure in case of death of one of several defendants or of sole defendant.—

(1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendants to be made a party and shall proceed with the suit.

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

(3) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant.

(4) The Court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing; and judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place.

(5) Where—

(a) the plaintiff was ignorant of the death of a defendant, and could not, for that reason, make an application for the substitution of the legal representative of the defendant under this rule within the period specified in the Limitation Act, 1963 (36 of 1963), and the suit has, in consequence, abated, and

(b) the plaintiff applies after the expiry of the period specified therefore in the Limitation Act, 1963 (36 of 1963), for setting aside the abatement and also for the admission of that application under Section 5 of that Act on the ground that he had, by reason of such ignorance, sufficient cause for not making the application with the period specified in the said Act, the Court shall, in considering the application under the said section 5, have due regard to the fact of such ignorance, if proved.

4A. Procedure where there is no legal representative.—

(1) If, in any suit, it shall appear to the Court that any party who has died during the pendency of the suit has no legal representative, the Court may, on the application of any party to the suit, proceed in the absence of a person representing the estate of the

deceased person, or may be order appoint the Administrator-General, or an officer of the Court or such other person as it thinks fit to represent the estate of the deceased person for the purpose of the suit; and any judgment or order subsequently given or made in the suit shall bind the estate of the deceased person to the same extent as he would have been bound if a personal representative of the deceased person had been a party to the suit.

(2) Before making an order under this rule, the Court—

(a) may require notice of the application for the order to be given to such (if any) of the persons having an interest in the estate of the deceased person as it thinks fit; and

(b) shall as certain that the person proposed to be appointed to represent the estate of the deceased person is willing to be so appointed and has no interest adverse to that of the deceased person.

5. Determination of question as to legal representative.—

Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, such question shall be determined by the Court: 1 [Provided that where such question arises before an Appellate Court, that Court may, before determining the question, direct any subordinate Court to try the question and to return the records together with evidence, if any, recorded at such trial, its findings and reasons therefor, and the Appellate Court may take the same into consideration in determining the question.

6. No abatement by reason of death after hearing.—

Notwithstanding anything contained in the foregoing rules, whether the cause of action survives or not, there shall be no abatement by reason of the death of either party between the conclusion of the hearing and the pronouncing of the judgment, but judgment may in such case be pronounced notwithstanding the death and shall have the same force and effect as if it had been pronounced before the death took place.

7. Suit not abated by marriage of female party.—

(1) The marriage of a female plaintiff or defendant shall not cause the suit to abate, but the suit may notwithstanding be proceeded with the judgment, and, where the decree is against a female defendant, it may be executed against her alone.

(2) Where the husband is by law liable for the debts of his wife, the decree may, with the permission of the Court, be executed against the husband also; and, in case of judgment for the wife, execution of the decree may, with such permission, be issued upon the application of the husband, where the husband is by law entitled to the subject-matter of the decree.

8. When plaintiff's insolvency bars suit.—

(1) The insolvency of a plaintiff in any suit which the assignee or receiver might maintain for the benefit of his creditors, shall not cause the suit to abate, unless such assignee or receiver declines to continue the suit or (unless for any special reason the Court otherwise directs) to give security for the costs thereof within such time as the Court may direct.

(2) Procedure where assignee fails to continue suit, or give security.—

Where the assignee or receiver neglects or refuses to continue the suit and to give such security within the time so ordered, the defendant may apply for the dismissal of the suit on the ground of the plaintiff's insolvency, and the Court may make an order dismissing the suit an awarding to the defendant the costs which he has incurred in defending the same to be proved as a debt against the plaintiff's estate.

9. Effect of abatement or dismissal.—

(1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.

(2) The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the assignee or the receiver in the case of an insolvent plaintiff may apply for an order to set aside the abatement or dismissal; and if it is proved that he was prevented by any sufficient cause from continuing the suit, the Court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit.

(3) The provisions of Section 5 of the Indian Limitation Act, 1877 (15 of 1877) shall apply to applications under sub-rule (2).

Explanation.—
Nothing in this Rule shall be construed as barring, in any later suit, a defence based on the facts which constituted the cause of action in the suit which had abated or had been dismissed under this Order.

10. Procedure in case of assignment before final order in suit.—

(1) In other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved.

(2) The attachment of a decree pending an appeal therefrom shall be deemed to be an interest entitling the person who procured such attachment to the benefit of sub-rule (1).

10A. Duty of pleader to communicate to Court death of a party.—

Wherever a pleader appearing for a party to the suit comes to know of the death of that party, he shall inform the Court about it, and the Court shall thereupon give notice of such death to the other party, and, for this purpose, the contract between the pleader and the deceased party shall be deemed to subsist.

11. Application of Order to appeals.—

In the application of this Order to appeals, so far as may be, the word "Plaintiff" shall be held to include an appellant, the word "defendant" a respondent, and the word "suit" an appeal.

12. Application of Order to proceedings.—

Nothing in Rules 3, 4 and 8 shall apply to proceedings in execution of a decree or order."

LEGAL POSITION SET FORTH THROUGH PRECEDENTS:

9. It may be beneficial to quote from *Meena Pradhan Vrs. Kamla Pradhan, 2023 INSC 847 (non-reportable)* reported at *(2023) 9 SCC 734],* wherein the Hon'ble Supreme Court of India has been pleased to lay down the principles regarding validity and execution of Will:

"9. A Will is an instrument of testamentary disposition of property. It is a legally acknowledged mode of bequeathing a testator's property during his lifetime to be acted upon on his/her death and carries with it an element of sanctity. It speaks from the death of the testator. Since the testator/testatrix, at the time of testing the document for its validity, would not be available for deposing as to the circumstances in which the Will came to be executed, stringent requisites for the proof thereof have been statutorily enjoined to rule out the possibility of any manipulation.

10. Relying on H. Venkatachala Iyengar Vrs. B.N. Thimmajamma, 1959 Supp (1) SCR 426 (3-Judge Bench), Bhagwan Kaur Vrs. Kartar Kaur, (1994) 5 SCC 135 (3-Judge Bench), Janki Narayan Bhoir Vrs. Narayan Namdeo Kadam, (2003) 2 SCC 91(2-Judge Bench) Yumnam Ongbi Tampha Ibema Devi Vrs. Yumnam Joykumar Singh, (2009) 4 SCC 780 (3-Judge Bench) and Shivakumar Vrs. Sharanabasappa, (2021) 11 SCC 277 (3-Judge Bench), we can deduce/infer the following principles required for proving the validity and execution of the Will:

i. The Court has to consider two aspects: firstly, that the Will is executed by the testator, and secondly, that it was the last Will executed by him;

ii. It is not required to be proved with mathematical accuracy, but the test of satisfaction of the prudent mind has to be applied.

iii. A Will is required to fulfil all the formalities required under Section 63 of the Succession Act, that is to say:

(a) The testator shall sign or affix his mark to the Will or it shall be signed by some other person in his presence and by his direction and the said signature or affixation shall show that it was intended to give effect to the writing as a Will;

(b) It is mandatory to get it attested by two or more witnesses, though no particular form of attestation is necessary;

(c) Each of the attesting witnesses must have seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of such signatures;

(d) Each of the attesting witnesses shall sign the Will in the presence of the testator, however, the presence of all witnesses at the same time is not required;

iv. For the purpose of proving the execution of the Will, at least one of the attesting witnesses, who is alive, subject to the process of court, and capable of giving evidence, shall be examined;

v. The attesting witness should speak not only about the testator's signatures but also that each of the witnesses had signed the will in the presence of the testator;

vi. If one attesting witness can prove the execution of the Will, the examination of other attesting witnesses can be dispensed with;

vii. Where one attesting witness examined to prove the Will fails to prove its due execution, then the other available attesting witness has to be called to supplement his evidence;

viii. Whenever there exists any suspicion as to the execution of the Will, it is the responsibility of the propounder to remove all legitimate suspicions before it can be accepted as the testator's last Will. In such cases, the initial onus on the propounder becomes heavier.

ix. The test of judicial conscience has been evolved for dealing with those cases where the execution of the Will is surrounded by suspicious circumstances. It requires to consider factors such as awareness of the testator as to the content as well as the consequences, nature and effect of the dispositions in the Will; sound, certain and disposing state of mind and memory of the testator at the time of execution; testator executed the Will while acting on his own free Will;

x. One who alleges fraud, fabrication, undue influence et cetera has to prove the same. However, even in the absence of such allegations, if there are circumstances

giving rise to doubt, then it becomes the duty of the propounder to dispel such suspicious circumstances by giving a cogent and convincing explanation.

xi. Suspicious circumstances must be 'real, germane and valid' and not merely 'the fantasy of the doubting mind'. Whether a particular feature would qualify as 'suspicious' would depend on the facts and circumstances of each case. Any circumstance raising suspicion legitimate in nature would qualify as a suspicious circumstance for example, a shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading part in the making of the Will under which he receives a substantial benefit, etc.

11. In short, apart from statutory compliance, broadly it has to be proved that:
(a) the testator signed the Will out of his own free Will,
(b) at the time of execution he had a sound state of mind,
(c) he was aware of the nature and effect thereof and
(d) the Will was not executed under any suspicious circumstances."

10. This Court notices the following decisions on the issue involved in the present matter, relevant portions of which are quoted hereunder:

i. Chiranjilal Shrilal Goenka Vrs. Jasjit Singh, (1993) 2 SCC 507 = (1993) 2 SCR 454: (extracted from SCC)

"8. In Black's Law Dictionary the meaning of the word 'legal representative' is: The term in its broadest sense means one who stands in place of, and represents the interests of another. ***A person who oversees the legal affairs of another.*** *Examples include the executors or administrator of an estate and a Court appointed guardian of a minor or incompetent person.*

9. Term 'legal representative' which is almost always held to be synonymous with term 'personal representative', means in accident cases, member of family entitled to benefits under wrongful death statute, unsatisfied claim and judgment fund. In Andhra Bank Ltd. Vrs. R. Srinivasan, (1963) 1 An WR (SC) 14 = AIR 1962 SC 232 = (1962) 3 SCR 391 ***this Court considered the question whether the legatee under the Will is the legal representative within the meaning of Section 2(11) of the Code.*** *It was held that it is well known that the expression "legal representative" had not been defined in the Code of 1882 and that led to a difference of judicial opinion as to its denotation. Considering the case-law developed in that behalf it was held that respondents 2 to 12,* ***the legatees under the Will of the estate are legal representatives of the deceased Raja Bahadur and so it follows that the estate of the deceased was sufficiently represented by them when the judgments were pronounced****.*

10. In the Official Liquidator Vrs. Parthasarathi Sinha, (1983) 1 SCC 538 = 1983 SCC (Tax) 75 = AIR 1983 SC 188 this Court considered whether the legal representative would be bound by the liability for misfeasance proceeding against the deceased. While considering that question under Section 50, CPC this Court held that the legal representative, of course, would not be liable for any sum beyond the value of the estate of the deceased in his hands. Mulla on CPC, 14th Edn., Vol. 1 at p. 27 stated that ***a person on whom the estate of the deceased devolves would be his legal representative even if he is not in actual possession of the estate.*** *It includes heirs and also persons who without title either as executors, administrators were in possession of the estate of the deceased.* ***It is, therefore, clear that the term legal representative is wide and inclusive of not only the heirs but also intermeddlers of the estate of the deceased as well as a person who in law represents the estate of the deceased.*** *It is not necessarily confined to heirs alone. The executor, administrators, assigns or persons acquiring*

interest by devolution under Order 22, Rule 10 or legatee under a Will, are legal representatives.

11. Section 3(f) of the Hindu Succession Act, 1956 defines "heirs" to mean any person, male or female who is entitled to succeed to the property of an intestate under this Act. Section 8 thereof provides that the property of a male Hindu dying intestate shall devolve according to the provisions of this chapter, 'Chapter II' (Intestate succession) firstly upon the heirs, being the relatives specified in Class I of the Schedule .... Schedule provides Class I heirs are son, daughter, widow, mother .... Thus under the personal law of Hindu Succession Act, if a Hindu dies intestate, the heirs either male or female specified in Schedule I, Class I, are heirs and succeed to the estate as per law. In their absence, the next class or classes are entitled to succeed to the property of an intestate under the Act. In Sudama Devi Vrs. Jogendra Choudhary, AIR 1987 Pat 239 (FB) = 1987 PLJR 394 a Full Bench considered the question whether father of the minor in possession of his property and who himself was a party to the suit along with the minor is legal representative. The minor died. The father was held per majority to be legal representative under Section 2(11) of the Code as an intermeddler. ***It must therefore be held that not only that Class I heirs under Section 8 read with Schedule of the Hindu Succession Act but also the executor of the Will of the deceased Goenka are legal representatives within the meaning of Section 2(11) of the Code.***

12. Section 213 of the Indian Succession Act (39 of 1925) for short 'the Succession Act' provides right to the executor to obtain probate of the Will thus:

'(1) No right as executor ... can be established in any Court of Justice, unless a Court of competent jurisdiction in India has granted probate of the Will under which the right is claimed ... with a copy of the Will annexed."

By operation of sub-section (2)(i) only in the case of Wills made by any Hindu ... where such Wills are of classes specified in clauses (a) and (b) of Section 57 ... Section 57 provides that the provisions of this part which are set out in Schedule III, shall, subject to the restrictions and modifications specified therein, apply— (a) to all Wills ... made by any Hindu, on or after the first day of September, 1870, within the local limits of the ordinary original civil jurisdiction of the High Court of Judicature at Madras and Bombay ... (c) to all Wills and codicils made by any Hindu ... on or after the first day of January, 1927, to which those provisions are not applied by clauses (a) and (b). In other places the District Court or Court to whom the power is delegated alone are entitled to grant probate.

13. Section 276 provides the procedure to obtain probate, namely,— (1) application for probate ...with the Will annexed, shall be made by a petition distinctly written in English ...with the Will or copy, as the case may be, stating the particulars and the details mentioned in clauses (a) to (e) and further details provided in sub-sections (2) and (3), the mention of the details whereof are not material for the purpose of this case. The petition shall be verified in the manner prescribed under Section 280 and also further to be verified by at least one of the witnesses to the Will in the manner and to the effect specified therein. The Caveator is entitled to object to its grant by operation of Section 284 .... When it is contested Section 295 directs that probate proceedings shall take, as nearly as may be, the form of a regular suit, according to the provisions of CPC and the petitioner for probate ... shall be the plaintiff and the person who had appeared to oppose the grant shall be the defendant. Section 217 expressly provides that save as otherwise provided by this Act or by any other law for the time being in force, all grants of probate ... with the Will annexed ... shall be made or carried out, as the case may be, in accordance with the provisions of Part IX. Section 222 declares that (1) Probate shall

be granted only to an executor appointed by the Will. (2) The appointment may be expressed or by necessary implication Section 223 prohibits grant of probates to the persons specified therein. Section 224 gives power to appoint several executors. Section 227 declares the effect of probate thus: "Probate of a Will when granted establishes the Will from the death of the testator, and renders valid all intermediate acts of the executor as such." Section 248 envisages grant of probate for special purposes, namely, "if an executor is appointed for any limited purpose specified in the will, the probate shall be limited to that purpose, and if he should appoint an attorney ... with the Will annexed, shall be limited accordingly"

14. Section 273 declares conclusiveness of probate thus: "Probate ... shall have effect over all the property and estate, moveable or immovable, of the deceased, throughout the State in which the same is or are granted; and shall be conclusive as to the representative title against the debtors of the deceased, and all persons holding property which belongs to him, and shall afford full indemnity to all debtors, paying their debts and all persons delivering up such property to the person to whom such probate ... have been granted". The further details are not necessary for the purpose of this case. Under Section 294 it shall be the duty of the Court to preserve original wills. Section 299 gives right of appeals against an order or the decree of the court of probate. ***By operation of Section 211(1) the executor of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such.***

15. In Ishwardeo Narain Singh Vrs. Smt. Kamta Devi, (1953) 1 SCC 295 = AIR 1954 SC 280 this Court held that the Court of probate is only concerned with the question as to whether the document put forward as the last Will and testament of a deceased person was duly executed and attested in accordance with law and whether at the time of such execution the testator had sound disposing mind. ***The question whether a particular bequest is good or bad is not within the purview of the probate court. Therefore the only issue in a probate proceedings relates to the genuineness and due execution of the Will and the court itself is under duty to determine it and preserve the original Will in its custody.*** *The Succession Act is a self-contained code insofar as the question of making an application for probate, grant or refusal of probate or an appeal carried against the decision of the probate court. This is clearly manifested in the fascicule of the provisions of the Act.* ***The probate proceedings shall be conducted by the probate court in the manner prescribed in the Act and in no other ways. The grant of probate with a copy of the Will annexed establishes conclusively as to the appointment of the executor and the valid execution of the Will.*** *Thus it does no more than establish the factum of the Will and the legal character of the executor. Probate court does not decide any question of title or of the existence of the property itself.*

16. The grant of a probate by Court of competent jurisdiction is in the nature of a proceeding in rem. ***So long as the order remains in force it is conclusive as to the due execution and validity of the Will unless it is duly revoked as per law.*** *It binds not only upon all the parties made before the court but also upon all other persons in all proceedings arising out of the Will or claims under or connected therewith.* ***The decision of the probate court, therefore, is the judgment in rem.*** *The probate granted by the competent Court is conclusive of the validity of the Will until it is revoked and no evidence can be admitted to impeach it except in a proceeding taken for revoking the probate. In Sheoparsan Singh Vrs. Ramnandan Prasad Narayan Singh, ILR (1916) 43 Cal 694 = AIR 1916 PC 78 = 43 IA 91 the Judicial Committee was to consider whether the Will which had been affirmed by a Court of competent jurisdiction, would not be impugned in a Court exercising original jurisdiction (civil court) in suit to declare the grant of probate illegal etc. The Privy Council held that the Civil Court has no*

jurisdiction to impugn the grant of probate by the Court of competent jurisdiction. In that case the subordinate Court of Muzafarbad was held to have had no jurisdiction to question the validity of the probate granted by the Calcutta High Court. In Narbheram Jivram Purohit Vrs. Jevallabh Harjivan, AIR 1933 Bom 469 = 35 BLR 998 = 147 IC 362 probate was granted by the High Court exercising probate jurisdiction. A civil suit on the original side was filed seeking apart from questioning the probate, also other reliefs. The High Court held that when a probate was granted, it operates upon the whole estate and establishes the Will from the death of the testator. Probate is conclusive evidence not only of the factum, but also of the validity of the Will and after the probate has been granted, it is incumbent of a person who wants to have the Will declared null and void, to have the probate revoked before proceeding further. That could be done only before the probate court and not on the original side of the High Court. When a request was made to transfer the suit to the probate court, the learned Judge declined to grant the relief and stayed the proceeding on the original side. Thus it is conclusive that the court of probate alone had jurisdiction and is competent to grant probate to the Will annexed to the petition in the manner prescribed under the Succession Act. That court alone is competent to deal with the probate proceedings and to grant or refuse probate of the annexed Will. It should keep the original Will in its custody. ***The probate thus granted is conclusive unless it is revoked. It is a judgment in rem.***

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20. On a conspectus of the above legal scenario we conclude that ***the probate court has been conferred with exclusive jurisdiction to grant probate of the Will of the deceased annexed to the petition (suit); on grant or refusal thereof, it has to preserve the original Will produced before it. The grant of probate is final subject to appeal, if any, or revocation if made in terms of the provisions of the Succession Act. It is a judgment in rem and conclusive and binds not only the parties but also the entire world.*** *The award deprives the parties of statutory right of appeal provided under Section 299. Thus the necessary conclusion is that the probate court alone has exclusive jurisdiction and the civil court on original side or the arbitrator does not get jurisdiction, even if consented to by the parties, to adjudicate upon the proof or validity of the Will propounded by the executrix, the applicant.* ***It is already seen that the executrix was nominated expressly in the Will and is a legal representative entitled to represent the estate of the deceased but the heirs cannot get any probate before the probate court. They are entitled only to resist the claim of the executrix of the execution and genuineness of the will. The grant of probate gives the executrix the right to represent the estate of the deceased, the subject-matter in other proceedings.*** *We make it clear that our exposition of law is only for the purpose of finding the jurisdiction of the arbitrator and not an expression of opinion on merits in the probate suit."*

ii. Jaladi Suguna Vrs. Satya Sai Central Trust, (2008) 7 SCR 734 = (2008) 8 SCC 521: (extracted from SCC)

"12. "Legal representative" according to its definition in Section 2(11) CPC, means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased. Thus a legatee under a will, who intends to represent the estate of the deceased testator, being an intermeddler with the estate of the deceased, will be a legal representative.

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14. When a respondent in an appeal dies, and the right to sue survives, the legal representatives of the deceased respondent have to be brought on record before the

Court can proceed further in the appeal. Where the respondent-plaintiff who has succeeded in a suit, dies during the pendency of the appeal, any judgment rendered on hearing the appeal filed by the defendant, without bringing the legal representatives of the deceased respondent-plaintiff on record, will be a nullity. In the appeal before the High Court, the first respondent therein (Suguna) was the contesting respondent and the second respondent (the tenant) was only a pro forma respondent. When the first respondent in the appeal died, the right to prosecute the appeal survived against her estate. ***Therefore, it was necessary to bring the legal representative(s) of the deceased Suguna on record to proceed with the appeal.***

15. Filing an application to bring the legal representatives on record, does not amount to bringing the legal representatives on record. When an LR application is filed, the court should consider it and decide whether the persons named therein as the legal representatives, should be brought on record to represent the estate of the deceased. Until such decision by the court, the persons claiming to be the legal representatives have no right to represent the estate of the deceased, nor prosecute or defend the case. ***If there is a dispute as to who is the legal representative, a decision should be rendered on such dispute. Only when the question of legal representative is determined by the court and such legal representative is brought on record, can it be said that the estate of the deceased is represented. The determination as to who is the legal representative under Order 22 Rule 5 will of course be for the limited purpose of representation of the estate of the deceased, for adjudication of that case. Such determination for such limited purpose will not confer on the person held to be the legal representative, any right to the property which is the subject-matter of the suit, vis-à-vis other rival claimants to the estate of the deceased.***

16. The provisions of Rules 4 and 5 of Order 22 are mandatory. When a respondent in an appeal dies, the court cannot simply say that it will hear all rival claimants to the estate of the deceased respondent and proceed to dispose of the appeal. Nor can it implead all persons claiming to be legal representatives, as parties to the appeal without deciding who will represent the estate of the deceased, and proceed to hear the appeal on merits. The Court cannot also postpone the decision as to who is the legal representative of the deceased respondent, for being decided along with the appeal on merits. ***The Code clearly provides that where a question arises as to whether any person is or is not the legal representative of a deceased respondent, such question shall be determined by the court. The Code also provides that where one of the respondents dies and the right to sue does not survive against the surviving respondents, the court shall, on an application made in that behalf, cause the legal representatives of the deceased respondent to be made parties, and then proceed with the case.*** *Though Rule 5 does not specifically provide that determination of legal representative should precede the hearing of the appeal on merits, Rule 4 read with Rule 11 makes it clear that the appeal can be heard only after the legal representatives are brought on record.*

17. The third respondent, who is the husband of the deceased, wants to come on record in his capacity as a sole legal heir of the deceased, and support the case of the Trust that there was a valid gift by the deceased in its favour. On the other hand, the appellants want to come on record as testamentary legatees in whose favour the suit property was bequeathed by will, and represent the estate of the deceased Suguna as intermeddlers. They want to continue the contest to the appeal. When Suguna, the first respondent in the appeal before the High Court died, the proper course for the High Court, was first to decide as to who were her legal representatives. For this purpose the High Court could, as in fact it did, refer the question to a subordinate court under the

proviso to Rule 5 of Order 22 CPC, to secure findings. After getting the findings, it ought to have decided that question, and permitted the person(s) who are held to be the legal representative(s) to come on record. Only then there would be representation of the estate of the deceased respondent in the appeal. The appeal could be heard on merits only after the legal representatives of the deceased first respondent were brought on record. But in this case, on the dates when the appeal was heard and disposed of, the first respondent therein was dead, and though rival claimants to her estate had put forth their claim to represent her estate, the dispute as to who should be the legal representative was left undecided, and as a result the estate of the deceased had remained unrepresented. The third respondent was added as the legal representative of the deceased first respondent only after the final judgment was rendered allowing the appeal. That amounts to the appeal being heard against a dead person. That is clearly impermissible in law. We, therefore, hold that the entire judgment is a nullity and inoperative."

iii. Suresh Kumar Bansal Vrs. Krishna Bansal, (2010) 2 SCC 162 = (2009) 16 Addl.SCR 419: (SCC)

"10. Before us, the only question that has to be gone into is whether the appellant, on the death of the original plaintiff, namely, Mohanlal, was entitled to be impleaded/substituted in the suit for eviction along with the natural heirs and legal representatives of the deceased, namely, Respondent 1 and others.

11. Ms. Indu Malhotra, learned Senior Counsel appearing on behalf of the appellant submitted that since a separate probate proceeding has already been instituted by the appellant for grant of probate in the competent court of law which is now pending, the only course open to the court was to substitute or implead the appellant in the eviction proceeding along with natural heirs and legal representatives of the deceased plaintiff, that is to say, the entire proceeding should be carried on not only by the natural heirs and legal representatives of the deceased plaintiff but also by the appellant subject to grant of probate by a competent court of law. In support of this contention, Ms. Malhotra, learned Senior Counsel appearing on behalf of the appellant had drawn our attention to a decision of this Court in Jaladi Suguna Vrs. Satya Sai Central Trust, (2008) 8 SCC 521.

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15. It is true that in the impugned order, the High Court has made it clear that the finding regarding genuineness of the Will was made only for the purpose of deciding the application for impleadment filed at the instance of the appellant. But, in our view, if at this stage, the appellant is not permitted to be impleaded and in the event an order of eviction is passed ultimately against the respondent tenant, the tenants will be evicted by the natural heirs and legal representatives of the deceased plaintiff who thereby shall take possession of the suit premises, but if ultimately the probate of the alleged Will of the deceased plaintiff is granted by the competent court of law, the suit property would devolve on the appellant but not on the natural heirs and legal representative of the deceased. Therefore, in the event of grant of probate in favour of the appellant, he has to take legal proceeding against the natural heirs and legal representatives of the deceased plaintiff for recovery of possession of the suit premises from them which would involve not only huge expenses but also considerable time would be spent to get the suit premises recovered from the natural heirs and legal representatives of the deceased plaintiff.

16. ***On the other hand, if the appellant is allowed to carry on the eviction petition along with the natural heirs and legal representatives of the deceased plaintiff, in that***

case a decree can be passed for eviction of the tenant when the appellant shall not be entitled to get possession from the tenants in respect of the suit premises until the probate in question is granted and produced before the court. *Therefore, ultimately if the court grants a decree for eviction of the respondent tenant from the suit premises, such decree shall be passed subject to production of probate by the appellant.*

17. That apart, since the question of genuineness of the Will cannot be conclusively gone into by the court in a proceeding for substitution in a pending eviction suit and in view of the fact that an application was made at the instance of the appellant for impleadment as a legal representative of the deceased on the basis of the Will which is yet to be probated, in our view, the best course open to the court is to allow impleadment of the appellant in the eviction proceeding, thereby permitting him to proceed with the eviction suit along with natural heirs and legal representatives of the deceased plaintiff, but in case the decree is to be passed for eviction of the tenant from the suit premises such eviction decree shall be subject to the grant of probate of the Will alleged to have been executed by the deceased plaintiff.

18. At the same time, it is clear that in case the Will of the deceased plaintiff is found not to be genuine and probate is not granted, the court shall proceed to grant the eviction decree in favour of Respondent 1 and not in favour of the appellant. It is well settled that in the event, the Will is found to be genuine and probate is granted, only the appellant would be entitled to get an order of eviction of the respondent tenants from the suit premises excluding the claim of the natural heirs and legal representatives of the deceased plaintiff.

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20. ***It is now well settled that determination of the question as to who is the legal representative of the deceased plaintiff or defendant under Order 22 Rule 5 of the Code of Civil Procedure is only for the purpose of bringing legal representatives on record for the conducting of those legal proceedings only and does not operate as res judicata and the inter se dispute between the rival legal representatives has to be independently tried and decided in probate proceedings.*** *If this is allowed to be carried on for a decision of an eviction suit or other allied suits, the suits would be delayed, by which only the tenants will be benefited.*

21. In order to shorten the litigation and to consider the rival claims of the parties, in our view, ***the proper course to follow is to bring all the heirs and legal representatives of the deceased plaintiff on record including the legal representatives who are claiming on the basis of the Will of the deceased plaintiff so that all the legal representatives, namely, the appellant and the natural heirs and legal representatives of the deceased plaintiff can represent the estate of the deceased for the ultimate benefit of the real legal representatives.*** *If this process is followed, this would also avoid delay in disposal of the suit.*

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23. Before parting with this judgment, it is necessary to consider the decision of this Court in Jaladi Suguna Vrs. Satya Sai Central Trust, (2008) 8 SCC 521 cited by the learned Senior Counsel for the appellant. In Jaladi Suguna, (2008) 8 SCC 521 this Court held that the intestate heir (husband) and the testamentary legatees (nieces and nephews), seeking impleadment as the heirs of the deceased respondent in an appeal have to be brought on record before the court can proceed further in the appeal. Furthermore, in that decision it was also held that ***a legatee under a will, who intends to represent the estate of the deceased testator, being an intermeddler with the estate of the deceased testator, will be a legal representative.***

24. In view of the aforesaid discussions and in view of the decision in Jaladi Suguna, (2008) 8 SCC 521, we are also of the view that in an eviction proceeding, when a legatee under a Will intends to represent the interest of the estate of the deceased testator, he will be a legal representative within the meaning of Section 2(11) of the Code of Civil Procedure, for which it is not necessary in an eviction suit to decide whether the Will on the basis of which substitution is sought for, is a suspicious one or that the parties must send the case back to the Probate Court for a decision whether the Will was genuine or not."

iv. Varadarajan Vrs. Kanakavalli, (2020) 1 SCR 132:

"6. The High Court held that the Executing Court is the competent and proper Court to determine the validity of the Will as well as the legatee under a Will can be construed as a legal representative and come on record to seek execution of the decree. However, the High Court found that the execution of the Will was surrounded by suspicious circumstances. It may be noticed that the High Court in revisional jurisdiction has interfered with the findings of fact recorded by the Executing Court in respect of execution of Will arrived at after considering the evidence led by the parties. The High Court found that as per the appellant, the decree holder, Umadevi, was driven out of her house by her step son Munisamy Naicker and was staying with her sister for nearly 20 years but the execution of the Will at the last moment is a suspicious circumstance. The High Court returned the following findings:

'19. In view of all the above facts which were established by way of evidence, this Court is of the view that the propounder on whom the allegation casts upon to dispel the suspicious circumstances surrounded the execution of the will. Further, the Court below has not given satisfactory reasons while coming to the conclusion that the Will was proved. In the absence of satisfactory evidence, I am unable to ascertain as to whether the Will was executed by the testatrix. Therefore, when once it is held that the very execution of the Will has not been proved and it is not genuine, consequently, the legatee under the said Will cannot become a legal representative to come on record in order to maintain the execution petition in the place of the decree holder, i.e. the testatrix.'

7. We find that the order of the High Court is not sustainable in law. The appellant claims to be the legal representative of Umadevi on the basis of the Will executed by her. He has produced an attesting witness and the scribe of the Will. The witnesses have deposed the execution of the Will by Umadevi in favour of the appellant who is the son of her sister. No one else has come forward to seek execution of decree as the legal representative of the deceased decree holder. It is Umadevi who has filed the execution petition but after her death, the appellant has filed an application to continue with the execution. ***In the absence of any rival claimant claiming to be the legal representative of the deceased decree holder, the High Court was not justified in setting aside the order of the Executing Court, when in terms of Order XXII Rule 5 of the Code, the jurisdiction to determine who is a legal heir is summary in nature.***

8. We may state that Order XXII of the Code is applicable to the pending proceedings in a suit. ***But the conflicting claims of legal representatives can be decided in execution proceedings in view of the principles of Rule 5 of Order XXII.*** *This Court in a judgment reported as V. Uthirapathi Vrs. Ashrab, (1998) 3 SCC 148 = (1998) 1 SCR 937 held that the normal principle arising in a suit— before the decree is passed— that the legal representatives are to be brought on record within a particular period is not applicable to cases of death of the decree-holder or the judgment-debtor in execution proceedings. This Court held as under:*

'11. Order 22 Rule 12 of the Code of Civil Procedure reads as follows: "Order 22 Rule 12: Application of order to proceedings.— Nothing in Rules 3, 4 and 8 shall apply to proceedings in execution of a decree or order."

12. In other words, the normal principle arising in a suit— before the decree is passed— that the legal representatives are to be brought on record within a particular period and if not, the suit could abate,— is not applicable to cases of death of the decree holder or the judgment-debtor in execution proceedings.

13. In Venkatachalam Chetti Vrs. Ramaswami Servai, ILR (1932) 55 Mad 352 = AIR 1932 Mad 73 (FB) a Full Bench of the Madras High Court has held that this rule enacts that the penalty of abatement shall not attach to execution proceedings. Mulla's Commentary on CPC [(Vol. 3) p. 2085 (15th Edn., 1997)] refers to a large number of judgments of the High Courts and says:

'Rule 12 engrafts an exemption which provides that where a party to an execution proceeding dies during its pendency, provisions as to abatement do not apply. The Rule is, therefore, for the benefit of the decree-holder, for his heirs need not take steps for substitution under Rule 2 but may apply immediately or at any time while the proceeding is pending, to carry on the proceeding or they may file a fresh execution application.'

14. In our opinion, the above statement of law in Mulla's Commentary on CPC, correctly represents the legal position relating to the procedure to be adopted by the parties in execution proceedings and as to the powers of the civil court.'

9. ***The legal representatives are impleaded for the purpose of a suit alone*** *as held by this Court in Daya Ram Vrs. Shyam Sundari, AIR 1965 SC 1049 = (1965) SCR 231 wherein it was held that impleaded legal representatives sufficiently represent the estate of the deceased and the decision obtained with them on record will bind not merely those impleaded but the entire estate, including those not brought on record. This Court approved the judgment of the Madras High Court in Kadir Vrs. Muthukrishna Ayyar, ILR 26 MAD 230.*

10. The Full Bench of the Punjab & Haryana High Court in a judgment reported as Mohinder Kaur Vrs. Piara Singh, AIR 1981 P&H 130 examined the question as to whether a decision under Order XXII Rule 5 of the Code would act as res judicata in a subsequent suit between the same parties or persons claiming through them. The Court held as under:

'5. So far as the first argument of Mr. Bindra, noticed above is concerned, we find that in addition to the judgments of the Lahore High Court and of this Court, referred to in the earlier part of this judgment, he is supported by a string of judgments of other High Courts as well wherein it has repeatedly been held on varied reasons, that, a decision under Order 22, Rule 5, Civil Procedure Code, would not operate as res judicata in a subsequent suit between the same parties or persons claiming through them wherein the question of succession or heirship to the deceased party in the earlier proceedings is directly raised. Some of these reasons are as follows:—

(i) Such a decision is not on an issue arising in the suit itself, but is really a matter collateral to the suit and has to be decided before the suit itself can be proceeded with. The decision does not lead to the determination of any issue in the suit.

(ii) The legal representative is appointed for orderly conduct of the suit only. Such a decision could not take away, for all times to come, the rights of a rightful heir of the deceased in all matters.

(iii) The decision is the result of a summary enquiry against which no appeal has been provided for.

(iv) The concepts of legal representative and heirship of a deceased party are entirely different. ***In order to constitute one as a legal representative, it is unnecessary that he should have a beneficial interest in the estate. The executors and administrators are legal representatives though they may have no beneficial interest.*** *Trespasser into the property of the deceased claiming title in himself independently of the deceased will not be a legal representative. On the other hand the heirs on whom beneficial interest devolved under the law whether statute or other, governing the parties will be legal representatives.*

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9. We are, therefore, of the opinion that in essence a decision under Order 22, Rule 5, Civil Procedure Code, is only directed to answers an orderly conduct of the proceedings with a view to avoid the delay in the final decision of the suit till the persons claiming to be the representatives of the deceased party get the question of succession settled through a different suit and such a decision does not put an end to the litigation in that regard. It also does not determine any of the issues in controversy in the suit. Besides this it is obvious that such a proceeding is of a very summary nature against the result of which no appeal is provided for. The grant of an opportunity to lead some sort of evidence in support of the claim of being a legal representative of the deceased party would not in any manner change the nature of the proceedings. In the instant case the brevity of the order (reproduced above) with which the report submitted by the trial Court after enquiry into the matter was accepted, is a clear pointer to the fact that the proceedings resorted to were treated to be of a very summary nature. It is thus manifest that the Civil Procedure Code proceeds upon the view of not imparting any finality to the determination of the question of succession or heirship of the deceased party.'

