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CRIMINAL PROCEDURE CODE, 1973 – Appeal U/s. 374 of Cr.P.C. filed against the judgment dt. 24.02.2016 passed by the Sessions Judge, Mayurbhanj, Baripada in Sessions Case No. 168 of 2011 – Appellant was found guilty U/s. 302 of IPC and sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs. 10,000/-, in default of payment of fine to suffer further R.I. for a period of six months – Defence took the plea of false implication.

Nabakishore Naik V. State of Odisha.

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CRIMINAL PROCEDURE CODE, 1973 – Section 125 – The learned Judge Family court granted maintenance to each Opp. Parties Rs. 7.500/- per month – Petitioner took a stand that the Opp. Party No. 1 is not his legally wedded wife as no marriage was performed so also Opp. Party No. 2 is not his daughter – Whether the Order of maintenance can be interfered.

Held: No – When the parties are lively together as husband and wife, there is a presumption that they are legally married couple for claim of maintenance U/s. 125 of Cr.P.C.

then Judge, who was supposed to hear the bail matter of her husband – The name of the Hon'ble Judge of this court (then was) written in the complaint – The complaint alleged that she has given two mobile phone and some original title deed/ land record for the purpose of securing bail of her husband – It has also alleged that petitioner being an advocate used blank paper signed by informants husband – Whether the prayer to quash FIR can be entertained?

Held: No – This court is not inclined to do so as the allegations are not only at a nascent stage of investigation but also as quite serious in nature as the name of a former Judge of this court has been soiled – The CRLMC dismissed with cost of Rs.10,000/-.

Sambit Samal V. State of Odisha.

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CRIMINAL TRIAL – Offence charged U/s. 302 of Indian Penal Code – The appellant on return home from the field asked his wife to give him food and the deceased asked him to wait for some time as the preparation of food is under process – In such a state the appellant became furious and assaulted the deceased by means of a "katuri" – Whether the case of the appellant would come under culpable homicide not amount to murder.

Held: No – It is clear that on the day of the incident nothing had happened to cause sudden provocation which was grave enough to make the appellant lose his balance of mind and assault mercilessly to his helpless wife in front of his minor daughter.

Raikishore Jena V. State of Odisha.

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FAMILY COURTS ACTS, 1984 – Section 19(4) r/w section 442 of BNSS, 2023 – The petitioner disputed that the Opp. Party No. 1 is not his legally wedded wife as no marriage was performed so also Opp. Party No. 2 is not his daughter – The learned Judge Family Court after considering the rival submission upon taking into consideration the evidence on record passed the Order directing the petitioner to pay monthly maintenance – Whether the revisional court has power to re-appreciate the evidence on record and subtitle its view on a finding of fact.

Held: No – Revisional Court has no power to re-appreciate the evidence on record and substitute its views on a finding of fact.

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GUARDIANS AND WARDS ACT, 1890 – Sections 17(1)(2), 19(1)(b), 25 r/w sections 352, 353 of Mulla's Mohammad law – The learned family court granted custody of the minor to the father/respondent by adjudicating an application filed by father U/s. 25 of the Act – Whether question of guardianship' of the minor is distinct from 'custody' of the minor.

Held: No – The principle for custody of a minor child under the personal law shall not be read in isolation and divorced from the provisions of Guardians and Wards Act, which confers the Court a discretion to return the custody of a minor to his guardian, who leaves or removed from his custody in appropriate cases where Court thinks that exercise of such a discretion is necessary for welfare of the ward – Welfare of a child is the paramount consideration to determine the custody of the ward (minor child) including a female child.

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2024 (III) ILR-Cut…… 717

HINDU MARRIAGE ACT, 1955 ─ Section 13(i-b) ─ Appellant prayed for divorce on the ground of desertion ─ Respondent/wife claimed that the husband/Appellant has failed to make out a case of attempting to bring back her to the matrimonial house ─ Whether there is a requirement in the provision regarding a spouse alleging desertion to prove the fact of attempt to bring back her to the matrimonial home.

Held: No ─ Impugned judgment reversed in Appeal ─ The marriage solemnized is dissolved by decree of divorce on the ground of desertion.

Chitaranjan Prusty V. Priyattama Prusty@Patra
2024 (III) ILR-Cut…… 617

HINDU MARRIAGE ACT, 1955 – Section 24 r/w Section 23 of the Protection of Women from Domestic Violence Act, 2005 – The learned Judge, Family Court while entertaining an application U/s. 24

of the 1955 Act allowed Rs. 10,000/- per month as interim maintenance and Rs. 50,000/- towards litigation expenses in favour of Opp. Party – The learned SDJM granted interim maintenance of ₹ 6000/- in favor of Opp. Party U/s. 23 of 2005 Act which was reduced to Rs. 4000/- by the Appellate Court.

Held : A DV Court has Jurisdiction to entertain such relief of maintenance during the subsistence of an earlier order but to determine the quantum and make the necessary adjustment or set off accordingly, provided a case is made out by the aggrieved spouse stating the circumstances and the need for the same – It is hence to be concluded that the spouse, in whose favor an order of maintenance has been passed, shall have to disclose it to the subsequent Court but for any such nondisclosure, the Court shall have the jurisdiction to modify the order or even review or recall the same on being informed by the other spouse.

Goutam Charan Das V. Biswadarsani Das.
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HINDU MARRIAGE ACT, 1955 ─ Section 25(1) ─ The marriage between the appellant and the respondent was dissolved on 26.08.2009. The present appeal was filed for enhancement permanent alimony and maintenance – Discretion of the Court ─ Whether the appellate Court can exercise the discretion as provided U/s. 25(1) of the Act and modify the directions for permanent alimony and maintenance.

Held : Yes – The directions of the Family Court for permanent alimony and maintenance were modified.

Pranati Mishra V. Chandra Sekhar Tripathy.
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HINDU SUCCESSION ACT, 1956 – Sections 4, 14 & 15 – The plaintiff claimed that she is the only legal heir and successor of Sumitra Barik, that defendant No. 1 is not the adopted son of Sumitra Barik and as such not entitled to her (Sumitra's) properties – Defendant No. 1 denied the same and claims to be in possession of the suit land – Suit was decreed – Matter went in Appeal by defendant Nos. 1 & 3 – The First Appellate Court partly reversed the decree of the Court below – The present Appeal is filed against the decree of the First Appellate Court.

Held: Right of a female Hindu widow to succeed to the property of her deceased husband is absolute and cannot be restricted in any manner including the fact of her remarriage – In the event of the widow dying intestate without any issue, the provisions of sub-section (2) of Sec.15 would apply – But in the event the widow has remarried and dies leaving behind children begotten out of the remarriage, the property succeeded by her from her husband of the first marriage would devolve on her children begotten out of the second marriage as her legal heirs, provided she was issueless from her first marriage.

Arnapurna Pradhan V. Trinath Barik & Ors.
2024 (III) ILR-Cut…… 789

INDIAN EVIDENCE ACT, 1872 ─ Section 118 **─** The appellant was convicted under Section 302 of the Indian Penal Code,1860 on 27.11.2009 and sentenced to undergo imprisonment for life (L.I.) and to pay a fine of Rs. 5000/-(Rupees five thousand), in default, to undergo R.I. for six months more. Defence raised a contention about the acceptance of solitary evidence of the child witness (P.W.12). Whether the testimony of the child witness be accepted.

Held: Yes – When a child witness is capable enough to give rational answers to the questions put to him/her after understanding the same, his/her evidence is admissible.

Duty of the Trial Court while recording testimony of a child witness – The preliminary examination of a child witness is nothing but a rule of caution – The trial Court is required to record its query to a child witness in the form of questions and answers so that the Appellate Court will be in a position to see whether child witness understands the duty of speaking truth – Even though it is desirable to make such preliminary examination but it is not always imperative. There is no rule that in case of every child witness, the trial Court should conduct a preliminary examination – It is only a rule of prudence and not a legal obligation – When questions are raised regarding the intellectual capacity of the child witness, the Court can peruse the evidence of the victim in its entirety to find out as to whether he/she was capable enough to give rational answers to the questions put to him/her after understanding the same – Absence of preliminary examination of the child witness would not render his/her evidence inadmissible.

Raikishore Jena V. State of Odisha.

2024 (III) ILR-Cut…… 665

INDIAN EVIDENCE ACT, 1872 – Section 134 – Law is well settled that in the matter of appreciation of evidence of witnesses, it is not the number of witnesses, but the quality of their evidence is important – There is no requirement in the law of evidence that a particular number of witnesses must be examined in order to prove/disprove a fact – The evidence has to be weighed and not counted – The legal system is opposed to the multiplicity or plurality of witnesses – It is thus, the quality and not quantity, which determines the adequacy of evidence, as has been provided under section 134 of the Evidence Act – If the evidence of a solitary witness is cogent, credible and trustworthy, the same can be acted upon.

The act of the appellant comes within the ambit of Section 302 or 304 of IPC.

Held: There is no opinion that the bodily injury caused to the deceased was sufficient in the ordinary course of nature to cause death, we are of the view that the act has been done with the intention of causing such bodily injury as he knew to be likely to cause the death of the deceased which comes under clause second of section 300 of I.P.C. – To decide the question of provocation, an objective test has to be applied as to whether in the opinion of the Court, the provocation would have made a reasonable man lose his self-control, whether he would have retaliated in the same way as the accused in fact did, which requires affirmative answers – Whether the provocation was such as to deprive the accused of his self-control, the condition of the mind of the accused at the time of provocation is required to be taken into consideration – The case would not come with the purview of section 302 of the I.P.C and it would come within the ambit of culpable homicide not amounting to murder and fall within the first part of section 304 of the I.P.C.