11. The judgment in Mohinder Kaur (AIR 1981 P&H 130) was referred to and approved by this Court in a judgment reported as Dashrath Rao Kate Vrs. Brij Mohan Srivastava, (2010) 1 SCC 277. In the said case, the High Court came to the conclusion that since the inquiry under Order XXII Rule 5 of the Code was of a summary nature, it was limited only to the determination of the right of the appellant therein to be impleaded as the legal representative. This Court in the said case held as under:

'21. As a legal position, it cannot be disputed that normally, an enquiry under Order 22 Rule 5 CPC is of a summary nature and findings therein cannot amount to res judicata, however, that legal position is true only in respect of those parties, who set up a rival claim against the legatee. For example, here, there were two other persons, they being Ramesh and Arun Kate, who were joined in the civil revision as the legal representatives of Sukhiabai. The finding on the Will in the order dated 09.09.1997 passed by the trial court could not become final as against them or for that matter, anybody else, claiming a rival title to the property vis-à-vis the appellant herein, and therefore, to that extent the observations of the High Court are correct. However, it could not be expected that when the question regarding the Will was gone into in a detailed enquiry, where the evidence was recorded not only of the appellant, but also of the attesting witness of the Will and where these witnesses were thoroughly cross-examined and where the defendant also examined himself and tried to prove that the Will was a false document and it was held that he had utterly failed in proving that the document was false, particularly because the document was fully proved by the appellant and his attesting witness, it would be futile to expect the witness to lead that evidence again in the main suit.

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25. Dr. Kailash Chand, learned counsel appearing for the respondent, also relied on ruling in Vijayalakshmi Jayaram Vrs. M.R. Parasuram, AIR 1995 AP 351. It is correctly held by the Andhra Pradesh High Court that Order 22 Rule 5 is only for the purpose of bringing legal representatives on record for conducting of proceedings in which they are to be brought on record and it does not operate as res judicata. However, the High Court further correctly reiterated the legal position that the inter se dispute between the rival legal representatives has to be independently tried and decided in separate proceedings. Here, there was no question of any rivalry between the legal representatives or anybody claiming any rival title against the appellant-plaintiff. Therefore, there was no question of the appellant-plaintiff proving the Will all over again in the same suit. 26. The other judgment relied upon is the Full Bench judgment of the Punjab and Haryana High Court in Mohinder Kaur Vrs. Piara Singh, AIR 1931 P&H 130. The same view was reiterated. As we have already pointed out, there is no question of finding fault with the view expressed. However, in the peculiar facts and circumstances of this case, there will be no question of non-suiting the appellant-plaintiff, particularly because in the same suit, there would be no question of repeating the evidence, particularly when he had asserted that he had become owner on the basis of the Will (Ext. P-1).'

***

14. In view of the aforesaid judgments, we find that the appellant is the sole claimant to the estate of the deceased on the basis of Will. The Executing Court has found that the appellant is the legal representative of the deceased competent to execute the decree. In view of the said fact, the appellant as the legal representative is entitled to execute the decree and to take it to its logical end."

v. Surendra Chandra Jena Vrs. Laxminarayan Jena, 1987 SCC OnLine Ori 80 = AIR 1988 Ori 143 = 65 (1988) CLT 212:

5. Apart from the above fact, Section 211 of the Act makes a special provision. According to this provision, the executor or administrator, as the case may be, of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such. ***According to the scheme of the above provision of the Act, the executor is not required to wait for the grant of the probate but can ipso facto being the legal representative prosecute the lis in view of the devolution of the interest under Order XXII, Rule 10 of the Civil Procedure Code inasmuch as the testator's title stands vested in the executor on the his death.*** *The case of an administrator may, however, be different, because he has to wait until grant of the letters of administration in his favour by the court. The proposition is well settled, and if any authority is needed I may refer to a case of the Patna High Court in Ramcharan Singh Vrs. Mst. Dharohar Kuer, AIR 1954 Pat 175.*

11. This Court takes note of *Vatsala Srinivasan Vrs. Shyamala Raghunathan, (2016) 13 SCC 253* wherein the Hon'ble Supreme Court of India quoted from *Jadeja Pravinsinhji Anandsinhji Vrs. Jadeja Mangalsinhji Shivsinhji, 1961 SCC OnLine Guj 62 = AIR 1963 Guj 32* rendered by the Gujarat High Court with approval:

"We are also in agreement with the view expressed in the impugned judgment, which has also relied upon law laid down in Jadeja Pravinsinhji Anandsinhji Vrs. Jadeja Mangalsinhji Shivsinhji, 1961 SCC OnLine Guj 62 = AIR 1963 Guj 32, in which it has been held: (SCC OnLine Guj paras 6 & 9)

> *"6. *** An executor, in the capacity of an executor, has no personal interest in the estate of the deceased. *** The object of the executor in these proceedings is to get an adjudication not of any dispute in which he is personally interested but the object is to propound the Will of the deceased for the benefit of those who take an interest in the Will.*
> *****
> *9. It is, therefore, clear that* ***an executor in applying for probate is not fighting a personal action but fighting for the interests of all the beneficiaries under the Will.*** *Therefore the action of an executor in applying for a probate is not in substance a personal action and as observed earlier by me the maxim 'actio personalis moritur cum persona' could not apply to such a case. If the executor fails in his duty, any of those whom he represents are entitled to intervene and carry on the proceedings with a 'formal modification' that the prayer must then be for letters of administration with the Will annexed."*

ANALYSIS AND DISCUSSIONS:

12. The issue involved in the present revision rests on the question whether by dint of a Will, which has till now remained not probated, the substituted plaintiff can be treated to be legal representative of the deceased plaintiff to pursue the suit. It is undisputed fact as unfurled in the pleadings and emanates from arguments of counsel for the parties that the daughter-in-law (legatee of suit schedule property), who claims to be executor of the Will of Sarojini Mohapatra (the testator-"deceased plaintiff") is allowed to continue with the suit, bearing CS No.1601 of 2020, by an order dated 14.12.2022 of the Senior Civil Judge, Bhubaneswar. Such a course is contested by the defendant against whom the original plaintiff has instituted the said suit for declaration of gift deed executed by her null and void and for permanent injunction on the ground of fraud being played by the petitioner.

12.1. By virtue of provisions of Section 251 read with Section 253 of the Indian Succession Act, it is recognized that it is not only the "legal heir" who can represent in a suit for the deceased plaintiff or the deceased defendant, but it is the "legal representative" who can represent the deceased plaintiff or the deceased defendant to pursue the suit. It is well-settled that in a proceeding for substitution under Order XXII, CPC, Court cannot go into the question of genuineness of the Will. It is also not out of place to say that the natural heirs and legal representatives of the deceased plaintiff would only be entitled to get possession on the basis of inheritance of the suit property on the death of the original plaintiff, but the legatee under a Will would also be entitled to obtain an order or a decree in its favour subject to grant of probate of the Will of the deceased plaintiff in favour of the executor.

12.2. An executor can act even before probate is obtained. In *Bali Ram Dhote Vrs. Bhupendra Nath Banerjee, 1978 SCC OnLine Cal 153 = AIR 1978 Cal 559* it has been observed as follows:

> *"Under Sections 211 and 307 of the Indian Succession Act an executor obtains a title by virtue of the Will and not from the date when the Will is probated. Under Section 211 of the Indian Succession Act "the executor or administrator, as the case may be, of a*

deceased person is his legal representative for all purposes and all the properties of the deceased person vest in him as such." The executor derives his title from the Will and immediately after the testator's death, his property vests in the executor as the law knows no interval between the testator's death and the vesting of the property. An executor by virtue of his office, that is in the character of executor takes an estate in the property of the deceased and a legal character is vested in him. In the present case, the Will also empowers the executor, the defendant No. 4 herein to sell the property. ***The executor represents the estate even before he has taken the probate. As such the probate is not necessary to make an executor entitled to the properties as his title is derived under the will.*** *There is nothing in the law to prevent the executor from acting as an executor and exercise a power given to him without obtaining probate."*

12.3. The Calcutta High Court in *Ashoke Mukherjee Vrs. Musha Khan, 1986 SCC OnLine Cal 171* held as follows:

"In such circumstances, the only point as referred to hereinbefore arises for consideration. Section 213(1) of the Indian Succession Act, 1925, which corresponds to section 187 of the 1965 Act, no doubt lays down specifically that

'No right as executor or legatee can be established in any court of justice, unless a court of competent jurisdiction in Indian has granted probate of the Will under which the right is claimed or has granted letters of administration with the Will or with an authenticated copy of the Will annexed.'

This section has been interpreted to create a bar to the establishment of any right under the Will by an executor or a legatee unless probate or letters of administration of the Will then obtained. [Hem Nalini Vrs. Isolyne Sarojbashini, AIR 1962 SC 1472]. But it is one thing to establish any right which is different from taking any step towards the establishment of such a right. Instituting a suit or getting oneself substituted in place of the deceased testator may be a step in said towards the establishment of a right under the Will but the same is clearly distinct from the establishment of the right itself. Preponderance of this view following the decision of the Privy Council in the case of S.M.K.R. Meyappa Chetti Vrs. Subramaniam Chetti, 43 Indian Appeals 113 is that the aforesaid statutory bar incorporated in the Indian Succession Act, does not bar institution of a suit or getting the executor substituted in a pending suit. The oft-quoted passage from the aforesaid decision of the Judicial Committee is worthy of repetition. It was observed:

'It is quite clear that an executor derives his title and authority from the Will of his testator and not from any grant of probate. ***The personal property of the testator, including all rights of action, vests in him upon the testator's death and the consequence in that he can institute an action in the character of executor before he proves the will.*** *He cannot it is true, obtain a decree before probate, but this is not because his title depends on probate but because the production of probate is the only way in which, by the rules of the court he is allowed to prove his title.'*

The Judicial Committee therefore, expressly laid down that an executor can institute an action even before probate has been obtained though before the decree is actually passed such executor is to prove his title by proving the probate.

A Division Bench of this Court in the case of Gopal Lal Chandra Vrs. Amulya Kumar Sur, AIR 1933 Calcutta 234 (at page 236) followed the same principle when it was observed,

'It is true that, if an executor institutes a suit in anticipation of probate and subsequently obtains probate, the requirements of Section 187 Succession Act (obviously referring to the old Act) are satisfied for the purpose of a decree to be obtained.'

That appears to be the consistent view taken by this Court in other cases too and last in the series is the decision of Murari Mohan Dutt, J., in the case of Arijit Mullick Vrs. Corporation of Calcutta, 1979 (2) Cal LJ 426, with which I am in respectful agreement. A Bench decision in the case of Bibhuti Bhusan Roy Vrs. Narendra Narayan Ghose, 54 CWN 667 was relied upon in support of a contrary contention but in my opinion the said decision is clearly distinguishable since therein no point now under consideration did arise for consideration there, the issue raised was as to whether sale held in respect of a property of a deceased testator in the absence of the executor before the probate of the Will had been obtained was a valid sale when there was substantial representation of the estate of the deceased. This Court held that in the absence of the probate since the executor could not represent the estate or contest the sale such a sale cannot be held to be invalid in law. The point thereunder consideration, therefore, was totally distinct and different from the point now under consideration by me."

12.4. In *Raja Rama Vrs. Fakruddin, AIR 1930 Mad 218,* the distinction between letters of administration and probate has succinctly been discussed:

"There can, we think, be no doubt that when an executor in his petition for probate includes a debt owing by his testator in Annexure-B he must be deemed to acknowledge liability for that debt in his capacity of legal representative of the deceased. This arises from his position of executor. ***The executor derives his title from the Will. Immediately upon the testator's death his property vests in the executor, for the law knows no interval between the testator's death and the vesting of the property*** *[Whitehead Vrs. Taylor (1839) 10 A. & E., 210]. It follows that before and without obtaining probate the executor may do most things which appertain to his office: thus, he may take possession of the testator's property; he may pay, or take releases of debts owing from the estate; and he may receive or release debts which are owing to it (Williams on Executors, Vol. II page 220, 10th Edition).* ***The grant of probate does not give him his title: it makes his title certain.*** *[Hewson Vrs. Shelley, (1914) 2 Ch., 13 at p. 38]. An executor therefore, having the power as legal representative to admit and dispose of claims against the testator's estate when he includes such a claim in Annexure-B as owing from the testator and payable from his estate, may be assumed to acknowledge liability of the estate for the debt. But the position of an administrator is very different. He derives his title wholly from the Court. He has none until the letters of administration are granted, and the property of the deceased vests in him only from the time of the grant [Woolley Vrs. Clark, (1822) 5 B. & Ald., 744]. Upon the issue of the grant the administrator's title has relation back to the date of the deceased's death. Section 220 of the Indian Succession Act provides:— "Letters of administration entitle the administrator to all rights belonging to the intestate as effectually as if the administration had been granted at the moment of his death". But an act done by a party who afterwards becomes administrator to the prejudice of the estate is not made good by the subsequent administration; for it is only in those cases where the act is for the benefit of the estate that the relation back exists [see Morgan Vrs. Thomas, (1839) 10 A. & E., 210]. And this principle is embodied in Section 221, Indian Succession Act, which states:—*

"Letters of administration do not render valid any intermediate acts of the administrator tending to the diminution or damage of the intestate's estate."

12.5. The settled position as set forth in *Soona Mayna Kena Roona Meyappa Chitty Vrs. Soona Navena Suppramanian Chitty, 1916 SCC OnLine PC 11 = (1915-16) 20 CWN 833 = (1915-16) 43 IA 113 = AIR 1916 PC 202,* stands thus:

> *"Assuming, but without deciding, that this is to be deemed to be a suit, which the testator would, if he were living, have a right to institute, their Lordships have come to the conclusion that this contention cannot be upheld.* ***It is quite clear that an executor derives his title and authority from the Will of his testator and not from any grant of probate. The personal property of the testator, including all rights of action, vests in him upon the testator's death, and the consequence is that he can institute an action in the character of executor before he proves the Will. He cannot, it is true, obtain a decree before probate, but this is not because his title depends on probate, but because the production of probate is the only way in which, by the rules of the Court, he is allowed to prove his title.*** *An administrator, on the other hand, derives title solely under his grant and cannot, therefore, institute an action as administrator before he gets his grant. The law on the point is well settled (see Comyn's Digest "Administration," B. 9 and 10; Thompson Vrs. Reynolds, 3 C. & P. 123 (1827). And Woollcy Vrs. Clark, 5 B. & Ald. 744 (1822)."*

12.6. Interpreting the term "as such" employed in Section 211 of the Indian Succession Act, 1925, the Gujarat High Court in the case of *AIR 1999 Guj 162* observed as follows:

> *"We now come to the contention that the evidence of Kesuprasad Jani as regards the execution of the Will must be rejected, since he was a propounder of the Will, who had a beneficial interest under the Will, Exh. 77. Under Section 211 of the Indian Succession Act, the executor or administrator, as the case may be, of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such. Under Section 222 of the said Act, probate can be granted only to an executor appointed by the Will. As provided by Section 226, when probate has been granted to several executors, and one of them dies, the entire representation of the testator accrues to the surviving executor or executors.* ***Probate of a Will, when granted, establishes the Will from the death of the testator and renders valid all intermediate acts of the executor as such, as provided by Section 227 of the said Act. Thus, the executor derives title under the Will and testator's properties vest in him from the death of the testator.*** *Therefore, he may seize and take in his hands the testator's properties, which are covered under the Will, and there can be nothing suspicious in the fact that the properties and effects of the testator covered under the Will are found in the custody of the executor.* ***The property bequeathed by the testator vests in the legatee, only when assent of the executor is given, as provided by Section 332 of the said Act.*** *When the executor gives his assent to a specific bequest, that would be sufficient to divest his interest as executor and to transfer the subject of the bequest of the legatee, unless the nature or the circumstances of the property require that it shall be transferred in a particular way, as provided in Section 333 of the said Act. Assent of executor is required even to his own legacy, as provided in Section 335, which lays down that when the executor or administrator is a legatee, his assent to his own legacy is necessary to complete his title to it, in the same way as it is required when the bequest is to another person.* ***These provisions make it abundantly clear that the executor does not acquire any personal benefit, when the property of the deceased person vests in him in his capacity as an executor. It can, therefore, never be said that the executors acquired any beneficial interest under the Will, when the Will required them to take over the possession of the properties covered under it, as if they were the owners thereof. It is only the legal estate that vests in the executor and the vesting is not of any personal benefit. The words "as such" used in Section 211 of the Act clearly indicate that the executor is not the absolute owner of the property that vests in him, in the sense of***

being beneficial owner thereof and that the property vests in him only for the purpose of its administration under the Will. He gets completely divested of such legal interest as executor, when the property is transferred to the legatee, as envisaged by Section 333. *The assent of the executor to a legacy gives effect to it from the death of the testator, as provided by Section 336 of the said Act and therefore an executor gets divested of his interest as an executor with effect from the death of the testator, when he assents to a specific legacy.* ***This clearly means that no benefit to the executors in their personal capacity was ever intended to be given under the Will****, Exh. 77, and all the powers or rights that they acquired were given to them in their capacity as executors and vested in them only by virtue of their office. Even though these executors have been described as 'trustees' in the Will, Exh. 77, it is clear that the word "trustee" is used by the testatrix in a loose sense, and what is meant is that they shall be the executors of her property, appointed generally to administer her estate. On the reading of the Will, it is clear that they have been assigned duties to administer the estate and no bequest is intended to be given to them in their personal capacity. There is a presumption in law that a legacy to a person appointed as executor is given to him in that character and is attached to the office and if he claims it otherwise than as attached to his office, it would be incumbent on him to show something in the nature of the legacy or other circumstances arising under the Will to rebut that presumption. In a case before the Chancery Division, Rees' Will Trusts, Williams Vrs. Hopkins, reported in (1949) 1 All ER 609, where a testator, after appointing his friend and his solicitor to be executors and trustees of his Will, referring to them as "my trustees" devised and bequeathed all his property, subject to the payment of his funeral and testamentary expenses and debts to "my trustees absolutely they well knowing my wishes concerning the same and I direct them to permit my brother LJR to have and receive the rents and profits of my property at V during his lifetime" and LJR predeceased the testator and before signing his Will the testator had intimated to his friend and his solicitor that he desired them after his death to make certain gifts, which amounted in value to some 8,000 pounds and he then told them that they were to have the surplus for their own use and his residuary estate amounted to more than 30,000 pounds, the House of Lords held that on the true construction of the Will, the gift was made to the testator's friend and solicitor as trustees and the Court being bound to disregard any evidence to the contrary, they were not beneficially entitled to the surplus. ***"*

13. With the aforesaid conspectus of legal position when this Court, sitting in revision against the order dated 14.12.2022 passed by the Senior Civil Judge, Bhubaneswar while considering the petition under Order XXII, Rule 3, CPC examines, does not find any infirmity in allowing the opposite party to be substituted by treating her as "legal representative" for the deceased plaintiff *viz.*, Sarojini Mohapatra. Inasmuch as probate would only reassert the title of the executor, the contention of the petitioner that unless and until probate is granted in favour of the opposite party, she cannot continue to pursue the suit stepping into the shoes of the deceased plaintiff is fallacious.

Conclusion:

14. Upon perusal of the impugned order, this court does not find any illegality or error in exercise of jurisdiction of the Senior Civil Judge, Bhubaneswar in disposing of the petition under Order XXII, Rule 3 so as to warrant indulgence under Section 115 of the Code of Civil Procedure, 1908.

15. As the opposite party has been substituted for deceased plaintiff, she can pursue the suit bearing CS No.1601 of 2020 till its logical end, but with a caveat— as stipulated in *Suresh Kumar Bansal Vrs. Krishna Bansal, (2010) 2 SCC 162*— the opposite party herein would be entitled to decree if the grounds taken in the plaint stand proved; however, such decree shall be passed subject to grant of probate of the Will of the deceased plaintiff in favour of the opposite party-Rukmuni Mohapatra.

16. Having not found any valid and plausible reason to interfere with the order dated 14.12.2022 passed in CS No.1601 of 2020 by the learned Senior Civil Judge, Bhubaneswar for the discussions made *supra*, this Court does not accede to the arguments advanced by the learned counsel for the revisionist and accordingly, instant revision petition stands dismissed.

16.1. Pending application, if any, also stands disposed of and as consequence thereof, interim orders passed in the matter are vacated.

16.2. It is made clear that any observation made herein touching the facts which may be relevant for proof during the trial of suit is only for the purpose of adjudication of the instant petition and shall have no bearing whatsoever on the merits of the case at any stage of civil suit being CS No.1601 of 2020 pending before the Senior Civil Judge, Bhubaneswar.

16.3. In the circumstances, the parties are left to bear their own costs.

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2024 (III) ILR-CUT-505

SANJAY KUMAR MISHRA, J.

W.P.(C) NO.11848 OF 2024

M/s. BANSAL INFRA PROJECTS PVT. LTD., BOLANGIR .....Petitioner

V.

M/s. JINDAL STEEL & POWER LTD. & ORS. .....Opp.Parties

(A) CONSTITUTION OF INDIA, 1950 – Article 226 r/w Section 9 of Arbitration and Conciliation Act, 1996 r/w Order 39 Rule 3 and Section 151 of the Code of Civil Procedure – The Court below rejected the application to grant *ex parte ad interim* injunction against invocation of bank guarantee filed U/o.39 Rule 3 r/w Section 151 of the Code – Scope of interference/injunction against invocation of Bank Guarantee – Discussed. (Paras 15 - 24)

(B) ARBITRATION AND CONCILIATION ACT, 1996 – Sections 9, 37(1)(b) r/w Section 13 of the Commercial Courts Act, 2015 – Whether rejection of interlocutory application filed U/o. 39 Rule 3 of the Code is appealable U/s. 37(1)(b) of 1996 Act so also Section 13 of the CC Act ? – Held, No – The interlocutory order passed in Section 9 application

moved before the District Judge/Commercial Court under the Act, 1996, rejecting the prayer of the applicant to exempt notice to the opp. party and pass an *ex parte ad interim* injunction is not an appealable order and the party aggrieved has to approach the Writ Court under Article 227 of the constitution of India. (Para 13)

Case Laws Relied on and Referred to :-

1. (2016) 11 SCC 720 : Gangotri Enterprises Limited Vs. Union of India & Ors.
2. (2012) 5 SCC 370 : Maria Margarida Sequeira Fernandes & Ors. Vs. Erasmo Jack De Sequeira (dead)
3. AIR 2016 Orissa 103: M/s Sai Concrete Pavers Pvt. Ltd., Visakhapatnam vs. National Aluminium Company Ltd., Koraput
4. 2014 SCC Online Bombay 534 : Perin Hoshang Davierwalla vs. Kobad
5. 2017 SCC OnLine Del 10365 : Dorabji Davierwalla Deepak Mittal vs. Geeta Sharma
6. (2003) 7 SCC 410 : National Highway Authority of India Vs. Ganga Enterprises & Ors.
7. (2016) 14 SCC 517 : Adani Agri Fresh Ltd. Vs. Mahaboob Sharif & Ors.
8. (2019) 20 SCC 669 : Andhra Pradesh Pollution Control Board vs. CCL Products (India) Ltd.
9. 2007(Suppl.2) OLR 822:Trafalgar House Construction (T) Satyam Shankaranarayana (JV) vs. State of Orissa & Ors.
10. (2020) 15 SCC 706 : Deep Industries Ltd. Vs. Oil & Natural Gas Corporation Ltd. & Ors.
11. 2017 SCC OnLine Del 10365: Deepak Mittal & another Vs. Geeta Sharma & Ors.
12. 2023 SCC OnLine Orissa 2301: Santosh Kumar Acharya Vs. Ratnakar Swain
13. 2023(I) ILR-CUT-253 : Odisha State Road Transport Corporation, Bhubaneswar vs. ARSS Bus Terminal Pvt. Ltd., Bhubaneswar
14. (2022) 1 SCC 75 : Bhaven Construction through authorized signatory Premjibhai K. Shah Vs. Executive Engineer, Sardar Sarovar Narmada Nigam Limited and another
15. AIR 1969 SC 556 : Baburam Prakash Chandra Maheshwari vs. Antarim Zila Parishad Now Zila Parishad, Muzaffarnagar
16. (2022) 1 SCC 712 : Arcelor Mittal Nippon Steel India Ltd. Vs. Essar Bulk Terminal Ltd.
17. (2016) 11 SCC 720 : Gangotri Enterprises Ltd. vs. Union of India & Ors.
18. (2022) 7 SCC 67 : Union of India & Anr. vs. Millenium Delhi Broadcast LLP & Ors.
19. (2012) 5 SCC 370 : Maria Margarida Sequeira Fernandes & Ors. vs. Erasmo Jack De Sequeira (dead) through L.Rs.
20. 2010 1 GLT 141 : Sati Oil Udyog Ltd. Vs. Avanti Projectrs & infrastructure
21. 2014(3) BomCR 551: Perin Hoshang Davierwalla and ors. Vs. Kobad Dorabji Davierwalla & Ors.
22. 2015 SCC OnLine Hyd 311 : ICICI Bank Limited V. IVRCL Ltd.
23. 2017 SCC OnLine Del 10365 : Deepak Mittal V. Geeta Sharma
24. (2008) 2 KLJ 24 : Symphony Services Corporation (India) Private Limited, Bangalore V. Sudip Bhattacharjee
25. (2012) 6 BOMCR 149 : Conros Steels Pvt. Ltd. Vs. Lu Quin (Hong Kong) Co. Ltd. & Ors.
26. AIR 2021 Meghalaya 53: National Thermal Power Corporation Limited Vs. Meghalaya Power Distribution Corporation Ltd. and others)
27. 2020 SCC OnLine Ker 5476: Pranathmaka Ayurvedics Pvt. Ltd. Vs. Cocosath Health Products
28. (2018) 14 SCC 715 : Kandala Export Corporation & Anr. Vs. M/s OCI Corporation & Ors.
29. (1996) 5 SCC 34: Hindustan Steel Works Construction Ltd. Vs. Tarapore & Co
30. (1995) 4 SCC 515: National Thermal Power Corpn. Ltd. Vs. Flowmore Pvt. Ltd
31. (2007) 8 SCC 110: Himadri Chemicals Industries Ltd. Vs. Coal Tar Refining Co
32. (2008) 1 SCC 544: Vinitec Electronics Pvt. Ltd. v. HCL Info Systems Ltd,
33. AIR 2003 SC 3823: NHAI v. Ganga Enterprise
34. AIR 1991 SC 1994 : General Electric Technical Jasp Services Company Inc. v. M/s. Punj Sons (P) Ltd. & Anr.

35. (1994) 1 SCC 502 : Svenska Handelsnbanken v. Indian Charge Chrome,
36. (2006) 2 SCC 728 : B.S.E.S. Ltd. (Now Reliance Energy Ltd.) v. Fenner India Ltd.
37. (2019) 20 SCC 669 : Andhra Pradesh Pollution Control Board
38. (1996) 5 SCC 450 : Ansal Engg. Projects Ltd. v. Tehri Hydro Development Corpn. Ltd.
39. (2006) 6 SCC 293 : SBI v. Mula Sahakari Sakhar Karkhana Ltd.
40. (1999) 8 SCC 436 : Hindustan Construction Co. Ltd. v. State of Bihar
41. (2020) 13 SCC 574 : Standard Chartered Bank

For Petitioner : Mr. M.K. Mishra, Sr. Adv, & Mr. P.K. Nayak.
For Opp.Parties : Mr. G. Mukherjee, Sr. Adv & Mr. S. Nanda & S. Acharya.

JUDGMENT Dates of Hearing : 20.05 & 19.07.2024 : Date of Judgment : 20.08.2024

S.K. MISHRA, J.

1. The Petitioner Company has preferred the Writ Petition challenging the order dated 30.04.2024 passed by the Senior Civil Judge (Commercial Court), Cuttack in ARBP No.14 of 2024, vide which the Court below rejected its application under Order 39 Rule 3 read with section 151 of the Code of Civil Procedure, 1908, shortly, "the CPC", moved in a section 9 application filed under the Arbitration and Conciliation Act,1996, shortly, "the Act,1996", to grant ex-parte ad interim injunction with an observation that, an order cannot be passed without hearing the Opposite Parties and accordingly, ordered for issuance of notice to the Opposite Parties fixing the date to 25.06.2024 for appearance.

2. While issuing notice to the Opposite Parties, this Court, vide order dated 13.05.2024, as an interim measure, passed an order to maintain status quo as on the said date till the next date with regard to invocation of Bank Guarantee. Paragraph 3 of the Order dated 13.05.2024 passed in I.A. No.6416 of 2024, being relevant, is reproduced below for ready reference.

> *"Taking into consideration the ratio decided by the apex Court in (2022) 1 SCC 712* ***(Arcelor Mittal Nippon Steel India Limited Vs. Essar Bulk Terminal Limited), (2016) 11 SCC 720 (Gangotri Enterprises Limited Vs. Union of India and others)*** *& (2012) 5 SCC 370* ***(Maria Margarida Sequeira Fernandes & others Vs. Erasmo Jack De Sequeira*** *(dead) so also after going through the pleadings made in the Writ Petition* ***and documents appended thereto****, as an interim measure, it is ordered to maintain the status quo as on date with regard to encashment of Bank Guarantee No.32700IGL0001122, which is valid till 05.09.2024, till the next date."*

3. Though it was ordered to list the matter in the week commencing from 17.06.2024, the present Opposite Parties appeared suo motu. Instead of filing Counter, dealing with the specific allegations made in the Writ Petition so also documents appended there to, I.A. No.6777 of 2024 has been filed for vacation of the aforesaid interim order. On being moved showing urgency, the matter was listed for orders and a short adjournment being granted, the Petitioner also filed its Objection to I.A. No.6777 of 2024 opposing to the prayer for vacation of stay. However, on consent of the learned Senior Counsel for the Parties, the Writ Petition along with all I.As. were taken up together for hearing and final disposal.

4. The factual matrix(as pleaded in the Writ Petition), which led to filing of the Writ Petition, is that Work Order dated 24.01.2022 was issued in favour of the Petitioner by the Opposite Party No.2 for construction of 400 flats at Jindal Nagar, South Block (Sharmik Vihar) at Jindal Steel & Power Limited, shortly hereinafter "JSPL". The total amount of the agreement value was Rs.4,39,946,924.13. To execute the said work, the Opposite Party No.2 (JSPL) had given an advance of 8.5% of the contract price amounting to Rs. 3,73,95,490/- and to secure the same, the Petitioner executed Bank Guarantee (B.G.) in favour of JSPL, drawn in Opposite Party Nos.3 and 4 Bank for the said amount.

The contract dated 24.01.2022 is a reciprocal one without which it cannot be performed by the Petitioner. As per the said contract, the Petitioner was to complete the work within 8 months from the date of contract. But due to non-fulfillment of the reciprocal promises by JSPL in time, the work could not be executed as per the programme.

There are provisions in the contract that the Management of JSPL is to supply free materials in time. However, due to delay in supply of materials, there was massive impact on the work. Further though the Petitioner, as per the work executed, submitted running bills, the same were not released in time which resulted in suffering from cash inflow and delay in work. The Management of JSPL, without any notice to the Petitioner, reduced the scope of work by 30-40 since March, 2023. It also did not provide sufficient hutment and facilities for the workers as per terms of the contract in terms of the requirement of the Petitioner, for which the work could not run in full swing.

Due to non-fulfillment of reciprocal promises made by the JSPL, by various letters, the Petitioner drew attention of JSPL in between 22.08.2022 to 20.02.2024 indicating therein as to not handing over a hindrance free site for excavation, non-payment of the deviation quantity of excavation, rock strata found during excavation, nonpayment of deviation quantity of excavation (not estimated at the time of contract allocation) leading to increase in cost and time, continuous delays in providing free issue materials i.e. Backfill material, TMT bars, concrete, structural materials, PS Panel, L-Mesh, u-Mesh, sand, cement, paint etc. labour hutment, free electricity and water. Further there was various revision and rectification of drawings, delay in payment and non reconciliation of accounts and detail deduction sheets. Further the GST payment as per the contract was not released and unilaterally the work was reduced without any intimation or discussion, for which the Petitioner had deployed machinery, equipment, material and manpower. Despite intimation of such hindrances, the Opp. Party has not solved any problem and huge outstanding bill has not been released, for which the Petitioner suffered financial crisis.

It is further case of the Petitioner that without clearing the hindrances, as pointed out by the Petitioner, the Opposite Party No.2 (Associate Vice President, Commercial, JSPL) vide letter dated 07.07.2023, issued notice to the Petitioner Company for revision in quantity / termination of contract due to alleged poor

performance in the construction work. On receipt of the said letter dated 07.07.2023, the Petitioner, vide letter dated 26.07.2023, wrote to the Opposite Party No.2 that while extension of time has been approved and there is a copy of note sheet reflecting the reason of delay, which is approved by the Petitioner. The Petitioner vide letter dated 11.08.2023, requested the Manager-Contract Cell, JSPL for urgent action for critical material shortage threatening project timeline and considering the situation to take immediate intervention to expedite the resolution of the matter.

However, in violation of terms of the contract from the side of the Management of JSPL, vide letter dated 25.03.2024, the Authorized Signatory of the Management of JSPL communicated to the Petitioner that as per the books of account, there is a debit balance of Rs.4,12,54,904/- towards unadjusted advance and other deductions and it was observed that the Petitioner is not responding to the directions of the Civil Department of the Company, which is allegedly impacting the site progress and such conduct of the Petitioner is against the terms of the work order dated 24.01.2022 and advance against the Petitioner is pending since 18.09.2023. If the payment is not received on or before 30.04.2024, the Management of JSPL will go for encashment of the B.G of Rs.3,73,95,490/- vide B.G. dated 08.03.2022, executed by the Petitioner.

In response to the letter dated 25.03.2024, reiterating its stand in reminder letter dated 22.08.2022, a reply was given by the Petitioner to the Opposite Party No.2 vide letter dated 19.04.2024, indicating therein that as the Petitioner has not violated the terms of contract, such communication dated 25.03.2024 is illegal. However, being aggrieved by the action of the Opposite Parties, the Petitioner preferred Arbitration Petition under section 9 of the Arbitration and Conciliation Act, 1996, shortly hereinafter "the Act, 1996", before the Senior Civil Judge (Commercial Court), Cuttack, along with Petitions under Order 39 Rules 1 and 2 and Order 39 Rule 3 of the CPC for granting ex-parte injunction, prohibiting the Opposite Parties not to encash the B.G. pursuant to the letter dated 25.03.2024. The said Petition was taken up for hearing by the Commercial Court on 30.04.2024. On the very day, the Court below rejected the Petition of the Petitioner Company for ex parte injunction and ordered to issue notice to the Opposite Parties.

5. As detailed above, knowing about filing of the Writ Petition and passing of the interim order dated 13.05.2024 in I.A. No.6416 of 2024, the Opposite Parties filed I.A. No.6777 of 2024 for vacation of the interim order on the ground that in view of the judgment of this Court reported in AIR 2016 Orissa 103 (**M/s Sai Concrete Pavers Pvt. Ltd., Visakhapatnam vs. National Aluminium Company Ltd., Koraput**), the Writ Petition is not maintainable. Further, in view of the statutory bar under the Commercial Courts Act, 2015, the status quo order dated 13.05.2024 is liable to be vacated. A further stand has been taken in the I.A. that in the matter of invocation of B.G., the Courts can only interfere in exceptional circumstances. The Opposite Party-Company being severely prejudiced due to non-refund of the debit balance totaling to Rs.4,12,54,904/- by the Petitioner, status quo order dated 13.05.2024 needs to be vacated.

Apart from dealing with the judgments referred to in the order dated 13.05.2024 cited by the Petitioner, it has also been stated in the I.A. that Order 39 Rules 1, 2 and 3 of the CPC is not applicable to proceeding under section 9 of the Act, 1996. If such an application is filed, the same can only be considered to be an application under section 9 of the Act, 1996 and any order passed in a section 9 proceeding is appealable under section 37(1) (b) of the Act, 1996. Hence, the writ jurisdiction cannot be invoked to circumvent the procedure under the Act, 1996.

A stand has also been taken in the I.A. that interpretation and implementation of clause in a contract cannot be the subject matter of a Writ Petition, since the Petitioner has already approached the Commercial Court by way of an Application under section 9 of the Act, 1996 and thus, intended to have the issues decided by an Arbitral Tribunal.

A further stand has also been taken in the I.A. for vacation of stay on the ground that the Clause 58 of the contract/work order dated 24.01.2022 between the parties provides for arbitration in respect of all disputes and differences of any kind, arising out of or in connection with the contract, whether during the progress of work or after its completion, and whether before or after the termination of contract.

It has also been stated in the I.A. that in view of the bar under sections 8 and 13 of the Commercial Courts Act, 2015, the Writ Petition assailing an order passed by the Commercial Court rejecting an application under Order 39, Rule 3 of C.P.C. is not maintainable.

6. In response to the said I.A. filed by the Opposite Parties for vacation of stay so also regarding maintainability of the Writ Petition, the Petitioner has filed an Objection stating therein that the judgment of this Court cited by the Opposite Party Nos. 1 and 2 is not applicable to the present case, as in the said case it was decided that an Appeal under Order 43, Rule 1(r) of the CPC, out of an order passed in an Application under section 9 of the Act, 1996, is not maintainable. In the instant case, the Petitioner has approached this Court under Article 227 of the Constitution of India to exercise its superintendence power against the order passed by the Commercial Court under Order 39, Rule 3 of the CPC.

Apart from the said stand, it has also been stated that since the B.G. executed by the Petitioner is valid till 05.09.2024, the Opposite Party Nos. 1 and 2 will no way be prejudiced as the Petitioner is to get huge amount of pending bills along with other amounts from the Opposite Party.

It has also been stated in the Objection that in view of specific allegations, as detailed in Paragraph 18 of the Writ Petition, the Opposite Party Nos. 1 & 2 issued letter dated 25.03.2024 through their authorized signatory stating therein that as per the books of account, there is a debit balance of Rs.4,12,54,904/- towards unadjusted advance and other deductions. If the payment is not received before 30.04.2024, the Opposite Parties will go for encashment of the B.G. of Rs.3,73,95,490/- vide BG dated 08.03.2022 and the said letter is illegal as the Petitioner is entitled to more amount from the Opposite Parties.