Nabakishore Naik V. State of Odisha.

2024 (III) ILR-Cut…… 652

INDIAN NURSING COUNCIL ACT, 1947 ─ Sections 16(1)(g)(1)(h), 16(1)(i) r/w Art. 226 of Constitution of India ─ The Indian Nursing Council prescribed the condition for admission to training course and the standard of examination as per the power confers under the Act by way of regulation ─ In view of the policy of

Held: No – When the social investigation report does not show that, the petitioner has been subjected to any form of abuse or was a victim of any similar incident earlier or he was with any bad association earlier and the mother of petitioner is expressing her willingness to take care of petitioner and when there is no reasonable apprehension of his fleeing away from the process of Justice after his release on bail, the application for bail should not be denied.

N. Kaushik Ojha V. State of Odisha.
2024 (III) ILR-Cut…… 923

LAND ACQUISITION – Compensation – Claimant has prayed lesser amount in his application – Whether the referral court can enhance such amount.

Held: Yes. – Law is well settled that even if the Petitioner/ Claimant has prayed for a lesser amount, if after recording evidence, the referral Court finds that the Petitioner/Claimant is entitled to more compensation, it should award more compensation than what has been claimed by the Petitioner/Claimant.

Dhulia Naik V. Land Acquisition Collector, Dhenkanal.
2024 (III) ILR-Cut…… 870

LIMITATION ACT, 1963 – Section 5 r/w Order XLI Rule 3-A of Code of Civil Procedure – Condonation of delay – There is a delay of 2336 days in filing the appeal – Learned Appellate Court taking into consideration the ratio of the Apex Court in Miscellaneous Application No. 665 of 2021 arising out of *Suo Motu* Writ Petition (Civil) No. 03 of 2020 excluded the period of Covid pandemic (i.e. from 15/03/2020 to 02/10/2021) and calculated the delay as 1774 days in filing the appeal and condoned the same – Whether the condonation of delay of 1774 days without sufficient cause is sustainable under law.

Held: No – By efflux of time, a right has accrued in favour of the Petitioners/Respondents by virtue of the judgment and decree passed in CS No.95 of 2014 – The same cannot be taken away so lightly without even discussing the objection raised by them opposing condonation of delay as has been done by learned Additional District Judge, Chatrapur – Exclusion of period of COVID-19 is immaterial and inconsequential for consideration of petition to condone the delay

in filing the Appeal, as the statutory period for filing the appeal had expired four years before the outbreak of COVID-19 pandemic– No doubt, public interest plays a vital role while considering the petition for condonation of delay, but that does not take away the responsibility of the party seeking for condonation of delay to provide sufficient cause for the same – Learned Court below could not have condoned the delay in filing the Appeal, as the finding of latches on the part of the revenue authorities itself makes it clear that no sufficient cause has been shown by the Government functionaries for condonation of delay.

Laxmi Gouda & Ors. V. The District Collector, Ganjam & Ors.
2024 (III) ILR-Cut…… 706

MEANING OF THE WORDS "SON" OR "DAUGHTER", ETC. MENTIONED IN THE PROPOSITION – Whether "son" or "daughter", etc. mentioned in the proposition can include son and daughter begotten by the widow through her remarriage.

Held: Yes – The legal position is that 'son-daughter' includes natural son, adopted son and sons/daughters by different husbands.

Arnapurna Pradhan V. Trinath Barik & Ors.
2024 (III) ILR-Cut…… 789

NATIONAL HIGHWAY AUTHORITY OF INDIA (RECRUITMENTS, SENIORITY AND PROMOTION) AMENDMENT REGULATIONS, 2015 ─ Clause 13(A)(F) **─** Regularization of service – The NHAI regularized the service of petitioners prospectively w.e.f. 1st June, 2018 in terms of clause 13 (A)(F) of the 2015 Regulations instead of regularizing from the date of completion of five years of service in the post of Jr. Accountants Officer w.e.f. 2005 – The petitioners have never challenged the amended regulation 2015 – on the contrary consciously subjected themselves to the assessment as prescribed under 13A(1)(m) of NHAI Regulations, 2015 and accepted consequential regularization – Whether the petitioners can claim retrospective regularization at this stage.

Held: No – The petitioners are estopped from challenging the consequential prospective promotion – It is trite law that once a person has accepted a benefit flowing from an order, he cannot turn around and challenge a part of the same order.

Held: No ─ An Authority/State is not expected to pass separate orders on the suggestions/objections received by the public in general in response to the statutory draft notice inviting suggestions/objection.

Pramodini Dash V. The State of Odisha & Ors.
2024 (III) ILR-Cut…… 595

ODISHA GROUP-C AND GROUP-D POSTS (CONTRACTUAL APPOINTMENT) RULES, 2013 – Regularization – The Authority rejected the recommendation for regularization of petitioner on the ground that the appointment is not as per 2013 Rules and without due procedure of selection – Whether the rejection is sustainable.

Held: No – The initial appointment of petitioner was made in the year 1996 when no such rules for contractual posts were there and the continuance of the petitioner for the post was never objected by the Government at any point of time – So the objection made in the counter affidavit of the State with regard to initial appointment of the petitioner as irregular cannot be allowed to sustain for the reason that his employment and continuance in service was though irregular but never stated as illegal and the long continuance of the petitioner in service for last 28 years without any interruption would definitely justify his requirement in the post for substantial discharge of duty necessitated for the employer.

Tusara Ranjan Patra V. State of Odisha & Ors.
2024 (III) ILR-Cut…… 740

ODISHA SERVICE CODE – Rule 91 – Appellate authority set aside the order of punishment treating the period of suspension as such – Disciplinary authority without complying the order of appellate authority passed the impugned order of claim of pay for the period under suspension is abandoned in consonance with Rule 91 of the Odisha Service Code – Whether the order in compliance with Rule 91 of the code is applicable once the appellate authority set aside the order of punishment.

Held: No – Present case factually does not fit into clause (1) of Rule 91.

Kansari Behera V. State of Odisha & Ors.
2024 (III) ILR-Cut…… 845

ORISSA CIVIL SERVICES (CCA) RULES, 1962 – Rules 15 and 16 – A proceeding was initiated against the petitioner vide office order dated 04.04.2019 – It is found that petitioner was never held guilty of the charges in the proceeding – The Opp. Party No. 4 passed the order of removal which was confirmed by the appellate authority (Opp. Party No. 2) – Whether the order of removal is sustainable.

Held: No – When the proceeding was initiated under Rule 16 of the 1962 Rules and the petitioner was never held guilty, no major punishment can be imposed – Only minor punishment can be imposed.

Padmanava Sethy V. State of Odisha & Ors.
2024 (III) ILR-Cut…… 835

ODISHA CIVIL SERVICES (CCA) RULES, 1962 – Rules 29 & 30 – Disciplinary authority imposed punishment treating the period of suspension as such – Petitioner preferred appeal challenging the punishment of disciplinary authority – Appellate authority set aside the order imposing penalty – The disciplinary authority without implementing the order of appellate authority sought advice from the Revenue and Disaster Management Department – Whether the disciplinary authority has any scope to seek advice from the higher authority in view of the provisions contained in Rule 30 of the 1962 Rules.

Held: No – The Disciplinary authority was bound by the quasi-Judicial order in appeal, and in defiance thereof he was not competent to pass fresh orders by adhering to directive of Revenue and Disaster Management Department on the administrative side – Such a course, in flagrant violation of provision of Rule 30 of OCS (CCA) Rules, 1962, is impermissible

Kansari Behera V. State of Odisha & Ors.
2024 (III) ILR-Cut…… 845

ORISSA LEGISLATIVE ASSEMBLY SECRETARIAT (RECRUITMENT AND CONDITIONS OF SERVICE) RULES, 1983 – Rule 10(3) – As per Rule 10(3) a merit list has to be prepared for direct recruitment – In the present case merit list is absent – What should be the appropriate modality for fixing *inter se* seniority of the employees in absence of the merit list?

Held : No merit list of the candidates is available with the employer – It is true that the date of joining in service of respective candidate as mentioned in the final gradation list under the impugned order is never disputed by either party – Therefore, their date of joining can be safely taken as their date of entry in the service and their seniority can be counted from said dates as they borne into the service from that date.When the date of entry of respective candidates into the service is remaining an undisputed fact, the safest procedure would be to rely upon such undisputed fact to fix *inter se* seniority between the parties.

E. China Babu V. Odisha Legislative Assembly & Ors.
2024 (III) ILR-Cut…… 730

ORISSA POLICE SERVICES (METHOD AND RECRUITMENT AND CONDITIONS OF SERVICE OF CONSTABLES) ORDER 2010 r/w 2021 Order issued vide notification dated 08.06.2021 – The 2010 Order provides that each year the written willingness of sepoy/constable will be received through the commandant at concerned SAP headquarters by 31st January for consideration of their redeployment – The petitioners were eligible since 2017 and for no reason whatsoever is coming forth from the concerned Opp. Party authorities as to why their names were not sent for consideration for redeployments – The said 2010 Order by providing a time stipulation confers a right upon the petitioner to be considered for redeployment in the district cadre – In the meantime amended Order 2021 came into force incorporating additional disqualification criteria – Whether the case of petitioners should be considered as per 2021 order.

Held: No – The proposition of law with regard to filling up of the vacancies arising prior to the rules were amended, by applying the amended rules, would not be applicable in the present case, inasmuch as the Government was under a statutory obligation to fill up such vacancies in a time bound manner as has been laid down in the relevant Order of 2010.

Ranjan Parida V. State of Orissa & Ors.
2024 (III) ILR-Cut…… 808

PAYMENT OF GRATUITY ACT, 1972 – Section 4 (6) – Payment of Gratuity – Whether the authority/employer can forfeit the gratuity of an employee after his superannuation on the plea regard to

outstanding of loan amount where such employee stood as a guarantor against the loan.

Held: No – The Opp.Party No.4's services were never terminated for causing any damage or loss to the bank – Rather, she was allowed to retire from service w.e.f. 31.07.2010 on attaining the age of superannuation – Hence, stand of forfeiture of gratuity of the Opp.Party No. 4 because of alleged loss caused to the bank by standing as guarantor against the loanees is misconceived and untenable in the eye of law.

Cuttack Central Co-Operative Bank Ltd. V. The Joint Labour Commissioner, Odisha & Ors.

2024 (III) ILR-Cut…… 875

PREVENTION OF CORRUPTION ACT, 1988 – Section 13 (1) (d), 13 (2), 7 and 20 – The appellate/ accused in his statement has taken a specific plea of his defense regarding the acceptance of alleged tainted money towards the fee formulation – The said statement was substantiated by him by adducing evidence of the Amin who was indeed present at the spot, while the trap was laid – Whether mere recovery of currency notes can constitute the offence U/s. 7 of the Act?

Held: No – Unless it is proved beyond all reasonable doubt that the accused voluntarily accepted the money knowing it to be bribe.

Babulal Sahu V. State of Orissa

2024 (III) ILR-Cut…… 899

SERVICE JURISPRUDENCE – No work No pay – Applicability of – The petitioner was exonerated from the charges in the vigilance proceeding and he was extended with the benefit of promotion to different ranks as per the order of learned Tribunal and the order passed by the Tribunal was never assailed by the State – Whether the principle of no work no pay is applicable to petitioner.

Held: No – Since the Petitioner was exonerated from all the charges and was accordingly acquitted, in view of such exoneration, the petitioner is entitled to get all service benefits as due and admissible and principle of No Work No Pay is not applicable.

Held: Marriage is no longer a deciding factor in determining a daughter's responsibility toward her family – The idea that a daughter becomes part of her husband's family after marriage and is thereby relieved of her obligation to her own family is outdated – In reality married daughters often play crucial role in looking after their parent, financially and emotionally regardless of their marital status – This shift recognizes that the bond between a daughter & her parents is not severed by marriage, and that her responsibilities to her natal family remain intact – In today's society, gender-based distinctions in familial duties have gradually faded as women have become equal contributors to the economic, emotional, and social well-being of their families – Daughters, whether married or unmarried, actively participate in supporting their parents and ensuring the smooth functioning of their households, debunking the traditional notion that sons alone are responsible for family care. Moreover, the evolving societal and legal landscape increasingly acknowledges that care giving responsibilities and family support should not be confined to gender or marital status – Now, it is true that the petitioner got married in 2015, but she has continued to care for the needs of her widowed mother – There is no legal prohibition on granting compassionate appointment to a married daughter, and the rejection of her claim, despite her being otherwise eligible, lacks rational justification.

N. Sonam Shilpa V. Union of India & Ors.

2024 (III) ILR-Cut…… 758

SERVICE LAW – Departmental Proceeding pending since 2003, nearly about two decades – Vigilance case which was initiated already been closed as the investigation report did not disclose any criminal liability – Petitioner meanwhile retired from service and retiral benefits like gratuity and leave salary have been held up – Plea of delay and latches pleaded – Effect of such long protraction/delay in conclusion of the departmental proceeding.

Held: The petitioner has already endured substantial hardship due to the ongoing disciplinary proceedings – In fact, the mental anguish & suffering experienced by the petitioner as a result of these prolonged proceedings would far outweigh any potential punishment – Hence, there is no hesitation to quash the charge memo and the departmental proceeding issued against the petitioner in toto – The petitioner will be entitled to all the withheld retiral benefits with 10% simple interest from the date of retirement.

SPECIFIC RELIEF ACT, 1963 – Section 19(b) – One contract for sale was executed by the original defendant in favor of the plaintiff – Suit for specific performance of such agreement for sale has been filed against the defendant (and after his death, the legal heirs) – Plaintiff filed an application under Order VI Rule 17 read with Order 1 Rule 10 Code of Civil Procedure to amend the plaint as well as to implead eleven *lis pendens* purchasers as parties to the suits alleging that the owner of the suit properties executed eleven sale deeds in favor of those persons in respect of different portion of the suit property on payment of consideration – Whether a *lis pendens* purchaser is a necessary party to a suit for specific contract.

Held: No – The parties to be impleaded in the present suit are not necessary parties as no relief is claimed against them in the suit and a decree for specific performance may be passed in their absence.

WORDS & PHRASES – 'WELFARE' meaning of – 'Welfare' includes material welfare both in sense of adequacy of resources to provide a pleasant home and a comfortable standard of living. While considering the welfare of the ward, adequacy of care to ensure that good health and due personal pride should be given due weightage. More important are the stability and the security, the loving and understanding care and guidance, the warm and compassionate relationships that are essential for the full development of the child's own character, personality and talents. Reference made to Walker Vs. Walker and Harrison: 1981 New Ze Recent Law 257.

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2024 (III) ILR-CUT-595

PRAMODINI DASH
V.
THE STATE OF ODISHA & ORS.

(W.P.(C) NO. 9210 OF 2024)

14 MAY 2024

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

Issue for Consideration

Framing of the regulations by the Bhubaneswar Development Authority while exercising power U/ss. 124, 125(2) of Orissa Development Authorities Act, 1982 is challenged.

Headnotes

ODISHA DEVELOPMENT AUTHORITIES ACT, 1982 ─ Sections 124, 125(2) ─ The Development Authority invited objection/suggestions by the notification dated 09.06.2023 for framing of the regulations in accordance with the sub-section 2 of the Section 125 of the Act ─ Petitioner filed his objection to the draft notification ─ Final Notification published, where it was mentioned that objections and suggestions had duly been considered by the Development Authority ─ Petitioner's contention that, some order ought to have passed on his objection by the Authority in compliance to section 125(2) of the Act ─ Whether the authority should pass separate order U/s. 125(2) of the Act ?

Held: No ─ An Authority/State is not expected to pass separate orders on the suggestions/objections received by the public in general in response to the statutory draft notice inviting suggestions/objection. (Para 13)

List of Acts

Odisha Development Authorities Act, 1982

Keywords

Ultra vires, Draft notification

Case Arising From

The legality of the Gazette notification dated 07.12.2023 notifying the regulations and the subsequent office order dated 13.12.2023 issued by the Secretary, BDA.

Appearances of Parties

For Petitioner : Mr. Aurovinda Mohanty

For Opp.Parties : Mr. Debakanta Mohanty, A.G.A.

Judgment/Order

Order

BY THE BENCH

This matter is taken up through Hybrid mode.

2. Section 124 of the Orissa Development Authorities Act, 1982 (hereinafter referred to as 'the Act') confers power upon the Orissa Development Authority to frame regulations, with the previous approval of the State Government, not inconsistent with the provisions of the Act or the rules made thereunder for carrying out all or any of the purposes of the Act and, particularly, in regard to all matters expressly required or allowed by the said Act or the rules, to be regulated by the authority.

3. Section 125 of the Act lays down the procedure for making regulations under Section 124 of the Act thereof, which reads as under:"

> *"**125. Procedure for making rules and regulations**-(1) In making rules or regulations under Section 123 or 124, a draft of the same shall be published in the Gazette.*
>
> *(2) There shall be published with the draft a notice specifying a date, being not earlier than fifteen days, on or after which the draft shall be taken into consideration.*
>
> *(3) The State government or the Authority, as the case may be, shall consider any objection or suggestion, if any, that may be received before the specified date and make such alterations or modifications as it may deem fit.*
>
> *(4) All rules and regulations so made shall be published in the Gazette and shall come into force on the date of such publication."*

4. The Bhubaneswar Development Authority (BDA), in exercise of the said powers conferred by Section 124 of the Act, has notified Bhubaneswar Development Authority Property (Management and Allotment) Regulations, 2023 (hereinafter referred to as 'the regulations') on 14.11.2023, which came to be published in the Official Gazette on 07.12.2023. Further, an office order has been issued by the BDA on 13.12.2023 to the effect that the said regulations shall come into force with effect from 07.12.2023, i.e. from the date of its publication in the official gazzette.

5. The present writ petition has been filed under Article 226 of the Constitution of India assailing the legality of the aforesaid Gazette notification dated 07.12.2023 notifying the regulations and the subsequent office order dated 13.12.2023 issued by the Secretary, BDA to the effect that the regulations shall come into force with effect from 07.12.2023.

6. It is worthwhile noticing that complying with the requirement of publication of draft notice inviting objections contemplated under Section 125 of the Act, objections were invited through a notification, published in the official gazette from all persons likely to be affected thereby, for consideration of the authority for framing of the regulations.

7. The petitioner had earlier approached this Court by filing a writ petition registered as W.P.(C) No.35722 of 2023 for consideration of his objection to the proposed regulations, which was disposed of by an order of this Court dated 17.11.2023 with a direction to the opposite party no.1 of the said writ petition to consider the petitioner's objection by passing appropriate order.