A stand has also been taken in the Objection that vide letter dated 11.05.2024, addressed to the Opposite Parties, the Petitioner has requested to release all pending bills and issue gate pass for removal of machinery, shuttering materials and other unused building materials, such as tiles, plumbing items etc. so also requested to withdraw the claim of invocation of B.G. and release all outstanding payments and dues.

A further stand has been taken in the Objection that the contract executed between the parties requires reciprocal promise in which the Opposite Parties failed to discharge their obligations. The Petitioner, vide various letters, including letter dated 26.07.2023, intimated the Opposite Parties regarding non-performance of their contractual obligations. The Petitioner, vide communication dated 26.06.2023, intimated the Opposite Parties regarding their failure to supply free material in time and also proposed to conduct a joint meeting to sort out the issues and prepare collective plan. However, the Opposite Parties have shown no interest, as proposed by the Petitioner.

It has also been stated in the Objection that as per the condition of contract, electricity and water supply must be provided by the owner (Opposite Party) at one point free of cost to the Contractor. The Petitioner, vide letter dated 24.02.2022 and 30.03.2022, pointed out that it did not receive the same properly at the beginning. In fact, almost for a month or two, the Petitioner was told that it must take the same from other Contractor namely, SPD, and the same would not be provided to the Petitioner by the Opposite Parties, which resulted in a huge hindrance to start the work. It has also been alleged in the Objection that the Petitioner has not received all the drawings as on 26.07.2023 from the Management of JSPL, which in fact, is one of the reasons for extension that has been applied and approved by the Opposite Parties. Further, there have been several revisions in drawing which also affected the progress of work.

It has also been alleged in the Objection that the Opposite Party Nos.1 and 2 did not intend to pay the bills of the Petitioner and have incorrectly taken measurements to reduce the quantity of work completed and consequently, undervalued the bills. Also, the Opposite Parties have not released previously withheld quantities nor finalized the deviation items, for which payment is due. It has also been alleged that the Opposite Party Nos. 1 and 2 are refusing to allow the Petitioner to remove its machineries and materials from the site, which may have criminal conspiracy to exploit the Petitioner's survival without payment.

A stand has also been taken in the Objection that the issues regarding pending bills, deviation from the original scope, withheld amounts, claims for delay in supply of materials and idling of machinery, manpower, interest and overhead, have been pending since long and the Opposite Party Nos. 1 and 2 did not address these issues nor deputed any person for reconciliation or meeting, despite repeated reminders and letters given by the Petitioner. Further, the contract being a reciprocal one, due to non-fulfillment of the reciprocal promise by the Opposite Party Nos. 1

and 2 in time, the work could not be executed as per the programme. Further, the Opposite Party Nos. 1 and 2 arbitrarily stopped issuing gate pass from September, 2023 to February, 2024 for which the personnel of the Petitioner could not enter the premises and thereby work was stopped and it suffered loss of huge amount of money and the Petitioner is entitled to running bills and other cost and damage to the tune of near about Rs.20 crores from the Opposite Party Nos. 1 and 2.

It has also been stated in the Objection that it is stand of the Opposite Party Nos. 1 and 2 that vide letter dated 07.07.2023 it issued notice for revision in quantity / termination of contract due to poor performance in the construction work. It is well evident from the documents appended to the I.A. that the Opposite Party Nos. 1 and 2 prepared minutes dated 30.04.2024 in which 30 days' time was allowed to the Petitioner to rectify the defects. On the other hand, before expiry of 30 days, vide letter dated 07.05.2024 under Annexure-H to the I.A., the Opposite Party No.2 issued letter to the Bank for encashment of B.G., which shows that the Opposite Party No.2 has acted in a very unfair and mala fide manner. The prayer to vacate the interim order has also been opposed to on the ground that the Petitioner has huge outstanding against the Opposite Party and though it has submitted the R/A bills to the Opposite Parties, the same are yet to be cleared.

Further, it has been averred that reconciliation of account would be sufficient to establish that allegation of refund towards unadjusted advance of Rs.3,12,64,904/- is incorrect whereas, the B.G. amount is Rs.3,73,95,490/-. As such, without reconciliation of the bills of the Petitioner, the letter dated 25.03.2024 for encashment of B.G. is illegal and arbitrary.

A stand has also been taken in the Objection that the judgments cited by the Petitioner seeking for interim relief are applicable to the facts and circumstances of the present case and as per the letter dated 29.11.2023 submitted by the Petitioner, as at Annexure-9 of the Writ Petition, the payment due against the Opposite Parties is for an amount of Rs.514.01 lakhs. The Opposite Parties, without paying the same, arbitrarily issued letter dated 25.03.2024. After receiving the letter dated 25.03.2024, the Petitioner issued a letter dated 19.04.2024 under Annexure-11. Apart from that, the Petitioner has already invoked the arbitration clause and nominated Hon'ble Justice B.N. Rath (Former Judge of this Court) as its Arbitrator, but the Opposite Parties have not yet responded to the same.

It has also been stated in the Objection that there is no clear bar in the Arbitration Act as well as in Commercial Courts Act not to exercise the power under Article 227 of the Constitution of India. Rather, in exceptional circumstances, when the action of a party is completely perverse and acted in bad faith, the interference of the writ court is permissible. A stand has also been taken in the Objection that if the encashment of BG is not stayed, it will cause irretrievable injustice to the Petitioner as the letter dated 07.05.2024 to encash the B.G. was only issued after notice was issued to the Opposite Parties by the Commercial Court pursuant to the impugned order dated 30.04.2024. Thus, the action of the Opposite Parties is not fair and mala

fide. Accordingly, it has been stated that the prayer of the Opposite Parties to vacate the interim order passed by this Court is liable to be rejected.

7. To substantiate the stand taken in the Application for vacation of stay, Mr. Mukherjee, learned Senior Counsel for the Opposite Parties, relying on the judgment in **Perin Hoshang Davierwalla vs. Kobad Dorabji Davierwalla**, reported in 2014 SCC Online Bombay 534 and in **Deepak Mittal vs. Geeta Sharma**, reported in 2017 SCC OnLine Del 10365, submitted that an order making or rejecting an Application for ex parte ad-interim injunction is essentially an order under section 9 of the Act, 1996 only and not otherwise. Mr. Mukherjee further submitted that the scope and ambit of the Act, 1996 does not empower the Commercial Court to entertain any Application beyond the scope of the Act, 1996 be it an Application under Order 39 Rules-1 and 2 or 3, CPC. Even if such an application is filed, the same can only be considered to be an application under section 9 of the Act, 1996.

Mr. Mukherjee further submitted that in view of the specific provisions under section 37 (1)(b) of the Act, 1996, any order passed in a section 9 application, including interlocutory order, is an appealable order under the said provision. Hence, as there is a specific alternative remedy of Appeal against the interlocutory order passed in a section 9 proceeding, the Writ Petition is not maintainable. To substantiate such submission the following judgments were cited:-

Mr. Mukherjee, learned Senior Counsel, relying on the judgment of the apex Court in **Gujarat Maritime Board vs. L & T Infrastructure Development Projects Ltd. and others**, reported in (2016) 10 SCC 46, submitted that the scope of interference with regard to encashment of B.G. is very limited and the Court can only interfere with regard to encashment of B.G., where allowing encashment of an unconditional B.G. or a letter of credit would result in irretrievable harm or injustice to one of the parties concerned or in case of fraud of an egregious nature, which would vitiate the very foundation of such B.G. or letter of credit and the beneficiary seeks to take advantage of such situation.

Mr. Mukherjee, learned Senior Counsel further submitted that whether the cancellation of contract is legal and proper, and whether on such cancellation, the B.G. could have been invoked on the extreme situation of the party justifying its inability to perform its obligations under the contract, etc. are not within the purview of an inquiry under Article 227 of the Constitution of India. Between the Bank and the Opposite Parties, the moment there is a written demand for invoking the B.G., pursuant to breach of the covenants between the parties is satisfied, the Bank is bound to honour payment under the guarantee. It was also submitted by the learned Senior Counsel that the Writ Petition is not maintainable and the Court below was justified to reject the Petition to pass an ad interim ex parte injunction before hearing the Opposite Party and since the section 9 Application is pending before the Court below, at this juncture, the Writ Petition is not maintainable. To substantiate the said submission, the following judgments were cited:

i) **National Highway Authority of India Vs. Ganga Enterprises and others**, reported in (2003) 7 SCC 410.

ii) **Adani Agri Fresh Ltd. Vs. Mahaboob Sharif and others**, reported in (2016) 14 SCC 517.

iii) **Andhra Pradesh Pollution Control Board vs. CCL Products (India) Ltd.**, reported in (2019) 20 SCC 669.

iv) **Trafalgar House Construction (T) Satyam Shankaranarayana (JV) vs. State of Orissa and others**, reported in 2007 (Suppl. 2) OLR 822 : CLT (2007) Supp 394.

v) **Deep Industries Limited Vs. Oil and Natural Gas Corporation Limited and others**, (2020) 15 SCC 706.

vi) **Deepak Mittal & another Vs. Geeta Sharma & others**, 2017 SCC OnLine Del 10365.

8. In response to the submissions made by the learned Senior Counsel for the Opposite Parties, Mr. Mishra, learned Senior Counsel for the Petitioner submitted that even if it is accepted that against an interim order passed in a Section-9 proceeding alternative remedy is available under section 37 (1)(b) of the Act, 1996 to prefer an Appeal, the present Writ Petition under Article 227 of the Constitution of India is maintainable. Mr. Mishra, further submitted that the Petitioner preferred the Writ Petition in view of lack of clarity under Section 37(1)(b) of the Act, 1996 that even interlocutory orders passed by the Commercial Court in a Section-9 application are also appealable and under such bonafide impression that only final order granting or rejecting an application under Section-9 is appealable, being remediless, the Petitioner has preferred the present Writ Petition. To substantiate such submission Mr. Mishra cited the following judgments:-

i) **Santosh Kumar Acharya Vs. Ratnakar Swain**, reported in 2023 SCC OnLine Orissa 2301

ii) **Odisha State Road Transport Corporation, Bhubaneswar vs. ARSS Bus Terminal Pvt. Ltd., Bhubaneswar**, reported in 2023 (I) ILR-CUT-253

iii) **Bhaven Construction through authorized signatory Premjibhai K. Shah Vs. Executive Engineer, Sardar Sarovar Narmada Nigam Limited and another**, reported in (2022) 1 SCC 75.

iv) **Baburam Prakash Chandra Maheshwari vs. Antarim Zila Parishad Now Zila Parishad, Muzaffarnagar**, reported in AIR 1969 SC 556

Mr. Mishra, learned Senior Counsel for the Petitioner, relying on the judgment of the Supreme Court in **Arcelor Mittal Nippon Steel India Ltd. Vs. Essar Bulk Terminal Ltd.**, reported in (2022) 1 SCC 712, submitted that Applications for interim relief are inherent applications, which are required to be disposed of urgently. Interim relief is granted in aid of final relief. The object is to ensure protection of the property being the subject matter of arbitration and/or otherwise to ensure that the arbitration proceedings do not become infructuous and the arbitral award does not become an award on paper, of no real value.

Similarly, relying on the judgment of the Supreme Court in **Gangotri Enterprises Ltd. vs. Union of India and others**, reported in (2016) 11 SCC 720,

Mr. Mishra, learned Senior Counsel submitted that the Opposite Parties are now claiming alleged unadjusted amount given to the Petitioner as advance to carry out the contractual job so also penalty, which is yet to be adjudicated upon in an arbitral proceeding and the Petitioner's running bills and other demands are yet to be honoured by the Opposite Parties. Hence, the Petitioner has made out a prima facie case in its favour for grant of injunction against the Opposite Parties not to invoke the B.G.

Relying on the judgment of the Supreme Court in **Union of India and another vs. Millenium Delhi Broadcast LLP and others** reported in (2022) 7 SCC 67, Mr. Mishra, learned Senior Counsel submitted that the B.G. given by the Petitioner was executed as security against the advance given by the Opposite Party-Company and is not a performance B.G. Hence, the alleged unadjusted advance needs computation. Unless and until the claim made by the Petitioner is decided by the Arbitral Tribunal, the Opposite Parties will not be justified to encash the B.G.

Relying on the judgment of the Supreme Court in **Maria Margarida Sequeira Fernandes and others vs. Erasmo Jack De Sequeira (dead) through L.Rs.** reported in (2012) 5 SCC 370, Mr. Mishra, learned Senior Counsel further submitted that unless the Petitioner is protected, so far as invocation of B.G., it will cause irretrievable injustice to the Petitioner, as huge amount in crores are laying unpaid at the end of the Opposite Party Company despite repeated demands made by the Petitioner to make the payment. If the Opposite Parties are permitted to encash the B.G., which is valid till 05.09.2024, there will be a great set back to the Petitioner Company affecting its financial condition, which may lead to irretrievable harm and injustice to the Petitioner Company, as the conduct of the Opposite Parties have weakened the financial condition of his client. Mr. Mishra further submitted that the pleadings made in the present Writ Petition and the documents annexed hereto to substantiate the said stand are same as in ARBP No.14 of 2024.The Court below failed to take note of the pleadings and contents of the documents appended to the section 9 Application.

9. Upon hearing the learned Counsel for the parties and after going through the record so also case laws cited by the learned Senior Counsel for the parties, the following points emerge for consideration.

> ***(I)*** *Whether an interlocutory order passed by the Commercial Court in a section 9 application under the Arbitration & Conciliation Act, 1996, rejecting the prayer of the petitioner for exemption of notice to the opposite party and pass an ad interim ex parte injunction, is appealable under section 37(1) (b) of the said Act, 1996 so also Section 13 of the C.C. Act, 2015?*
>
> ***(II)*** *If not what is the remedy available to an aggrieved party to challenge the said interlocutory order?*
>
> ***(III)*** *Whether the Commercial Court was justified to reject the application filed under Order 39, Rule 3 of the Code of Civil Procedure in the section 9 application?*
>
> ***(IV)*** *Whether injunction against invocation of unconditional bank guarantee is permissible? If so, when and under what circumstances?*

10. So far as **Point Nos.i) & ii),** the same being interrelated, are dealt with and answered together.

Before dealing with the said points, it would be apt to extract below Sections 8 and 13 of the Commercial Courts Act, 2015, Order 43 Rule 1(r) of C.P.C and Sections 9 and 37 of the Act, 1996 for ready reference:

Commercial Courts Act, 2015

"Section-8. Bar against revision application or petition against an interlocutory order*.—Notwithstanding anything contained in any other law for the time being in force, no civil revision application or petition shall be entertained against any interlocutory order of a Commercial Court, including an order on the issue of jurisdiction, and any such challenge,* ***subject to the provisions of section 13****, shall be raised only in an appeal against the decree of the Commercial Court.*

Section-13. Appeals from decrees of Commercial Courts and Commercial Divisions*.— (1) 1[Any person aggrieved by the judgment or* ***order of a Commercial Court below the level of a District Judge may appeal to the Commercial Appellate Court*** *within a period of sixty days from the date of judgment or order.*

(1A) Any person aggrieved by the judgment or order of a Commercial Court at the level of District Judge exercising original civil jurisdiction or, as the case may be, Commercial Division of a High Court may appeal to the Commercial Appellate Division of that High Court within a period of sixty days from the date of the judgment or order:

Provided that an appeal shall lie from such orders *passed by a Commercial Division* ***or a Commercial Court that are specifically enumerated under Order XLIII of the Code of Civil Procedure, 1908 (5 of 1908) as amended by this Act and section 37 of the Arbitration and Conciliation Act, 1996 (26 of 1996).]***

(2) Notwithstanding anything contained in any other law for the time being in force or Letters Patent of a High Court, no appeal shall lie from any order or decree of a Commercial Division or Commercial Court otherwise than in accordance with the provisions of this Act." ***(Emphasis supplied)***

Order XLIII C.P.C.

"1. Appeals from orders*-An appeal shall lie from the following orders under the provisions of section104,namely:-*

(r) ***an order under rule 1, rule 2 [rule 2-A], rule 4 or rule 10 of Order XXXIX;****"*

(Emphasis supplied)

Arbitration and Conciliation Act,1996

*"****Section-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 subject-matter 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) ***interim 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[(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 sub-section (1), unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious.]

Section-37:-Appealable orders.- *(1) [Notwithstanding anything contained in any other law for the time being in force, an appeal] shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:-*

[(a) refusing to refer the parties to arbitration under section 8;

(b) ***granting or refusing to grant any measure under section 9;***

(c) setting aside or refusing to set aside an arbitral award under section 34.]

(2) Appeal shall also lie to a court from an order of the arbitral tribunal--

(a) accepting the plea referred to in sub-section (2) or sub-section (3) of section 16; or

(b) granting or refusing to grant an interim measure under section 17.

(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court." ***(Emphasis supplied)***

From the provisions under section 9 of the Act, 1996, it is amply clear that the party may, before or during arbitration proceedings or at any time after making of the arbitral award, but before it is enforced in accordance with section 36 of the Act, 1996, can apply to a Court for the purpose, as detailed under the said provision.

11. Though the High Court of Gouhati in **Sati Oil Udyog Ltd. Vs. Avanti Projectrs & infrastructure**, reported in 2010 1 GLT 141, High Court of Mumbai in **Perin Hoshang Davierwalla and ors. Vs. Kobad Dorabji Davierwalla and ors)** reported in 2014(3) BomCR 551: MANU/MH/0569/2014, High Court of Hydrabad in **ICICI Bank Limited V. IVRCL Ltd.**, reported in 2015 SCC OnLine Hyd 311: AIR 2015 Hyd 179, and High Court of Delhi in **Deepak Mittal V. Geeta Sharma,** reported in 2017 SCC OnLine Del 10365 took a view that interlocutory orders passed by the Commercial Court in a section 9 application, including the final order, are appealable under section 37(1) (b) of the Act, 1996, High Court of Karnataka in **Symphony Services Corporation (India) Private Limited, Bangalore V. Sudip Bhattacharjee**, reported in 2007 SCC OnLine Kar 368: (2008) 2 KLJ 24, Division

Bench of High Court of Mumbai in **Conros Steels Pvt. Ltd. Vs. Lu Quin (Hong Kong) Co. Ltd. and other**, reported in (2012) 6 BOMCR 149 , Division Bench of High Court of Meghalaya in **National Thermal Power Corporation Limited Vs. Meghalaya Power Distribution Corporation Ltd. and others**) reported in AIR 2021 Meghalaya 53 and High Court of Kerala in **Pranathmaka Ayurvedics Pvt. Ltd. Vs. Cocosath Health Products**, reported in 2020 SCC OnLine Ker 5476 have taken a contrary view as to maintainability of an Appeal under section 37(1) (b) of the Act, 1996 against an interlocutory order passed by the Commercial Court in a section 9 application, during pendency of the said application.

12. So far as judgment of this Court in **M/s. Sai Concrete Pavers Pvt. Ltd.(supra)** , cited by the learned Senior Counsel for the Opposite Parties, the issue before the coordinate Bench was as to whether separate applications under Order 39 Rule 1 & 2 so also Rule 3 of CPC are required to be filed in application moved under section 9 of the Act,1996 and if an application moved before the Court under Order 39 Rule 3 of CPC seeking for an ad interim ex parte injunction stands rejected, is the said order appealable under Order 43 Rule-1(r) C.P.C.? Paragraphs 5 to 8, 11 and 12 of the said judgment, being relevant, are extracted below:

> *"**5.** Mr. Rao, learned counsel for the appellant placing reliance upon paragraph-11 of the decision of the Hon'ble Supreme Court in the case of A. Venkatasubbiah Naidu v. S. Chellappan, reported in AIR 2000 SC 3032* ***contended that order passed either refusing or granting an application under Rule-3 of Order 39, CPC is appealable one. Mr. Rao further submits that there are two provisions under the Act, namely, Section-9 and Section 17 of the Act, which enable either the Court or the Arbitrator to pass interim orders or make an interim arrangement****. Section 9 of the Act empowers the Court to pass interim orders or make interim arrangement in contemplation of an arbitral proceeding. Though the provisions of Section 9 of the Act deals with entertaining an application for interim measure it does not make any provision as to how the interest of the aggrieved party is to be protected before the petition under Section 9 of the Act is taken up on merit.* ***Thus, the application filed for injunction can only be entertained under the provisions of Order 39 Rules 1 and 2, CPC and not otherwise. Thus, the appeal against the said order is maintainable before this Court.***
>
> ***6.*** *Right of appeal is not inherent one. It is a creature of the statute, and should be considered on interpretation of the relevant provision. Thus, it is to be examined as to whether the appellant has a statutory right to prefer an appeal against rejection of an application under Order 39 Rule-3, CPC.* ***On a plain reading of Section 104 as well as Order 43 Rule-1, CPC, which provides an appeal against order does not include an order of rejection of an application under Order 39 Rule-3, CPC.***
>
> ***7.*** *Law is no more res integra on this issue. This Court in a decision in the case of Sri. Rabindra Kumar Mohanty v. Smt. Sujata Mohapatra (FAO No. 86 of 2012 disposed of on 10.07.2015) relying upon A. Venkatasubbiah Naidu (supra) as well as decisions reported in 1989 (II) OLR 455 and AIR 1993 (Orissa) 78 held as under : -*
>
> *"6. In view of the discussion made above and the law laid down (supra), I have no hesitation to hold that* ***an appeal is maintainable as against an ex parte ad interim order of injunction as provided under Order XLIII Rule (1)(r) C.P.C., but not against the order refusing to exercise power under Order 39 Rule 3 C.P.C……"***

8. Thus, it can be unhesitatingly held that no appeal lies against an order rejecting an application under Order 39 Rule-3, CPC".

xxx ***xxx*** ***xxx***

11. *Section 9(1)(ii)(d) of the Act empowers the Court, namely, the District Judge to make any interim arrangement including that of injunction or appointment of receiver. The language employed in Section 9 of the Act, more particularly the words "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" makes it clear that the Court shall have the same power to make any order in any proceedings under Section 9 of the Act. Thus, an order making or rejecting an application for ad-interim injunction is essentially an order under Section 9 of the Act only and not otherwise.* ***Further, the scope and ambit of the Act does not empower the District Judge to entertain any application beyond the scope of this Act, be it an application under Order 39 Rules-1 and 2 or 3, CPC. Even if such an application is filed the same can only be considered to be an application under the provisions of Section 9 of the Act.***

12. *Learned counsel for the parties made arguments at length on merits of the case relying upon different case laws of the Hon'ble Supreme Court. This Court does not feel it prudent to delve into the merit of the case at this stage which can be effectively gone into at the time of hearing of the petition under Section 9 of the Act.* ***Thus, in view of the discussions made above, this Court holds that the appeal under Order 43 Rule-1(r), CPC is not maintainable and the same is accordingly dismissed."***

(Emphasis supplied)

13. From the discussions made above, legal provisions enshrined under the relevant Acts and C.P.C., as extracted above, so also judgments of various High Courts for and against the point regarding maintainability of an Appeal under Section 37 (1)(b) of the Act,1996, this Court is in respectful agreement with the views taken by various High Courts to the effect that interlocutory order passed by the Court, refusing to entertain an application under Order 39, Rule 3 of C.P.C. to pass an ad interim exparte injunction order in a section 9 application filed under the Act,1996 is not appealable. However, the reasons to agree with the said views are slightly different, as detailed below:

i) As per the settled position of law, it is to be presumed that while enacting the subsequent law i.e. C.C. Act, 2015, the legislature is conscious of the provisions of the Act, 1996 prior in time and therefore, the later Act shall prevail.

ii) As provided under section 21 of the C.C. Act, 2015, the said Act shall have overriding effect. It provides that, save as otherwise provided, the provisions of the said Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

iii) As held by the Supreme Court in **Kandala Export Corporation & Another Vs. M/s OCI Corporation & Another**, reported in (2018) 14 SCC 715, both the Act, 1996 and C.C. Act, 2015 call for a harmonious interpretation. If at all there is any conflict, as to the substantive provisions, the Act, 1996 prevails; but it has left the procedural niceties to the C.C. Act, 2015.

iv) Section 8 of the Commercial Courts Act, 2015 provides, notwithstanding anything contained in any other law for the time being in force, no civil revision application or petition shall be entertained against any interlocutory order of a Commercial Court,

including an order on the issue of jurisdiction, and any such challenge, "**subject to the provisions of section 13**", shall be raised only in an Appeal against the decree of the Commercial Court.

v) Proviso under section 13 of the C.C. Act, 2015 mandates that an Appeal shall lie from such orders passed by a Commercial Division or a Commercial Court, that are specifically enumerated under Order XLIII of C.P.C. and Section 37 of the Act, 1996.

vi) In view of the proviso under section 13 of the C.C. Act, 2015, read with Order 43 Rule 1(r) C.P.C., orders passed by the Court, exercising power under Order 39 Rules 1, 2, 4 & 10, are appealable. **(Emphasis supplied)**

vii) Order 39 Rule 3 of C.P.C. mandates, the Court shall in all cases, except where it appears that the object of granting the injunction would be defeated by the delay, before granting an injunction, direct notice of the application to the Opposite Party. However, if the Court grants injunction before noticing the Opposite Party, it shall record the reasons for ordering so. **(Emphasis supplied)**

viii) There is no such provision of appeal under Order 43 or Section 104 of C.P.C, if the Court declines to exercise its exceptional/special power under Order 39, Rule 3 C.P.C. (which would be subject to recording the reasons for ordering so) to exempt notice to the Opposite Party before passing an ad interim injunction under Order 39 Rules 1 & 2 of C.P.C.

ix) In view of the provisions under Order-43, Rule 1(r) of C.P.C., an order passed in a section 9 application filed under the Act, 1996, granting the injunction under Order 39 Rules 1 & 2 C.P.C. or refusing to vacate the order of injunction on filing application under Order 39 Rule 4 C.P.C. are appealable, but not an order declining to exempt notice to the Opposite Party before passing an ad interim injunction.

x) As held by the coordinate Bench in **M/s. Sai Concrete Pavers Pvt. Ltd.** (supra), even if separate applications are filed under Order 39 Rule 1 & 2 or Rule 3 C.P.C. in a section 9 proceeding, the same is to be considered as an application under Section 9 of the Act,1996. In addition to the said views of the coordinate Bench, this Court is of the view that such an interlocutory order of refusal to exempt notice to the Opposite Party before passing an ad interim injunction in a section 9 proceeding, being akin to rejection of prayer made in an application under Order 39 Rule 3 C.P.C., is not appealable, as held in the said case.

xi) In view of the above, this Court is of further view that interlocutory order passed in a section 9 application moved before the District Judge/ Commercial Court under the Act, 1996, rejecting the prayer of the Applicant to exempt notice to the Opposite Party and pass an ex parte ad interim injunction is not an appealable order and the party aggrieved has to approach the writ court under Article 227 of the Constitution of India.

Both the **Point Nos.i) & ii)** are answered accordingly.

14. **So far as Point Numbers iii) and iv),** regarding justification to reject the application for exemption of notice to the Opposite Parties and scope of judicial interference as to granting injunction against invocation of an unconditional Bank Guarantee, the said points are dealt with together for the sake of clarity and being interconnected.

15. A Bank Guarantee is an independent and distinct contract between the bank and the beneficiary and is not qualified by the terms of the underlying transaction, or the primary contract between the person at whose instance the bank guarantee is

given and the beneficiary. As held by the Supreme Court in **Hindustan Steel Works Construction Ltd. Vs. Tarapore & Co** reported in (1996) 5 SCC 34), the nature of obligation of the bank is absolute, and not dependent upon the inter se disputes or proceedings. The bank is liable to pay as soon as the demand is made by the creditor as held in **National Thermal Power Corpn. Ltd. Vs. Flowmore Pvt. Ltd**, reported in (1995) 4 SCC 515.

16. In **Himadri Chemicals Industries Ltd. Vs. Coal Tar Refining Co**, reported in (2007) 8 SCC 110, the Supreme Court has held that in the matter of invocation of a bank guarantee or of credit, a bank guarantee is an independent and a letter separate contract and is absolute in nature. The existence of disputes between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of a bank guarantee, or letter of credit. In the matter of invocation, it is not open to a bank to rely upon the terms of the underlying contract between the parties. The Supreme Court has enunciated the following principles in the matter of injunction for restraining encashment of a bank guarantee or a letter of credit:-

> *"(i) While dealing with an application for injunction in the course of commercial dealings, and when an unconditional bank guarantee or letter of credit is given or accepted, the beneficiary is entitled to realize such a bank guarantee or a letter of credit in terms thereof irrespective of any pending disputes relating to the terms of the contract.*
>
> *(ii) The bank giving such guarantee is bound to honour it as per its terms, irrespective of any dispute raised by its customer.*
>
> *(iii) The courts should be slow in granting an order of injunction to restrain the realization of a bank guarantee or a letter of credit.*
>
> *(iv) Since a bank guarantee or a letter of credit is an independent and a separate contract and is absolute in nature, the existence of any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of bank guarantee or letter of credit.*
>
> *(v) Injunction against encashment may be granted if there is fraud of an egregious nature which would vitiate the very foundation of such a bank guarantee or letter of credit, and the beneficiary seeks to take advantage of the situation.*
>
> *(vi) Allowing encashment of an unconditional bank guarantee or a letter of credit would result in irretrievable harm or injustice to one of the parties concerned."*

17. The principle laid down in Himadri Chemicals Industries Ltd. (supra) was followed by the Supreme Court in the matter of **Vinitec Electronics Pvt. Ltd. v. HCL Info Systems Ltd**, reported in (2008) 1 SCC 544 , wherein it was held that in the case of an unconditional bank guarantee, the same are payable by the guarantor on demand. When in the course of commercial dealings, unconditional guarantees have been given or accepted, the beneficiary is entitled to realise such a bank guarantee in terms thereof, irrespective of any pending disputes. The bank guarantee is an independent contract between the bank and the beneficiary thereof. For a party to claim that the case falls under the exception of fraud or special equities, proper

pleadings must be made out which lay down the factual foundation of the allegation of fraud or special equities.

18. However, in **NHAI v. Ganga Enterprise**, reported in AIR 2003 SC 3823 : (2003) 7 SCC 410, the Supreme Court has held that a bank guarantee has to be strictly construed as per the terms of the guarantee. The invocation must be in accordance with the terms of the bank guarantee, and any deviation therefrom, would render the invocation bad in law. If the enforcement is in terms of the guarantee, the courts would normally refrain from interfering with the enforcement of the bank guarantee. Interference would be justified if the invocation is contrary to the terms of the guarantee, or in the case of fraud.

19. A bank guarantee must be honoured strictly in accordance with the terms of the guarantee, subject to two exceptions. The first is in a clear case of fraud, which the bank has notice of, and the beneficiary seeks to take advantage of.

20. The Supreme Court in **General Electric Technical Jasp Services Company Inc. v. M/s. Punj Sons (P) Ltd. and another**, reported in AIR 1991 SC 1994, held that by interim injunction under Order 39 Rule 1 of the CPC, bank guarantee cannot be interdicted by Court in the absence of fraud or special equities in the form of preventing irretrievable injustice between the parties. It was further held that it is the fraud of beneficiary, not the fraud of somebody else.

21. In **Svenska Handelsnbanken v. Indian Charge Chrome**, reported in (1994) 1 SCC 502, the Supreme Court has held that fraud in connection with the bank guarantee would vitiate the very foundation of the bank guarantee. The fraud must be of an egregious nature such as to vitiate the entire underlying transaction.

22. As held by the Supreme Court in **B.S.E.S. Ltd. (Now Reliance Energy Ltd.) v. Fenner India Ltd.**, reported in (2006) 2 SCC 728,the second exception to the general rule of non-intervention is if there are 'special equities' in favour of injunction, such as when 'irretrievable injury or 'irretrievable injustice' would occur if such an injunction was not granted.

23. The Supreme Court in **Andhra Pradesh Pollution Control Board** , reported in (2019) 20 SCC 669, while taking note of its earlier decisions in the matters of **Ansal Engg. Projects Ltd. v. Tehri Hydro Development Corpn. Ltd.**, reported in (1996) 5 SCC 450, **SBI v. Mula Sahakari Sakhar Karkhana Ltd.**, reported in (2006) 6 SCC 293, and **Hindustan Construction Co. Ltd. v. State of Bihar**, reported in (1999) 8 SCC 436, held that in absence of a case of fraud, irretrievable injustice and special equities, the Court should not interfere with the invocation or encashment of a bank guarantee so long as the invocation was in terms of the bank guarantee.

24. Thereafter, in **Standard Chartered Bank** , reported in (2020) 13 SCC 574 the Supreme Court again noticed its earlier decision in **Himadri Chemicals Industries Ltd.** (supra) and held that bank guarantee is an independent contract

between bank and the beneficiary and the bank is always obliged to honour its guarantee as long as it is unconditional and irrevocable one. It has been further held that the dispute between the beneficiary and the party at whose instance the bank has given the guarantee is immaterial and is of no consequence, however, exceptions to this rule are when there is a clear case of fraud, irretrievable injustice or special equities. It was also held that the Court ordinarily should not interfere with the invocation or encashment of the bank guarantee so long as the invocation is in terms of the bank guarantee. It was held that once the demand was made in due compliance with bank guarantees, it was not open for the bank to determine as to whether the invocation of the bank guarantee was justified so long as the invocation was in terms of the bank guarantee. Relevant paragraphs of the said judgment are reproduced below:

> *"**19**. The law relating to invocation of bank guarantees with the consistent line of precedents of this Court is well settled and a three-Judge Bench of this Court in Ansal Engg. Projects Ltd. v. Tehri Hydro Development Corpn. Ltd. [Ansal Engg. Projects Ltd. v. Tehri Hydro Development Corpn. Ltd., (1996) 5 SCC 450] held thus: (SCC p. 454, paras 4-5)*
>
> *"4. It is settled law that bank guarantee is an independent and distinct contract between the bank and the beneficiary and is not qualified by the underlying transaction and the validity of the primary contract between the person at whose instance the bank guarantee was given and the beneficiary. Unless fraud or special equity exists, is pleaded and prima facie established by strong evidence as a triable issue, the beneficiary cannot be restrained from encashing the bank guarantee even if dispute between the beneficiary and the person at whose instance the bank guarantee was given by the bank, had arisen in performance of the contract or execution of the works undertaken in furtherance thereof. The bank unconditionally and irrevocably promised to pay, on demand, the amount of liability undertaken in the guarantee without any demur or dispute in terms of the bank guarantee. The object behind is to inculcate respect for free flow of commerce and trade and faith in the commercial banking transactions unhedged by pending disputes between the beneficiary and the contractor.*
> *5. ... The court exercising its power cannot interfere with enforcement of bank guarantee/letters of credit except only in cases where fraud or special equity is prima facie made out in the case as triable issue by strong evidence so as to prevent irretrievable injustice to the parties." (emphasis supplied)*
>
> ***20**. A bank guarantee constitutes an independent contract. In Hindustan Construction Co. Ltd. v. State of Bihar [Hindustan Construction Co. Ltd. v. State of Bihar, (1999) 8 SCC 436] , a two-Judge Bench of this Court formulated the condition upon which the invocation of the bank guarantee depends in the following terms: (SCC p. 442, para 9)*
>
> *"9. What is important, therefore, is that the bank guarantee should be in unequivocal terms, unconditional and recite that the amount would be paid without demur or objection and irrespective of any dispute that might have cropped up or might have been pending between the beneficiary under the bank guarantee or the person on whose behalf the guarantee was furnished. The terms of the bank guarantee are, therefore, extremely material. Since the bank guarantee represents an independent contract between the bank and the beneficiary, both the parties would be bound by the terms thereof. The invocation, therefore, will have to be in accordance with the terms of the bank guarantee, or else, the invocation itself would be bad."*

22. *Taking note of the exposition of law on the subject in Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co. [Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co., (2007) 8 SCC 110] , a two-Judge Bench of this Court in Gujarat Maritime Board v. Larsen & Toubro Infrastructure Development Projects Ltd. [Gujarat Maritime Board v. Larsen & Toubro Infrastructure Development Projects Ltd., (2016) 10 SCC 46 : (2017) 1 SCC (Civ) 458] has laid down the principles for grant or refusal for invocation of bank guarantee or a letter of credit. The relevant paragraph is as under: (Himadri Chemicals Industries Ltd. case [Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co., (2007) 8 SCC 110] , SCC pp. 117-18, para 14)*

"14. From the discussions made hereinabove relating to the principles for grant or refusal to grant of injunction to restrain enforcement of a bank guarantee or a letter of credit, we find that the following principles should be noted in the matter of injunction to restrain the encashment of a bank guarantee or a letter of credit:

(i) While dealing with an application for injunction in the course of commercial dealings, and when an unconditional bank guarantee or letter of credit is given or accepted, the beneficiary is entitled to realise such a bank guarantee or a letter of credit in terms thereof irrespective of any pending disputes relating to the terms of the contract.

(ii) The bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer.

(iii) The courts should be slow in granting an order of injunction to restrain the realisation of a bank guarantee or a letter of credit.

(iv) Since a bank guarantee or a letter of credit is an independent and a separate contract and is absolute in nature, the existence of any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of bank guarantees or letters of credit.

(v) Fraud of an egregious nature which would vitiate the very foundation of such a bank guarantee or letter of credit and the beneficiary seeks to take advantage of the situation.

(vi) Allowing encashment of an unconditional bank guarantee or a letter of credit would result in irretrievable harm or injustice to one of the parties concerned."