8. Later, apparently after issuance of the gazette notification dated 07.12.2023 and the subsequent office order dated 13.12.2023 as noted above, the petitioner filed another writ petition before this Court giving rise to W.P.(C) No. 42097 of 2023 alleging disobedience of the earlier order of this Court dated 17.11.2023 passed in W.P.(C) No. 35722 of 2023. The said writ petition came to be dismissed as not maintainable by a coordinate Bench of this Court by an order dated 06.02.2024 with a liberty to the petitioner to pursue her remedy before the appropriate forum in accordance with law. The following was the relief sought by the petitioner in W.P.(C) No. 42097 of 2023 is as under:

> *"It is therefore, most respectfully prayed that let this Hon'ble Court may be graciously be pleased to allow this writ petition and issue writ of mandamus or any other appropriate writ/writs in form of certiorari to quash/ set aside the Gazette notification dated 07.12.2023 under Annexure-11 as some of the clauses deliberately incorporated by opposite party no.3 in manipulating/ tampering the decision of the BDA Authority dated 10.02.2023 under Annexure-3.*
>
> *And further be pleased to declare that the action of the opposite party no.3- Secretary, BDA in issuing office order dated 13.12.2023 under Annexure-12 is also not in consonance with law; and violating the order of this Hon'ble Court dated 17.11.2023 passed in W.P.(C) No.35722 of 2023 thereby all consequential actions be declare as illegal and without jurisdiction in terms of section 125(3) of the ODA Act, 1982."*

9. The petitioner has again questioned the validity of the same Gazette notification dated 07.12.2023 and subsequent office order dated 13.12.2023 in the present writ petition. It is the petitioner's case that the provisions of the regulations as notified, deviate from the authority's resolution dated 10.02.2023 passed in the Agenda Item No.29/145. It is also the petitioner's case that despite this Court's order, the petitioner's objection was not considered as stipulated under Section 125 of the Act, and without considering the objections, the regulations have been notified. On the said grounds, the petitioner wants this Court to declare the regulations *ultra vires* Section 125 of the Act.

10. We have heard Mr. Aurovinda Mohanty, learned counsel appearing on behalf of the petitioner and Mr. Debakanta Mohanty, learned Additional Government Advocate (AGA) for the opposite parties-State.

11. Mr. Aurovinda Mohanty, learned counsel for the petitioner has vehemently argued that it was incumbent upon the authority to consider the objections and suggestions made by the petitioner and that having not been done, the regulations are *ultra vires* the said provision. He has also drawn our attention to the resolution of the BDA dated 10.02.2023 passed in Agenda Item No.29/145 concerning framing of the regulations and submitted that some of the provisions in the regulations are

different from that which were decided by the resolution dated 10.02.2023. This is another ground on which he has challenged the validity of the regulations.

12. In our opinion, challenge made by the petitioner to the regulations on both the grounds as noted above, are wholly untenable. Notably, it is not the case of the petitioner that the said regulations, which have been notified with the approval of the State Government are either contrary to or defeat any purpose of the Act. It is also not the petitioner's case that any provision under the regulations is beyond the regulations making power of the authority under Section 124 of the Act.

13. It is an admitted fact that by the notification dated 09.06.2023 objections/suggestions were invited by the Development Authority for framing of the regulations in accordance with Sub-section 2 of Section 125 of the Act which was published in the Official Gazette. The impugned notification published on 07.12.2023 clearly mentions that the objections and suggestions before the expiry of the period specified in the said draft had duly been considered by the BDA. The petitioner's contention that there ought to have been some order passed on his objection by the State Government or the authority to comply with the requirement of Section 125(2) of the Act is wholly misconceived. The apparent requirement of publication of draft notice before finalizing the regulations under Section 125(2) of the Act is to make aware the public in general about the intention of the authority/ the State Government about proposed provisions to be incorporated in the regulations and to seek their opinion/suggestions for alteration/improvement, if so required, after consideration. In the Court's opinion, an authority/State is not expected to pass separate orders on the suggestions/objections received by the public in general in response to the statutory draft notice inviting such suggestions/ objections.

14. Secondly, the petitioner's case that the provisions under the regulations are different from the resolution of the authority dated 10.02.2023 and, therefore, they are unsustainable has no merit at all. It is not the petitioner's case that the regulations as notified by the authority were not approved by the BDA.

15. In such view of the matter, we do not find any merit in this writ petition, which is accordingly dismissed. No orders as to costs.

Headnotes prepared by :
Smt. Madhumita Panda, Law Reporter
(Verified by : Shri Pravakar Ganthia, Editor-in-Chief)

Result of the case :
Writ petition dismissed

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2024 (III) ILR-CUT-599

M/s. GRAPHITES INDIA LIMITED.
V.
PRESIDING OFFICER, LABOUR COURT, SAMBALPUR & ORS.

(W.P.(C) NOS. 22006, 22008 & 22010 OF 2014)

02 MAY 2024

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

Issue for Consideration

Whether the Labour Court has the jurisdiction to enter into the proportionality of the punishment imposed by the management while holding an enquiry under Section 33(2)(b) of the Industrial Disputes Act.

Headnotes

INDUSTRIAL DISPUTES ACT, 1947 ─ Section 33(2)(b) ─ Whether the Labour Court has the jurisdiction to enter into the proportionality of the punishment imposed by the management while holding an enquiry under Section 33(2)(b) of the Act.

Held : No ─ Such a power can be exercised by the Labour Court or Tribunal only under Section 11-A of the Act ─ Impugned order setaside.

(Paras 16,19,20)

Citations Reference

Tata Iron and Steel Co. Ltd. v. S.N. Modak, **AIR 1966 SC 380**; Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. v. Ram Gopal Sharma, **(2002) 2 SCC 244**; John D'Souza v. Karnataka State Road Transport Corporation, **(2019) 18 SCC 47**; The Management of Orissa Road Transport Company Limited v. The Workman T. Bangali Patra, **1991 (II) OLR 515** – **referred to**.

List of Acts

Industrial Disputes Act, 1947

Keywords

Proportionality of the punishment, *bona fide*, Jurisdiction of the Labour Court

Case Arising From

Orders dated 06.06.2014 passed by the Presiding Officer, Labour Court, Sambalpur in M.C. No.02 of 2011, M.C. No.10 of 2011 and M.C. No.6 of 2011 U/s. 33(2)(b) of the Industrial Disputes Act.

Appearances of Parties

For Petitioner : Mr. Durga Prasad Nanda, Sr. Adv.
For Opp.Parties : Mr. L. Samantray, AGA for State, Mr. H.K. Mohanta.

Judgment/Order

Judgment

CHAKRADHARI SHARAN SINGH, CJ.

The petitioner, M/s. Graphites India Limited (hereinafter referred to as 'the management') has put to challenge in the present writ applications filed under Article 226 of the Constitution of India three orders of the same date, i.e. 06.06.2014 passed by the Presiding Officer, Labour Court, Sambalpur in M.C. No. 02 of 2011, M.C. No. 10 of 2011 and M.C. No. 6 of 2011, whereby the applications filed by the management under Section 33(2)(b) of the Industrial Disputes Act, 1947 (in short 'the I.D. Act') for approval of an order of dismissal of the opposite party no.2 (the workman) have been rejected.

2. The points involved in all the cases being identical in nature, they have been heard together and are being disposed of by the present common judgment and order.

3. For convenience, we are referring to the facts pleaded in W.P.(C) No.22006 of 2014 wherein, the order dated 06.06.2014 passed in M.C. No.02 of 2011 has been put to challenge.

4. We have heard Mr. Durga Prasad Nanda, learned Senior Counsel appearing on behalf of the petitioner-management and Mr. H.K. Mohanta, learned counsel appearing on behalf of the opposite party-workman.

5. During the pendency of an industrial dispute, a disciplinary proceeding was initiated against the opposite party-workman by the management which subsequently resulted in to passing of an order of dismissal from service by the management.

6. Section 33(2) of the I.D. Act stipulates that during the pendency of any proceeding in respect of an industrial dispute, the employer may, in accordance with the standing orders applicable to a workman concerned in such dispute or in accordance with the terms of contract in the absence of any standing orders, alter the conditions of service applicable to the workman, immediately before the commencement of the proceeding; or for any misconduct, discharge or punish, whether by dismissal or otherwise, that workman; which is not connected with the dispute.

7. The *proviso* to clause-b of sub-Section 2 of Section 33 of the I.D. Act is at the core of the controversy in the present case, which reads thus:

> *"Provided that no such workman shall be discharged or dismissed, unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer."*

8. On bare perusal of the aforementioned proviso, it can easily be discerned that there are two condition precedents for discharge or punish, whether by dismissal

or otherwise, a workman during the pendency of an unconnected pending industrial dispute, namely;

> *(i) the workman is paid wages for one month; and*
>
> *(ii) an application has been made by the employer to the authority before which the proceeding is pending; "**for approval of the action taken by the employer**".*
>
> (Emphasis added)

9. The facts of the case are not in dispute. A proceeding was initiated against the opposite party-workman, when he was working as a Technician-Arc-Furnace in SMS Department, by the management on 01.08.2009, on the charge of misconduct of refusal to work, negligence in discharge of duty, participating in illegal strike and willful disobedience to the lawful orders of the superiors. The workman was found to be guilty of misconduct in an enquiry held by the management and considering the seriousness of the charge, it proposed to impose the punishment of dismissal from service in accordance with the provisions under the certified standing orders of the management. The opposite party-workman was given an opportunity to reply against the proposed punishment. Later, he was dismissed from service by an order with effect from 03.03.2011 by the management.

10. It is noted that when the said order of dismissal was passed by the management, an industrial dispute being I.D. Case No.11/2008 to 18/2008 was pending between the management and the workman. It transpires from the impugned order passed by the learned Presiding Officer, Labour Court, Sambalpur that indisputably, the management had complied with the requirement of payment of wages for one month and that of making an application to the Labour Court for approval of action of the workman's dismissal from service. In paragraph-5 of its impugned order, the Labour Court has opined that while dealing with an application under Section 33(2)(b) of the I.D. Act, it has to consider two things, namely, (a) whether the workman was dismissed from service on the basis of domestic enquiry conducted, observing all formalities without violation of principles of natural justice, and (b) whether the punishment of dismissal of the workman was commensurate with the acts of misconduct levelled against him.

11. As regards the first consideration, the Labour Court found, based on the evidence adduced before him, that the enquiry was conducted observing the principles of natural justice and due opportunity was given to the workman to defend the charge levelled against him. The Labour Court specifically recorded that the report of the Enquiry Officer was based on the evidence collected during the enquiry and there was nothing to find any fault with the said report. The Labour Court further recorded that the domestic enquiry conducted by the management was fair and proper.

12. However, considering the second point, i.e., whether the punishment of dismissal of the workman was commensurate with the acts of misconduct or not, the Labour Court reached a conclusion that the management ought to have imposed some lesser punishment on the proof of charge levelled against him, instead of

dismissing him from service. He recorded this finding in the wake of the fact that the workman was charged of not performing his duties on 05.07.2009 with other workmen in protest against an alleged assault on a regular workman. The Labour Court has noted in its impugned order that the workman had neither initiated any strike nor had he called for stoppage of work. He had rather, only responded to the call for refusal of work on a particular cause. Further, he had not directly caused any loss to the Company and, therefore, the punishment of dismissal from service of the workman was not commensurate with the acts alleged against him.

13. After having opined thus, the Labour Court rejected the management's application filed under Section 33(2)(b) of the I.D. Act, holding that the management's action in dismissal of the workman from service with effect from 03.03.2011 could not be approved.

14. The facts and the background of the other two cases are almost identical based on which the Labour Court has rejected the management's applications under Section 33(2)(b) of the I.D. Act.

15. Assailing the impugned order of the Labour Court, Mr. Nanda, learned Senior Counsel appearing on behalf of the petitioner-management has drawn our attention to the following decisions of the Supreme Court of India:-

(1) Tata Iron and Steel Co. Ltd. v. S.N. Modak; AIR 1966 SC 380;

(2) Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. v. Ram Gopal Sharma; (2002) 2 SCC 244; and

(3) John D'Souza v. Karnataka State Road Transport Corporation; (2019) 18 SCC 47.

He has also placed reliance on a division Bench decision of this Court in case of ***The Management of Orissa Road Transport Company Limited v. The Workman T. Bangali Patra***, reported in ***1991 (II) OLR 515***.

16. Explaining the limitation and scope of the power of a Labour Court while considering an application under Section 33(2)(b) of the I.D. Act with reference to the aforementioned decisions, he has submitted that it was not within the jurisdiction of the Labour Court to have entered into the proportionality of the punishment imposed by the management. He has laid great emphasis on the law laid down by the Supreme Court in case of ***John D'Souza v. Karnataka State Road Transport Corporation*** (*supra*), paragraph-37 of which reads as under :

> *"37. The Labour Court or Tribunal, therefore, while holding enquiry under Section 33(2)(b) cannot invoke the adjudicatory powers vested in them under Sections 10(i)(c) and (d) of the Act nor can they in the process of formation of their prima facie view under Section 33(2)(b), dwell upon the proportionality of punishment, as erroneously done in the instant case, for such a power can be exercised by the Labour Court or Tribunal only under Section 11-A of the Act."*

17. Mr. Mohanta, learned counsel appearing on behalf of the opposite party-workman has submitted that duly exercising its power under Section 33(2)(b) of the I.D. Act, the Labour Court declined to approve the order of dismissal passed by the management which was not found to be *bona fide*, the same being shockingly

disproportionate to the charge of misconduct. He has also submitted that the impugned order passed by the Presiding Officer, Labour Court, Sambalpur does not suffer from any legal infirmity.

18. After having carefully gone through the impugned order passed by the Labour Court and the Supreme Court's decisions as noted above, more specifically, the law clearly enunciated in case of ***John D'Souza v. Karnataka State Road Transport Corporation*** (*supra*), we find force in the submissions advanced on behalf of the management.

19. In case of ***John D'Souza v. Karnataka State Road Transport Corporation*** (*supra*), the Supreme Court has noticed the judicial pronouncements on the limitation, scope and nature of exercise of power by a Labour Court under Section 33(2)(b) of the I.D. Act. After having noticed the precedents and the statutory provisions, the Supreme Court has held in no uncertain that a Labour Court or Tribunal cannot dwell upon the proportionality of punishment.

20. In view of the law laid down by the Supreme Court in case of ***John D'Souza v. Karnataka State Road Transport Corporation*** (*supra*) to the effect that a Labour Court or Tribunal while holding an enquiry under Section 33(2)(b) of the I.D. Act cannot dwell upon the proportionality of punishment, we have no other option but to interfere with the impugned orders passed by the Labour Court, Sambalpur.

21. In the aforesaid background, the impugned orders dated 06.06.2014 passed by the Presiding Officer, Labour Court, Sambalpur in all the aforesaid M.C. cases are hereby set aside.

22. The Presiding Officer, Labour Court, Sambalpur shall be required to pass orders afresh on the management's application filed under Section 33(2)(b) of the I.D. Act preferably within a period of three (03) months from the date of receipt/ production of certified copy of this order.

23. Accordingly, these writ petitions are allowed with the aforesaid observation and direction.

Headnotes prepared by :
Smt. Madhumita Panda, Law Reporter
(Verified by : Shri Pravakar Ganthia, Editor-in-Chief)

Result of the case :
Writ Petitions are allowed.

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2024 (III) ILR-CUT-603

GKF NURSING INSTITUTE, KHURDA
V.
STATE OF ODISHA & ORS.

(W.P.(C) NO. 39868 OF 2023 & BATCH)
14 MAY 2024
[CHAKRADHARI SHARAN SINGH, C.J. & M.S.RAMAN, J.]

Issue for Consideration

Whether the Court has the jurisdiction to relax the criteria prescribed by the Indian Nursing Council.

Headnotes

(A) CONSTITUTION OF INDIA, 1950 ─ Article 226 ─ Power of Judicial Review ─ The Indian Nursing Council in its regulations provides that no admission will be undertaken after the cut-off date that is 30th September ─ Whether the Court should extend the cut-off date for admission in exercising the Power of Judicial Review under Article 226 of the Constitution of India.

Held : No ─ Reason indicated with reference to case laws. [Para 25(i)]

(B) INDIAN NURSING COUNCIL ACT, 1947 ─ Sections 16(1)(g)(1)(h), 16(1)(i) r/w Art. 226 of Constitution of India ─ The Indian Nursing Council prescribed the condition for admission to training course and the standard of examination as per the power confers under the Act by way of regulation ─ In view of the policy of the INC the admission to Basic B.Sc Nursing Course shall be through Common Entrance Examination ─ Whether the Court has the jurisdiction to relax the criteria prescribed by the INC.

Held : No ─ The provisions relating to admission as contained in the regulation aims to achieve the object of admission of meritorious candidates in the course, so it should not be tinkered with. [Para 25(ii)]

Citation Reference

Priya Gupta v. State of Chhattisgarh, **(2012) 7 SCC 433**; Mridul Dhar v. Union of India **(2005) 2 SCC 65**; Modern Dental College and Research Centre & Ors. v. State of Madhya Pradesh & Ors., **(2016) 7 SCC 353**; T.M.A. Pai Foundation and Others v. State of Karnataka, **(2002) 8 SCC 481**; Islamic Academy of Education & Anr. v. State of Karnataka & Ors., **(2003) 6 SCC 697**; P.A.Inamdar & Ors. v. State of Maharastra & Ors., **(2005) 6 SCC 537** – **referred to**.

List of Acts

Constitution of India, 1950, Indian Nursing Council Act, 1947

Keywords

Judicial Review, Indian Nursing Council, Jurisdiction of Court, admission.

Appearances of Parties

For Petitioners : Ms. Pami Rath, Sr Adv., Mr. Soumendra Pattanaik
Mr. G.R. Sethi, Mr. A.K. Pandey

For Opp.Parties : Mr. R.N. Mishra, Addl. Govt. Adv.
Mr. R.C. Mohanty (DMET)
Mr. P.K. Parhi, DSGI, Mr. D.R. Bhokta (CGC for INC)

Judgment/Order

Judgment

CHAKRADHARI SHARAN SINGH, C.J.

Since all these writ petitions filed under Article 226 of the Constitution of India involve common issues and the grievances of the petitioners are almost identical, they have been heard together and are being disposed of by the present common judgment and order.

2. The petitioners are the nursing institutions, governed by Indian Nursing Council Act, 1947 (hereinafter referred to as 'the Act'). In exercise of the powers conferred by sub-section (1) of Section 16 of the Act, the Indian Nursing Council (INC) has framed Indian Nursing Council (Revised Regulations and Curriculum for B.Sc. (Nursing) Program), Regulations, 2020 with effect from 05.07.2021

3. These institutions were granted no objection certificate (NOC) for opening of new ANM, GNM, B.Sc.(N), P.B.B.Sc.(N) and M.Sc.(N) nursing course for the academic session 2023-24 in September 2023 by the Odisha Nurses and Midwives Registration Council (ONMRC). Later, provisional recognitions were granted in their favour in the month of October, 2023. It is the case of the petitioners that they were granted affiliation in November 2023 by the University.

4. It is noteworthy that by virtue of Section 16(1)(g) of the Act, the INC is vested with the power to prescribe the standard curricula for the training of nurses, midwives and health visitors, for training courses for teachers of nurses, midwives and health visitors, and for training in nursing administration by making Regulation. Section 16(1)(h) confers power on the INC to prescribe the conditions for admission to courses of training and Section 16(1)(i) to prescribe the standards of examination and other requirements to be satisfied to secure for qualifications recognition under this Act by way of regulation.