23. *The settled position in law that emerges from the precedents of this Court is that the bank guarantee is an independent contract between bank and the beneficiary and the bank is always obliged to honour its guarantee as long as it is an unconditional and irrevocable one. The dispute between the beneficiary and the party at whose instance the bank has given the guarantee is immaterial and is of no consequence.* ***There are, however, exceptions to this rule when there is a clear case of fraud, irretrievable injustice or special equities. The Court ordinarily should not interfere with the invocation or encashment of the bank guarantee so long as the invocation is in terms of the bank guarantee.***

26. *In our considered view, once the demand was made in due compliance with bank guarantees, it was not open for the appellant Bank to determine as to whether the invocation of the bank guarantee was justified* ***so long as the invocation was in terms of the bank guarantee****. The demand once made would oblige the bank to pay under the terms of the bank guarantee and it is not the case of the appellant Bank that its defence falls in any of the exception to the rule of case of fraud, irretrievable injustice and special equities.* ***In absence thereof, it is not even open for the Court to interfere with the invocation and encashment of the bank guarantee so long as the invocation was in terms of the bank guarantee*** *and this is what has been observed by the Division Bench*

of the High Court in the impugned judgment [Heavy Engg. Corpn. Ltd. v. Standard Chartered Bank, 2019 SCC OnLine Cal 617 : (2019) 3 Cal LT 133] and that reflected the correct legal position." ***(Emphasis supplied)***

25. So far as the judgment cited by the Petitioner, in Arcelormittal Nippon Steel (India) Ltd. (supra), the Supreme Court has held as follows:-

*"**88**. Applications for interim relief are inherently applications which are required to be disposed of urgently.* ***Interim relief is granted in aid of final relief. The object is to ensure protection of the property being the subject-matter of arbitration and/or otherwise ensure that the arbitration proceedings do not become infructuous and the arbitral award does not become an award on paper, of no real value."***

(Emphasis supplied)

In **Gangotri Enterprises Ltd.** (supra), the Supreme Court, vide Paragraph Nos.39, 40 & 43, held/observed as follows:-

*"**39**. Coming now to the facts of the case at hand, we find that wordings of Clause 62 of the contract in question with which we are concerned is identical to that of Clause 18 of Raman Iron Foundry case [Union of India v. Raman Iron Foundry, (1974) 2 SCC 231] . Clause 62 of GCC provides for determination of contract owing to default of contractor. The relevant portion of Clause 62 reads as under:*

"The amounts thus to be forfeited or recovered may be deducted from any monies then due or which at any time thereafter may become due to the contractor by the Railways under this or any other contract or otherwise."

40.** On perusal of the record of the case, we find that firstly, arbitration proceedings in relation to the contract dated 22-8-2005 are still pending. Secondly, the sum claimed by the respondents from the appellant does not relate to the contract for which the bank guarantee had been furnished but it relates to another contract dated 22-8-2005 for which no bank guarantee had been furnished. Thirdly, the sum claimed by the respondents from the appellant is in the nature of damages, which is not yet adjudicated upon in arbitration proceedings. Fourthly, the sum claimed is neither a sum due in praesenti nor a sum payable.* ***In other words, the sum claimed by the respondents is neither an admitted sum and nor a sum which stood adjudicated by any court of law in any judicial proceedings but it is a disputed sum, and lastly, the bank guarantee in question being in the nature of a performance guarantee furnished for execution work of contract dated 14-7-2006 (AnandVihar works) and the work having been completed to the satisfaction of the respondents, they had no right to encash the bank guarantee.

43. In the light of foregoing discussion, we hold that the appellants have made out a prima facie case in their favour for grant of injunction against the respondents so also they have made out a case of balance of convenience and irreparable loss in their favour as was held by this Court in Raman Iron Foundry case [Union of India v. Raman Iron Foundry, (1974) 2 SCC 231] . They are, therefore, entitled to claim injunction against the respondent in relation to encashment of Bank Guarantee No. 12/2006 dated 4-8-2006." ***(Emphasis Supplied)***

In **Union of India (supra)**, the Supreme Court, vide Paragraph Nos.14 and 15, held/observed as follows:-

*"**14.** Clause 9 of the tender document enables the appellant to encash the bank guarantee, in case of failure on the part of the licensee either to deposit licence fee within 7 days of the beginning of each year or if the licensee stops the service without giving one year's notice. The bank guarantee can also be invoked if the licensee is declared or applies for being declared insolvent or bankrupt. There is no dispute that the licensee did not commence its operations and therefore the second condition does not apply. Admittedly, the third condition is not applicable to the facts of the case. According to the appellant, bank guarantee was invoked due to failure on the part of the licensee to deposit the licence fee within 7 days of beginning of the year. Essentially, the bank guarantee given by the respondent is a performance bank guarantee and was intended to ensure the due performance of the licence agreement. A perusal of the conditions of the relevant clauses of the agreement clearly shows that according to Article 1.1 of Schedule 'C' to the agreement, the licence was granted for period of 10 years which has to be reckoned from the date of issuance of WOL by the WPC. Admittedly, WOL was never issued by WPC. A Deemed Operational Licence, which was to be issued by the appellant, was not contemplated in the agreement.*

15. We are of the opinion that the Tribunal did not commit any error in its interpretation of the clause pertaining to bank guarantee by holding that the conditions provided therein have not been satisfied for the invocation of the bank guarantee." ***(Emphasis Supplied)***

In **Maria Margarida Sequeira Fernandes(supra)** the Supreme Court ,vide Paragraph No.84, held/observed as follows:-

*"**84.** In order to grant or refuse injunction, **the judicial officer or the Judge must carefully examine the entire pleadings and documents with utmost care and seriousness.** The safe and better course is to give a short notice on the injunction application and pass an appropriate order after hearing both the sides. **In case of grave urgency, if it becomes imperative to grant an ex parte ad interim injunction, it should be granted for a specified period, such as, for two weeks. In those cases, the plaintiff will have no inherent interest in delaying disposal of injunction application after obtaining an ex parte ad interim injunction."*** ***(Emphasis Supplied)***

26. After analysing the judgments of the Supreme Court on the point, as detailed above, and summarizing the principles decided there in as to the scope of interference/injunction against invocation of BG, this Court is of the following views:-

i) The Courts should be slow in granting the injunction to restraint the realization of a bank guarantee

ii) However, there are two well recognized exceptions to this rule which are:

(a) A fraud of egregious nature.

(b) The invocation/encashment of bank guarantee would result in irretrievable harm or injustice to one of the parties.

iii) In some cases third exception is also carved out viz. when there are special equities in favour of the person seeking injunction.

iv) In case the bank guarantee is not invoked in terms thereof, the bank can refuse to honour the bank guarantee, as in that case it would not be in accordance with the agreed stipulation and invocation would be improper. This can be treated as the fourth exception, as in such a case injunction can be granted.

Point No.iv) is answered accordingly.

27. Now the question is, whether any of the above established grounds for injunction against invocation of BG, has been made out by the Petitioner.

To determine Point Nos. iii) and iv), it would be appropriate to examine the averments made in the section 9 application so also the documents appended there to in support of such averments, which are in ditto , as made in the writ petition , so also averments made in the I.A. for vacation of stay and Objection filed by the Petitioner in response to the said I.A.

28. Paragraph Nos.18, 19, 31 to 33 of the application under section 9 of the Act, 1996, where in the Petitioner has allegedly pleaded the grounds for interference regarding invocation of BG on the ground of special equities, so also contents of some of the documents appended to such application as Annexures 1 to 13 , which were filed by both the parties during rehearing of the matter on 19.07.2024, being so directed by this Court, are extracted below:-

> *"**18**. That in violation of terms of the contract from the side of the employer, vide letter dated 25.03.2024 the authorized signatory of the employer stated that as per books there is a debit balance of Rs.4,12,54,904.00 towards unadjusted advance **and other deductions** and it has been observed that you are not responding to our civil department direction and it is impacting out site progress and it is totally against our contract vide work order dated 24.01.2022 and advance is pending since 18.09.2023 and if the payment is not received on our before 30.04.2024, we will go for encashment of the BG of Rs.3,73,95,490.00 vide BG No.327001GL00001122 dated 8.3.2022. Copy of letter dated 25.03.2024 is filed herewith as Annexure-10.*
>
> ***19.** That in reply to letter dated 25.3.2024 the petitioner on 19.04.2024 **reiterated its reminder letter from 22.08.2022 till such letter and stated that the letter dated 25.03.2024 is illegal because, the petitioner has not violated terms of contract. Rather bill of the petitioner is not released timely and not reconciled and no deduction is provided**. Further suo moto work is reduced without any intimation. Since March 2023, stopping the contractor from taking out its materials and machinery. Petitioner requested to intervention to review our bills, approve necessary deviation and promptly settle out outstanding payment. Copy of letter dated 19.04.24 is filed herewith as Annexure-11.*
>
> ***31.** That it is submitted that the petitioner has huge outstanding against the op.party and submitted the R/A bills which list is filed herewith as Annexure- 13**. If the op.parties is directed to reconcile the account then it will be sufficient towards allegation of refund towards unadjusted advance of Rs.3,12,64,904.00 whereas, the B.G. amount is Rs.3,73,95,490.00. As such without reconciliation of the petitioner bill the letter dated 25.3.2024 for encashment of bank guarantee is illegal and arbitrary.***
>
> ***32.** That it is submitted that the dispute to the contract to be settled by Arbitration. **But before commencement of Arbitration Proceeding, if the owner/op.party encashed the Bank guarantee, the bank shall debit the BG amount from the account of the petitioner and will proceed recovery proceeding and will not wait till the result of the arbitration proceeding.** Further if the Bank Guarantee is stayed, the op.party shall not suffer any loss because the petitioner has to get huge outstanding dues from the op.parties. Further huge material, machineries and equipments are in the custody of the op.party/owner.*

33. That the petitioner has a prima facie case in his favour and balance of conveniences lies in favour of the petitioner and if interim order staying the encashment of bank guarantee vide letter dated 25.03.2024 is not passed the petitioner shall suffer irreparable loss and injury. *It is submitted that dispute will be decided by the Arbitral Tribunal which has not yet constituted. As such, Section-9 petition is filed for an interim measure of protection and such power is vested with your Honour restraining the Opp.paties not to proceed further in respect of termination notice dated 07.07.2023 and letter dated 25.3.2024 for encashment of Bank Guarantee."*

(Emphasis supplied)

Clauses-37.1, 41.0 and 66 of the Work Order dated 24.01.2022, being relevant, are extracted below:-

"37.1 ***Payment of all works done by the Contractor shall be made on the basic of the measurement recorded on the measurement sheets in pro-forma prescribed by the Owner/Engineer/consultants. The Contractor shall submit along with each bill the following documents:***

A) Certificate complying statutory obligation of labour.

B) Copies of the labour license and insurance policies.

C) Copies of the proof of the payment of provident fund certified monthly wage sheets.

D) Detailed measurement sheets/books and bill forms.

E) Unstamped acknowledgements for the material received from employer.

F) Material issue statements along with copies of the store issue notes and safe custody certificate indicating that the materials are in good condition, material consumption statements and material reconciliation statement based on working drawings.

G) Royalty/seigniorage statements along with proof payment of the royalty /seigniorage to mines department for the minor minerals consumed in the works.

The Contractor shall submit the bill to Owner/Engineer once in a month for the work done, unit wise in the prescribed pro forma as given in Annexure-VIII in six(6) copies with the above documents based on measurements as accepted by the Owner or his authorized representative/Engineer*. If the Contractor fails to submit any of the documents mentioned above along with the bill, then the Owner/ # consultant will return the bill. Owner will not be liable to pay any amount under said bill and the Contractor shall re-submit the same along with all the documents mentioned above for payment."*

"41.0 PAYMENT TERMS: ***(Refer Clause No-66 of SCC)"***

"66. ***PAYMENTS*** *(to be read in conjunction with Clause-37)*

The payments shall be released only on submission of invoices/bills complete in all respects by Contractor, along with all requisite commercial documents.

a) ***Ten percent (10%) of total Contract Value shall be payable on issuing W.O. against submission of Advance Bank Guarantee of equivalent amount & submission of invoice.***

b) Running Payment: ***Hundred(100%) of the Contract Value shall be paid on Running bills for Works performed for, correct & complete in all respects, to be raised by Contractor on monthly basis*** *based on joint measurement, material reconciliation statement by Contractor and Owners appointed agency. The bills of Contractor shall be certified by Owner within 30(Thirty) days of submission of bill, only if bills are correct & complete in all respects.* ***The Payment shall be released after deduction of 5 percent***

> ***(5%) as retention amount, recover of the advance amount on pro rata basis****, and any other recoveries are due. The bills shall be submitted in triplicate. If bills are found to be incorrect & incomplete, the same shall be intimated by Owner to Contractor for correction. The breakup of details of payment under this clause is as given below:*
>
> *c)* ***Retention Amount of Five (5) percent shall be deducted from on account bills, shall be paid by Owner to Contractor against submission of PBG of equivalent amount.***
> ***OR***
> ***After 01 year from the date completion of issuance of "Completion Certificate and after fulfillment of the following conditions:***
>
> *1) Submission of Final Bill.*
>
> *2) Finishing, cleaning, housekeeping etc. of the fabrication yard & erection site.*
>
> *3) Receipt of as-built drawings (hard & soft copy is reproducible Auto Cad format) as certified by Owner.*
>
> *4) Final reconciliation statement for free issue materials duly accepted by Owner.*
>
> *5) Return of balance material including scrap to Owner at any location within plant site.*
>
> *6) Return of any material taken from Owner on returnable basis.*
>
> *7) Proof of final settlement of labour dues engaged at site by Contractor.*
>
> *8) Proof of compliance with statutory requirements like payment of PF.*
>
> *9) Return of all gate passes issued to the workmen engaged by the Contractor during the execution of work.*
>
> *10) Submission of No Claim / No Demand Certificate by the Contractor."*
>
> ***(Emphasis supplied)***

Clause-66(a) of the Work Order dated 24.01.2022 mandates to pay 10% advance against advance submission of BG. The Opposite Party Management was to deduct 5% as retention amount from each bill submitted by the Petitioner, apart from recovering the advance amount on pro rata basis from the running bills submitted by the Petitioner from time to time in terms of Clause 66(b) of the Work Order. As prescribed under Clause 66(c) of the Work Order, retention amount of five (5) percent deducted from on account bills, is to be paid by Owner to the Contractor against submission of PBG of equivalent amount or after 01 year from the date issuance of Completion Certificate and after fulfillment of conditions detailed under the said clause.

Apart from the same, it would be apt to extract below the contents of letters dated 29.11.2023, as at Annexure-9, and dated 19.04.2024, as at Annexure-11, which were given to the Chairman and the Project Incharge, JSPL respectively, referring to fifty (50) previous correspondences made by the Petitioner Company in the said regard:-

> ***<u>Letter Dated 29.11.2023:</u>***
>
> *"To,*
>
> *Mr. Naveen Jindal*
> *Chairman*
> *Jindal Steel & Power Ltd.*
> *Angul*
> *Odisha*

Sub :Concerns regarding Housing Construction of site of 400 Flats of Jindal Nagar South Block (ShramikVihar) at JSPL vide our WO No. 4563501345, Dated: 25.02.2022

Sir,

In reference to the subject cited above, we would like to bring to your kind attention that we have been awarded the subject work vide WO No. 4563501345, Dated: 25.02.2022. ***Since the beginning of the work, there were multiple hindrances such as non-timely supply of materials and shortages of materials, Pending COS of many lines of items, etc. This has been repeatedly reported to the concerned officials but there was never any concrete step taken by them for resolution of the hindrances. Due to the same the work progress was hampered badly and it could not be completed as per the targeted timelines which was categorically explained in our different letters & intimated to the concerned authorities in personal meeting time to time but unfortunately nobody is taking any pain even to properly reply via letter. However always verbal assurance has been given that the issues will be resolved.***

After a lot of persuasions and intervention of the head office of JSPL represented by Mr. Ashok Mahunta (Chairman Commercial), finally on 18th October 2023, a Video Meet was organized and it was decided that the contract would be short closed and a physical meeting will be organized to decide a way forward. However, till date even after our repeated persuasion, multiple letters and requests, there has been no response from any officials.

Further we have invested a huge amount of funds for execution of the project which is now completely stuck due to negligence and unpreparedness of the JSPL field officers. Details of our pending payments with your company are tabulated below:

Sl.No.	*PARTICULARS*	*AMOUNT*
1	*Against RA 1 to 14*	*Rs. 38.14 Lakhs*
2	*Against RA 15*	*Rs. 278.99 Lakhs*
3	*GST Withheld against RA 11 & 12*	*Rs.31.71 Lakhs*
4	*Against Security Deposit*	*Rs.15.17 Lakhs*
5	*Against COS (Deviation of Item & Quantity) (approx)*	*Rs.150.00 Lakhs*
	Total	***Rs.514.01 Lakhs***

Apart from the above, our work worth approximately Rs. 2 Cr is executed but is not measured and considered yet. Also, about 1 Cr of materials is in stock.

Further we also express our concern for security of our machinery, equipment and material, left on site without proper measures in place. Currently no gate pass has been issued since first week of October and our workers are unable to access the premises. The absence of adequate security measures poses a risk of loss or theft. Also idling of manpower and machinery is resulting huge financial losses for us.

Hence, in light of the above submission, we request your urgent intervention for resolution of the same and an amicable settlement.

Thanking You

Yours Sincerely
For, Bansal Infraprojects Pvt. Ltd.
Sd/-
(Authorised Signatory)" ***(Emphasis Supplied)***

Letter Dated: 19.04.2024

"To,

Project Incharge
Jindal Steel and Power Limited
CCD Office, Angul Plant
Angul, Odissa.

Ref: 1 Construction of 400 flats of Jindal Nagar South Block (ShramikVihar at JSPL, Angul, Odisha)
2 Our letter dated: 22.08.2022
3 Our letter dated: 09.09.2022
4 Our letter dated: 12.09.2022
5 Our letter dated: 19.09.2022
6 Our letter dated: 22.09.2022
7 Our letter dated: 01.10.2022
8 Our letter dated: 06.10.2022
9 Our letter dated: 07.10.2022
10 Our letter dated: 15.10.2022
11 Our letter dated: 19.10.2022
12 Our letter dated: 31.10.2022
13 Our letter dated: 27.10.2022
14 Our letter dated: 18.11.2022
15 Our letter dated: 02.12.2022
16 Our letter dated: 07.01.2023
17 Our letter dated: 13.01.2023
18 Our letter dated: 19.01.2023
19 Our letter dated: 23.01.2023
20 Our letter dated: 31.01.2023
21 Our letter dated: 07.02.2023
22 Our letter dated: 08.02.2023
23 Our letter dated: 23.02.2023
24 Our letter dated: 28.02.2023
25 Our letter dated: 03.03.2023
26 Our letter dated: 15.03.2023
27 Our letter dated: 16.03.2023
28 Our letter dated: 18.03.2023
29 Our letter dated: 21.03.2023
30 Our letter dated: 28.03.2023
31 Our letter dated: 29.03.2023
32 Our letter dated: 06.04.2023
33 Our letter dated: 14.04.2023
34 Our letter dated: 26.04.2023
35 Our letter dated: 29.04.2023
36 Our letter dated: 06.05.2023
37 Our letter dated: 11.05.2023
38 Our letter dated: 15.05.2023
39 Our letter dated: 22.05.2023
40 Our letter dated: 29.05.2023
42 Our letter dated: 16.10.2023
43 Our letter dated: 27.10.2023
41 Our letter dated: 14.08.2023

44 Our letter dated: 07.11.2023
45 Our letter dated: 16.11.2023
46 Our letter dated: 22.11.2023
47 Our letter dated: 29.11.2023
48 Our letter dated: 15.01.2024
49 Our letter dated: 23.01.2024
50 Our letter dated: 29.02.2024

Sub: Concerns and Challenges Regarding Contractual Obligations

Dear Sir,

With reference to the subject cited above, ***we would like to inform you that from the first day, this contract has been delayed from the employer side****. This includes not handing over a hindrance-free site for excavation, non-payment of the deviation quantity of excavation, rock strata found during excavation (which was not estimated at the time of contract allocation by JSPL), leading to increased cost and time that has not yet been paid or accounted for. There were continued delays in the provision of free-issue material to be provided by JSPL as per contract, which includes, but is not limited to, backfill material, TMT bars, concrete, structural material, PS panel, L-mesh, U-mesh, sand, cement, paint, etc.*

Furthermore, as per the provisions of the contract, JSPL was supposed to provide labour hutment, free electricity, and water, which was not provided. Even after repeated requests, the same was not provided as per our requirement, which we have pointed out via many letters and presentations.

Moreover, there were various revisions and rectifications of drawings done by JSPL, due to which a lot of work was delayed. Furthermore, as per the condition of the contract, payment must be made by JSPL within 1 month of the submission of the bill, but it was made within an average of 3 months that too partially. During this time, we received partial payment, and even after repeated requests to provide reconciliation of accounts and detailed deduction sheets, the same has not been done till date.

Additionally, many GST payment of our invoice by JSPL. have not been made, which is a criminal offense. Also, suo-moto our scope of work was reduced by JSPL without any intimation or discussion, whereas we had deployed machinery, equipment, material, and manpower for the complete project and not the reduced scope, which leads to much higher costs than ascertained before the time of bidding.

Till date, the entire deviation quantity from the original scope has been submitted to JSPL multiple times, but no payment has been made regarding the same.

Despite all these issues, the contractor had been working, but since March 2023, JSPL has been making arbitrary decisions without proper consultation and representation of the contractor, keeping the contractor at their mercy, illegally stopping the contractor from taking out its material and machinery. This is a criminal conspiracy to steal or misuse the contractor's material by not providing the contractor and their people access to the site, and subsequently not providing the labour hutment, and blaming the contractor för slow-progress of work and not releasing payments.

Again, the company has also denied meeting the contractor's high-level management multiple times and seized all forms of communication by not responding to the contractor's mails, letters, etc., and only raising their issues without responding to the contractor's issues to handicap the contractor from executing its obligations.

Furthermore, the civil department has arbitrarily refused to review the contractor's bill, citing vague reasons*. It is evident that JSPL is engaging in a criminal conspiracy to*

avoid paying the contractor and impede their work by withholding essential resources such as drawings, electricity, water, site access, and accommodation. Additionally, they are blackmailing the contractor ***by neglecting to verify the bill and threatening to invoke the bank guarantee, all while neglecting their contractual obligations as the project owner/employer.***

Therefore, we urgently request your intervention to review our bills, approve necessary deviations, and promptly settle our outstanding payments. Failure to comply will leave us with no choice but to take the shelter of court.

Thank you,

Yours faithfully,
For, BANSAL INFRAPROJECTS PVT LTD
Sd/-
(Authorised Signatory)" ***(Emphasis Supplied)***

29. Since one of the issues involved in the present lis is regarding right of the Petitioner seeking for injunction not to invoke the Bank Guarantee, it would be relevant to extract below Clause-2, 3, 7 and special clauses prescribed in the BG under the heading "Notwithstanding anything contained herein" for ready reference:-

"2) At the request of Applicant and in consideration of your making an advance payment of Rs.3,73,95,490 (Rupees Three Crores Seventy Three Lakhs Ninety Five Thousand Four Hundred Ninety Only) (Amount in words) subject to deduction of tax at source (TDS), if applicable as per the prevailing rules against Invoice No.BIPL/OD/148, Dated 07/03/2022 to Applicant. We the Union Bank of India, having our registered office at Nariman point Mumbai and a branch at Ajit Tower near Sindhi School, Main Branch, Ramsagar Para, Raipur (C.G.) (Name and complete address of the Applicant's Bank) hereby irrevocably and unconditionally guarantee as Principal obligator to pay to you on your first demand, irrespective of the validity of the Agreement and waiving all rights of objection and defence arising out of and/or from the Agreement or otherwise whatsoever, payments not exceeding a maximum aggregate amount of Rs.3,73,95,490 (Rupees Three Crores Seventy Three Lakhs Ninety Five Thousand Four Hundred Ninety Only) within two (2) days from the date of receipt of your demand in writing, stating that Applicant has failed to perform its obligations under the AGREEMENT without demur or without reference to the Applicant.

3) This Guarantee shall automatically become effective from the date of issue of the Guarantee the date of receipt of the advance payment by the Applicant in its account with us and shall remain valid until close of banking hours at this office on date 07.12.2022 and ***shall be automatically reduced by 10% of the 100% invoice value of each shipment against presenting of copies of invoices and copies of corresponding LR details, the receipt of which is duly acknowledged by your authorized representative and submitted to us by Applicant, which we will be entitled to accept as conclusive evidence of such reduction. This Guarantee can be invoked in one or more tranches and you will not be required to submit the original Guarantee along with submission of claim.***

7) We further undertake to pay you the amount demanded by you notwithstanding any dispute raised by Applicant in any suit or proceeding pending before any arbitrator or courts. This Guarantee will not be affected, altered or reduced ***(except as per the provisions of Clause-3 above)*** *by any amendment to the AGREEMENT without your prior written agreement.*

Notwithstanding anything contained herein,

1. Our liability under this Bank Guarantee shall not exceed INR 3,73,95,490 (Rupees Three Crores Seventy Three Lakhs Ninety Five Thousand Four Hundred Ninety Only).

2. This Bank Guarantee shall be valid up to 07.12.2022.

*3. Further the claim of 12 months from the expiry date of the Bank Guarantee is available to make a demand under this Bank Guarantee. We are liable to pay the guarantee amount or any part thereof under this Bank Guarantee only and only if you serve upon us a written claim or demand on or before 07.12.2023. (Date of Expiry of the guarantee PLUS the claim period if any)******

4. At the end of expiry of the validity period, unless an action to enforce the claim under this guarantee is initiated before the court or Tribunal on or before 07.12.2022 after the expiry of the validity period, all your rights under this Bank Guarantee shall stand extinguished and we shall be relieved and discharge from all our liabilities and obligations under this bank Guarantee irrespective of return of original Bank Guarantee.

**Amount of BG*

**Expiry date of BG*

**Claim Period*

5. Confirmation of this Extension of Bank Guarantee may be directly obtained from our E-Confirmation Cell (ECC) mentioned below:

E-Confirmation Cell Union Bank of India 4th Floor,CP & MSME Department Central Office,239, Vidhan Bhavan Marg, Nariman Point, Mumbai-400021,
Tell No-022-22892211
E-Mail- ecc@unionbankofindia.com" ***(Emphasis Supplied)***

Though Clause-66(a) of the Work Order dated 24.01.2022 mandates to pay 10% advance, as is revealed from the B.G., the Opposite Party gave an advance of Rs.3,73,95,490/- i.e. 8.5%, instead of 10% of the total contract value, as agreed upon, on furnishing BG to secure the said amount paid to the Petitioner as advance.

30. Similarly, it would be apt to reproduce below the contents of letter dated 25.03.2024, vide which the Opposite Party asked the Petitioner to arrange for refund of an amount of Rs.4,12,54,904.00 (Rupees Four Crore Twelve Lac Fifty Four Thousand Nine Hundred Four Only) within 30th April, 2024.

Letter dated 25.03.2024

"To

M/s BANSAL INFRA PROJECTS PVT LTD
OPP- HOTEL SUSHILA, NEAR INDIRA CHOWK,
Balangir-767039
Mobile No.9866684408

***Subject**: Refund towards unadjusted advance of Rs.3,12,64,904.00 **and penalty towards project delay of Rs.1,00,00,000.00** amounting to total Rs. 4,12,54,904.00*

Dear Sir,

*As per our books there is a debit balance of Rs. 4,12,54,904.00 (Rupees Four Crore Twelve Lac Fifty Four Thousand Nine Hundred Four Only) **towards unadjusted advance and other deductions** and it has been observed that you are not responding to our civil department direction and it is impacting our site progress. It is totally against our contract vide work order number 4563501345 dt. 24.01.2022 and advance is*

pending since 18.09.2023. Due to this type of indiscipline activities from your side, our project progress is stuck.

Hence it is hereby asked to arrange for refund of above amount of Rs.4,12,54,904.00 (Rupees Four Crore Twelve Lac Fifty Four Thousand Nine Hundred Four Only) within 30th April, 2024.

If the payment is not received on or before 30.04.2024 we will go for encashment of the BG of Rs.3,73,95,490.00 vide BG No.32700IGL00001122 dt. 08.03.2022 and further we will initiate legal course of action.

Thanking you,
Yours faithfully,
For Jindal Steel & Power Ltd.
Sd/-
Authorized Signatory" ***(Emphasis supplied)***

31. From the pleadings made in the Writ Petition so also Application filed by the Opposite Party Nos. 1 and 2 for vacation of stay as well as Objection filed by the Petitioner in response to the said Application, it is amply clear that despite various allegations made by the Petitioner regarding the reasons of its failure to act in terms of its contractual obligations in time, the said allegations have not been denied by the Opposite Parties by filing Counter to the Writ Petition. Rather, as is revealed from the alleged Minutes of Meeting (MoM) for construction site C3G and C4H dated 30.04.2024, as at Annexure-E series, at running page 35 of the application for vacation of stay, the Management of JSPL allegedly offered 30 days' time to the Petitioner for rectification and completion of the job indicating therein that it shall submit the work breakdown structure latest by 03.05.2024 and the progress shall be monitored by the PBO on daily basis and in case of deficiency, JSPL will be free to take over the job on recommendation of PBO at the cost and risk of the Petitioner. The so called Minutes of Meeting, which has been annexed to the I.A., has not been signed by the authorized person of the Petitioner Company and it seems to be one sided. The contents of the alleged minutes of meeting, being relevant, are extracted below for ready reference:-

"Minutes dated 30.04.2024

WO no.4563501345 Dtd. 24 Jan. 2022
Location : South Block JSPL Angul

Attendees:
JSPL Members
Raj Kumar – (Project Head)
Jai Prabhu (Project Manager)
Biswajit Pattanaik (Site Engineer)
Apporva Anant (Site Engineer)
Nisha Bharti (Site Engineer)

M/s. Bansal Infra,
Addideb Dutta-Site Eng. Bansal Infra
Regarding the assessment of quality and readiness of the towers C3G and C4H

This refers the site visit of Mr. Aayush Bansal- Director (Bansal Infra) Mr. Sovan Nanda on 26.04.2024 Regarding the assessment of quality and readiness of the towers C3G and

C4H. Accordingly they deputed Mr. Adideb Dutta – Site Eng. Bansal Infra for the detailed assessment of the towers C3G and C4H (total 56 Flats).

The Team visited the each flat and assessed the quality and readiness of the towers C3G and C4H on Date. The assessment was done jointly. The detailed report is attached herewith.

Observation summary.

1. None of the flat out of 56 was ready for handover on date.
2. Workmanship of tower no.C3G and C4H is very poor and in most of the flats, fixation of door and windows needs to be re-installed.
3. Many walls are misaligned and need to be re-constructed. Putty and plaster need re-work. Shotcrete work needs to be completed.
4. Tile work in bathrooms and kitchens need to the rectified.
5. Parapet walls are completely misaligned and need to be rectified.
(Detailed work sheet flatwise with observation is attached herewith)
No manpower is engaged in other tower since Oct. 2023. Abandoned towers C4D, C4G, C4F,C4E, C4A,C4B and C4C is allocated to other contractors.

JSPL offer 30 days time for rectification and completions of the job to M/s Bansal Infra. M/s. Bansal Infra shall submit the WBS (work breakdown structure) latest by 03.05.2024 and the progress shall be monitored by PBO on daily basis. In case of any deficiency, JSPL will be free to take over the job on recommendation of PBO at cost and risk of M/s. Bansal Infra." (Emphasis supplied)

32. As it ascertained from the alleged MoM dated 30.04.2024, before expiry of the said period, on getting notice from the Commercial Court, the Opposite Party has made a communication to the Opposite Party Bank for invocation of Bank Guarantee, that to contrary to the terms of BG, which is not permissible under law.

33. It is further revealed from the records, series of communications were made to the Opposite Parties regarding non-fulfillment of its contractual objections enabling the Petitioner Company to carry out its job in time, which resulted in misunderstanding against the parties.

34. So far as allegation of non-payment of running bills as well as non-issuance of gate pass, rather restricting the Petitioner to enable its Officers and workers to enter into the premises of the Opposite Parties to carry out its contractual obligation so also take away the machineries held up inside the premises of the Opposite Parties have also not been denied by filing a Counter to the said effect or in the Reply to the Objection filed by the Petitioner in response to I.A. filed by the Opposite Parties for vacation of the interim order.

35. As held by the Supreme Court in **Maria Margarida SequeiraFernandes** (supra), in order to grant or refuse injunction, the Judicial Officer or the Judge must carefully examine the entire pleadings and documents with utmost care and seriousness. However, as is revealed from the impugned order, the Commercial Court rejected the application filed under Order 39 Rule 3 C.P.C. with an observation that the Petitioner has failed to explain the irreparable mischief, which is impending and mere allegation of irreparable injury will not be sufficient and the Court is of the opinion that the Petitioner has failed to explain exceptional

circumstances for grant of relief in the said Petition, which can cause serious loss to the Petitioner. Admittedly, the Court below has not taken in to consideration the documents filed before it to substantiate the prayer made in the section 9 application, as has been detailed above.

36. As held by the Supreme Court in **Arcelormittal Nippon Steel (India) Ltd. (supra),** interim relief is granted in aid of final relief. The object is to ensure protection of the property being the subject-matter of arbitration and/or otherwise ensure that the arbitration proceedings do not become infructuous and the arbitral award does not become an award on paper, of no real value. Hence, this Court is of the view that the Court below, while considering the application under Order 39 Rule 3, read with Section 151 Application, failed to appreciate the settled position of law so also take note of the contents of the documents filed along with the section 9 application. Point No.iii) is answered accordingly.

37. Admittedly, during pendency of the present Writ Petition, the Opposite Party (JSPL) has made a communication to the Opposite Party-Bank on 07.05.2024, as at Annexure-H of the I.A., for invocation of Bank Guarantee on the ground that the Petitioner has failed to perform its obligation under the agreement, though the said BG is not a performance BG. However, due to interim order dated 20.05.2024, which is still in vogue, the Opposite Parties were restrained from invoking the bank guarantee. The contents of the said letter dated 07.05.2024, being relevant, are extracted below:

Letter dated 07.05.2024

"Ref No: JSPL/BG/EN/4080
Date : 07.05.2024

The Manager,
Union Bank of India
Ajit tower, Near Sindhi School,
Main Branch, Ramsagar para,
Raipur(CG)-492001
Tel: 7525003213

Subject – Encashment of Bank Guarantee

Dear Sir,
The following Bank Guarantee was issued by your bank in our favour on behalf of M/s BANSAL INFRA PROJECTS PRIVATE LIMITED As Advance Bank Guarantee.

Type of BG	*Bank guarantee No.*	*BG Amount (Rs.)*	*BG Date*	*Valid Date*	*Claim Date*
ABG	*32700IGL00001122*	*37395490.00*	*08.03.2022*	*05.09.2024*	*05.12.2025*

The bank guarantee is expiring on 05 Sep.24. We would like to inform you that M/s BANSAL INFRA PROJECTS PRIVATE LIMITED ***has failed to perform its obligation under the agreement*** *and an amount of Rs.37395490.00 (RUPEES THREE CRORE SEVENTY THREE LAKHS NINTELY FIVE THOUSAND FOUR HUNDRED AND NITELY ONLY.) due to us. So we hereby request you to please encash the same guarantee immediately and remit the proceeds in our following Bank Account.*

JINDAL STEEL & POWER LIMITED
A/C NO.31740999687
IFSC CODE : SBIM0012066
STATE BANK OF INDIA
NISHA, JINDAL CAMPUS
DIST-ANGUL-759111

Thank you
Yours faithfully,
For Jindal Steel & Power Ltd.
Sd/-
Authorized Signatory" ***(Emphasis supplied)***

38. On conjoint reading of the terms of Bank Guarantee, which mandates as to reduction by 10% of Invoice Value of each shipment, communication dated 25.03.2024 made to the Petitioner, which well demonstrates that in addition to alleged refund towards unadjusted advance, a penalty of Rs.1,00,00,000/- was claimed towards project delay and the contents of the letter dated 07.05.2024, which was issued during pendency of the Writ Petition, which indicates that the Opposite Party wanted to invoke the BG on the ground that the Petitioner failed to perform its obligation under the agreement, this Court is of the prima facie view that the Opposite Party has acted contrary to the terms of Bank Guarantee, which was furnished to secure the advance given by the Opposite Parties to the Petitioner. This Court is also of prima facie view that there are special equities in favour of the Petitioner and if the Opposite Parties are permitted to encash the BG, it may cause irretrievable injustice to the Petitioner Company.

39. Admittedly, the section 9 application is still pending for consideration by the Commercial Court, Cuttack on merit and if at this stage the Opposite Parties are permitted to invoke the Bank Guarantee, the prayer made in the section 9 application shall become infructuous. Further, the Petitioner has already moved before this Court under Section 11(6) of the Act, 1996 for appointment of Arbitrator.

40. Hence, the parties are directed to appear before the Senior Civil Judge, Commercial Court, Cuttack in ARBP No.14 of 2024 on 27.08.2024. If so required, the Commercial Court shall pre-pone the date to the said date, if the said case stands posted to any date beyond the said date. The Opposite Parties shall file their Objection with all relevant documents, if any, to the application filed under section 9 of the Act, 1996, within ten days from the said date.

41. On filing of Objection, the Senior Civil Judge, Commercial Court, Cuttack shall proceed further in accordance with law and shall try to conclude the said proceeding at the earliest, preferably within a period of six weeks from the date of filing of the objection and documents by the Opposite Parties.