5. The INC has provided in its regulations that the start of semester for a course shall be 1st August every year. It further provides that no admission after the cut-off date, i.e. 30th September will be undertaken. Further, hall tickets/ admit cards, etc. shall not be issued to the candidates who are admitted after 30th September. The INC came out with a notification on 06.04.2023 reiterating the requirement that the commencement of session of B.Sc. (Nursing) Program shall be 1st August and last date of admission shall be 30th September every year. Further, admission to B.Sc. (N) during the academic year 2023-24 shall be through Common Entrance Examination by the State Govt. Common Entrance Cell/Universities. The notification further prescribed that such entrance test must be conducted before 15.06.2023. In the light of the said notification issued by the INC, the Directorate of Medical Education & Training (DMET), Odisha issued a notice on 23.05.2023 to the

effect that admission to Basic B.Sc. Nursing course during the academic session 2023-24 shall be through Common Entrance Examination (CEE) conducted by the State Government Common Entrance Cell/University instead of NEET (UG). It also prescribed that such admission would be allowed through an entrance examination conducted by the State Nursing Selection Committee (SNSC), Odisha for the academic session 2023-24.

6. Further, the INC issued another notification dated 08.06.2023, in continuation with the earlier notification dated 06.04.2023 to the effect that students of B.Sc. (N) shall be admitted only if they qualify in the entrance examination conducted by the State Government/University/State Common Entrance Cell. The notification further stipulates that in case the admissions are resorted to with the concerned students not passing or appearing in the combined admission test conducted for the purpose of admission to B.Sc.(N) course nor following the guidelines for admission prescribed by the INC, the said students will be liable to face problems in reciprocal registration.

7. A subsequent notification No.17 dated 31.10.2023 issued by the INC has been brought to our notice extending the last date for all Nursing Programs for the academic year 2023-24, whereby last date for admission was extended till 30.11.2023. The said notification is crucial and is accordingly reproduced herein below: -

F No. 1-6/LT/2023-INC Dated 31 Oct 2023

NOTIFICATION No.17 of 2023

Sub: Extension of Last date of Admission for the all Nursing Programs for Academic year 2023-24-reg.

In continuation to earlier notification no.13 of 2023 dated 22.09.2023, Indian Nursing Council has considered the request from the States with respect to extension of last date of admission for all nursing programs i.e., ANM, GNM, B.Sc. (N), PBB. Sc. (N), M. Sc. (N), Post Basic Diploma and NPCC for the Academic Year 2023-24 till **30th November 2023**.

The total number of students admitted upto 31st Oct 2023 (regular batch) and 30th Nov 2023 (irregular batch) should add up to the sanctioned strength and shall not exceed the Annual intake.

NOTE:

It shall be ensured that the INC guidelines with respect to completion of syllabus in various nursing programmes be strictly followed.

(i) For B.Sc. (N) - The Universities/Colleges of Nursing shall implement the B.Sc. (N) semester wise. In this context, it is clarified that the students who are admitted upto 31st Oct 2023 shall be considered as REGULAR BATCH. The students admitted from 1st Nov 2023 onwards will be considered as IRREGULAR BATCH. Examination shall be conducted separately for the above batches. Universities shall ensure that institution shall comply with semester requirements as prescribed in the syllabi before the conduct of examination:

(a) A candidate must have minimum of 80% attendance (irrespective of the kind of absence) in theory and practical in each course/ subject for appearing for examination.

> **(b)** A candidate must have 100% attendance in each of the practical areas before award of degree.
>
> **(ii) For GNM**-a candidate must have minimum of 80% attendance (irrespective of the kind of absence) in theory and practical in each subject for appearing for examination. The diploma shall not be awarded to the student till she/he has completed the clinical/filed requirement.
>
> **(iii) For ANM**-at least 80% of all the clinical requirement should be completed before appearing for the final (second year) examination and should have acquired the requisite competencies as listed in the syllabus before the award of the certificate/diploma by the State Nursing Council/Examination Board.
>
> **No request for further extension shall be considered**. This issues with approval from the competent Authority.

8. It is worthwhile mentioning that the DMET, Odisha came out with a notice dated 30.06.2023 inviting applications from eligible candidates for admission to ANM, GNM, Basic B.Sc., P.B. B.Sc., M.Sc. and P.B. Diploma Nursing courses in all ONMRC recognized Government and Private Nursing Institutions of the State for the academic session 2023-24. The admission calendar and the prospectus were also issued in relation to the admission to different nursing courses in such institutions.

9. It is an admitted fact that the institutions/bodies which have filed the present writ petitions did not have the ONMRC recognition as on the date of issuance of the said notice dated 30.06.2023.

10. In the present batch of writ petitions, the petitioners have put to challenge a notice dated 19.06.2023 issued by the DMET, Odisha wherein it has been prescribed that students of basic B.Sc. nursing course shall be admitted only if they qualify in the entrance examination conducted by the State Nursing Selection Committee, Odisha. It is their case that they were initially granted provisional recognition for nursing courses after the entrance examinations were held and last date for admission prescribed by the INC had already expired. It is also their case that since the recognition to these institutions was granted for the academic session 2023-24 after the cut-off date for admission, the opposite parties should allow them to fill-up the vacant seats by taking admission of the eligible candidates who fulfill the eligibility criteria as mentioned in the Clause-D of the prospectus, irrespective of the fact whether they had appeared in the CEE or not. They have also sought for a direction to the opposite parties to relax the qualifying percentile, i.e. 50 in the CEE as directed by the INC to zero.

11. In W.P.(C) No.39868 of 2023, a counter affidavit has been filed on behalf of the opposite parties no.2, 3 and 4. It is not in dispute that in accordance with the notice dated 30.06.2023 regarding admission to various courses including basic B.Sc. (N), an entrance test was held, whereafter the result came to be published on 15.09.2023. The merit list was prepared on 25.09.2023 and after scrutiny the final merit list was published on 03.10.2023. It has further been stated that after publication of result of entrance examination, choice locking of seats of Government institutions as well as private institutions was done. For the said purpose, the list of

Basic B.Sc. Nursing institutions which had obtained the university affiliation was displayed and a revised tentative calendar for online counseling and admission to different nursing courses were also published. The office of the Convener, SNSC, Odisha issued a tentative admission calendar for online counseling and admission to various nursing courses. After completion of government counseling, the State Nursing Selection Committee issued a letter on 30.01.2024 intimating therein that the remaining vacant seats of government quota and in private quota of private ONMRC recognized institutions stood converted to management quota against which admission could be made at institutional level on or before 31.01.2024, in accordance with the prescribed guidelines. The institutions were also advised therein for online uploading process of admitted student's details in the management quota, to be completed between 01.02.2024 to 29.02.2024.

12. Ms. Pami Rath, learned Senior Counsel appearing in some of the cases including the lead case, i.e. W.P.(C) No.39868 of 2023, has argued that as per the prospectus issued by the DMET, admission of students against 85% seats of the private institutions were to be given from central counseling. Further, in case any seat remained unfilled after completion of central counseling, those seats were required to be surrendered to the institutions. Such surrendered vacant seats, as well as the management seats, as per the prospectus, could be filled up by the recognized private nursing institutions at their own level by following the eligibility criteria fixed by the State Government. She has argued that the eligibility criteria of a candidate is that the candidate must have passed in the subject of Physics, Chemistry, Biology (PCB) and English and must have obtained minimum 45% marks taken together in PCB at the qualifying examination, i.e. 10+2. She further contends that the conditions as applicable to the seats actually filled by the Government have been made applicable to the surrendered seats and management seats. She accordingly contends that such privately managed institutions which have been recognized by the DMET, cannot be compelled to give admission to only such students, who had appeared in the CEE. It is her contention that such privately managed institutions should have the liberty to admit students against 15% management seats and the seats surrendered to the management which remained unfilled after the Central Counseling, based solely on the eligibility criteria as prescribed in the prospectus.

13. Mr. R.N. Mishra, learned Additional Government Advocate (AGA) appearing on behalf of the State and Mr. R.C. Mohanty, learned counsel for the DMET have submitted that the process adopted by the DMET is in accordance with the requirements laid down by the INC and as per the time schedule. He has argued that the private institutions cannot be allowed to give admission to the candidates who had not participated in the entrance examination, that too after the cut-off date fixed for the said purpose in view of the specific guidelines issued by the INC in this regard.

14. They have drawn our attention to a notification dated 22.10.2019 issued by Letter No. 26601 by the Government of Odisha in the Health and Family Welfare

Department which lays down the general guidelines for issuance of NOC and recognition to different institutions for opening of nursing/para-medical or allied medical science courses. The aforesaid general guidelines issued by the Department vide letter No.26601 dated 22.10.2019 prescribes also calendar for issuance of NOC as under:

Calendar for Issue of NOC:

Sl. No	Event	Date/ time for new NOC	Date and time for Renewal/ Revalidation of NOC/Renewal of recognition
1.	Floating of advertisement by DMET. (no application shall be entertained without any advertisement being floated)	By 31R' July every year (subject to requirement as per the GIS mapping and gap analysis)	
2.	Last date of receipt of application	16th August	By 15th January (1st December to 15th January)
3.	Issue of Acknowledgement Letter	By 30th August	By 31st January
4.	Time for compliance of deficiencies	By 15th September	By 15th February
5.	Inspection of institutions	By 31st October	By 15th March
6.	Compliance of deficiencies as pointed out by inspection team	By 30th November	By 31st March
7.	Recommendation to Govt. for issue or rejection of NOG by Council	By 31st December	By 15th April
8.	Approval of Government for issue /not issue of NOC by Council	By 31st January	30th April
9.	Issue of NOC by concerned Council.	By 28th February	By 15th May
10.	Issue of Provisional Recognition by Council	31st March	By 21st May
11.	Issue of Final / Renewal of Recognition by Council	After the completion of Final year examination	After the completion of Final year examination

15. We are worried over the state affairs as noted above, in the present case, and we express our anguish, for two reasons. Firstly, the opposite parties granted recognition/affiliation (if any) to these institutions on the dates when the last date of admission earlier fixed by INC had already expired. Secondly, the time schedule prescribed for issuance of NOC for opening of new nursing courses for the academic session 2023-24 has not at all been adhered to.