42. Since the Bank Guarantee furnished by the Petitioner is going to expire on 05.09.2024, the Petitioner is directed to extend the said BG until 31.12.2024 well before the expiry of the said period.

43. As the Opposite Parties contested the present Writ Petition on technical grounds of maintainability so also scope regarding interference by the Court regarding invocation of Bank Guarantee and are yet to file their Objection in ARBP No.14 of 2024, it is made clear that after filing of Objection by the Opposite Parties, the Senior Civil Judge, Commercial Court, Cuttack shall proceed further in accordance with law and decide the prayer made in ARBP No.14 of 2024 on merit taking into consideration the pleadings and documents on record, without being influenced by the observations made above. However, the interim order dated 20.05.2024 passed in the present case shall remain in force till disposal of the ARBP No.14 of 2024, subject to extension of Bank Guarantee by 31st August, 2024.

44. Accordingly, the Writ Petition stands disposed of. No order as to cost.

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2024 (III) ILR-CUT-539

SANJAY KUMAR MISHRA, J.

ELPET NO. 28 OF 2024

GURUBUX SINGH AHLUWALIA ……Petitioner

V.

SANATAN MAHAKUD ……Respondent

REPRESENTATION OF THE PEOPLE ACT, 1951 ─ Section 81 r/w Section 86 ─ Period of limitation for presentation of Election Petition ─ Whether presentation of Election Petition within 45 days from the date of Election of the returned candidate as prescribed in Sec 81 is mandatory? ─ Held, Yes ─ Section 86 (1) of the Act, 1951 mandates for dismissal of the Election Petition for non compliance of the provisions of Section 81 or 82 or 117 of the Act,1951 ─ The defect of the delay is not a curable one. (Para 10)

Case Laws Relied on and Referred to :-

1. (1974) 2 SCC 133 (Hukumdev Narain Yadav Vs. Lalit Narain Mishra)
2. 1987 (Supp) SCC 93 (Dhartipakar Madan Lal Agarwal Vs. Rajiv Gandhi)

For Petitioner : Mr. S. Kanungo.
For Respondent : Mr. G.K. Agarwal.

JUDGMENT Date of Order : 18.09.2024

S.K. MISHRA, J.

This matter is taken up through hybrid mode.

2. Mr. G.K. Agarwal, learned Counsel is present and files Vakalatnama duly executed in his favour and associates by the sole Respondent and submits, though his client should have appeared on caveat, since the matter is on board, on being instructed by the Respondent, he files the Vakalatnama to represent the sole Respondent and he may be permitted to address this Court on the application for condonation of delay filed by the Election Petitioner.

3. In view of such submission made by Mr. Agarwal, learned Counsel, the Vakalatnama filed in the Court is taken on record.

4. Learned Counsel for the Election Petitioner submits, the Election Petition has been preferred by the Petitioner, who is an Elector of 25-Champua Assembly Constituency, challenging the election of Mr. Sanatan Mahakud, who has been elected as M.L.A., 25-Champua Assembly Constituency. Mr. Kanungo, learned Counsel for the Election Petitioner further submits, there is a delay of 9 days in presenting the Election Petition. The Election Petition could not be presented within 45 days as there was a delay on the part of the Public Information Officer (PIO) to supply the information and documents, based on which the Election Petition has been filed. Hence, the delay should be condoned. To substantiate his submission, Mr. Kanungo, learned counsel for the Election Petitioner relies on the judgment of the Supreme Court reported in (1974) 2 SCC 133 (**Hukumdev Narain Yadav Vs. Lalit Narain Mishra).**

5. Learned Counsel for the Election Petitioner further submits, the delay in presenting an Election Petition can be condoned by this Court, provided sufficient cause is shown in the Application. As the Election Petition was preferred after obtaining the information under the Right to Information Act, 2005 because of the conduct of the PIO to supply the necessary documents/information belatedly, the Election Petition could not be presented on time.

6. Per contra, Mr. Agarwal, learned Counsel for the Respondent submits, so far as delay is concerned, the stamp reporting has been done incorrectly. It should have been calculated as 11 days, instead of 1 day delay, as the cause of action arose on 04.06.2024, where as the Election Petition has been presented on 30.06.2024. There is no such order, which is under challenge in the present Election Petition, requiring certified copy, thereby permitting the Office to deduct 10 days towards alleged period consumed for obtaining the certified copy.

7. Drawing attention of this Court to the legal provisions under Section 81 read with Section 86 of the Representation of People Act, 1951, shortly, 'the Act, 1951' so also judgment of the Supreme Court reported in 1987 (Supp) SCC 93 **(Dhartipakar Madan Lal Agarwal Vs. Rajiv Gandhi**), learned Counsel for the Respondent submits, in terms of Section 81 of the Act, 1951, the Election Petition calling in question any election, has to be presented within 45 days from the date of election of the returned candidate and if an Elector intends to challenge such election, it has to be within 45 days from the date of election of the returned candidate and if there is a delay in presenting the application, such defect is not curable and the Election Petition has to be dismissed in terms of Section 86 of the Act, 1951.

8. To substantiate his submission, Mr. Agarwal draws attention of this Court to para-31 of the judgment in **Rajiv Gandhi (supra),** wherein the Supreme Court held as follows:

> ***"31.*** *The above scanning of the election petition would show that the appellant failed to plead complete details of corrupt practice which could constitute a cause of action as contemplated by Section 100 of the Act and he further failed to give the material facts and other details of the alleged corrupt practices. The allegations relating to corrupt practice, even if assumed to be true as stated in the various paragraphs of the election petition do not constitute any corrupt practice. The petition was drafted in a highly vague and general manner. Various paragraphs of the petition presented disjointed averments and it is difficult to make out as to what actually the petitioner intended to plead. At the conclusion of hearing of the appeal before us appellant made applications for amending the election petition to remove the defects pointed out by the High Court and to render the allegations of corrupt practice in accordance with the provisions of Section 83 read with Section 124 of the Act. Having given our anxious consideration to the amendment applications, we are of the opinion that these applications cannot be allowed at this stage. It must be borne in mind that the election petition was presented to the Registrar of the High Court, at Lucknow Bench on the last day of the limitation prescribed for filing the election petition. The appellant could not raise any ground of challenge after the expiry of limitation. Order VI Rule 17 no doubt permits amendment of an election petition but the same is subject to the provisions of the Act.* ***Section 81 prescribes a period of 45 days from the date of the election for presenting election petition calling in question, the election of a returned candidate. After the expiry of that period no election petition is maintainable and the High Court or this Court has no jurisdiction to extend the period of limitation****. An order of amendment permitting a new ground to be raised beyond the time specified in Section 81 would amount to contravention of those provisions and beyond the ambit of Section 81 of the Act. It necessarily follows that a new ground cannot be raised or inserted in an election petition by way of amendment after the expiry of the period of limitation. The amendments claimed by the appellant are not in the nature of supplying particulars instead those seek to raise new ground of challenge. Various paragraphs of the election petition which are sought to be amended, do not disclose any cause of action; therefore it is not permissible to allow their amendment after expiry of the period of limitation. Amendment applications are accordingly rejected".* ***(Emphasis Supplied)***

9. So far as the judgment cited by the learned Counsel for the Petitioner in **Hukumdev Narain Yadav** (supra), the issue involved in the said case was the limitation which was expiring on Saturday, when the judges of the High Court do not sit and whether the Court can be said to be closed on that day and whether the Election Petition presented on Monday can be held to be within time. Rather, in **Hukumdev Narain Yadav** (supra), the Supreme Court held as follows:

> "*16. In K. Venkateswara Rao v. Bekkam Narasimha Reddi [AIR 1969 SC 872 : (1969) 1 SCR 679 : (1969) 2 SCJ 505] to which we shall refer more fully later, Vidyacharan Shukla case was attempted to be pressed into service, but this Court repelled it and observed at pp. 688-689:*
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> *"In our view, the situation now obtaining in an appeal to this Court from an order of the High Court is entirely different. There is no Section in the Act as it now stands which equates an order made by the High Court under Section 98 or Section 99 to a decree passed by a civil court subordinate to the High Court. An appeal being a creature of a statute, the rights conferred on the appellant must be found within the four corners of the Act. Sub-section (2) of the present Section 116-A expressly gives this Court the discretion and authority to entertain an appeal after the expiry of the period of thirty*

days. ***No right is however given to the High Court to entertain an election petition which does not comply with the provisions of Section 81, Section 82 or Section 117."***

17. Though Section 29(2) of the Limitation Act has been made applicable to appeals both under the Act as well as under the Code of Criminal Procedure, no case has been brought to our notice where Section 29(2) has been made applicable to an election petition filed under Section 81 of the Act by virtue of which either Sections 4, 5 or 12 of the Limitation Act has been attracted. Even assuming that where a period of limitation has not been fixed for election petitions in the Schedule to the Limitation Act which is different from that fixed under Section 81 of the Act, Section 29(2) would be attracted, and what we have to determine is whether the provisions of this Section are expressly excluded in the case of an election petition. It is contended before us that the words "expressly excluded" would mean that there must be an express reference made in the special or local law to the specific provisions of the Limitation Act of which the operation is to be excluded. As usual the meaning given in the Dictionary has been relied upon, but what we have to see is whether the scheme of the special law, that is in this case the Act, and the nature of the remedy provided therein are such that the Legislature intended it to be a complete code by itself which alone should govern the several matters provided by it. If on an examination of the relevant provisions it is clear that the provisions of the Limitation Act are necessarily excluded, then the benefits conferred therein cannot be called in aid to supplement the provisions of the Act. In our view, even in a case where the special law does not exclude the provisions of Sections 4 to 24 of the Limitation Act by an express reference, it would nonetheless be open to the Court to examine whether and to what extent the nature of those provisions or the nature of the subject-matter and scheme of the special law exclude their operation. ***The provisions of Section 3 of the Limitation Act that a suit instituted, appeal preferred and application made after the prescribed period shall be dismissed are provided for in Section 86 of the Act which gives a peremptory command that the High Court shall dismiss an election petition which does not comply with the provisions of Sections 81, 82 or 117. It will be seen that Section 81 is not the only Section mentioned in Section 86, and if the Limitation Act were to apply to an election petition under Section 81 it should equally apply to Sections 82 and 117 because under Section 86 the High Court cannot say that by an application of Section 5 of the Limitation Act, Section 81 is complied with while no such benefit is available in dismissing an application for non-compliance with the provisions of Sections 82 and 117 of the Act, or alternatively if the provisions of the Limitation Act do not apply to Section 82 and Section 117 of the Act, it cannot be said that they apply to Section 81.*** *Again Section 6 of the Limitation Act which provides for the extension of the period of limitation till after the disability in the case of a person who is either a minor or insane or an idiot is inapplicable to an election petition. Similarly, Sections 7 to 24 are in terms inapplicable to the proceedings under the Act, particularly in respect of the filing of election petitions and their trial. 23. In Charan Lal Sahu v. Nandkishore Bhatt [(1973) 2 SCC 530.] it was held that there is no question of any common law right to challenge an election as such any discretion to condone the delay in presentation of the petition or to absolve the petitioner from payment of security for costs can only be provided under the statute governing election disputes. It was observed that if no discretion was conferred in respect of any of these matters, none can be exercised under any general law or on any principles of equity.* ***If for noncompliance with the provisions of Sections 82 and 117 which are mandatory, the election petition has to be dismissed under Section 86(1) the presentation of election petition within the period prescribed in Section 81 would be equally mandatory, the non-compliance with which visits the penalty of the petition being***

> ***dismissed.*** *The answer to the plea that if the petition were to be dismissed, allegations of serious corrupt practices cannot be enquired into and the purity of the elections cannot be maintained is that given by Mitter, J., in Venkateswara Rao case [AIR 1969 SC 872 : (1969) 1 SCR 679 : (1969) 2 SCJ 505] where he said at p. 689:*
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> *"That is however a matter which can be set right only by the legislature. It is worthy of note that although the Act has been amended on several occasions, a provision like Section 86(1) as it now stands has always been on the statute book but whereas in the Act of 1951 the discretion was given to the Election Commission to entertain a petition beyond the period fixed if it was satisfied as to the cause for delay no such saving clause is to be found now. The legislature in its wisdom has made the observance of certain formalities and provisions obligatory and failure in that respect can only be visited with a dismissal of the petition."* ***(Emphasis supplied)***

10. Admittedly, though the cause of action to file the Election Petition arose on 04.06.2024, the Election Petition has been presented on 30.07.2024. The Office has incorrectly pointed out that there is a delay of 1 day in presenting the Election Petition after deducting 10 days consumed towards alleged obtaining of the certified copy. Even 1 day delay in presenting an Election Petition is not condonable, there being no such provision under the Act, 1951. Rather, Section 81 of the Act, 1951 prescribes presentation of Election Petition within 45 days of from, but not earlier than, the date of election of returned candidate. Section 86(1) of the Act, 1951 mandates for dismissal of the Election Petition for non compliance of the provisions of Section 81 or 82 or 117 of the Act, 1951. The defect of delay is not a curable one.

11. Accordingly, the application for condonation of delay so also the Election Petition stand dismissed.

12. Office is directed to communicate the substance of this order to the Election Commission and the Speaker of the State Legislative Assembly at the earliest so also an authenticated copy of this order to the Election Commission, in terms of Section 103 of the Act, 1951, read with Rule 16, under Chapter XXXIII of the High Court of Orissa Rules, 1948.

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2024 (III) ILR-CUT-543

G. SATAPATHY, J.

CRLMP NO.781 OF 2022

MADANMOHAN SWAIN & ORS. .....Petitioners

V.

SUPDT. OF POLICE, CBI & ORS. .....Opp.Parties

CONSTITUTION OF INDIA, 1950 – Art.227 – Present writ petition has been filed with a prayer to handover the investigation from local police to any independent agency like CBI, Crime Branch, EOW etc. – In this case, there is a financial fraud involving Rs.20,00,000/- while withdrawing money from the mutual fund (SBI) – FIR lodged in the year

2022 – Though police has submitted the preliminary charge sheet, the Final Form has not been submitted till date – Challenging the inaction, slow action/progress, specifically due to personal dissatisfaction over the police investigation, present writ petition has been filed – But the petitioners have not been able to produce any material indicating any biasness or malafides of the investigating agency – The question crops up whether in the above circumstance the prayer to handover the investigation to any independent agency is admissible? – Held, No – Reasons indicated – CRLMP stands dismissed. (Paras 7-10)

Case Laws Relied on and Referred to :-
1. (2016) 3 SCC 135 : Pooja Pal vrs. Union of India;
2. (1996) 11 SCC 253 : CBI & Anr. Vrs. Rajesh Gandhi & Anr.
3. (2013) 12 SCC 480 : K.V.Rajendra vrs. Supdt. of Police
4. (2010) 3 SCC 571 : State for of West Bengal Vrs. Protection of Democratic Rights
5. (2002) 5 SCC 521 : Secretary, Minor Irrigation and Rural Engineering Services, U.P. & Ors. vrs. Sahngoo Ram Arya & Anr.;
6. (2008) 2 SCC 409: Sakiri Vasu v. State of Uttar Pradesh & Ors.
7. (2016) 6 SCC 277 : Sudhir Bhaskar Rao Tambe Vrs. Hemant Yashwant Dhage & Ors.
8. (2008) 3 SCC 542 : Divine Retreat Centre Vs. State of Kerala & Ors.

For Petitioners : Mr. S.Dash.
For Opp. Parties : Mr. S.S.Pradhan.

JUDGMENT Date of Judgment : 07.08.2024

G. SATAPATHY, J.

1. The petitioners by way of this Criminal Misc. Petition has invoked the jurisdiction of this Court under Article 227 of the Constitution of India praying to direct OP No.1 to register the written complaint of the petitioners as an FIR or in the alternative to direct other agencies to conduct due and proper investigation under monitoring of this Court or to transfer the investigation of the registered FIR to OP No.1-cum-Central Bureau of Investigation or Economic Offence Wings of Odisha or to any other appropriate independent agency.

2. The short facts involved in this case are on 27.08.2020 the petitioner No.1 who is aged about 64 years had been to the State Bank of India, Industrial Estate Branch, Palasuni for redemption of his SBI Mutual Fund for a sum of Rs.20,00,000/-, but soon after receipt of his application by the Branch Manager, he received a call from Phone No. 7978379071 suggesting him to hold the Mutual Fund by not redeeming the bond till March, 2021. However, on 04.04.2021, the petitioner called in the number and requested for redemption, but on being asked, on 05.04.2021 he met the Branch Manager who introduced to one Subrat Kumar Mohanty to help him for redemption as well as management of the funds. Accordingly, said Subrat Kumar Mohanty installed a App MyCAMS in the mobile of petitioner No.1 and thereafter, the petitioner No.1 applied for redemption of bond. On being advised to deposit the redemption amount in an account, the petitioner No.1 provided a cheque to Subrat Kumar Mohanty and the Branch Manager with endorsement "pay to yourself" for

investment in SBI Electoral Bond for an amount of Rs.7,00,000/- and in the process said Subrat Kumar Mohanty(OP No.8) transferred a sum of Rs.29,00,000/- on five occasions for the purpose of investment in SBI Electoral Bond and IPO shares and later on, the petitioner No.1 found the bonds/certificates to be forged/manufactures by OP No.8- Subrat Kumar Mohanty and tried to get back his amount of Rs.29,00,000/- from said Subrat Kumar Mohanty, but in vain. Finding no way out, the petitioner and two others who are also being defrauded in same manner lodged an FIR before the IIC, Mancheswar P.S. which came to be registered as PS Case No. 57 of 2022 and the case was investigated into and accordingly, a preliminary charge sheet was filed with arrest of OP No.8, but final charge sheet is still awaited. On the aforesaid backdrop, the petitioners have approached this Court for the relief indicated supra.

3. Mr.Suryakanta Dash, learned counsel for the petitioners without disputing about submission of preliminary charge sheet, however strongly argues by submitting that although the legitimate grievance of the petitioners appears to have investigated into, but in fact, there is no progress in the investigation, however, the Investigating Officer is only sitting ideal by submitting preliminary charge sheet after arresting OP No.8 and keeping the investigation open. He further submits that the investigating agency has virtually not done anything after submitting preliminary charge sheet on 26.02.2022, but the hardened money not only of a senior citizen, but also of different persons is involved in a larger conspiracy of financial fraud and none of the staff of the bank have even been examined by the police whose conduct by itself speaks in volume. Mr.Dash by taking this Court through the decision in ***Pooja Pal vrs. Union of India;(2016) 3 SCC 135*** submits that the petitioners cannot become the victim of faulty investigation to reduce the justice a casualty and mere submission of charge sheet would not ipso facto be a prohibitive impediment for directing further investigation/reinvestigation or handing over the investigation to any independent agency. Accordingly, Mr.Dash has prayed to pass necessary direction to hand over the investigation of the case to any impartial agency like CBI or EOW of Orissa.

4. On the other hand, Mr.S.S.Pradhan, learned AGA by producing the written instruction received from Superintendent of Police, EOW, Bhubaneswar submits that the limit for financial fraud to entrust investigation to EOW being fixed at Rs. 1 crore and the defalcation amount involved in this case being much less than that amount at Rs.29,00,000/-, EOW cannot be directed to conduct investigation. It is further submitted by learned AGA that the matter was once referred to EOW, Bhubaneswar, but EOW has referred the matter again to the concerned IO for proper investigation and in this case, investigation having done in a proper way with arrest of the accused Subrat Kumar Mohanty who already being released on bail, the Investigating Officer cannot be considered as negligent since he has already filed preliminary charge sheet by keeping the investigation open. Mr.Pradhan further submits that the petitioners cannot insist for handing over the investigation to any other investigating agency in a routine manner and since the investigation being in

progress in a right direction, the Criminal Misc. Petition is unmerited and liable to be dismissed. Mr.Pradhan has accordingly prayed to dismiss the CRLMP.

5. Admittedly, the FIR of the petitioners has been registered by Mancheswar Police vide PS Case No. 57 of 2022 which was investigated into, but the IO has only filed preliminary charge sheet by praying to keep the investigation open U/S. 173(8) of CrPC. It is also not disputed that one accused Subrat Kumar Mohanty was arrested and released on bail. The allegations as contained in the FIR of the petitioners reveal financial fraud of Rs.29,00,000/- and accordingly, preliminary charge sheet has been submitted against the accused Subrat Kumar Mohanty for commission of offence U/S. 420/467/468/34 of IPC. The involvement of other persons is, however, claimed by the petitioners, but no materials have been produced by them, however, the investigation is still kept opened U/S. 173(8) of CrPC. It is also submitted by learned counsel for the petitioners that the petitioners have also filed a petition U/S. 156(3) of CrPC before the jurisdictional Magistrate to monitor the investigation of the case, but it hardly yield any result. On the contrary, the prayer of the petitioners for investigation by EOW received a jolt when it is undisputedly found that the threshold limit for conducting investigation by EOW for matters relating to defalcation of money is one crore, but in this case, the defalcation amount as alleged by the petitioners is Rs.29,00,000/-.

6. Addressing the relief sought for by the petitioners to handover the investigation to impartial investigating agency, this Court is of the considered that an order directing handing over investigation to any other agency other than police should not be passed in favour of the party applying for it as a matter of right or in a routine manner merely because the party is not satisfied with the progress of investigation. Nonetheless, such extra ordinary power must be exercised sparingly, cautiously and in exceptional situation, where it becomes necessary to provide credibility and instill confidence in the investigation or where the incident may have national or international ramification, otherwise the independent agency like CBI or Crime Branch would be flooded with large number of cases and the very purpose of creating such agency would be defeated. Moreover, the petitioners in this case is only dissatisfied with the progress of investigation because the IO has not submitted final charge sheet, rather he has filed preliminary charge sheet with arrest of one accused, but the petitioners have not able to provide any concrete materials for involvement of others. In ***CBI and another Vrs. Rajesh Gandhi and another;(1996) 11 SCC 253*** the Apex Court has held that no one can insist that an offence be investigated by a particular agency, but an aggrieved person can only claim that the offence he alleges be investigated properly, however, he has no right to claim that it be investigated by any particular agency of his choice. Further, in ***K.V.Rajendra vrs. Supdt. of Police; (2013) 12 SCC 480***, the Apex Court observed that the Court could exercise its constitutional powers for transferring any investigation from the State Investigating Agency to any other independent investigating agency like CBI only in rare and exceptional cases. Such as where high officials of State Authorities are involved, or the accusation itself is against the top officials of the investigating

agency thereby allowing them to influence the investigation, and further that it is so necessary to do justice and to instill confidence in the investigation or where the investigation is prima facie found to be tainted/biased.

7. Committee In ***State for of West Bengal Vrs. Protection of Democratic Rights;(2010) 3 SCC 571*** a constitutional Bench of five Judges of Apex Court while accepting the view taken in ***Secretary, Minor Irrigation and Rural Engineering Services, U.P. and others vrs. Sahngoo Ram Arya and another; (2002) 5 SCC 521*** has held as under:-

> *"In so far as the question of issuing a direction to CBI to conduct investigation in a case is concerned, although no inflexible guidelines can be laid down to decide whether or not such power should be exercised but time and again it has been reiterated that such an order is not to be passed as a matter of routine or merely because a party has leveled some allegations against the local police. This extra-ordinary power must be exercised sparingly, cautiously and in exceptional situations where it becomes necessary to provide credibility and instill confidence in investigations or where the incident may have national and international ramifications or where such an order may be necessary for doing complete justice and enforcing the fundamental rights. Otherwise the CBI would be flooded with a large number of cases and with limited resources, may find in difficult to properly investigate even serious cases and in the process lose its credibility and purpose with unsatisfactory investigations."*

8. It is no doubt true that the petitioners are aggrieved by the slow progress of investigation, but in ***Sakiri Vasu v. State of Uttar Pradesh and others; (2008) 2 SCC 409***, the Apex Court at paragraph-27 has held as under:-

> *"27. As we have already observed above, the Magistrate has very wide powers to direct registration of an FIR and to ensure a proper investigation and for this purpose he can monitor the investigation to ensure that the investigation is done properly (though he cannot investigate himself). The High Court should discourage the practice of filing a writ petition or petition under Section 482 CrPC simply because a person has a grievance that his FIR has not been registered by the police, or* ***after being registered, proper investigation has not been done by the police****. For this grievance, the remedy lies under Sections 36 and 154(3) before the police officers concerned, and if that is of no avail, under Section 156(3) CrPC before the Magistrate or by filing a criminal complaint under Section 200 CrPC and not by filing a writ petition or a petition under Section 482 CrPC."*

9. Further, in ***Sudhir Bhaskar Rao Tambe Vrs. Hemant Yashwant Dhage and others; (2016) 6 SCC 277***, the Apex Court while reiterating the decision in ***Sakiri Vasu(supra)*** has observed as under:-

> *"A learned Magistrate can also recommend for change of the Investigating Officer if the investigation is not marched in proper prospective to discover the truth. Hence, adequate alternative remedy is available to the petitioners to approach the learned Jurisdictional Magistrate to monitor the investigation so as to ensure fair and proper investigation. Hence, the present petition is not maintainable before this Hon'ble Court."*

10. In ***Divine Retreat Centre Vs. State of Kerala and Others reported in (2008) 3 SCC 542***, the Apex Court at paragraph-41 has held as under:-

"41. It is altogether a different matter that the High Court in exercise of its power under Article 226 of the Constitution of India can always issue appropriate directions at the instance of an aggrieved person if the High Court is convinced that the power of investigation has been exercised by an investigating officer mala fide. That power is to be exercised in the rarest of the rare case where a clear case of abuse of power and non-compliance with the provisions falling under Chapter XII of the Code is clearly made out requiring the interference of the High Court. But ***even in such cases, the High Court cannot direct the police as to how the investigation is to be conducted but can always insist for the observance of process as provided for in the Code."***

11. In this case, although the petitioners are not satisfied with the progress of investigation, much less the slow progress, but they have not been able to produce any material to indicate any biasness or malafides of the investigating agency. In the circumstance, no direction can be issued either to handover the investigation to any independent agency or to entrust the investigation to other official, merely because the petitioners are aggrieved with the slow progress of investigation. In view of the aforesaid discussions of fact and law vis-à-vis the grievance of the petitioners, this Court hardly sees any reason to handover the investigation to any other agency, but the petitioners can always avail the remedy to get the investigation monitored by appropriate provision of law.

12. Resultantly, the CRLMP being devoid of merit stands dismissed. The Investigating Agency is, however, directed to proceed further in the matter for early completion of the investigation, which has been kept open U/S. 173(8) of CrPC. It is, however, observed that the petitioners are at liberty to approach appropriate forum in accordance with law, if they are dissatisfied with the result of the final outcome in the investigation of Mancheswar P.S. Case No.57 of 2022.

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2024 (III) ILR-CUT-548

G. SATAPATHY, J.

CRLREV NO. 587 OF 2023

PRATAP KUMAR JENA @PRATAP JENA …..Petitioner

V.

STATE OF ORISSA & ANR. …..Opp.Parties

(A) CODE OF CRIMINAL PROCEDURE, 1973 – Section 190 – Cognizance of offence – Whether the jurisdictional magistrate can take cognizance of offences(s) for second time on the protest petition of the complainant/informant? – Held, No. (Para 23)

(B) CRIMINAL TRIAL – Complaint Case – Second Complaint – Whether second complaint is maintainable on the same facts & circumstances? – Held, law does not prohibit filing or entertaining the second complaint even on the same facts, provided the earlier complaint has been decided on the basis of insufficient material or the

order has been passed without understanding the nature of complaint or the complete facts could not be placed before the court or after disposal of the first complaint the complainant came to know certain facts which could have tilted the balance in his favour. However, second complaint would not be maintainable wherein the earlier complaint has been disposed of on full consideration of the case of the complainant on merit. (Para 13)

(C) CODE OF CRIMINAL PROCEDURE, 1973 – Sections 207, 209, 319 – Whether during committal of the case the magistrate has the power to decide whether any accused needs to be added or subtracted? – Held, No. (Para 14)

(D) CRIMINAL TRIAL – Committal of Case – Whether after committal of case the magistrate can issue process on a protest petition? – Held, No. (Para 23)

(E) CODE OF CRIMINAL PROCEDURE, 1973 – Section 401 – Criminal Revision – Whether the court while sitting as revisional court can exercise the power under section 482 of Cr.P.C? – Held, in the interest of justice or if the situation so demands the revisional court can exercise the power under section 482 of Cr.P.C. (Para 28)

Case Laws Relied on and Referred to :-

1. (2014) 3 SCC 306 : Dharam Pal & Ors. v. State of Haryana & Anr.
2. (1993) 2 SCC 16 : Kishun Singh v. State of Bihar
3. (1985) CriLJ 1238 (FB) : Sk. Latfur Rahman & Ors. v. The State
4. (2023) SCC Online 6069 : Bichitra Pradhan & Ors. v. State of Orissa & Anr.
5. (2021) 5 SCC 435 : Krishna Lal Chawla v. State of Uttar Pradesh & Anr.
6. 2024 SCC Online SC 38 : Suresh Garodia v. State of Assam & Anr.
7. (2014) 3 SCC 92 : Hardeep Singh vrs. State of Punjab & Ors.
8. (2019) 16 SCC 610 : Birla Corporation Ltd. v. Adventz Investments & Holdings Ltd. & Ors.
9. AIR 1980 SC 1883 : H.S. Bains v. State (Union Territory of Chandigarh)
10. (2019) 17 SCC 1 : Vinubhai Haribhai Malaviya & Ors. v. State of Gujarat & Anr.
11. (2004) 5 SCC 347 : Hasanbhai Valibhai Qureshi v. State of Gujarat
12. MANU/SC/1373/2011 : Shiv Sankar Singh v. State of Bihar & Ors.
13. 2023 SCC Online SC 1082 : Zunaid v. State of UP & Ors.
14. (2012) 3 SCC 383 : Jile Singh v. State of Uttar Pradesh & Anr.
15. (1998) 7 SCC 149 : Ranjit Singh v. State of Punjab
16. 2004 13 SCC 11 : Kishori Singh and others v. State of Bihar & Anr.
17. (1996) 4 SCC 495 : Raj Kishore Prasad vrs. State of Bihar
18. (1989) 2 SCC 132 : India Carat (P) Ltd. v. State of Karnataka
19. Criminal Appeal No. 121 of 2012 : Jile Singh v. State of Uttar Pradesh
20. (1998) 5 SCC 749 : Pepsi Foods Ltd. & Anr. vrs. Special Judicial Magistrate & Ors.
21. (2006) 7 SCC 296 : Popular Muthiah vrs. State represented by Inspector of Police

For Petitioner : Mr. S. Agarwal, Sr. Advocate, Mr. D.P. Dhal, Sr. Advocate, Mr. P. Mahapatra, Mr. A. Mohanty & Mr. A Ray.
For Opp.Parties : Mrs. S. Pattanaik, AGA, Mr. J.K. Das, Sr. Adv., Mr. P. Parija & Mr. L.K. Maharana. (O.P. No.2).

JUDGMENT Date of Hearing : 01.08.2024 : Date of Judgment : 01.10.2024

G. SATAPATHY, J.

1. The petitioner by invoking the jurisdiction of this Court U/S. 401 read with Section 397 of the Code of Criminal Procedure, 1973 (in short, "CrPC") has challenged the order dated 25.09.2023 passed on the protest petition filed in the shape of complaint in ICC No. 11 of 2023 arising out of G.R. Case No. 14 of 2021 corresponding to Mahanga P.S. Case No. 5 of 2021, by which the learned J.M.F.C., Salipur has again taken cognizance of offences punishable U/Ss. 302/120-B and 506 of Indian Penal Code, 1860 (in short, "IPC") and directed the complainant to file requisites for issuance of process against the petitioner.

2. The main ground of challenge in this revision is that the impugned order taking cognizance of offences again being passed on the second protest petition subsequently to the order taking cognizance dated 03.05.2021 passed in G.R. Case No. 14 of 2021 for commission of offences punishable U/Ss. 120B/147/148/302 /506/149 of IPC read with Section 26/27 of Arms Act and committing the case record to the Court of Sessions on 08.10.2021 qua the other accused persons which was registered as S.T. Case No. 32 of 2021 of the Court of learned Additional Sessions Judge, Salipur, is illegal and unsustainable in the eye of law, since cognizance of offence is taken once as well as after commitment of records, there remains no record with the committing Court.

3. The short background facts required for disposal of this revision are that on 02.01.2021 at about 7.50 PM, two persons namely Kulamani Baral and Dibyasingh Baral of village Jankoti were being brutally assaulted by a group of persons with lethal weapons like sword, billhook, gun and chappad(sharp cutting weapon), near the house of one Suresh Chandra Sarangi leading to their death in the hospital at CHC, Mahanga. On the next day at about 8.35 AM, one Ramakanta Baral who was the son of the deceased Kulamani Baral appeared at Mahanga PS and presented an FIR (Annexure-1) alleging therein against 14 persons in killing his father and deceased Dibyasingh Baral, but in such FIR the informant Ramakanta Baral specifically alleged against the present petitioner who was then a sitting MLA and was earlier a Minister, for giving threatening to kill the deceased Kulamani Baral who disclosed it before the informant just four days before the occurrence.

3.1 On the aforesaid FIR, Mahanga PS Case No.5 of 2021 corresponding to GR Case No.14 of 2021 of the Court of learned JMFC, Salipur was registered against the petitioner and others for commission of offence U/Ss.147/148/149/506/302/120-B of IPC r/w Sections 25/27 of Arms Act and, accordingly, the investigation ensued in the matter which culminated in submission of charge-sheet against 13 accused persons on 01.05.2021, but the investigating officer did not file any chargesheet against the petitioner and another person namely Shakti Prasad Rout as the allegation against them could not be substantiated. On receipt of the charge-sheet (final form), the learned JMFC, Salipur vide order dated 04.05.2021 (Annexure-3)

by taking cognizance of offences issued process against the accused persons named in the final form submitted by the IO under Annexure-2. Being dissatisfied with the result of investigation for not finding complicity of the petitioner in this case, the informant-Ramakanta Baral on 16.08.2021 filed a complaint in 1CC Case No.217 of 2021 in the form of protest petition vide Annexure-4 before the learned JMFC, Salipur who vide an order dated 25.08.2021 under Annexure-5 by making a detail analysis, directed the IIC, Mahanga PS to take up further investigation against the petitioner and to submit a report in accordance with Section 173(8) of CrPC on the aforesaid protest petition of the informant. Pending further investigation, the learned JMFC, Salipur vide order dated 08.10.2021 under Annexure-6 committed the case record to the Court of learned Additional Sessions Judge, Salipur leading to registration of ST Case No.32 of 2021 for trial of the 10 apprehended accused persons whose names found place in the charge-sheet. On 18.11.2021, the learned JMFC, Salipur by an order under Annexure-7 passed in the complaint on the petition of the complainant directed the IIC, Mahanga PS for collection and preservation of CDR of material persons and to intimate the Court about the action taken by 25.11.2021. However, on 20.09.2022, the investigating officer filed the final form under Annexure-8 by submitting a final report against the petitioner treating the case against him as false.

3.2 Against the aforesaid final report, since the informant in Mahanga PS Case No.5 of 2021 died in the meanwhile, his brother instituted a second complaint in the form of protest petition on 09.01.2023 under Annexure-9 which was registered as 1CC Case No.11 of 2023 in the Court of learned JMFC, Salipur. After recording the initial statement of the complainant under Section 200 of CrPC as well as the statements of other witnesses in an enquiry under Section 202 of CrPC, the learned JMFC, Salipur transferred the record on 15.09.2023 to the learned Additional District & Sessions Judge-cum-Special Court, Bhubaneswar for disposal of the case in accordance with law on the ground that the said Court has jurisdiction to deal with the matter relating to MP and MLA, but such record was returned back to the learned JMFC, Salipur on 25.09.2023 for the defect of not taking cognizance. Accordingly, on 25.09.2023, the learned JMFC, Salipur by an order took cognizance again for offences U/Ss 302/120-B/506 of IPC by holding the same to have been made out against the petitioner and directed the complainant to file requisites for issuing summons/process against the petitioner. On the aforesaid backdrop, the petitioner claiming incurable jurisdictional error and illegality has approached this Court in this Criminal Revision praying to quash the order taking cognizance of offences for second time and the entire criminal proceedings in 1CC Case No.11 of 2023.

4. In assailing the impugned order taking cognizance of offences for the second time, Mr. Siddharth Agarwal, learned Senior Counsel appearing along with Mr. D.P. Dhal, learned Senior Counsel for the petitioner has submitted that once Magistrate takes cognizance of offences upon receipt of police report and commit the case record to the Court of Sessions, he becomes functus officio and such

Magistrate is denuded with power of taking cognizance of offences for second time after initially taking cognizance of offences. It is further submitted by learned Senior Counsel Mr. Agarwal that after taking cognizance of offences upon receipt of report under Section 173(2) of Cr.P.C. in Mahanga PS Case No.5 of 2021 initially on 04.05.2021, the Magistrate could not have ordered for further investigation under Section 173(8) of Cr.P.C. without assigning any reason(s) or disagreeing with such report Under Section 173 of Cr.P.C. as submitted by the IO, but even thereafter, the IO on the direction of the learned Magistrate had conducted further investigation in the matter and submitted a final report as false against the petitioner and thereby, without disagreeing with such report on further investigation or assigning any reason, the learned Magistrate has erroneously entertained the second protest petition on the same facts and incident and that too, after a considerable lapse of time of commitment of case record in original file to the Court of Sessions on 08.10.2021 by entertaining the second protest petition on 09.01.2023. It is further submitted by Mr. Agarwal that there is no bar in entertaining the second protest petition, but the same should be resorted to in exceptional circumstance, more particularly the same can be done by a reasoned order, however, no reasoned order having been passed to entertain the second protest petition, the proceeding itself pursuant to the second protest petition is vitiated and liable to be quashed, especially when the investigating agency has submitted the final report as false against the petitioner after duly analyzing the allegation stated in the first protest petition as well as making an analysis of detailed call records of the phone numbers used by the petitioner, so also examining the witnesses on whose statements in an enquiry under Section 202 of Cr.P.C., the learned Magistrate has taken cognizance of offences for the second time by directing to issue process against the petitioner. Mr. Agarwal has further submitted that after committal of the case record, 13 accused persons are facing trial in respect of the same incident in the Court of learned Additional Sessions Judge, Salipur and the Magistrate after committing the case record to the Court of Sessions is denuded with the power to entertain the second protest petition. However, ignoring such situation, the learned Magistrate has exceeded jurisdiction by taking cognizance of offences and directing issuance of process when the learned Additional Sessions Judge is in seisin over the case, but by adding the petitioner as an accused in this case, the learned Magistrate has practically adopted the course under Section 319 of Cr.P.C., but such power is not available to him in view of the fact that the case record has been committed to the Court of Sessions who is in seisin over the matter and, therefore, the impugned order as well as the proceeding arising out of second protest petition in 1CC Case No.11 of 2023 are ex-facie illegal and cannot stand on the scrutiny of law. In order to fortify his submission, Mr. Agarwal, learned Senior Counsel has mainly relied upon the decisions in (1) ***Dharam Pal and others v. State of Haryana and another; (2014) 3 SCC 306, (2) Kishun Singh v. State of Bihar; (1993) 2 SCC 16, (3) Sk. Latfur Rahman and others v. The State; (1985) CriLJ 1238 (FB), (4) Bichitra Pradhan and others v. State of Orissa and another; (2023) SCC Online 6069, (5) Krishna Lal Chawla v. State of Uttar Pradesh and another; (2021) 5 SCC 435, (6) Suresh Garodia v. State of Assam***

and another; 2024 SCC Online SC 38, (7) Hardeep Singh vrs. State of Punjab and others; (2014) 3 SCC 92 and (8) Birla Corporation Limited v. Adventz Investments and Holdings Limited and others; (2019) 16 SCC 610. In summing up his argument and reiterating the facts of the case, Mr. S. Agarwal has prayed to allow the Revision by quashing the impugned order and the criminal proceeding arising out of second protest petition in 1CC Case No.11 of 2023.

5. In repealing the aforesaid submissions as advanced for the petitioner, Mr. J.K. Das, learned Senior Counsel appearing along with Mr. P. Parija, learned counsel for OPNo.2 has submitted that law does provide for filing or entertaining of second complaint even on the same facts and since the investigation in this case against the petitioner, who was a sitting MLA of the ruling party then was biased, the complainant-cumOPNo.2 was forced to institute the second protest petition, especially when the first protest petition was neither investigated into properly nor was any evidence collected against the petitioner for his influence ultimately leading to filing of closure report against him by the police which necessitated the filing of second protest petition against him which was rightly entertained by the learned Magistrate who has committed no illegality in taking cognizance of offences and issuing process against the petitioner by taking into consideration the statement of the complainant and witnesses. It is also submitted by Mr. Das that there is absolutely no bar to entertain the second protest petition even after committal of the case record to the Court of Sessions for trial of other accused persons, since the investigating agency committed willful lapses in submitting a closure report against the petitioner. It is also submitted on behalf of OPNo.2 that law confers power on the Magistrate to take cognizance of offences under Section 190(1)(a) of Cr.P.C. on the basis of original complaint upon examination of the complainant and witnesses on oath in view of the provision laid down in Section 200 and 202 of Cr.P.C. which has been clearly laid down by the Apex Court in ***H.S. Bains v. State (Union Territory of Chandigarh); AIR 1980 SC 1883.*** It is also argued on behalf of OPNo.2 that the Magistrate has got definite power to issue process even against those persons not arraigned as an accused in police report and whose name also does not figure out in Column No.2 of such report, but in this case, the petitioner being named in the FIR and the investigation against him being biased, it was perfectly within the power and domain of the learned jurisdictional Magistrate to proceed against him on the protest petition which is the proposition enunciated by the Apex Court in Nahar Singh v. State of Uttar Pradesh and another; (2022) 5 SCC 295. Further, it is submitted by Mr. Das that the criminal proceeding against the petitioner arising out of the protest petition cannot be quashed in exercise of power under Sections 397/401 of Cr.P.C. Learned Senior Counsel has also submitted by relying upon the decision in ***Vinubhai Haribhai Malaviya and others v. State of Gujarat and another; (2019) 17 SCC 1*** that the direction passed by the learned Magistrate in directing further investigation even after committing the record to the Court of Sessions does not suffer from any infirmity, since the Magistrate at all stages of criminal proceeding has power to direct for further investigation. Mr. Das, learned

Senior Counsel while concluding his argument has prayed to dismiss the Criminal Revision.

6. In playing a passive role, Mrs. S. Pattanaik, learned AGA, however, has submitted that upon receipt of police report under Section 173(2) of Cr.P.C., the learned Magistrate may agree or disagree with such report and proceed in accordance with law, but after taking cognizance of offences, the Magistrate cannot resort to Section 156(3) of Cr.P.C. for ordering a fresh investigation, however, in this case, the Magistrate having proceeded against the petitioner on the second protest petition, this Court may pass appropriate order in accordance with law.

7. After having bestowed an anxious and careful consideration to the rival submissions upon perusal of record, the following legal questions which arise for consideration of this Court are: -

> *(i) Whether the jurisdictional Magistrate can take cognizance of offence(s) for second time on the protest petition of the complainant-informant and issue process against a person, who although named in the FIR was not chargesheeted as an accused in the report submitted under Section 173(2) of Cr.P.C. after committal of case record to the Court of Sessions, especially when cognizance was already taken for the first time and process was issued against the accused persons named in such police report?*
>
> *(ii) Whether all the actions taken by jurisdictional Magistrate in the same case record after its committal to the Court of Sessions are without any jurisdiction?*

8. The aforesaid two questions are formulated on the basis of the undisputed facts involved in this case which disclose that two persons were being brutally assaulted to death and the son of one of the deceased lodged an FIR against 14 accused persons including the petitioner and one unknown person holding them responsible for the murder of his father and another and, the only allegation leveled against the petitioner in the FIR in this case is that the petitioner had threatened to kill the informant and his father which was disclosed by the deceased to his son–cum-informant just four days before the occurrence. The investigating officer upon investigation on the FIR of the informant submitted the report under Section 173(2) of CrPC by stating therein that the allegation against the petitioner could not be substantiated on verification of phone calls of the petitioner while submitting charge-sheet against 13 other accused persons. Pursuant to the aforesaid report under Section 173(2) of CrPC, the matter was further investigated upon the first protest petition of the informant, but the IO upon further investigation submitted a final report treating the case against the petitioner as false leading to filing of second protest petition resulting in the impugned order. It is also not in dispute that the witnesses cited in the second protest petition figured out in the charge-sheet as a chargesheet witnesses.

9. On consideration of the undisputed facts in the light of rival submissions, there appears no dispute that Chapter-XII of the CrPC lays down the statutory scheme and procedure to provide "information to the police and their powers to investigate the matter" and in any case upon completion of an investigation pursuant

to the registration of the FIR, the officer-in-charge of such police station shall forward to the jurisdictional Magistrate empowered to take cognizance of offence on a police report, a report in the form prescribed by the Government stating inter-alia whether any offence appears to have committed and if so, by whom, which has been provided in Section 173(2)(i)(d) of CrPC, but Sec. 173(2)(ii) makes it obligatory for the officer to communicate the action taken by him to the informant. This is not an empty formality, but a statutory duty cast upon the officer conducting investigation. Whatever may be the result of investigation, the informant is entitled to know such result and, therefore, the Court is duty bound to ensure the compliance of aforesaid provision. As soon as the jurisdictional Magistrate receives a report U/S. 173(2) of CrPC, he may either agree or disagree with such report, but in case he is not directing further investigation while agreeing with such report, it is advisable for him to give notice to the informant before accepting such report and taking further action thereof, which would obviously avoid anomaly and situation like this leading to further litigation. In this case at hand, the learned JMFC, Salipur while accepting such report U/S. 173(2) of CrPC, which was filed against 14 accused persons excluding the petitioner and one Shakti Prasad Rout, took cognizance of offences and directed issuance of process against the accused persons named in the report, however, without giving notice to the informant who had right to know the result of investigation, which gave rise to further litigation in the matter. However, the informant being dissatisfied with the police report had filed a protest petition on 16.08.2021 which came to be registered as ICC No. 217 of 2021 and on 19.08.2021 the same was directed to be tagged with original case record in G.R. Case No. 14 of 2021, but on 25.08.2021 the learned JMFC, Salipur after referring to the various precedents of Apex Court had passed an order directing further investigation in the light of allegation raised in the protest petition, however, such order was bereft of any discussion with regard to any defect/negligence in the investigation nor does it disclose his dissatisfaction in the matter of investigation. Undoubtedly, the learned JMFC, Salipur had passed this order for further investigation against the petitioner, but the same was passed after passing of order taking cognizance of offences with issuance of process against the accused persons named in the police report U/S. 173(2) of CrPC on 04.05.2021 in G.R. Case No. 14 of 2021, which order in fact also does not disclose any negligence/latches in the matter of investigation. This Court is conscious of the power of the Magistrate to direct further investigation, but when such power is being exercised by the learned Magistrate which is at the post cognizance stage, the order should have contained the reasons for directing further investigation which was in fact not done in this case.

10. The word further investigation as it denotes by its meaning is a continuation of earlier investigation, but it is neither fresh investigation nor re-investigation. Admittedly, charge-sheet No.109 dated 01.05.2021 was received in the Court on 03.05.2021 and on the next day, cognizance of offences was taken by the learned JMFC, Salipur, but the protest petition was received in the Court on 16.08.2021 which is more than three months after submission of charge-sheet. However, the

learned Court of JMFC, Salipur is not denuded of power to direct further investigation in such situation, but such order must contain the brief reasons as to why the further investigation is ordered since the Magistrate has already taken cognizance without noticing or indicating any defect or negligence in investigation. There is no dispute that if the police do not perform its statutory duty in accordance with law or the investigation is biased or there is defect or negligence in investigation, the Court cannot abdicate its duty by simply saying that the investigation is exclusive prerogative of police. Once the conscience of the Court is satisfied on analysis of material collected in the course of investigation that the police was slack or negligent in investigation or it has not investigated properly, in such situation, the Court cannot close its eye, rather it has got a constitutional duty to ensure fair and impartial investigation and, in such situation, the Court can direct for further investigation within the contours of law, since a fair investigation is explicit and inherent in Article 21 of the Constitution of India. This Court never doubts the powers of the Magistrate to order for further investigation. The powers of the Magistrate and the stage of the case for directing further investigation has come up for discussion in the case of ***Vinubhai Haribhai Malaviya (supra)*** wherein a three Judge Bench of apex Court in paragraph-42 has been held as under:

> ***"42.*** *Xxx xxx xxx To say that a fair and just investigation would lead to the conclusion that the police retain the power, subject, of course, to the Magistrate's nod under Section 173(8) to further investigate an offence till charges are framed, but that the supervisory jurisdiction of the Magistrate suddenly ceases midway through the pre-trial proceedings, would amount to a travesty of justice, as certain cases may cry out for further investigation so that an innocent person is not wrongly arraigned as an accused or that a prima facie guilty person is not so left out. There is no warrant for such a narrow and restrictive view of the powers of the Magistrate, particularly when such powers are traceable to Section 156(3) read with Section 156(1), Section 2(h) and Section 173(8) CrPC, as has been noticed hereinabove, and would be available at all stages of the progress of a criminal case* ***before the trial actually commences****. It would also be in the interest of justice that this power be exercised suo motu by the Magistrate himself, depending on the facts of each case. Whether further investigation should or should not be ordered is within the discretion of the learned Magistrate who will exercise such discretion on the facts of each case and in accordance with law. If, for example, fresh facts come to light which would lead to inculpating or exculpating certain persons, arriving at the truth and doing substantial justice in a criminal case are more important than avoiding further delay being caused in concluding the criminal proceeding, as was held in* ***Hasanbhai Valibhai Qureshi v. State of Gujarat; (2004) 5 SCC 347."***

11. The inevitable conclusion as emanates from the discussions made hereinabove is that the jurisdictional Magistrate has power and authority to direct for further investigation at post cognizance stage till the trial actually commences, but as the word "discretion" used in the decision ***Vinubhai Haribhai Malaviya (supra),*** the jurisdictional Magistrate has to exercise such discretion in accordance with law and the order directing for further investigation must contain the brief reasons for directing further investigation and such order directing further investigation should

not be passed in a routine manner, merely on the asking of the party since the person who has been alleged has an inherent right not to be harassed on the pretext of further investigation merely on the ground of settling the score on account of personal vendetta of the other side.

12. This brings this Court to the main question which can be quite objectively said that cognizance of offence cannot be taken multiple times including for the second time. In a criminal case, the Magistrate is normally the interface between the investigating wing and the Court at the first point of time, irrespective of the offence(s) being triable by a Magistrate or a Court of Sessions, but not for an offence under Special Act, and taking cognizance of offence(s) more than once is impermissible, unless the order taking cognizance is setaside or varied by the higher forum since cognizance of offence is taken, but not against the offender. Whether cognizance of offence(s) can be taken for the second time without the said order taking cognizance being setaside or varied has been well settled by apex Court in the decision relied on by the petitioner in ***Dharam Pal (supra)*** wherein a Constitutional Bench of five judges in paragraph-39 has held as under:

> ***"39.*** *Xxx xxx xxx. It is well settled that* ***cognizance of an offence can only be taken once. In the event, a Magistrate takes cognizance of the offence and then commits the case to the Court of Session, the question of taking fresh cognizance of the offence and, thereafter, proceed to issue summons, is not in accordance with law.*** *If cognizance is to be taken of the offence, it could be taken either by the Magistrate or by the Court of Session. The language of Section 193 of the Code very clearly indicates that* ***once the case is committed to the Court of Session by the learned Magistrate, the Court of Session assumes original jurisdiction and all that goes with the assumption of such jurisdiction.*** *The provisions of Section 209 will, therefore, have to be understood as the learned Magistrate playing a passive role in committing the case to the Court of Session on finding from the police report that the case was triable by the Court of Session.* ***Nor can there by any question of part cognizance being taken by the Magistrate and part cognizance being taken by the learned Session Judge."***

Similarly, in the decision relied on by the learned counsel for OPNo.2 in ***Balveer Singh and another v. State of Rajasthan and another; (2016) 6 SCC 680***, the Apex Court by following the decision in ***Dharam Pal (supra)*** has once again reiterated that cognizance of offence can only be taken once and in the said decision, the Apex Court in paragraph-24 has held as under: -

> *"Xxx xxx xxx xxx it would be a case where the Magistrate has taken cognizance of offence. Notwithstanding the same, the Sessions Court on similar application made by the complainant before it, took cognizance thereupon, normally, such a course of action would not be permissible."*

13. It is, therefore, crystal clear that in a criminal case, cognizance of offence can only be taken once, but not for multiple times. Admittedly, in this case, the learned JMFC, Salipur has entertained a second protest petition and after recording initial statement of the complainant and statements of witnesses in enquiry under Section 202 of CrPC has proceeded to take cognizance of offences again and directed issuance of process against the petitioner. This brings us to another legal

puzzle about the validity of entertaining the second protest petition. It is, however, argued by Mr. Agarwal, learned Senior Counsel that entertaining second complaint in the form of protest petition would amount to grave abuse of process. In this regard, he has relied upon the decision in ***Krishna Lal Chawla (supra)*** wherein at paragraph-10, the Apex Court has observed as under: -

> ***"10****. …Permitting multiple complaint by the same party in respect of the same incident, whether it involves a cognizable or private complaint offence, will lead to the accused being entangled in numerous criminal proceedings. As such, he would be forced to keep surrendering his liberty and precious time before the police and the courts, as and when required in each case…"*

On the other hand, in the decision relied on by OPNo.2 in ***Shiv Sankar Singh v. State of Bihar and others; MANU/SC/1373/2011***, the Apex Court has held that the law does not prohibit filing or entertaining of the second complaint even on the same facts, provided the earlier complaint has been decided on the basis of insufficient material or the order has been passed without understanding the nature of the complaint or the complete facts could not be placed before the court or where the complainant came to know certain facts after disposal of the first complaint which could have tilted the balance in his favour. However, second complaint would not be maintainable wherein the earlier complaint has been disposed of on full consideration of the case of the complainant on merit. It is thus clear that the second protest petition is permissible and maintainable even on same facts, but subject to aforesaid stipulation as discussed.

14. Further, the OP No.2 has also relied upon the decision in ***Zunaid v. State of UP and others; 2023 SCC Online SC 1082*** to contend that the learned Magistrate was not denuded of power to take cognizance of offence on second protest petition, but fact remains in the relied on case is that learned CJM had refused to accept the final report and accepted the protest petition and thereafter, proceeded U/Ss. 200 and 202 of CrPC which is not in the present case inasmuch as the learned JMFC, Salipur has never refused to accept the police report submitted by the Investigating Agency, rather he has accepted the police report, took cognizance of offences and committed the case to the Court of Sessions, whereafter he on receipt of first protest petition, has directed for further investigation in the matter, but when the police submitted a final report as FIR false on the allegation raised by the complainant in the complaint against the present Petitioner, OP No.2 filed second protest petition in which after initial statement and enquiry, the learned JMFC, Salipur took cognizance of offence again and directed for filing of requisites for issuance of process against the Petitioner. At this juncture, it is considered apt to refer to paragraph-47 of the decision in ***Hardeep Singh (supra)*** wherein a Constitutional Bench of five Judges of Apex Court has held as under:-

> *"Since after the filing of the charge-sheet, the court reaches the stage of inquiry and as soon as the court frames the charges, the trial commences, and therefore, the power under section 319(1) CrPC can be exercised at any time after the charge-sheet is filed and before the pronouncement of judgment, except during the stage of Sections 207/208*

CrPC, committal, etc. which is only a pretrial stage, intended to put the process into motion. This stage cannot be said to be a judicial step in the true sense for it only requires an application of mind rather than a judicial application of mind. At this pre-trial stage, the Magistrate is required to perform acts in the nature of administrative work rather than judicial such as ensuring compliance with Sections 207 and 208 CrPC, and committing the matter if it is exclusively triable by the Sessions Court. Therefore, it would be legitimate for us to conclude that ***the Magistrate at the stage of Sections 207 to 209 CrPC is forbidden, by express provision of Section 319 CrPC, to apply his mind to the merits of the case and determine as to whether any accused needs to be added orsubtracted to face trial before the Court of Session".***

15. In the aforesaid situation, another legal question crops up as to whether the learned Magistrate was empowered to summon the present Petitioner in respect of the case which has already been committed by him to Court of Sessions around two years before, wherein the evidence has already been recorded, since admittedly by the time of filing of second protest petition, the complainant-cum-OP No.2 and two out of rest four witnesses have already tendered their evidence before the Sessions Court and the rest of two witnesses cited in the complaint have also tendered their evidence in the Court of Sessions by the time they were examined in the complaint U/S. 202 of CrPC. In peculiar situation, when the Sessions trial arising out of the present case, has already reached the stage of 319 of CrPC for addition of accused, but no such application was moved before the Sessions Court for arraying the Petitioner as an accused on the basis of evidence tendered by the witnesses and instead OP No.2 approached the learned JMFC, Salipur without offering any explanation for not resorting to Sec.319 of CrPC. The aforesaid conundrum can be well answered by referring to the decision relied on by the Petitioner in ***Jile Singh v. State of Uttar Pradesh and another; (2012) 3 SCC 383***, wherein after referring to the decision in ***Ranjit Singh v. State of Punjab; (1998) 7 SCC 149*** which was subsequently followed by the Apex Court in ***Kishori Singh and others v. State of Bihar and another; 2004 13 SCC 11***, the Apex Court in paragraph nos. 10, 11 and 12 has held as under:-

10. In ***Ranjit Singh (supra),*** *this Court was concerned with the issue whether the Sessions Court can add a new person to the array of the accused in a case pending before it at a stage prior to collecting any evidence. The three Judge Bench that considered the above issue referred to various provisions of CrPC, namely, Sections 204, 207, 208, 209, 225, 226, 227, 228, 229, 230 and 319 and held as under: -*

"19. So from the stage of committal till the Sessions Court reaches the stage indicated in Section 230 CrPC, that court can deal with only the accused referred to in Section 209 CrPC. There is no intermediary stage till then for the Sessions Court to add any other person to the array of the accused.

20. Thus, once the Sessions Court takes cognizance of the offence pursuant to the committal order, the only other stage when the court is empowered to add any other person to the array of the accused is after reaching evidence collection when powers under Section 319 CrPC can be invoked. We are unable to find any other power for the Sessions Court to permit addition of new person or persons to the array of the accused. Of course, it is not necessary for the court to wait until the entire evidence is collected for exercising the said powers."

*11. The above legal position has been reiterated by this Court in a subsequent decision in **Kishori Singh (supra).** The twoJudge Bench in **Kishori Singh (supra)** considered some of the provisions of CrPC and earlier decision of this Court in Ranjit Singh and two other decisions, namely, **Raj Kishore Prasad vrs. State of Bihar; (1996) 4 SCC 495 and India Carat (P) Ltd. v. State of Karnataka; (1989) 2 SCC 132** and held as under:*

9. After going through the provisions of the Code of Criminal Procedure and the aforesaid two judgments and on examining the order dated 10-6-1997 passed by the Magistrate, we have no hesitation to come to the conclusion that the Magistrate could not have issued process against those persons who may have been named in the FIR as accused persons, but not charge-sheeted in the charge-sheet that was filed by the police under Section 173 CrPC.

10. So far as those persons against whom charge-sheet has not been filed, they can be arrayed as 'accused persons' in exercise of powers under Section 319 CrPC when some evidence or materials are brought on record in course of trial or they could also be arrayed as „accused persons' only when a reference is made either by the Magistrate while passing an order of commitment or by the learned Sessions Judge to the High Court and the High Court, on examining the materials, comes to the conclusion that sufficient materials exist against them even though the police might not have filed charge-sheet, as has been explained in the latter three-Judge Bench decision. Neither of the contingencies has arisen in the case in hand.

*12. In the present case, if the order passed by the Chief Judicial Magistrate, Mathura, in issuing summons against the appellant on the complaint filed by Respondent 2 complainant, which has been confirmed by the High Court, is allowed to stand, it would mean addition of the appellant to the array of the accused in a pending case before the Sessions Judge at a stage prior to collecting any evidence by that court. This course is absolutely impermissible in view of the law laid down by a three-Judge Bench of this Court in **Ranjit Singh (supra).***

16. In ***Jile Singh (Supra),*** wherein the facts are somehow akin to the present case, the son of the Informant was found murdered and FIR was lodged by him against unknown person, but on a conclusion of investigation, the IO submitted charge-sheet naming one Hari Singh as an accused for having committed the murder of the son of the Informant and on the basis of material collected by the IO, no case was found out against Jile Singh who was accordingly stated by the IO to have been falsely implicated in the course investigation and accordingly, the learned CJM, Mathura committed the accused Hari Singh to the Court of Sessions Judge, Mathura for trial, but the Informant instituted a complaint U/S. 200 CrPC against Jile Singh and one Jayveer Singh for the murder of his son and in such complaint, the learned CJM, Mathura after recording the statements U/S. 202 CrPC, issued summons to Jile Singh who being aggrieved, filed the criminal revision before the Allahabad High Court which came to be dismissed and thereby, leading to ***Jile Singh*** to approach the Apex Court in Criminal Appeal No. 121 of 2012 ***(Jile Singh v. State of Uttar Pradesh)***, wherein after analyzing the aforesaid facts, the Apex Court referring to the decision indicated above has held in paragraph 13 as under:-

"13. The stage of Section 209 CrPC having been reached in the Case, it was not open to the Chief Judicial Magistrate, Mathura to exercise the power under Section 204(1)(b)

CrPC and issue summons to the appellant (Jile Singh). The order of the Chief Judicial Magistrate, Mathura is totally without jurisdiction."

17. The aforesaid conclusion arrived at by the Apex Court makes it clear that once the Magistrate commits the case record to the Court of Sessions, it was not open for him to exercise jurisdiction to issue summons to other person as an accused when the Court of Sessions is in seisin over the said case. What is the stage at which power U/S 319 CrPC can be exercised has been answered by Apex Court in ***Hardeep Singh (supra)*** by recording conclusion at paragraph-117.1 that "in ***Dharam Pal (supra)*** case, the Constitutional Bench has already held that after committal, cognizance of offence can be taken against a person not named as an accused, but against whom materials are available from the papers filed by the police after completion of ivestigation. Such cognizance can be taken U/S. 193 CrPC and the Sessions Judge need not wait till "evidence" U/S. 319 CrPC becomes available for summoning an additional accused". The upshot of aforesaid conclusion is on the basis that there cannot be a committal of case without there being an accused person before the Court, but this only means that before a case in respect of an offence is committed, there must be some accused suspected to be involved in the crime before the Court, but once the case in respect of offence qua those accused who are before the Court is committed then the cognizance of offence can be said to have been taken properly by the Court of Sessions and the bar U/S. 193 of CrPC would automatically get lifted and the said Court can summon the additional person(s) who appear to be involved in the crime, but not facing the trial along with those who had already facing the trial and such implied cognizance taken by Court of Sessions is incidental to the normal process as provided in Sec. 319 of CrPC.

18. In this case, the learned JMFC on receipt of first protest petition directed for further investigation, but he instead of waiting the result of the further investigation, committed the case qua other accused persons to the Court of Sessions leading to the present controversy. This Court is never in dilemma that the Magistrate has ample power to direct further investigation even at the post cognizance stage, until trial commences with framing of charge, but it was desirable for him, more particularly in a Sessions case to wait for the result of the further investigation when he directs for further investigation pending committal of the case record to the Court of Sessions, otherwise such controversy is bound to occur. In order to avoid such situation like this, it would have been better for the learned JMFC who has directed for further investigation, but committed the case record qua the other accused persons against whom charge-sheet/police report have been filed pending further investigation, to commit/submit the case record on receipt of police report in the matter of further investigation along with the documents and the protest petition together with the statements U/Ss. 200 and 202 of CrPC in case the complainant was not satisfied with the result of the further investigation, for taking necessary action at the end of the Court of Sessions in terms of Provision of Chapter-XVIII of CrPC, but the learned Magistrate should not have taken cognizance of offence for second time.

19. In **Kishori Singh(supra)**, three appellants were named as accused in the FIR, but they had not been charge-sheeted and the offence in question was one, which was triable by a Court of Sessions and the learned Magistrate upon finding grounds to proceed against the accused persons by an order dated 10.06.1997 took cognizance of offences U/Ss. 302/34/324 and 448 of IPC and Sec. 27 of Arms Act, however, the Magistrate subsequently issued nonbailable warrants of arrest against the three appellants. On the above background of facts and by referring to the expression that "accused persons" would obviously mean to those accused persons against whom the police had filed charge sheet, the Apex Court in ***Kishori Singh(supra)*** has held in paragraph-9 as under:-

> "9. *After going through the provisions of the Code of Criminal Procedure and the aforesaid two judgments* ***[Raj Kishore Prasad(supra) and Ranjit Singh (supra)]*** *and on examining the order dated 10-6-1997 passed by the Magistrate, we have no hesitation to come to the conclusion that the Magistrate could not have issued process against those persons who may have been named in the FIR as accused persons, but not charge-sheeted in the chargesheet that was filed by the police under Section 173 CrPC."*

20. It is not out of place to mention here that even though the Magistrate takes cognizance of offence in respect of the accused persons named in the chargesheet, however, the Court of Sessions on receipt of the case record upon committal to it has ample jurisdiction to take cognizance of offence of the persons not named as offender, but whose complicity in the case would be evident from the materials available on record and even without recording evidence, the Sessions Judge may summon those persons not named in the police report to stand trial along with those already named therein and the aforesaid conclusion of law was clearly laid down by the Apex Court in paragraph 40 of the decision rendered by a Constitutional Bench of five Judges in ***Dharam Pal (supra):-***

> "*40. In that view of the matter, we have no hesitation in agreeing with the views expressed in Kishun Singh"s case [****Kishun Singh v. State of Bihar; (1993) 2 SCC 16****] that the Sessions Court has jurisdiction on committal of a case to it, to take cognizance of the offences of the persons not named as offenders but whose complicity in the case would be evident from the materials available on record. Hence, even without recording evidence, upon committal under Section 209, the Sessions Judge may summon those persons shown in column 2 of the police report to stand trial along with those already named therein.*

21. The aforesaid legal conclusion although was very much available to the Court of Sessions, but no such power has been invoked to arraign the present Petitioner as an accused, however, the aforesaid remedy to arraign the Petitioner as an additional accused is not at all foreclosed since the provision of Sec. 319 of CrPC is still available as the trial against absconding accused has not yet commenced, but for exercise of such power is further subject to satisfaction of the Court within the legal parameters as required therein. It is also not denied that neither the Sessions Court was moved nor did it invoke the power as contemplated U/S. 319 of CrPC to arraign the petitioner as an accused even after recording of evidence in the case record upon its committal.

22. In coming back to the applicability of the decisions relied on by OP No.2 in **H.S. Bains (supra)**, the Apex Court therein has held that a Magistrate who on receipts of a complaint, orders an investigation U/S 156(3) and receives a police report U/S. 173(1), may, thereafter, do one of the three things: (i) he may decide that there is no sufficient ground for proceeding further and drop action; (ii) he may take cognizance of the offence under Section 190(1)(b) on the basis of the police report and issue process; this he may do without being bound in any manner by the conclusion arrived at by the police in their report; (iii) he may take cognizance of offence U/S. 190(1)(a) on the basis of the original complaint and proceed to examine upon oath the complainant and his witnesses U/S. 200. If he adopts the third alternative, he may hold or direct an inquiry U/S. 202 if he thinks fit. Thereafter, he may dismiss the complaint or issue process, as the case may be. This Court is quite conscious and alive with the aforesaid principles as laid down by the Apex Court in ***H.S. Bains (supra),*** but the facts involved in this case is quite different inasmuch as the learned JMFC, Salipur upon receipts of police report took cognizance of offences on 04.05.2021 without disagreeing with the conclusion arrived at by the Investigating Officer and subsequently, thereafter, on receipt of first protest petition, the learned Magistrate directed for further investigation on 25.08.2021, but on receipt of final report in respect of further investigation, the learned Magistrate proceeded to entertain a second protest petition without accepting or refusing the final report submitted on further investigation and took cognizance of offence again, even after two years of committing the case record to the Court of Sessions. In such situation, the fact of the present case is found distinguishable to the facts involved in ***H.S. Bains (supra).*** In addition, the Opposite Party No.2 also relies heavily on ***Nahar Singh (supra)*** to contend that the Magistrate was not in error in taking cognizance of offence on second protest petition and issuing process against the Petitioner. True it is that on receipt of police report, the Magistrate is duty bound to find out the complicity of any person apart from those who are charge-sheeted and in case, the Magistrate comes to a conclusion that there is clinching evidence supporting the allegation made against some persons who have not been charge sheeted, he can certainly proceed against such person by summoning them. Similarly at the cost of repetition, it has been held by the Apex Court in ***Dharam Pal (supra)*** that the Sessions Judge upon receipt of record on committal can also proceed against those persons who have not been charge-sheeted, but has been named or not named in the FIR provided their complicity in commission of offence is found out on the basis of material produced by the Investigating Agency. Hence, the decision laid down in ***Nahar Singh (supra),*** rather supports the case of the Petitioner than of OP No.2 inasmuch as the Petitioner never disputes the position of law that the Magistrate may act on the basis of a protest petition that may be filed and commit the case record to the Court of Sessions, if the offences are triable by Court of Sessions and the power of Magistrate is not exercisable only in respect of persons whose names appear in column 2 of the charge sheet, but against those who are not arraigned as an accused in the police report, however, the present case relates to summoning of the Petitioner in the case which has already committed to Court of

Sessions near about two years before the date of such summoning and more particularly, when the Court of Sessions is in seisin of the trial and that too, on the basis of second order of taking cognizance of offence on consideration of second protest petition, and statements of complainant and witnesses recorded U/Ss. 200 and 202 CrPC which assumes significance in this situation, especially when the complainant and witnesses have already tendered their evidence in the trial before the Court of Sessions prior to filing of second protest petition, so also before their examination in the enquiry in such protest petition as well as no power U/S. 319 of CrPC being invoked even after such stage has already been reached before institution of the second protest petition.

23. This Court is also conscious of the significant change brought in the provision of cognizance of offence by a Court of Sessions as laid down in ***Sk. Latfur (supra)***, which lays down that earlier under old Code (CrPC), the accused was committed, whereas the case is required to be committed in the new Code (CrPC). Thus, when Sec. 193 of CrPC read in juxtaposition with Sec. 209 of CrPC, it appears that it is the case of the accused that is committed to the Court of Sessions, but not the accused. Hence, once the case is committed to the Court of Sessions by a Magistrate under the CrPC, the restriction as placed on the power of the case of the accused that is committed to the Court of Sessions, but not the accused. Hence, once the case is committed to the Court of Sessions by a Magistrate under the CrPC, the restriction as placed on the power of Court of Sessions to take cognizance of offence as a Court of original jurisdiction gets lifted and on committal of the case U/S. 209 of CrPC, the Bar U/S. 193 gets lifted and thereby, investing the Court of Sessions with complete and unfettered jurisdiction of the Court of original jurisdiction to take cognizance of offence which would include the summoning of the person or persons whose complicity in the commission of crime can prima facie be gathered from the materials available on record. It is obviously true that cognizance of offence is taken, but not against the offender. However, applying the law laid down by the Apex Court in ***Dharam Pal (supra)***, the summoning of accused not named in the police report, but whose complicity is found on the basis of materials collected by the Investigating Agency is to be understood in the context of taking cognizance of offences committed by the said accused persons not named as offender in the charge-sheet, but whose complicity is evident from the materials available on record. It is, however, reminded here that if cognizance is to be taken of the offence, it could be taken either by the Magistrate or by the Court of Session. It has also been held by ***Dharam Pal (supra)*** that once the case is committed to the Court of Sessions by the learned Magistrate, the Court of Sessions assumes original jurisdiction and all that goes with assumption of such jurisdiction. From a careful conspectus of discussions made hereinabove together with precedents as laid down by the Apex Court in ***Dharam Pal, Hardeep Singh, Balveer Singh, Jile Singh and Kishori Singh (supra)*** which have been referred to above, the only answer to the questions as formulated is that the jurisdictional Magistrate cannot take cognizance of offences for the second time during the currency/validity of the first cognizance order even on a protest

petition and such Magistrate cannot issue process against a person as an additional accused irrespective of the facts whether he is named or not named in the FIR, but not charge-sheeted, once the Magistrate commits the case record to the Court of Sessions after taking cognizance of offences by issuing process against the accused persons named in the police report U/S. 173(2) of the CrPC and in such situation, it is the only the Court of Sessions which assumes original jurisdiction in the matter to add such person(s) as an additional accused whose name(s) was/were left out by the police while submitting report U/S. 173(2) of the CrPC or by the learned Committing Magistrate for not sending the additional accused for trial at the time of commitment, but his/their (additional accused) complicity in commission of offence is well made out and, therefore, the Magistrate after committing the case record the Court of Sessions being *functus officio* in the matter, all the actions taken by him in the same case record are without jurisdiction, but the aforesaid conclusion is not applicable in case of absconding accused against whom the original case record is separated/split off or such accused person is brought on record on further investigation in terms of Sec. 173(8) of CrPC. The two questions as formulated by this Court are answered accordingly.

24. Law is also equally well settled and reiterated by the Apex Court in **Suresh Garodia (supra)** that the learned Magistrate while exercising his power U/S. 190 of CrPC, is not bound to accept the final report of the IO. However, if the learned Magistrate disagrees with the finding of the IO, the least that is expected of him is to give reasons as to why he disagrees with such report and as to why he finds it necessary to take cognizance despite the negative report submitted by the IO. In the present case, neither in his order dated 04.05.2021 on receipt of police report nor in his order dated 25.09.2023 on second protest petition, the learned Magistrate has whispered a single word as to why he agrees or disagrees with the conclusion arrived at by the IO in the course of investigation on the FIR or in the course of further investigation respectively. Further, the learned Magistrate in his order dated 04.05.2021 has simply accepted the police report on the FIR and took cognizance of offences without disclosing/assigning any reason in respect of IO not charge-sheeting the Petitioner. Similarly, in his order dated 25.09.2023, the learned JMFC, Salipur has not made any reference to the final report submitted by the IO in the matter relating to further investigation on the allegation against the Petitioner, although such report discloses specific action taken by the IO in the course of further investigation.