16. The Supreme Court has repeatedly frowned upon the authorities for not adhering to the time schedule in the matters of admission of students in professional course. In the case of ***Priya Gupta v. State of Chhattisgarh (2012) 7 SCC 433***, after having taken note of the various earlier decisions has noticed the adverse consequences of non-adherence to the prescribed schedule in paragraph-41 as under:

> *"41. Inter alia, the disadvantages are:*
>
> *(1) Delay and unauthorized extension of schedules defeat the principle of admission on merit, especially in relation to preferential choice of colleges and courses. Magnanimity in this respect, by condoning delayed admission, need not be shown by the courts as it would clearly be at the cost of more meritorious students. The principle of merit cannot be so blatantly compromised. This was also affirmed by this Court in Muskan Dogra v. State of Punjab (2005) 9 SCC 186.*
>
> *(2) Midstream admissions are being permitted under the garb of extended counselling or by extension of periods for admission which again is impermissible.*
>
> *(3) The delay in adherence to the schedule, delay in the commencement of courses, etc. encourage lowering of the standards of education in the medical/dental colleges by shortening the duration of the academic courses and promoting the chances of arbitrary and less meritorious admissions.*
>
> *(4) Inequities are created which are prejudicial to the interests of the students and the colleges and more importantly, affect the maintenance of prescribed standard of education. These inequities arise because the candidates secure admission, with or without active connivance, by the manipulation and arbitrary handling of the prescribed schedules, at the cost of more meritorious candidates. When admissions are challenged, these students would run the risk of losing their seats though they may have completed their course while litigation was pending in the court of competent jurisdiction.*
>
> *(5) The highly competitive standards for admission to such colleges stand frustrated because of non-adherence to the prescribed time schedules. The admissions are stretched to the last date and then admissions are arbitrarily given by adopting impermissible practices.*
>
> ***(6) Timely non-inclusion of the recognized/approved colleges and seats deprives the students of their right of fair choice of college/course, on the strength of their merit.***
>
> *(7) Preference should be to fill up all vacant seats, but under the garb that seats should not go waste, it would be impermissible to give admissions in an arbitrary manner and without recourse to the prescribed rule of merit."*

17. In case of ***Mridul Dhar v. Union of India; (2005) 2 SCC 65***, the Supreme Court has mandated that the time schedule provided in the regulations must be strictly adhered to by all concerned failing which the defaulting parties would be liable to be personally proceeded with.

18. Though the decisions in the case of ***Mridul Dhar*** (supra) and ***Priya Gupta*** (supra) relate to medical admissions, the principles enunciated therein equally apply in professional course of ANM, GNM, B.Sc.(N), PB B.Sc.(N), M.Sc.(N) nursing courses. A belated grant of NOC/recognition/affiliation to these institutions has not only resulted into a complex situation, such action/inaction of the State has generated unnecessary litigations which could have been easily avoided, had prompt

action been taken by the opposite parties, adhering to their own calendar for issuance of NOC.

19. Notably, an argument has been advanced on behalf of the petitioners that these institutions as noted above should be allowed to give admission to such students who had not participated in the entrance examination, but do possess eligibility criteria as laid down in the prospectus. The said submission has been made in the background of the fact that if they are not allowed to do so, the Management of these institutions shall have no other option, but to close the institutions. This argument is unsustainable for the single reason that the INC, which is the competent regulatory body, had clearly mandated in its notification dated 06.04.2023 (supra) that admission to B.Sc. (N) for the academic sessions 2023-24 shall be held through CEE.

20. It will be useful to notice that the requirement of holding CEE for admission to unaided privately managed professional institutions as mandatory has been addressed by the Supreme Court in case of ***Modern Dental College and Research Centre & Ors. v. State of Madhya Pradesh & Ors., (2016) 7 SCC 353***, wherein constitutional validity of "Niji Vyavasayik Shikshan Sanstha (Pravesh Ka Viniyaman Avam Shulk Ka Nirdharan) Adhiniyam, 2007" (hereinafter referred to as "2007 Act") and admission rules framed therein were under challenge.

21. The Supreme Court, in case of ***Modern Dental College & Research Centre*** (supra), after having noticed earlier decisions, in the cases of ***T. M. A. Pai Foundation and Others v. State of Karnataka, (2002) 8 SCC 481, Islamic Academy of Education & Anr. v. State of Karnataka & Ors., (2003) 6 SCC 697*** and ***P.A. Inamdar & Ors. v. State of Maharastra & Ors., (2005) 6 SCC 537*** emphasized the need of CEE to be held by agencies, for admission to educational institutions, more particularly those imparting professional education, which enjoy utmost credibility and expertise in the matter to achieve fulfillment of twin objectives of transparency and merit. The Supreme Court also observed that it is in the larger public interest which warranted such measure. Taking note of malpractices in the CEE, conducted by such private institutions themselves, the Supreme Court held that in larger interest and welfare of the student community, in order to promote merit add excellence and curb malpractices, that regulatory measures should be introduced. In paragraph 68 of the decision, in case of ***Modern Dental College & Research Centre*** (supra), the Supreme Court held thus:-

> *"**68.** We are of the view that the larger public interest warrants such a measure. Having regard to the malpractices which are noticed in the CET conducted by such private institutions themselves, for which plethora of material is produced, it is, undoubtedly, in the larger interest and welfare of the student community to promote merit, add excellence and curb malpractices. The extent of restriction has to be viewed keeping in view all these factors and, therefore, we feel that the impugned provisions which may amount to "restrictions" on the right of the appellants to carry on their "occupation", are clearly "reasonable" and satisfied the test of proportionality."*

22. Having said so, the Supreme Court, in case of ***Modern Dental College & Research Centre*** (supra), concluded that the provisions relating to admission, as contained in the Act and the Rules, were not offensive of Article 19(1)(g) of the Constitution.

23. What emerges from the decision of Supreme Court, in case of ***Modern Dental College & Research Centre*** (supra), on the question of the right of State to make provisions for CEE for admission to unaided private educational institutions, that the Supreme Court not only upheld the provisions of 2007 Act in this regard, rather emphasized its need in the larger interest and welfare of the student community to promote merit and excellence and curb malpractices.

24. The requirement prescribed by the INC of giving admissions in the nursing courses is thus, not only in exercise of its statutory powers to regulate admissions but it is in consonance with law laid down by the Supreme Court in the cases of ***Islamic Academy of Education*** (supra), ***T. M. A. Pai Foundation*** (supra), ***P.A. Inamdar*** (supra) and ***Modern Dental College & Research Centre*** (supra).

25. Considering the entire conspectus of the matter as discussed above, the reliefs which the petitioners are seeking in the present batch of writ petitions cannot be granted for the following reasons:

> (i) The institutions cannot be allowed to give admissions to students for the academic sessions 2023-24 as the extended cut-off date for such admission prescribed by the INC expired on 30.10.2023 itself. The said timeline, in the Court's opinion should not be extended by this Court exercising power of judicial review under Article 226 of the Constitution of India.
>
> (ii) In view of the policy of the INC that admissions to such courses would be only through CEE and no candidate who has not qualified or not appeared in the CEE shall be given admission, such requirement which aims to achieve the object of admission of meritorious candidates in the courses should not be tinkered with, more so, in view of the law laid down by the Supreme Court in ***P.A. Inamdar*** (supra) and ***Modern Dental College & Research Centre (supra).***

26. However, while rejecting the reliefs sought for in the present batch of writ petitions, we deem it just and proper to issue following directions in the interest of justice and to avoid recurrence of such situation, as has arisen in the present batch of cases in future, because of non-adherence to the calendar prescribed by the Health and Family Welfare Department, Government of Odisha: -

> (i) All concerned shall, without any exception, adhere to date/time schedule prescribed by the Government of Odisha in the Health and Family Welfare Department vide Letter No.26601 dated 22.10.2019; for issuance of NOC and grant of recognition.
>
> (ii) There shall be no departure, in any case, from the said time schedule without the leave of this Court. Any departure from time schedule shall be viewed seriously by this Court.
>
> (iii) Unless otherwise provided by the INC, no admissions shall be given by any nursing institution in the courses without merit-based CEE.

(iv) No admission shall be given to any student in a nursing institution after the cut-off date for admission, as may be prescribed by the INC.

27. While parting with the present judgment, we deem it apposite to notice, which is apparent from the records, that admissions have been allowed in B.Sc (N) courses even after the expiry of cut-off date. We express our serious concern over this happening. For the present, however, we are not expressing any opinion, in the present proceeding, about the consequences of such admissions, if that have been given breaching the INC guidelines.

28. With the aforesaid observations and directions, these writ petitions stand disposed of.

Headnotes prepared by :
Smt. Madhumita Panda, Law Reporter
(Verified by : Shri Pravakar Ganthia, Editor-in-Chief)

Result of the case :
Writ petitions stand disposed of.

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2024 (III) ILR-CUT-613

PRANATI MISHRA
V.
CHANDRA SEKHAR TRIPATHY

(MATA NO.53 OF 2009)

04 NOVEMBER 2024

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

Issue for Consideration

Permanent alimony and maintenance U/s. 25(1) Hindu Marriage Act.