25. The powers of Magistrate to summon a person not charge-sheeted as accused person is very much apparent that once he takes cognizance of offence, it is not obviously against any offender and after he takes cognizance of offence, it is his duty to find out who the offenders really are, but once he comes to a conclusion that apart from those accused persons sent up by the police to the Court, some others are still available and involved, the Magistrate is duty bound to proceed against those persons. The summoning of additional accused is part and parcel of the proceeding initiated by his taking cognizance of an offence. In this regard, this Court is alive

with the observation made in ***Sk. Latfur***, wherein it has been held in paragraph-7 that a Magistrate trying a warrant case as also a Court of Session having once validly taken cognizance of offence on the basis of a police report(when considering material before it for framing of a charge) is not only entitled, but indeed, duty bound to summon a person as an accused to stand trial before it if it is fully satisfied of the existence of a prima facie case against an additional accused who may not have been sent up as such. In this case, the learned JMFC, Salipur neither has exercised such jurisdiction suo motu nor has he recorded any disagreement with the report of the police submitted U/S. 173(2) of CrPC on the two occasions i.e. after initial round of investigation and further investigation. It needs to be highlighted that when a person is named in the FIR by the complainant, but police after investigation finds no role of that particular person and files the charge sheet without implicating him, the Court is not powerless and at that stage of summoning, if the Court finds that a Court is alive with the observation made in ***Sk. Latfur***, wherein it has been held in paragraph-7 that a Magistrate trying a warrant case as also a Court of Session having once validly taken cognizance of offence on the basis of a police report(when considering material before it for framing of a charge) is not only entitled, but indeed, duty bound to summon a person as an accused to stand trial before it if it is fully satisfied of the existence of a prima facie case against an additional accused who may not have been sent up as such. In this case, the learned JMFC, Salipur neither has exercised such jurisdiction suo motu nor has he recorded any disagreement with the report of the police submitted U/S. 173(2) of CrPC on the two occasions i.e. after initial round of investigation and further investigation. It needs to be highlighted that when a person is named in the FIR by the complainant, but police after investigation finds no role of that particular person and files the charge sheet without implicating him, the Court is not powerless and at that stage of summoning, if the Court finds that a particular person should be summoned as accused, even though not named in the charge sheet, it can do so. At that stage, chance is also given to complainant to file protest petition urging upon the Court to summon other persons who were named in the FIR, but not implicated in the charge sheet. Once that stage has gone, the Court is still not powerless by virtue of power U/S 319, however, the power therein gets triggered when during the trial some evidence surfaces against the proposed accused.

26. The concept fairness in criminal jurisprudence not only includes the right of accused, but also that of the complainant. It is also equally important that a person accused of offence is not found out to be involved for commission of the offence has a right not to face the rigmarole of trial and such right definitely flows from Article 21 of the Constitution of India. Further, the right of the de-facto complainant is no less important and deserves equal acceptance in the context of his grievance, but such grievance must stand to the legal scrutiny, otherwise a failure of justice may be occasioned in accepting the claim of the complainant without any legal scrutiny. In the present case, the only allegation against the petitioner is for his involvement in conspiracy, but the police after two rounds of investigation did not find the complicity

of petitioner, nonetheless the FIR allegation against the petitioner is for threatening to kill the informant and his father which was disclosed by the deceased to his son–cum-informant just four days before the occurrence. What is significant in this case is that the learned Magistrate, Salipur while accepting the police report U/S. 173(2) of CrPC in taking cognizance of offences has not disagreed with such report of the IO, nonetheless later on he had ordered for further investigation on the complaint of first complainant and also monitored the investigation by asking about preservation of CDR on the prayer of the first complainant. The second round of investigation which was specifically directed for further investigation with regard to conspiracy did not find the complicity of scrutiny, otherwise a failure of justice may be occasioned in accepting the claim of the complainant without any legal scrutiny. In the present case, the only allegation against the petitioner is for his involvement in conspiracy, but the police after two rounds of investigation did not find the complicity of petitioner, nonetheless the FIR allegation against the petitioner is for threatening to kill the informant and his father which was disclosed by the deceased to his son–cum-informant just four days before the occurrence. What is significant in this case is that the learned Magistrate, Salipur while accepting the police report U/S. 173(2) of CrPC in taking cognizance of offences has not disagreed with such report of the IO, nonetheless later on he had ordered for further investigation on the complaint of first complainant and also monitored the investigation by asking about preservation of CDR on the prayer of the first complainant. The second round of investigation which was specifically directed for further investigation with regard to conspiracy did not find the complicity of ***Pepsi Foods Ltd. and another vrs. Special Judicial Magistrate and others; (1998) 5 SCC 749*** has held thus:-

> *"28.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 allegation 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 allegation made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning the accused. The Magistrate has to carefully scrutinized 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".*

27. Similarly, in ***Birla Corporation Ltd. vrs. Adventz Investments and Holdings Limited and others; (2019) 16 SCC 610,*** the Apex Court at Paragraph-33 has held as under:-

> *"**33**. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and law applicable thereto. The application of mind has to be indicated by disclosure of mind on the satisfaction. Considering the duties on the part of the Magistrate for issuance of summons to the accused in a complaint case and that there must be sufficient indication as to the application of mind"*

28. In this premises, when the summoning of an accused in a criminal case is held to be a serious matter, but the present petitioner in this case has been arraigned as an additional accused and that too, at a stage on second protest petition after examination of the complainant and witnesses in the trial of such case record after its commitment when the Court of Sessions was in seisin over the matter, which cannot be considered lightly, rather the same deserves to be considered in a higher pedestal of Article 21 of the Constitution of India and the aforesaid situation gains serious momentum when the answer to the questions so formulated in this case favour the plea of the petitioner which in the circumstance needs to be examined on the context of the serious contention of OP No.2 that the proceeding against the petitioner cannot be quashed in exercise of power of revisional jurisdiction since the powers of the Court U/Ss. 397/401 of CrPC is quite distinguishable and different from that of Sec.482 of CrPC. The answer to the aforesaid challenge of OP No.2 is provided in the decision relied on by the petitioner in ***Popular Muthiah vrs. State represented by Inspector of Police; (2006) 7 SCC 296,*** wherein the Apex Court at paragraphs-29 & 30 has held as under:-

> ***"29****. The High Court while, thus, exercising its revisional or appellate power, may exercise its inherent powers. Inherent power of the High Court can be exercised, it is trite, both in relation to substantive as also procedural matters.*
>
> ***30****. In respect of the incidental or supplemental power, evidently, the High Court can exercise its inherent jurisdiction irrespective of the nature of the proceedings. It is not trammeled by procedural restrictions in that;*
>
> ***(i)*** *Power can be exercised suo motu in the interest of justice. If such a power is not conceded, it may even lead to injustice to an accused.*
>
> ***(ii)*** *Such a power can be exercised concurrently with the appellate or revisional jurisdiction and no formal application is required to be filed therefor.*
>
> ***(iii)*** *It is, however, beyond any doubt that the power under Section 482 of the Code of Criminal Procedure is not unlimited. It can inter alia be exercised where the Code is silent, where the power of the court is not treated as exhaustive, or there is a specific provision in the Code; or the statute does not fall within the purview of the Code because it involved application of a special law. It acts ex debito justitiae. It can, thus, do real and substantial justice for which alone it exists.*

It is, therefore, very clear that even though the petitioner has knocked the door of this Court by invoking revisional jurisdiction, but the same is not a fetter creating Bar against use of jurisdiction by this Court U/S. 482 of CrPC, if the situation so demands or in the interest of justice. In this case, not only the order impugned is unsustainable in the eye of law, but also the proceeding initiated against the petitioner in 1CC No. 11 of 2023 is absolutely without jurisdiction, since the learned JMFC, Salipur after committing the case record to the Court of Sessions without disagreeing with the report submitted by the IO U/S. 173(2) of CrPC has no jurisdiction to add the petitioner as an additional accused who was not charge-sheeted even after two rounds of investigation, more particularly when the Court of Sessions has already assumed jurisdiction over the matter after commitment and there-by, it was the Court of Sessions who could have passed order to add the

petitioner as an additional accused, but the Court of Sessions had neither invoked its power nor was it moved to arraign the petitioner as an additional accused even after recording of evidence, which in the circumstance gives rise to an reasonable presumption that there was no material to proceed against the petitioner as an additional accused even on the evidence of complainant and witnesses cited in the second protest petition in the Sessions trial record. In the interest of justice, the impugned order being unsustainable together with proceeding against the petitioner in 1CC No. 11 of 2023 is liable to be quashed.

29. Resultantly, the criminal revision stands allowed on contest, but no order as to costs. Accordingly, the impugned order dated 25.09.2023 passed by learned JMFC, Salipur in 1CC No. 11 of 2023 and the entire criminal proceeding against the petitioner therein are hereby quashed.

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2024 (III) ILR-CUT-569

SIBO SANKAR MISHRA, J.

CRLMC NO.1234 OF 2024

DIPTIPRAVA SAHU …..Petitioner

V.

STATE OF ODISHA …..Opp.Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 457 r/w Section 52 (a) NDPS Act – Offences under NDPS Act – Interim release of Vehicle – Whether the bar provided U/s. 60(3) of NDPS Act shall apply to the application if filed under section 457 of Cr. P.C. to release the vehicle? – Held, No – The law clearly emerges that Section 60(3) of the N.D.P.S. Act doesn't create an absolute bar for interim release of the vehicle rather it contemplates initiation of confiscation proceeding subject to the owner of the vehicle proving that he had no knowledge or he had not connived for commission of the offence. (Para 5)

Case Laws Relied on and Referred to :-

1. CRLMC No.985 of 2020 : Ratnakar Behera vs. State of Odisha
2. 2013 (I) OLR- 820 : Balabhadra Nayak vs. State of Orissa
3. 2017 (II) ILR-CUT-689 : Kishore Kumar Choudhury vs. State of Odisha
4. SLP (Crl.) 2745 of 2022 : Sunderbhai Ambalal Desai and others vs. State of Gujarat
5. CRLMC No.174 of 2022 : Aswini Kumar Das vs. State of Odisha

For Petitioner : Mr. Abhilash Mishra.
For Opp.Party : Mr. P.K. Maharaj, Addl. Standing Counsel

JUDGMENT Date of Hearing : 09.05.2024 : Date of Judgment : 20.06.2024

S.S. MISHRA, J.

1. The petitioner has moved an application U/S. 457 Cr.P.C. r/w Section-52(a) of the NDPS Act for release of her CRETA 1.5 MPL MT SX car bearing Registration No.0D-02-CL-4207, which has been turned down by the Court below.

2. On 21.11.2023, P.R. Case No.1851of 2023-24 was registered on the allegation that 140 Kgs. of ganja was carried in a CRETA car bearing Registration No.OD-02-CL-4207. The vehicle was seized along with accused persons carrying the ganja. The petitioner claimed to be the original owner of the CRETA car. He moved an application U/s.457 Cr.P.C for interim release of the said vehicle on the ground that he was not an accused in the NDPS case wherein the car was seized and being the registered owner of the said vehicle, he is entitled to the interim zima of the car. He has also contended that he had no knowledge about the vehicle being used for the alleged crime. Therefore, Section 60(3) of the NDPS Act shall not be operated against him for release of the said vehicle.

The application was opposed by the prosecution on the ground that Section 60(3) of the N.D.P.S. Act provides for confiscation of the vehicle used in the commission of the offence. Therefore, an application U/S. 457 of Cr.P.C r/w Section 52(A) of the N.D.P.S. Act is not maintainable. It is the statutory Scheme that the seized vehicle in N.D.P.S. case is liable to be confiscated U/s. 60(3) of the N.D.P.S Act, unless it is clearly established that the said vehicle was used by the accused persons without the knowledge of the owner. In this case, the petitioner has claimed the interim release of vehicle in his favour on the ground that he had no knowledge that the vehicle was being used in the crime.

3. Learned Court below rejected the application of the petitioner, *inter alia*, stating as under:

> *"Having gone through the above two provisions, it is found that there is only clear cut provisions U/s. 60(3) of NDPS Act for confiscation of the vehicle, if the owner fails to establish that her vehicle has been used by the accused persons without her knowledge. In the present case, on bare reading of petition filed U/s. 457 Cr.P.C., there is nothing specifically written that the said vehicle was used by the accused persons for transportation of ganja was not in the knowledge of the owner. She only demanded to release the vehicle under the ground that her vehicle is necessary for regular work and to maintain his livelihood."*

4. Learned trial Court primarily rejected the application moved by the petitioner U/S. 457 Cr.P.C r/w Section-52A(1) of the N.D.P.S. Act and refused the interim release of the vehicle on the ground that disposal of the seized vehicle involved in the N.D.P.S. case and confiscation of the vehicle is contemplated under the NDPS Act. The N.D.P.S. Act being a Special Act overrides the provisions of the general law, i.e., the Cr.P.C. Therefore, the application U/s. 457 Cr.P.C. is not tenable on the face of special statutory provision. The reasoning of the Court below appears to be contrary to the law laid down by various High Courts as well as the Hon'ble Supreme Court in regard to the interim release of the vehicle involved in the offence under NDPS cases. Our own High Court in a judgment in the case of ***Ratnakar Behera vs. State of Odisha*** passed in ***CRLMC No.985 of 2020*** has held as under:

> **"***7. In addition to this, several High Courts have held that mere initiation of confiscation proceeding cannot act as a bar for delivery of the vehicle to its owner when the owner of*

the registered vehicle has not been found guilty. Allahabad High Court in the cases of ***Kamal Jeet Singh v. State, Mohd. Hanif v. State of U.P. and Jai Prakash Sharma vs. State of U.P.*** *have reiterated the same. The ratio decidendi as provided in* ***Jai Prakash Sharma vs. State of U.P. (supra)*** *is as follows:*

"5. The revisionist had no knowledge or information of the liquor alleged to have been recovered from the truck. He is not a party to the aforesaid two cases pending before the District Magistrate, Etawah nor has any notice been issued to him the revisionist Jai Prakash Sharma, therein. The mere pendency of the confiscation proceedings is no bar to the release of the truck. The matter is still under investigation. The truck lying at the police station will, if not released, yet damaged, ruined and rusted, not only this, but it will also ultimately become unuseable and un-serviceable for various obvious reasons."

5. Further, our High Court also ruled in ***Balabhadra Nayak vs. State of Orissa*** case reported in ***2013 (I) OLR- 820*** that :

"There is no other provisions in the Cr.P.C. except Section 457 Cr.P.C. for passing order for interim release of the vehicle by the Criminal Court. In case the words, "Police Officer" occurring in Section 457(1) Cr.P.C. is given a restricted meaning so as to exclude officers of other departments like Excise etc. who are invested with power to investigate into the offence, effect seizure and launch prosecution and to report such seizure to the Criminal Court, it would cause injustice to the persons claiming to be entitled to custody of the property. Therefore, the words "Police Officer" in Section 457 Cr.P.C. must include an Excise Officer reporting such seizure to a Criminal Court in connection with the enquiry or trial of any criminal case.

Section 60(3) of the NDPS Act is no bar for interim release of the vehicle *as the said provision is only substantive in nature and speaks of the liability of the vehicle to be confiscated where the owner fails to prove that it was used without his knowledge or connivance or the knowledge and connivance of his agent in charge of the vehicle."*

In ***Kishore Kumar Choudhury vs. State of Odisha***, reported in ***2017 (II) ILR-CUT-689***, this Court held as under:

"In view of the submissions made by the learned counsel for the respective parties and taking into account the ratio laid down in the aforesaid cases, I am of the view that the learned Sessions Judge was not justified in rejecting the petition under section 457 of Cr.P.C. relying on the provision ***under section 60(3) of the N.D.P.S. Act. The conditions stipulated for not confiscating the vehicle after the end of trial as per section 60(3) of the N.D.P.S. Act*** *i.e. it was so used without the knowledge or connivance of the owner himself, his agent, if any and the person-in-charge of the vehicle and that each of them had taken all reasonable precautions against such use, is not applicable at the stage of consideration of interim release of the vehicle under section 457 of Cr.P.C."*

The Hon'ble Supreme Court has been pleased to formulate broad and general guideline to deal with such application in the case of ***Sunderbhai Ambalal Desai and others vs. State of Gujarat***, reported in ***SLP (Crl.) 2745 of 2022*** and held as under:

"7. *In our view, the powers under Section 451 Cr.P.C. should be exercised expeditiously and judiciously. It would serve various purposes, namely:-*

1. *Owner of the article would not suffer because of its remaining unused or by its misappropriation;*

2. *Court or the police would not be required to keep the article in safe custody ;*

3. *If the proper panchanama before handling over possession of article is prepared, that can be used in evidence instead of its production before the Court during the trial. If necessary, evidence could also be recorded describing the nature of the property in detail; and*

4. *This jurisdiction of the Court to record evidence should be exercised promptly so that there may not be further chance of tampering with the articles."*

From the discussion of the aforementioned judgments, the law clearly emerges that Section 60(3) of the N.D.P.S. Act doesn't create an absolute bar for interim release of the vehicle rather it contemplates initiation of confiscation proceeding subject to the owner of the vehicle proving that he had no knowledge or he had not connived for commission of the offence.

6. Perusal of the impugned order indicates that the application of the petitioner filed U/S. 457 Cr.P.C. has been rejected solely on the ground that Section 60(3) of the NDPS Act creates a bar for release of the vehicle seized in the course of the commission of the offence under the Act. However, contrary to the finding of the Court below, this Court has laid down the law that mere filing of the confiscation proceeding shall not operate as a bar to release the vehicle U/S. 457 Cr.P.C. unless the confiscation proceeding is concluded and appropriate orders are passed.

7. Learned counsel for the petitioner also relied upon two judgments of this Court in the cases of ***Aswini Kumar Das vs. State of Odisha*** passed in ***CRLMC No.174 of 2022*** and ***Ratnakar Behera vs. State of Odisha*** passed in ***CRLMC No.985 of 2020***. In the case of ***Aswini Kumar Das*** (supra), the relevant para-15 reads as under:

"15. Thus, from a conspectus of the analysis made herein before, the following position emerges:-

(i) The vehicle in question has not been produced before the Authorized Officer.

(ii) The so called confiscation proceeding is no proceeding in the eye of law.

(iii)The vehicle is lying unused and exposed to the elements for more than a year.

(iv) The bar under Section 72 shall not apply to the case at hand for which the provision under Section 457 of Cr.P.C. can be invoked for interim release of the vehicle."

The judgments cited by the petitioner although are relating to excise offences and deals with statutory bar contemplated under Section 72 of the Bihar and Orissa Excise Act, but the broad principle evolved from all the judgments is that the statutory bar created under special statutes shall not operate as absolute bar to consider application either under Section 451 or Section 457 Cr.P.C.

8. The impugned order is weighed taking into consideration the aforementioned judgments of our own High Court as well as the Hon'ble Supreme Court. It is found that the vehicle CRETA bearing Registration No.0D-02-CL-4207 was involved in illegal carrying of 140 kgs. ganja and was seized by the police. Accordingly, the F.I.R. in Boinda Excise P.R. No.185 of 2023 corresponding to Spy

(NDPS) Case No.19 of 2023 was registered against the accused persons for the offence U/S. 20(b)(ii)(C) of the NDPS Act. The present petitioner is not an accused in that case.

9. The petitioner claims to be the owner of the vehicle and is not the accused in the N.D.P.S. Case. Therefore, he moved an application before the Court below seeking interim release of the vehicle U/S. 457 Cr.P.C. The Court below rejected the application construing Section 52A(1) and Section 60(3) of the NDPS Act as a statutory bar and has held that the application under the general provision of Section 457 Cr.P.C. for release of the vehicle cannot find favors on the face of special provision under the NDPS Act regarding the disposal and confiscation of the vehicle involved in the commission of the crime.

10. Regard being had to the position of law as discussed above, I am not inclined to agree with the view of Court below. The Court below ought to have decided the application of the petitioner on its own merit instead of dismissing the same on technical grounds. Hence, the impugned order dated 05.03.2024 passed by the learned Addl. Sessions Judge, Athamallik in Criminal Misc. No.04 of 2024 is set aside and the petitioner is granted leave to move a fresh application before the Court below U/S. 457 Cr.P.C. If such application is filed before the Court below, the same shall be considered afresh on its merits.

11. The CRLMC is accordingly disposed of.

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2024 (III) ILR-CUT-573

SIBO SANKAR MISHRA, J.

CRLREV NO. 153 OF 2020

SITIKANTA SARANGI ….Petitioner

V.

STATE OF ORISSA (VIGILANCE) ….Opp.Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 197 r/w section 19 of the P.C.Act,1988 – Sanction – Offence U/ss.13(2) r/w section 13(1)(d) of P.C.Act along with Offences U/ss.420/120-B of IPC – Prosecution against retired Govt. Employee – Whether sanction is necessary even if the prosecution is launched against the retired government servant? – Held, Yes – It is mandatory for the prosecution to obtain sanction under Section 19 of the P.C. Act, even if the prosecution is launched after his retirement. (Paras 8 & 9)

Case Laws Relied on and Referred to :-

1. (2016) 9 Supreme Court Cases 598 : L. Narayana Swamy Vrs. State of Karnataka & Ors.
2. (2011) 7 Supreme Court Cases : Chittaranjan Das Vrs. State of Orissa

For Petitioner : Mr. G.M. Rath.
For Opp.Party : Mr. Sangram Das, Addl. Standing Counsel (Vigilance).

JUDGMENT Date of Hearing : 11.07.2024 : Date of Judgment : 30.07.2024

S.S. MISHRA, J.

In this Criminal Revision Petition, the petitioner has challenged the order dated 11.07.2019 passed by the learned Special Judge (Vigilance), Cuttack in T.R. Case No.17 of 2019 arising out of Vigilance G.R. Case No.45 of 2010, whereby cognizance of offences punishable under Section 13(2) read with Section 13(1)(d) of the P.C. Act, 1988 and Sections 420/120-B of the IPC has been taken against the petitioner and the other co-accused persons.

2. An F.I.R. was lodged on 30.06.2010 by the Inspector of Vigilance, Cuttack and registered as Cuttack Vigilance P.S. Case No.45 dated 30.06.2010. In the F.I.R., it was alleged that the accused persons had illegally shown distribution of coal in favour of six fake MSME Units to derive pecuniary advantage for their personal benefit, violating the New Coal Distribution Policy. The Odisha Small Industries Corporation Ltd. (OSIC) and the District Industries Centers were required to distribute coal as per the guidelines, to different MSME in a realistic manner. It came to light during physical verification by the Vigilance Department on 19.05.2010 that linkage coal has been sold in favour of fake firms, as named in the F.I.R., though there was no existence of said firms. However, the distribution of coal to those firms has been shown on record. Further, certain irregularities in the sale price of coal as compared to the market rate, were also seen. The total amount of pecuniary advantage gained by the accused persons has been computed to the tune of Rs.22,38,609/- (Rupees Twenty Two Lakhs Thirty Eight Thousand Six Hundred Nine) in the charge sheet and total 12 accused persons have been named therein, including the present petitioner.

3. After the completion of investigation, the Vigilance Department submitted charge sheet against 12 accused persons including the present petitioner. There were specific allegations made against the petitioner. On the basis of material available on record, the Vigilance Department applied for grant of sanction to prosecute the petitioner as required under Section 19 of the P.C. Act. The competent authority, vide Office Order dated 23.07.2018, declined to grant sanction to prosecute the petitioner. The Office Order dated 23.07.2018 reads as under:

"Confidential

Government of Odisha
General Administration & Public Grievance Department

No.GAD-SC-VG-0063-2016-20828/Gen, Bhubaneswar, dated 23 July, 2018
From
Sri Pradeep Kumar Biswal, IAS,
Additional Secretary to Government
To
The Deputy Secretary to Government
G.A. (Vigilance) Department,
Odisha, Cuttack

Sub : Sanction of prosecution against Sri Sitikanta Sarangi, Ex-G.M., D.I.C., Jagatpur, at present Joint Director of Industries, Cuttack and 2) Sri Sailendra Narayan Nayak, the thenAsst. Manager (Project), D.I.C., Jagatpur, Cuttack in Cuttack Vigilance P.S. Case No.45 dt.30.6.2010.

Sir,
I am directed to invite reference to your office letter NO.5373/Vig. Cell, dated 28.7.2015 on the subject mentioned above and to say that after careful consideration of the facts and circumstances of the case and material evidences on records, Government have been pleased to decline the proposal for according sanction of prosecution against Sri Sitikanta Sarangi, Ex-G.M., D.I.C., Jagatpur, at present Joint Director of Industries, Cuttack and 2) Sri Sailendra Narayan Nayak, the then Asst. Manager (Project), D.I.C., Jagatpur, Cuttack in Cuttack in Vigilance P.S. Case No.45, dt.30.6.2010.

In view of the above, you are requested to take further follow up action accordingly in the matter under intimation to this Department.

Yours faithfully,
Additional Secretary to Government"

4. When the matter stood thus, the leaned trial Court vide, its impugned order dated 11.07.2019, took cognizance of offences as mentioned above. The learned trial court was alive to the fact that sanction sought by the prosecution from the Department for the purpose of prosecuting the present petitioner had been denied. Even then, the learned trial court went on to take cognizance of offences inter alia stating that "as the other accused persons, namely, Sitikanta Sarangi (petitioner), Sailendra Narayan Nayak and Nihar Ranjan Parida, have already been retired from their service and one of the accused, namely, Sarat Kumar Satapathy, who had been expired since 03.10.2014, the order of sanction was not required against them." The learned trial court was of the opinion that since on the date of taking cognizance, the petitioner had already been superannuated from the service, therefore, no sanction was required to prosecute him.

5. Heard Mr. Gouri Mohan Rath, learned counsel for the petitioner, and Mr. Sangram Das, learned Additional Standing Counsel, Vigilance.

6. Mr. Rath, learned counsel for the petitioner, submitted that one of the co-accused, namely, Sailendra Narayan Nayak, had also questioned the cognizance order by filing CRLREV No.883 of 2019. The Coordinate Bench of this Court, vide its judgment dated 30.07.2020, has been pleased to quash the cognizance order for the lack of sanction. Mr. Rath supplied emphasis on Paragraph-9 of the said judgment, which reads as under:-

"9. Despite the fact that the Government, which is the sanctioning authority has declined to accord sanction in respect of the petitioner by its letter No. 20828/GEN dated 23.08.2018 (as mentioned in the charge sheet), the learned Vigilance Judge has proceeded in taking cognizance by observing that this petitioner has since been retired from service, the order of sanction is not required against him. This particular observation of the learned Vigilance Judge in the impugned order is not found correct on facts since it is the undisputed case of the parties that the petitioner is still serving as Deputy Secretary to the Government of Odisha in the Industries Department. Further,

when the sanctioning authority in clear tone has refused to grant sanction for prosecution against the present petitioner, it is not proper on the part of the trial court to proceed against the petitioner for prosecution. Therefore, the order taking cognizance of the offences against the present petitioner is liable to be set aside.

7. *Per contra*, Mr. Das, learned Additional Standing Counsel (Vigilance) submitted that during the tenure from 10.06.2005 to 09.07.2010, the present petitioner was working as G.M., D.I.C., Jagatpur. The petitioner has already superannuated from his service on 02.07.2018. Mr. Das contended that the impugned order passed by the learned Court below was justified and the sanction in the present case, was not required. He tried to substantiate his argument by relying upon Paragraph-21 of the judgment of Hon'ble Supreme Court in the case of **L. Narayana Swamy Vrs. State of Karnataka and others** reported in **(2016) 9 Supreme Court Cases 598**, which reads as under:-

"21. It clearly follows from the reading of the judgments in the cases of Abhay Singh Chautala and Prakash Singh Badal that if the public servant had abused entirely different office or offices than the one which he was holding on the date when cognizance was taken, there was no necessity of sanction under Section 19 of the P.C. Act. It is also made clear that where the public servant had abused the office which he held in the check up period, but had ceased to hold 'that office' or was holding a different office, then sanction would not be necessary. Likewise, where the alleged misconduct is in some different capacity than the one which is held at the time of taking cognizance, there will be no necessity to take the sanction. However, one discerning factor which is to be noted is that in both these cases the accused persons were public servants in the capacity of Member of Legislative Assembly / by virtue of political office. They were not public servants as government employees. However, detailed discussion contained in these judgments would indicate that the principle laid down therein would encompass and cover the cases of all public servants, including government employees who may otherwise be having constitutional protection under the provisions of Articles 309 and 311 of the Constitution."

8. I have perused the impugned order, the Government Order by which the sanction had been denied to the prosecution to proceed against the present petitioner and the judgments cited at the Bar. It is no more *res integra* that in the absence of sanction to prosecute a Government servant, the Government servant enjoys immunity from prosecution, even though the act was committed during the tenure of his office and came under the colour of his duties. It is mandatory for the prosecution to obtain sanction under Section 19 of the P.C. Act, even if the prosecution is launched after his retirement. The Hon'ble Supreme Court, in the case of **Chittaranjan Das Vrs. State of Orissa** reported in **(2011) 7 Supreme Court** Cases in Paragraph-14 has held as under:

"14. We are of the opinion that in a case in which sanction sought is refused by the competent authority, while the public servant is in service, he cannot be prosecuted later after retirement, notwithstanding the fact that no sanction for prosecution under the Prevention of Corruption Act is necessary after the retirement of Public Servant. Any other view will render the protection illusory. Situation may be different when sanction is refused by the competent authority after the retirement of the public servant as in that case sanction is not at all necessary and any exercise in this regard would be action in futility."

9. Since the legal position is abundantly clear that even if the prosecution is launched against the Government servant after retirement, the sanction is essential, the learned trial court has committed an error by taking cognizance of offence against the petitioner without a valid reason. Moreover, this Court, while allowing a similar prayer made by the co-accused, has quashed the cognizance order dated 11.07.2019 passed by the learned Special Judge (Vigilance), Cuttack in T.R. Case No.17 of 2019.

10. In view of the aforementioned, the impugned order dated 11.07.2019 passed by the learned Special Judge (Vigilance), Cuttack in T.R. Case No.17 of 2019, in respect of the present petitioner, is also set aside.

11. The CRLREV is accordingly allowed and disposed of.

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2024 (III) ILR-CUT-577

A.C. BEHERA, J

S.A. NO. 127 OF 2000

BHAKTARAM PADHAN …. Appellant

V.

PARSURAM PADHAN & ORS. …..Respondents

(A) CODE OF CIVIL PROCEDURE, 1908 ─ Section - 11 ─ The plaintiff filed cross objection before the First Appellate Court ─ The cross objection was dismissed ─ The plaintiffs neither preferred any independent appeal challenging the dismissal of the cross objection nor have filed any cross objection in the second appeal ─ The plaintiff agitated the same issue which was in the cross objection during the course of argument of second appeal ─ Whether the judgment and decree in the counter claim shall operate as *res judicata* ?─ Held, Yes. (Para 20)

(B) HINDU LAW ─ Partition ─ Undisputedly either the signature or the L.T.I. or the R.T.I. of the plaintiff is not available in the partition deed (Ext - F) ─ Whether the partition deed is effective? ─ Held, No ─ The document Ext-F cannot be held as a deed of partition between the plaintiffs and the defendants in respect of their Joint and undivided properties. (Para 18)

Case Laws Relied on and Referred to :-

1. AIR (1953) Calcutta 377 : Umapati Choudhuri & Ors. Vrs. Subodh Ch.Choudhuri & Ors.
2. 2011 (1) CJD (HC) 152 : Smt. Pakini alias Dalimba Naik & Ors. Vrs. Gajendra Patel (dead), Akshya Ku Patel & Ors.
3. 2014 (II) OLR-932 : Sarojini Dei alias Das & Ors. Vrs. Satya Prasad Pattnaik & Ors.
4. (2015) 2 SCC 682 : Rajni Rani & Anr. Vrs. Khairati Lal & Ors.
5. 2019 (I) ILR-Cuttack-736 : Smt. Rama Deo Vrs. State of Orissa & Ors.
6. 2023 (III) ILR-Cuttack-964 : Pitambar Giri & Ors. Vrs. Bishnupada Das.

For Appellant : Mr. Budhiram Das.
For Respondents : Mr. A. P. Bose.

JUDGMENT Date of Judgment : 23.09.2024 : Date of Judgment : 30.09.2024

A.C. BEHERA, J.

This second appeal has been preferred against the confirming judgment.

2. The appellant in this second appeal was the sole defendant before the Trial Court in the suit vide T.S. No.42 of 1993 and appellant before the First Appellate Court in the First Appeal vide T.A. No.24 of 1996.

The respondents in this second appeal were the plaintiffs before the Trial Court in the suit vide T.S. No.42 of 1993 and respondents before the First Appellate Court in the First Appeal vide T.A. No.24 of 1996.

3. The suit of the plaintiffs (respondents in this second appeal) before the Trial Court vide T.S. No.42 of 1993 against the defendant (appellant in this second appeal) was a suit for partition.

4. According to the pleadings of the plaintiffs, they (plaintiffs) and defendant are the brothers and sister and they all are Hindus and guided and governed by Mitakshara School of Hindu Law.

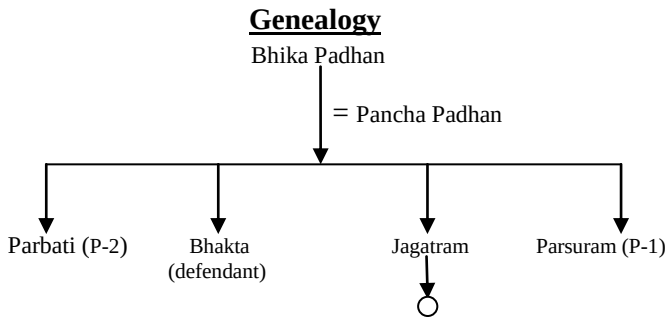
The law of succession provided in Hindu Succession Act, 1956 is applicable to them for inheritance and succession.

The father of the plaintiffs and defendant was Bhika Padhan. That Bhika Padhan died leaving behind his widow wife Pancha Padhan and four children i.e. Parbati (plaintiff No.2), Bhakta (defendant), Jagatram and Parsuram (plaintiff No.1).

After the death of Bhika Padhan, his wife Pancha Padhan died. The third child of Bhika Padhan i.e. Jagatram died issueless during his bachelorhood.

Accordingly, the plaintiffs and defendant are the children of Bhika Padhan.

5. In order to have a better appreciation, the family pedigree of the plaintiffs and defendant on the basis of the aforesaid pleadings of the plaintiffs is depicted hereunder for an instant reference:-



6. According to the pleadings of the plaintiffs, the properties described in schedule of the plaint are the suit properties for partition.

The suit schedule properties are under six Khatas vide Khata Nos.90, 87, 100, 106, 83 & 105.

During the lifetime of their father Bhika Padhan, their father Bhika Padhan had acquired all the properties covered under the above six Khatas and accordingly, all the suit properties were the self-acquired properties of their father Bhika Padhan. While Bhika Padhan and his wife expired leaving behind the plaintiffs and defendant as their successors, for which, all the suit properties left by their father Bhika Padhan had devolved upon the plaintiffs and defendant equally.

Therefore, plaintiffs and defendant have equal share i.e. 1/3rd share each in the suit properties covered under the above six Khatas vide Khata Nos.90, 87, 100, 106, 83 & 105.

When, on dated 14.04.1993, the plaintiffs requested the defendant for metes and bounds partition of the suit schedule joint and undivided properties covered under the above six Khatas, he (defendant) denied for the same. For which, they (plaintiffs) being the brother and sister filed the suit vide T.S. No.42 of 1993 against the defendant (who is also the brother of the plaintiffs) praying for partition of their 1/3rd share each from the suit properties.

7. Having been noticed from the Trial Court in the suit vide T.S. No.42 of 1993, the defendant contested the same by filing his written statement challenging the suit of the plaintiffs by taking the pleas that, the suit properties covered under all the Khatas except the properties covered under Khata No.105 had already been partitioned between them as per a written partition deed dated 21.02.1975 and in such partition, the plaintiff No.2 (sister of the defendant and plaintiff No.1) had received money equal to the value of her share in the joint properties and had relinquished her share in his favour and plaintiff No.1 and accordingly, on the basis of such partition, he (defendant) and plaintiff No.1 were possessing the properties covered under five Khatas vide suit Khata Nos.90, 87, 100, 106 & 83 separately and since such partition/division, he (defendant) has been residing separately after being separated from the plaintiff No.1. The plaintiff No.2 had already been given in marriage prior to the above partition. During his separation, he (defendant) has purchased the properties covered under suit Khata No.105 individually in his name. As such, the properties covered under suit Khata No.105 are his self-acquired properties out of his own income, in which, the plaintiffs have no interest and possession. As the properties covered under all the suit Khatas other than the properties covered under suit Khata No.105 have already been divided/partitioned between him and the plaintiffs as per the deed of partition dated 21.02.1975, for which, the present suit of the plaintiffs for partition of the suit properties is not maintainable under law.

Therefore, the suit of the plaintiffs for partition is liable to be dismissed against him (defendant).

8. Basing upon the aforesaid pleadings and matters in controversies between the parties, altogether 6 (six) numbers of issues were framed by the Trial Court in the suit vide T.S. No.42 of 1993 and the said issues are:-

ISSUES

(i) Whether lands of suit Khata No.90, 106, 83 & 87 are the self acquired property of Bhika Padhan?

(ii) Whether suit lands coming under Khata No.105 acquired out of the amount given by the wife of Bhika Padhan and surplus income from the self acquired lands of Bhika?

(iii) Whether the R.o.R. of present settlement of the suit land is correct?

(iv) Whether suit lands are the self acquired property of defendant?

(v) Whether there was prior partition between the plaintiff and defendant?

(vi) To what relief the plaintiff is entitled to?

9. In order to substantiate the aforesaid relief i.e. partition sought for by the plaintiffs against the defendant in the suit vide T.S. No.42 of 1993, the plaintiffs examined three witnesses from their sides including plaintiff No.1 as P.W.1 and exhibited series of documents on their behalf vide Exts.1 to 9.

On the contrary, in order to nullify/defeat the suit of the plaintiffs, the defendant examined five witnesses from his side including him as D.W.1 and relied upon series of documents on his behalf vide Exts.A to F.

10. After conclusion of hearing and on perusal of the materials, documents and evidence available in the record, the Trial Court answered issue Nos.1, 3, 5 & 6 in full in favour of the plaintiffs and against the defendant and answered issue Nos.2 & 4 in part in favour of the plaintiffs and in part 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 plaintiffs vide T.S. No.42 of 1993 preliminarily in part on contest against the defendant for partition, but without cost, as per its judgment and decree dated 22.12.1995 and 08.01.1996 respectively entitling the plaintiffs and defendant to get 1/3rd share each in the properties covered under suit Khata Nos.90, 87, 100, 106 & 83 and excluded the properties covered under suit Khata No.105 vide Plot No.1935 from partition assigning the reasons that, the properties covered under all the Khatas except the properties covered under suit Khata No.105 were acquired by the father of the parties i.e. Bhika Padhan and after the death of Bhika Padhan, the properties covered under suit Khata Nos.90, 87, 100, 106 & 83 had devolved upon the plaintiffs and defendant equally and the said properties are the joint and undivided properties of the plaintiffs and defendant, in which, the plaintiffs and the defendant have equal share and there was no previous partition of the said joint and undivided properties covered under suit Khata Nos.90, 87, 100, 106 & 83 between the plaintiffs and defendant. So, they (plaintiffs & defendant) are entitled for 1/3rd share each in the properties covered under suit Khata Nos.90, 87, 100, 106 & 83. But, the properties covered under suit Khata No.105 vide plot No.1935 are the self-acquired properties of the defendant, in which, the defendant is the exclusive owner. For which, the said properties covered under suit Khata No.105 are excluded from

partition and the plea of the defendant that, the suit properties covered under the suit Khata Nos.90, 87, 100, 106 & 83 were partitioned between them on dated 21.02.1975 through a deed of partition vide Ext.F is not acceptable under law.

11. On being dissatisfied with the aforesaid judgment and decree dated 22.12.1995 and 08.01.1996 respectively passed by the Trial Court in T.S. No.42 of 1993, the defendant challenged the same by preferring the First Appeal vide T.A. No.24 of 1996 being the appellant against the plaintiffs arraying them (plaintiffs) as respondents.

12. In that First Appeal vide T.A. No.24 of 1996, the plaintiffs filed a cross objection (cross appeal) challenging the part dismissal of their suit for partition in respect of the properties covered under the suit Khata No.105.

13. After hearing from both the sides, the First Appellate Court dismissed that First Appeal vide T.A. No.24 of 1996 filed by the defendant and also dismissed the cross objection filed by the plaintiffs concurring/accepting the findings and observations made by the Trial Court in T.S. No.42 of 1993 as per its judgment and decree dated 17.12.1999 and 25.02.2000 respectively.

14. On being aggrieved with the aforesaid judgment and decree of the dismissal of the First Appeal vide T.A. No.24 of 1996 of the defendant passed by the First Appellate Court as per its judgment and decree dated 17.12.1999 and 25.02.2000 respectively, the defendant challenged the same by preferring this second appeal being the appellant against the plaintiffs arraying them (plaintiffs) as respondents.

15. This Second Appeal was admitted on formulation of the following substantial questions of law i.e.:-

> *(i) Whether the findings of the Trial Court as well as First Appellate Court that, there was no previous partition of the suit properties between the parties is sustainable under law?*
>
> *(ii) Whether the plaintiff No.2 (sister of the plaintiff No.1 and defendant) is entitled to any share in the suit properties in view of the deed of previous partition vide Ext.F?*

16. I have already heard from the learned counsel for the appellant and the learned counsel for the respondents.

17. As the aforesaid both the formulated substantial questions of law are interlinked having ample nexus with each other as per the judgments and decrees passed by the Trial Court and First Appellate Court on the basis of the pleadings and evidence of the parties, then both the formulated questions of law are taken up together analogously for their discussions hereunder.

18. So far as the claim of previous partition of the appellant (defendant) between the parties on dated 21.02.1975 as per the deed of partition vide Ext.F is concerned;

Ext.F is an unregistered deed of agreement, to which, the defendant is claiming that, the said Ext.F is their deed of family partition between him and the plaintiffs on dated 21.02.1975.

Due to non-availability of the signature of plaintiff No.2 (who is the sister of plaintiff No.1 and defendant) in the Ext.F, the Trial Court as well as the First Appellate Court both have specifically held that, Ext.F cannot be treated/accepted as family partition between the parties, as the plaintiff No.2 has not signed on the same.

When, the signature or L.T.I. or R.T.I. of the plaintiff No.2 is not available in the Ext.F and when the plaintiffs are denying the execution of the said Ext.F, then at this juncture, it was the duty and obligation of the defendant for proving the due and proper execution of the same, but surprisingly, there is no legally admissible evidence on behalf of the defendant to prove the due and proper execution of the Ext.F between him and the plaintiffs. Because, the plaintiff No.2 was not a party to the Ext.F.

When undisputedly, either the signature or the L.T.I. or the R.T.I. of the plaintiff No.2 is not available in the Ext.F, then it is safely concluded that, the plaintiff No.2 was not a party to that Ext.F. For which, Ext.F cannot be held as a deed of partition between the plaintiffs and the defendant in respect of their joint and undivided properties.

The conclusion drawn above finds support from the ratio of the following decisions:-

> (i) ***AIR (1953) Calcutta 377—Umapati Choudhuri and others Vrs. Subodh Chandra Choudhuri and others***—(Para 1)—When all the co-sharers are not included in previous partition suit, then such partition decree is ineffective.
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> (ii) ***2011 (1) CJD (HC) 152—Smt. Pakini alias Dalimba Naik and others Vrs. Gajendra Patel (dead), Akshya Ku Patel and others***—(Para 17)—Hindu Law—Partition—An unjust and unfair partition can be reopened at any time.
>
> (iii) ***2014 (II) OLR—932—Sarojini Dei alias Das and others Vrs. Satya Prasad Pattnaik and others***—(Para 18)—Non-inclusion of some members having unity of title and possession to the so called deed, renders the document of having no value in the eye of law.

19. So far as the argument raised on behalf of the respondents (plaintiffs) that, the properties covered under suit Khata No.105 are also liable for partition between plaintiffs and defendant like the properties covered under other five Khatas is concerned;

The above plea was raised/agitated on behalf of the respondents/plaintiffs before the First Appellate Court by filing a cross objection, but after hearing from both the sides, that cross objection of the respondents (plaintiffs) was dismissed by the learned First Appellate Court.

After dismissal of such cross objection, the plaintiffs neither have preferred any independent appeal challenging the dismissal of their cross objection nor have filed any cross objection in this second appeal.

20. So, due to non-filing of any appeal or cross objection challenging the dismissal of the cross objection of the plaintiffs (respondents in this second appeal) by the First Appellate Court in T.A. No.24 of 1996, the dismissal judgment of the cross objection of the plaintiffs passed by the First Appellate Court in T.A. No.24 of 1996 has already been reached in its finality, for which, the plaintiffs (respondents in this second appeal) are precluded under law to agitate the same during the course of arguments of this second appeal.

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) ***(2015) 2 SCC 682—Rajni Rani and another Vrs. Khairati Lal and others***—CPC, 1908—O.8 R.6-A and Section 96 read with O.2 R.2—Remedy against final order of dismissal of counter claim on merits—appeal is the proper remedy—Such order attains status of decree—Order of dismissal of counter claim amounts to a decree, the second suit for the same is barred under O.2 R.2 of the CPC, because Order of dismissal of counter claim can be sought to be set aside by filing an appeal.
>
> (ii) ***2019 (I) ILR—Cuttack-736—Smt. Rama Deo Vrs. State of Orissa & Others***—CPC, 1908—Section 11—Suit dismissed but counter claim allowed—Against the judgment and decree passed in suit the plaintiff filed appeal but no appeal was filed against the judgment passed in counter claim—The question as to whether the judgment and decree in the counter claim shall operate as res judicata?—Held, Yes.
>
> (iii) ***2023 (III) ILR-Cuttack-964—Pitambar Giri and others Vrs. Bishnupada Das*** — CPC, 1908—Section 11—The Trial Court dismissed the suit of the plaintiff and as well as the counter claim of the defendants—The defendants have not preferred any appeal or cross objection in the 1st appeal challenging the order of dismissal of their counter claim—Whether the final finding made by the learned Trial Court against the defendants has become res-judicata against them?-Held, Yes. (Para 17)

21. As per the discussions and observations made above, when the contentions of the appellant (defendant) regarding the previous partition in respect of the properties covered under suit Khata Nos.90, 87, 100, 106 & 83 have already been negatived and when it is the concurrent findings and observations of the Trial Court and First Appellate Court that, the properties covered under suit Khata Nos.90, 87, 100, 106 & 83 are the joint and undivided properties of the plaintiffs and defendant and when the findings and observations of the Trial Court and First Appellate Court that, the plaintiffs and defendant have $1/3^{rd}$ share each in the properties covered under suit Khata Nos.90, 87, 100, 106 & 83 are not unreasonable or inacceptable under law and when the contentions raised on behalf of the plaintiffs that, the properties covered under suit Khata No.105 are not the self acquired properties of the defendant have not become sustainable under law for the reasons assigned above, then at this juncture, the question of interfering with the judgments and decrees passed by the Trial Court and First Appellate Court through this second appeal preferred by the appellant (defendant) does not arise.

Therefore, there is no merit in the appeal of the appellant (defendant). The same must fail.

22. In result, the appeal filed by the appellant (defendant) is dismissed on contest, but without cost.

The judgments and decrees passed by the Trial Court and First Appellate Court in T.S. No.42 of 1993 and T.A. No.24 of 1996 respectively are confirmed.

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2024 (III) ILR-CUT-584

A.C. BEHERA, J

MACA NO. 552 OF 2009

DIVISIONAL MANAGER, NEW INDIA ASSURANCE CO. LTD., CUTTACK .....Appellant

V.

LAMBODAR JHODIYA & ORS. .....Respondents

MOTOR VEHICLES ACT, 1988 – Section 147(1) – The Insurance Company challenges the Order of the learned Tribunal on the ground that an extra premium was not paid for the Trolley of the offending Tractor for carrying the labourers in which deceased was moving as labourer at the time of accident – Whether any extra premium is required to be paid to cover the liability of the labourers of the tractor for carrying them through that trolley fitted with the insured tractor? – Held, No – When a tractor is fitted with the trolley, no extra premium is required to be paid to cover the liability of the labourers of the Tractor for carrying them through that trolley fitted with the insured Tractor.

(Para 3)

Case Laws Relied on and Referred to :-

1. 2008(4) TAC-511(Panjab & Haryana) : Govind Ram vrs. Umed Singh
2. (2018) 72 OCR (S.C)-138 : Shamanna & Anr. vrs. The Divisional Manager, The Oriental Insurance Co. Ltd. & Ors.
3. AIR 2001(S.C.)-1419 : New India Assurance Co., Shimla vrs. Kanku & Ors.
4. 2018(2) CCC-467 (S.C.) : Mangla Ram vrs. Oriental Insurance Co. Ltd
5. 2014(I) TAC-311(Orissa) : Branch Manager Bajaj Allianz General Insurance Co. Ltd. vrs. Kumari Podha & Ors.
6. 2009 (II) OLR-982 : The Divisional Manager Oriental Insurance vrs. Manik Munda & Ors.

For Appellant : Mr. N.K. Mohanty.
For Respondents : Mr. P.K. Behera.

JUDGMENT Date of Hearing : 25.09.2024 : Date of Judgment : 30.09.2024

A.C. BEHERA, J.

This appeal under Section 173 of the Motor Vehicles Act, 1988 (in short 'the M.V. Act, 1988') preferred by the appellant(Insurance Company) challenging an award passed by the learned Additional District Judge-cum-3rd MACT, Rayagada

in MAC No.20 of 2006 for pay and recover in a motor vehicular accidental death claim case vide MAC No.20 of 2006 on two grounds, i.e., (i) an extra premium was not paid for the Trolley(Trailor) of the offending Tractor for carrying the labourers, in which, the deceased was moving as a labourer at the time of accident and (ii) the driver of that offending Tractor had no valid driving license to drive the same has been taken up into consideration for its final disposal at the stage of admission after hearing from the learned counsels of both the sides.

2**.** It is the settled propositions of law that, once an Insurance Company has undertaken the liability of the third party in a motor vehicular accident caused by the use of an offending insured vehicle, in that case, the right of the third party to get the compensation amount from the insurer of the offending vehicle, i.e., from the Insurance Company is not affected by any of the conditions of the insurance policy of the offending vehicle, even though, there is any violation of the insurance policy condition of the offending vehicle either on account of disqualification of the driver of the offending vehicle to drive the same or in otherwise. In such contingency, the Insurance Company (insurer) shall indemnify the awarded compensation amount first in favour of the third party and then, the Insurance Company may recover the said paid compensation amount from the insured owner of the offending vehicle, who had breached/violated the insurance policy condition.

3. It is also the settled propositions of law that, when a Tractor is fitted with its trolley (Trailor) and the said trolley is for carrying goods, then, as per under Section 147(1) of the M.V. Act, 1988, no extra premium is required to be paid to cover the liability of the labourers of the Tractor for carrying them through that trolley fitted with the insured Tractor.

4**.** On this aspect, the propositions of law has already been clarified in the ratio of the following decisions:-

> ***(i) 2008(4) TAC-511(Panjab & Haryana) : Govind Ram vrs. Umed Singh***—Once company had undertaken the liability to third party, the third parties right to recover and amount under or by virtue of provisions of the Act was not affected by condition of that policy.
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> ***(ii) (2018) 72 OCR (S.C.)-138 : Shamanna and Another vrs. The Divisional Manager The Oriental Insurnce Co. Ltd. and Ors.—Accident Claim***—Breach of insurance policy condition due to disqualifications of the driver or invalid driving license of the driver—In case of third party risks, the insurer has to indemnify the compensation amount to the third party and insurance company may recover the same from the insured.
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> ***(iii) AIR 2001(S.C.)-1419 : New India Assurance Co., Shimla vrs. Kanku and others—Breach of policy conditions of the Insurance Policy on account of vehicle being driven without valid driving Licence— Insurer made statutorily liable to pay compensation to third parties can recover from insured vehicle owner amount paid to third parties***—The poor applicants should not suffer. So, inconsonance with provisions of Section 149, this Court directs that, the Insurance Company first deposit the entire amount before the learned Tribunal, then, to realize the said amount from the owner of the offending vehicle inconsonance with law.

(iv) 2018(2) CCC -467(S.C.) : Mangla Ram vrs. Oriental Insurance Co. Ltd.—Even if insurance company is not held liable, principle of 'pay and recover' can be involved.

(v) 2014(I) TAC-311(Orissa) : Branch Manager Bajaj Allianz General Insurance Co. Ltd. vrs. Kumari Podha and others—Tractor fitted with Trolley is a goods carriage as per Section 147(1) , no extrapremium is required to be paid to cover the liability of such a labourer.

(vi) 2009 (II) OLR-982 : The Divisional Manager Oriental Insurance vrs. Manik Munda and two Others—Section 147(1)—A tractor fitted with trolley is a goods carriage, as per section, no extra premium is required to be paid to cover the liability of such a labourer carried in a goods vehicle.

5. Here, in this appeal at hand, when, on 12.03.2006, the mother of the petitioners, i.e., Sita Jhodiya was moving as a labourer of the offending Tractor bearing Registration No.OR-18-A-1979 on its Trolley bearing Registration No.OR-18-A-1980, the said Tractor met with an accident and by the result of such accident, the deceased mother of the petitioners expired and when the appellant (Insurance Company, i.e., insurer of the offending Tractor) has taken the above two pleas challenging the impugned award passed against it for exoneration of its liability and when the learned Tribunal has passed the impugned award in MAC No.20 of 2006 directing the Insurance Company (appellant) to pay awarded compensation amount to the claimants(petitioners) thereof first and then to realize (recover) the same from its owner, 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, it cannot be held that, the impugned award and directions made by the learned Tribunal to pay and recover cannot be held as erroneous in any manner. For which, the question of making any interference with the same through this appeal preferred by the appellant (Insurance Company) does not arise.

Therefore, there is no merit in the appeal of the appellant Insurance Company. The same must fail.

6. In result, the appeal filed by the appellant (Insurance Company) is dismissed on contest.

Registry is directed to send back the LCRs of this appeal forthwith for payment of the awarded compensation amount with interest thereon to the claimants on deposit of the awarded compensation amount with interest thereon by the appellant-Insurance Company as directed by the learned Additional District Judge-cum-3rd MACT, Rayagada in MAC No.20 of 2006 within a month hence.

The statutory deposited amount made by the appellant (Insurance Company) before the Hon'ble Courts in this appeal shall be refunded to the appellant (Insurance Company) on production of receipt regarding the deposit of the awarded compensation amount before the learned Tribunal in MAC No.20 of 2006.

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2024 (III) ILR-CUT-587

A.C. BEHERA, J.

M.A.C.A NOS. 1203 & 1228 OF 2015

URBASI BEHERA & ORS. ….Appellants

V.

ROTOSH AGRAWALLA & ANR. ….Respondents

AND

M.A.C.A. NO. 1228 OF 2015

(RELIANCE GENERAL INSURANCE CO. LTD, KOLKATA V. URBASI BEHERA & ORS)

(A) MOTOR VEHICLES ACT, 1988 – Compensation – It appears from the impugned award that nothing has been added with deceased salary towards his future prospect for computation of compensation – Though, at the time of motor vehicular accident death of the deceased, his remaining service period was more than 20 years till his superannuation – Whether the awarded compensation should be enhanced? – Held, Yes, 50% with the monthly salary of the deceased should have been added towards his future prospects for computation of compensation. (Paras - 13 & 18)

(B) MOTOR VEHICLES ACT, 1988 – Section 147 – Liability of Insurance Company – The insurance company contended that at the time of accident of the deceased, the offending truck was not covered with any insurance policy before its company, for which, on the basis of such xerox document, the insurance company shall be exonerated – In the claim petition, the claimant indicated with policy number and the same has also been reflected in the seizure list as well as in charge sheet vide Exts. 2 and 3 prepared by police during investigation – The insurance company has not objected to the exhibits – There is no specific pleadings (averments) in the written statement of the insurance company disputing/denying the insurance coverage of the offending vehicle – Whether the insurance company is entitled for exoneration from the liability? – Held, No. (Paras 11-12)

Case Laws Relied on and Referred to :-

1. 1996 ACJ 1220 (Orissa) : Oriental Insurance Co. Ltd. Vrs. Sk. Nasiruddin & Ors.
2. 2024 (1) Civ. L. J. 473 (Orissa) : Oriental Insurance Co. Ltd. Vrs. Babaji Charan Sahu (since dead) through LRs & Anr.
3. 2024 (2) Civ. L. J. 116 (Jharkhand) : Branch Manager, United India Insurance Company Ltd. through its Divisional Office Vrs. Meera Devi & Anr.
4. 2017 (4) T.A.C. 673 (S.C.) : National Insurance Company Ltd. Vrs. Pranay Sethi & Ors.
5. 2013 (3) T.A.C. 697 (S.C.):Rajesh and others Vrs. Rajbir Singh & Ors.
6. 2015 (1) T.A.C. 340 (S.C.) :Smt. Neeta W/o Kallappa Kadolkar & Ors. etc. Vrs. The Divisional Manager, MSRTC, Kolhapur
7. 2013 (4) T.A.C. 557 (Orissa):New India Assurance Co. Ltd. Vrs. Nim Indrajit Singh & Anr.
8. 2017 (4) T.A.C. 673 (S.C.) :National Insurance Company Vrs. Pranay Sethi & Ors.
9. 2017 (4) T.A.C. 673 (S.C.) :National Insurance Company Vrs. Pranay Sethi & Ors.
10. (2009) 6 SCC 121; Sarla Verma Vrs. Delhi Transport Corporation & Anr.

For Appellants : Mr. A.S. Nandy.
For Respondents : Mr. S. Satpathy.

JUDGMENT Date of Hearing : 03.10.2024 : Date of Judgment : 08.10.2024

A.C. BEHERA, J.

Since both the appeals were preferred by the respective appellants challenging one judgment/award passed on dated 31.07.2015 in M.A.C. Case No.11 of 2008 by the learned 1st M.A.C.T.-cum-District Judge, Dhenkanal, then both the appeals have been taken up together analogously for their final disposal through this common judgment.

2. The appeal vide M.A.C.A. No.1203 of 2015 was preferred by the appellants (claimants-petitioners before the learned Tribunal in M.A.C. Case No.11 of 2008) challenging the impugned judgment/award on the ground of inadequacy of the awarded compensation amount for enhancement of the same.

The appeal vide M.A.C.A. No.1228 of 2015 was preferred by the appellant (Insurance Company-opposite party No.2 in M.A.C. Case No.11 of 2008) challenging the impugned judgment/award for setting aside the same passed against the said Insurance Company.

3. The factual backgrounds of these two appeals, which prompted the appellants for preferring the same are that,

On dated 06.12.2007 at about 5:50 A.M., while the deceased Pabitra Behera was coming from his residence through his motorcycle bearing Registration No.OR-19B-4093 on the left side of N.H.42 in a normal speed to join in his duty at Captive Power Plant of NALCO, near the main gate of the said power plant, an offending truck bearing Registration No.CG-04T-6484 of opposite party No.1 in M.A.C. Case No.11 of 2008 came from his opposite side on being driven by its driver with a very high speed and in a rash and negligent manner and suddenly dashed against his motorcycle and by the result of such accident, he (deceased) thrown away from his motorcycle with heavy force and sustained multiple grievous injuries all over his body and for his such motor vehicular accidental injuries, he (Pabitra Behera) expired. For that motor vehicular accidental death of the deceased through the aforesaid offending truck of the opposite party No.1 due to the rash and negligent driving of the driver thereof, a case vide NALCO P.S. Case No.135 of 2007 was registered against the driver of the offending truck under Sections 279, 337 & 304-A of the IPC, 1860 and an investigation was conducted. During investigation, the offending truck of the opposite party No.1 along with its documents including the insurance policy were seized and the dead body of the deceased Pabitra Behera was sent for postmortem examination and accordingly, postmortem examination over the dead body of the deceased was conducted and on completion of the investigation, charge-sheet under Sections 279, 337 & 304-A of the IPC, 1860 was submitted against the driver of the offending truck.

Thereafter, the legal representatives of the deceased Pabitra Behera i.e. his wife, father and children filed a case vide M.A.C. Case No.11 of 2008 against the owner and insurer of the above offending truck bearing Registration No.CG-04T-6484 arraying them as opposite party Nos.1 & 2 respectively claiming their just compensation for such motor vehicular accidental death of the deceased stating that, at the time of death of the deceased through such motor vehicular accident, he (deceased) was a permanent employee of National Aluminum Company Ltd., Angul and his monthly salary was Rs.30,000/- and they (petitioners) were his dependants, because the deceased was the only earning member of their family.

4. Having been noticed from the learned Tribunal in M.A.C. Case No.11 of 2008, the owner of the offending truck i.e. opposite party No.1 was set *ex-parte* without filing any written statement and without contesting the same.

Whereas, the opposite party No.2 (Insurance Company) contested the case of the petitioners (claimants) by filing its written statement denying the involvement of the so called offending truck with such accident and also denying the occupation and income of the deceased stated by the petitioners in their claim petition.

5. The specific stands/pleas of the Insurance Company (opposite party No.2) in its written statement for its exoneration was that, at the time of the accident, the so called offending truck was moving on the road violating the insurance policy conditions thereof.

As there was breach of policy conditions by the owner of that truck i.e. opposite party No.1, for which, no accidental liabilities for the death of the deceased can be fastened upon it i.e. opposite party No.2 (Insurance Company).

As such, the Insurance Company (opposite party No.2) claimed for the dismissal of the claim application of the petitioners against the opposite party No.2 (Insurance Company).

6. In order to substantiate the claim of the petitioners against the opposite parties, the petitioners examined two witnesses from their side including the widow wife of the deceased i.e. petitioner No.1 as P.W.1 and exhibited series of documents vide Exts.1 to 9 i.e. certified copy of the F.I.R., charge-sheet, seizure list, inquest report, postmortem report, pay slip of the deceased, salary slips of the deceased and D.L. of the driver of the offending truck on their behalf.

But, none of the opposite parties including the opposite party No.2 (Insurance Company) adduced any oral or any documentary evidence from their side.

7. After conclusion of hearing and on perusal of the materials, documents and evidence available in the record, the learned Tribunal answered all the issues in M.A.C. Case No.11 of 2008 in favour of the petitioners and against the opposite parties including the opposite party No.2 (Insurance Company) and held that, the death of the deceased Pabitra Behera was the outcome of the motor vehicular accident caused through the use of the offending truck bearing Registration No.CG-

04T-6484 of the opposite party No.1 on dated 06.12.2007 at about 5:50 A.M. on N.H.42 near the main gate of the Captive Power Plant of NALCO only for the rash and negligent driving of the driver thereof and the petitioners being the legal heirs of the deceased, they were his dependants. He (deceased Pabitra Behera) had a regular and permanent job in NALCO and his monthly salary was Rs.19,041/- and his age was 35 years at the time of his death. The offending truck of the opposite party No.1 was covered with valid insurance policy before the opposite party No.2 (Insurance Company) at the time of accident of the deceased through the use of the same.

On the basis of the aforesaid findings and observations, the learned 1st M.A.C.T., Dhenkanal passed the judgment/award in M.A.C. Case No.11 of 2008 on dated 31.07.2015 entitling the petitioners to get compensation of Rs.27,66,760/- in total on the ground of their loss of dependency, loss of estate, loss of consortium, transportation and funeral expenses and directed opposite party No.2 (Insurance Company) to pay the said awarded amount to the petitioners with interest @ 6% thereon with effect from 10.01.2008 till its payment.

8. On being dissatisfied with the aforesaid quantum of awarded amount passed on dated 31.07.2015 in M.A.C. Case No.11 of 2008, the claimants (petitioners) thereof challenged the same by preferring an appeal vide M.A.C.A. No.1228 of 2015 being the appellant against the opposite parties thereof for the enhancement of the same on the ground of inadequacy.

Likewise, the Insurance Company (opposite party No.2 before the learned Tribunal in M.A.C. Case No.11 of 2008) challenged the said impugned award passed on dated 31.07.2015 in M.A.C. Case No.11 of 2008 by preferring an appeal vide M.A.C.A. No.1228 of 2015 for the total exoneration of opposite party No.2 (Insurance Company) from bearing the accidental liabilities in order to set aside the impugned judgment/award against the appellant (opposite party No.2, Insurance Company) on the ground that, at the time of the accident, the offending truck was not covered with any insurance policy before its company and the awarded compensation amount passed by the learned Tribunal in favour of the claimants thereof in M.A.C. Case No.11 of 2008 is high and excessive.

9. I have already heard from the learned counsels for the claimants and Insurance Company in both the appeals against each other.

10. During the course of arguments of these appeals, the learned counsel for the Insurance Company (opposite party No.2 in M.A.C. Case No.11 of 2008) submitted a Xerox copy of the insurance policy contending that, at the time of accident of the deceased, the offending truck was not covered with any insurance policy before its company, for which, on the basis of such Xerox document, the Insurance Company (opposite party No.2 in M.A.C. Case No.11 of 2008) shall be exonerated from payment of any compensation amount to the petitioners.

11. It appears from the record that, the claimants (petitioners in M.A.C. Case No.11 of 2008, those are the dependents of the deceased) have specifically stated in

their claim petition as well as in their evidence that, at the time of causing accident to the deceased Pabitra Behera through the offending truck of the opposite No.1, the said offending truck was duly insured before the opposite party no.2 (Insurance Company), to which, they have indicated with policy number in their claim petition and the same has also been reflected in the seizure list as well as in the charge-sheet vide Exts.2 & 3 prepared by the police during investigation. During enquiry of M.A.C. Case No.11 of 2008 before the learned Tribunal, the Insurance Company has not objected to the exhibits i.e. seizure list and charge-sheet vide Exts.2 & 3 as well as the contents thereof.

There is no specific pleadings (averments) in the written statement of the Insurance Company disputing/denying the insurance coverage of the offending truck and its policy number stated by the petitioners in their petition as well as in the seizure list and charge-sheet vide Exts.2 & 3 respectively. No evidence has been adduced on behalf of the opposite party No.2 (Insurance Company) stating that, policy number indicated in the petition, seizure list and charge-sheet about the coverage of the insurance policy of the offending truck at the time of the accident before its company was false.

On this aspect, the propositions of law has already been clarified by the Hon'ble Courts in the ratio of the following decisions:-

> (i) ***1996 ACJ 1220 (Orissa)—Oriental Insurance Co. Ltd. Vrs. Sk. Nasiruddin and others***—(Para 7)—M.V.Act, 1939—Section 95 (Section 147 of the 1988 Act)—Motor Insurance—Liability of Insurance Company—Claimant in his claim petition mentioned the name of insurance company and the policy number—No averment in the written statement of the owner that the vehicle was insured—Insurance company did not deny the insurance of the offending vehicle—Whether the insurance company is liable—Held: Yes.
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> (ii) ***2024 (1) Civ. L. J. 473 (Orissa)—Oriental Insurance Co. Ltd. Vrs. Babaji Charan Sahu (since dead) through LRs and another***—(Para 9)—M.V.Act, 1988—Sections 149 & 173—Seizure list prepared by the police and exhibited on behalf of the claimants had not been objected by the appellant-Insurance Company—Accordingly, the finding of the Tribunal that, the appellant-Insurance Company is liable to indemnify the compensation amount—Was confirmed.
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> (iii) ***2024 (2) Civ. L. J. 116 (Jharkhand)—Branch Manager, United India Insurance Company Ltd. through its Divisional Office Vrs. Meera Devi and another***—(Paras 10 to 12)—M.V.Act, 1988—Section 173—Documentary evidence had not been rebutted by the Insurance Company at any stage of the proceedings before the Tribunal—Therefore, the appellant-insurer cannot be allowed to contend that, the contents of the document had not been proved.

12. When, there is no pleadings and evidence on behalf of the Insurance Company (opposite party No.2 in M.A.C. Case No.11 of 2008) that, the insurance policy number of the offending truck covering the date of accident stated in the pleadings as well as in the oral and documentary evidence of the petitioners was false, then at this juncture, in view of the principles of law enunciated in the ratio of the aforesaid decisions, the plea of the Insurance Company for its exoneration from

its accidental liabilities on the ground of lack of insurance coverage of the offending vehicle at the time of the accident of the deceased through that offending vehicle (truck) cannot be sustainable under law.

13. So far as the inadequacy of the awarded compensation amount in favour of the petitioners (appellants in M.A.C.A. No.1203 of 2015) is concerned;

It is the undisputed case of the parties that, the deceased was a regular and permanent employee of NALCO at the time of his motor vehicular accidental death and his age was 35 years and his monthly income from his salary was Rs.19,041/-.

It appears from the impugned award that, nothing has been added with his salary towards his future prospect for computation of compensation, though, at the time of motor vehicular accidental death of the deceased, his remaining service period was more than 20 years till his superannuation.

Therefore, in order to increase/enhance the awarded compensation amount through addition of some amounts with the monthly salary of the deceased at the time of his death towards his future prospects as well as for addition of some amounts in the heads awarded by the learned Tribunal, the learned counsel for the appellants (petitioners) relied upon the ratio of the following decisions i.e.

National Insurance Company Ltd. Vrs. Pranay Sethi and Others reported in ***2017 (4) T.A.C. 673 (S.C.)***, ***Rajesh and others Vrs. Rajbir Singh and others*** reported in ***2013 (3) T.A.C. 697 (S.C.)***, ***Smt. Neeta W/o Kallappa Kadolkar and others etc. Vrs. The Divisional Manager, MSRTC, Kolhapur*** reported in ***2015 (1) T.A.C. 340 (S.C.)*** and ***New India Assurance Co. Ltd. Vrs. Nim Indrajit Singh and another*** reported in ***2013 (4) T.A.C. 557 (Orissa)***.

By the time of pronouncement of the impugned judgment/award on dated 31.07.2015, the Constitutional Bench judgment of the Supreme Court of India between ***National Insurance Company Vrs. Pranay Sethi and others*** reported in ***2017 (4) T.A.C. 673 (S.C.)*** was not pronounced.

14. The adequacy and inadequacy of the impugned award passed by the learned Tribunal in M.A.C. Case No.11 of 2008 are under challenge in M.A.C.A. No.1203 of 2015.

As, in fact, at the time of passing of the impugned award in M.A.C. Case No.11 of 2008 on dated 31.07.2015, the Constitutional Bench judgment of Supreme Court between ***National Insurance Company Vrs. Pranay Sethi and others*** reported in ***2017 (4) T.A.C. 673 (S.C.)*** was not pronounced, for which, the question of following the guidelines formulated by the Apex Court in ratio of the said decision by the learned Tribunal had not arisen. So, the impugned award/judgment passed in M.A.C. Case No.11 of 2008 by the learned Tribunal cannot be commented for non-following the guidelines of the Constitutional Bench judgment of Supreme Court reported in ***2017 (4) T.A.C. 673 (S.C.)***.

15. In the judgment reported in ***(2009) 6 SCC 121; Sarla Verma Vrs. Delhi Transport Corporation and another*** at Paragraph 24, there was directions/ guidelines for addition of 50% towards future prospects of the deceased with his monthly salary for computation of compensation in a motor vehicular accidental death of the deceased, where the deceased had a permanent job at the time of his accidental death having his age below 40 years.

16. Here in this case at hand, when the age of the deceased was 35 years and he had a regular and permanent job in NALCO, then at this juncture, in view of the above decision of the Apex Court reported in ***(2009) 6 SCC 121; Sarla Verma Vrs. Delhi Transport Corporation and another***, 50% with the monthly salary of the deceased should have been added towards his future prospects for computation of compensation in respect of his motor vehicular accidental death. But, the learned Tribunal has not done so. For which, there is justification under law for making some interference with the impugned award passed by the learned Tribunal for enhancement of the awarded compensation amount for the motor vehicular accidental death of the deceased through addition of 50% with the monthly salary of the deceased towards his future prospects for calculation of the compensation.

As, the petitioners in M.A.C. Case No.11 of 2008 were four in numbers and they being the wife, old father and minor children of the deceased were the dependants of the deceased, for which, at the time of providing compensation under the heading of consortium, the learned Tribunal should have awarded consortium under two other heads i.e. parental and filial consortium for the petitioner Nos.2, 3 & 4 in addition to the spousal consortium of Rs.5,000/- for the petitioner No.1 (wife of the deceased), but the learned Tribunal has not done so.

17. Therefore, the appeal preferred by the appellants (claimants) vide M.A.C.A. No.1203 of 2015 is to be allowed in part and the appeal preferred by the appellant (Insurance Company) is to be dismissed.

18. As per the discussions and observations made above, the petitioners are entitled for their just compensation amount as per the calculation given below:-

Monthly salary of the deceased at the time of his death Rs.19,041/- + Rs.9,520.50/- (addition of 50% with the salary towards future prospects, as the age of the deceased was less than 40)=Rs.28,561.50/-(monthly income)–Rs.7,140/-(1/4th deduction towards personal and living expenses of the deceased, as the number of his dependents were four)=Rs.21,421.50/-X 12=Rs.2,57,058/-(annual income) X 16 (multiplier as per ***Sarla Verma's case***, as the age of the deceased was within 31 to 35 years)= Rs.41,12,928/- + Rs.20,000/-(for funeral expenses Rs.5,000/-, loss of estate Rs.5,000/- and transportation & attendance charges Rs.10,000/-, as awarded by the learned Tribunal)=Rs.41,32,928/- + Rs.20,000/- (for loss of spousal, parental and filial consortium i.e. Rs.5,000/- for each petitioners)=Rs.41,52,928/- (Rupees Forty One lakh Fifty Two Thousand Nine Hundred Twenty Eight).

Therefore, as per the calculations made above, the petitioners in M.A.C. Case No.11 of 2008 are entitled for Rs.41,52,928/- in total as their just compensation with interest thereon @ 7.5% per annum as per the prevailing Bank interest at the time of passing of the impugned award.

The Insurance Company (opposite party No.2 in M.A.C. Case No.11 of 2008) is directed to deposit the said awarded amount i.e. Rs.41,52,928/- (Rupees Forty One lakh Fifty Two Thousand Nine Hundred Twenty Eight) within two months hence with interest @ 7.5% per annum thereon since 10.01.2008 till its deposit before the learned 1st M.A.C.T.-cum-District Judge, Dhenkanal in reference to M.A.C. Case No.11 of 2008.

19. In result, the appeal filed by the appellants vide M.A.C.A. No.1203 of 2015 is allowed in part and the appeal filed by the appellant (Insurance Company) vide M.A.C.A. No.1228 of 2015 is dismissed on contest.

Pending application (s), if any, shall stand disposed of.

The Registry is to transmit this judgment to the learned Tribunal for payment of the awarded compensation amount with interest thereon as directed above in reference to M.A.C. Case No.11 of 2008 to the petitioners/claimants thereof.

The statutory deposited amount, if any, made by the appellant (Insurance Company) in M.A.C.A. No.1228 of 2015 shall be refunded to the appellant (Insurance Company) on production of proper receipt regarding the deposit of the above awarded compensation amount with interest thereon before the learned Tribunal in M.A.C. Case No.11 of 2008.

20. Accordingly, both the appeals are disposed of finally.

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