Headnotes

HINDU MARRIAGE ACT, 1955 ─ Section 25(1) ─ The marriage between the appellant and the respondent was dissolved on 26.08.2009 ─ The present appeal was filed for enhancement permanent alimony and maintenance – Discretion of the Court ─ Whether the appellate Court can exercise the discretion as provided U/s. 25(1) of the Act and modify the directions for permanent alimony and maintenance.

Held : Yes – The directions of the Family Court for permanent alimony and maintenance were modified. (Para 10)

List of Acts

Hindu Marriage Act, 1955

Keywords

Restoration, Permanent Alimony, Maintenance, Discretion of the Court to order maintenance/alimony.

Case Arising From

Judgment dated 26.08.2009 passed by the Family Court, Cuttack.

Appearances of Parties

For Appellant : Mr. Alok Kumar Panda
For Respondent : Mr. S.C. Dash

Judgment/Order

Judgment

ARINDAM SINHA, J.

1. This is an old appeal, filed in year 2009. Appellant was wife in the marriage dissolved by judgment dated 26th August, 2009. She, being aggrieved by the direction for permanent alimony and maintenance, respectively for herself and the minor daughter, had preferred the appeal. It was dismissed for default. The application for restoration was also dismissed for default. Ultimately the appeal was restored on order dated 21st April, 2023. Mr. Panda, learned advocate appears on behalf of appellant and Mr. Dash, learned advocate, for respondent.

2. It appears from order sheet, the appeal was moved before us on 13th August, 2024. We reproduce below paragraphs 1 and 2 from said order.

> *"1. Ms. Dash, learned advocate appears on behalf of appellant, who was wife in the marriage dissolved by impugned judgment dated 26th August, 2009. She submits, meager amount of permanent alimony and maintenance at aggregate ₹3,50,000/- was directed. It transpires the money was deposited by respondent but not informed to her client for long years. Ultimately when there was information, she collected the amount. The appeal preferred because her client is aggrieved by inadequate permanent alimony and maintenance.*
>
> *2. Mr. Dash, learned advocate appears on behalf of respondent and submits, his client will pay further ₹6,50,000/- to make total permanent alimony and maintenance to be ₹10,00,000/-."*

3. It is necessary to also reproduce paragraphs 1 and 2 from our next order dated 23rd August, 2024.

> *"1. The appeal has been listed under heading "To Be Mentioned' pursuant to our order dated 13th August, 2024. Mrs. Dash, learned advocate appears on behalf of appellant and submits, her instruction is permanent alimony and maintenance to be aggregate ₹10,00,000/- is insufficient.*
>
> *2. Our endeavour to have this old appeal disposed of on consensus has not yielded result. The lower Court record is available. The appeal is ready for hearing."*
>
> As such the appeal has been called on for hearing.

4. Perused, inter alia, impugned judgment. It appears parties participated in mediation, referred on 18th August, 2008. Mediation report dated 29th October, 2008

was received by the Family Court. Terms and conditions of mutual settlement reported were reproduced in impugned judgment. The terms and conditions are extracted therefrom and reproduced below.

> *"1. Petitioner Chandrasekhar Tripathy shall invest a sum of Rs.2.5 lacs in any national Bank in fixed deposit by 15th December 2008 in the name of his daughter Bisakha Tripathy with the guardianship of her mother Smt. Pranati Mishra. The invested amount shall be renewed from time to time till Bisakha attains her majority. The Respondent-Opp. Party Smt. Pranati Mishra shall not withdraw this amount from the Bank within this period.*
>
> *2. The unpaid maintenance amount shall be paid by petitioner to the Opp. Party in four instalments commencing from the month of 10th December, 2008.*
>
> *3. The Opp. Party shall reside with petitioner and shall discharge her marital obligation towards petitioner.*
>
> *4. Petitioner shall look after the maintenance of the respondent and her minor daughter including educational expenses.*
>
> *5. They shall maintain good relationship between them forgetting their past differences and misunderstandings.*
>
> *6. Petitioner shall not ill-treat the respondent-Opp. Party in any manner and in the event of any such cruel treatment the Opp. Party free to leave the company of the petitioner and shall take appropriate action as available under law."*

We made queries to Mr. Panda and Mr. Dash regarding the mutual settlement not given effect to. We have ascertained, reciprocal obligations by the terms and conditions were not complied with. Mr. Dash draws attention to order sheet of the Family Court and takes us through orders dated 31st October, 2008 to 14th August, 2009. It appears therefrom, respondent had complained non-cooperation on part of appellant in giving effect to the terms conditions of mutual settlement. He had, therefore, filed petition dated 7th July, 2009, inter alia, for fixing permanent alimony.

5. Perused further, earlier orders in order sheet of the Family Court. It appears from order dated 17th August, 2007, cross-examination of appellant was deferred because there was possibility of the parties being reunited. However, following failure of conciliation, because appellant remained absent on many dates and as such there was presumption she had no desire to go and have company of her husband, the case was posted to 1st May, 2007 for further hearing. Appellant was not present. She later filed recall petition explaining her absence due to having suffered from typhoid. The Court found the doctor had not attested signature of the patient but was pleased to allow the recall petition, subject to condition that appellant should remain present on 18th August, 2007 for further cross-examination. We reproduce below order made by the Family Court on 18th August, 2007.

> *"The petitioner is present. OP is absent. Her evidence is expunged and the case of OP is closed. Posted on 20.08.07 for argument."*

6. Sub-section (1) in section 25 of Hindu Marriage Act, 1955 is reproduced below.

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

We see that the Court exercising jurisdiction under the Act has discretion to order for maintenance and support, by permanent alimony.

7. Paragraph-6 in impugned judgment gives an insight on the Family Court having exercised discretion in directing permanent alimony at ₹2,00,000/- for appellant and further sum of ₹1,50,000/- for maintenance and education expenses of the daughter. We have also ascertained that appellant had obtained order for interim maintenance. As aforesaid, none of the terms or conditions of mutual settlement arrived at between the parties in mediation were complied with or fulfilled by either party. On query made Mr. Dash submits, entire interim maintenance, on liquidation of the arrears, was paid by his client. The arrears were tendered by demand draft, revalidated and ultimately accepted by appellant. Directions for permanent alimony and maintenance, as in impugned judgment, were also complied with by his client. Mr. Panda confirms that all the amounts were withdrawn by his client, without prejudice to her contentions in the appeal.

8. A clear picture emerges revealing that the Family Court did not have assistance or cooperation from appellant in dealing with the question of maintenance. Appellant though had contested the suit but after the mediation, chose to stay away from participating in the proceeding. In such circumstances, the Family Court exercised discretion, on finding respondent's gross salary of ₹11,201/- per month was subsequently considerably increased to above ₹25,000/-. Presuming there was also income from landed property, annual income of respondent was said to be above ₹3,00,000/- per annum. Considering, inter alia, paying capacity of respondent, the directions for permanent alimony and maintenance were made. We appreciate that appellant's requirement for maintenance, was not put before the Court.

9. Respondent had agreed in the mediation to make a deposit of ₹2,50,000/- in the name of his daughter. Unpaid interim maintenance amount was to be liquidated in four installments commencing from 10th December, 2008. While respondent did liquidate the maintenance but direction for maintenance of the daughter made in impugned judgment, was at a lesser sum of ₹1,50,000/-. Hence, there appears to be error made by the Family Court in exercise of the discretion. On the other hand, respondent appears to have been consistent in wanting appellant back but she firstly did not join in conciliation and thereafter when there was mediation, she, on her part, neither then joined respondent in compliance nor came before the Family Court

complaining of non-cooperation. It was respondent who complained of non-cooperation, reflected in the order sheet.

10. Considering we as the appellate Court must also exercise discretion, in the facts and circumstances discussed above and respondent having had offered to pay ₹6,50,000/- in addition to having satisfied directions in impugned judgment, we hereby modify the directions for permanent alimony and maintenance. Permanent alimony to be paid will be ₹8,50,000/- and maintenance for the daughter at ₹5,00,000/-. Respondent will further pay ₹6,50,000/- as permanent alimony and ₹3,50,000/- to the daughter. The amounts are to be tendered by way of demand drafts, respectively drawn in their favour. Mr. Dash submits, the daughter is now grown up and earning. As such we observe that she may use the additional money for her marriage expenses.

11. The appeal is accordingly allowed and disposed of.

12. List under heading 'To Be Mentioned' on 25th November, 2024, for compliance.

Headnotes prepared by : *Result of the case :*
Smt. Madhumita Panda, Law Reporter Appeal is accordingly allowed and disposed of.
(Verified by : Shri Pravakar Ganthia, Editor-in-Chief)

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2024 (III) ILR-CUT-617

CHITARANJAN PRUSTY
V.
PRIYATTAMA PRUSTY@PATRA

(MATA NO.41 OF 2023)

6 NOVEMBER 2024

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

Issue for Consideration

Dissolution of marriage on ground of desertion

Headnotes

HINDU MARRIAGE ACT, 1955 ─ Section 13 (i-b) ─ Appellant prayed for divorce on the ground of desertion ─ Respondent/wife claimed that the husband/Appellant has failed to make out a case of attempting to bring back her to the matrimonial house ─ Whether there is a requirement in the provision regarding a spouse alleging desertion to prove the fact of attempt to bring back her to the matrimonial home.

Held: No — Impugned judgment reversed in Appeal — The marriage solemnized is dissolved by decree of divorce on the ground of desertion.

(Paras 8-9)

List of Act

Hindu Marriage Act, 1955

Keywords

Divorce, desertion, matrimonial home, proof of desertion, maintenance, permanent alimony.

Case Arising From

Order No.1 dated 19.11.2019 arising out of Judge Family Court, Puri in C.P. No. 330 of 2019

Appearances of Parties

For Appellant : Mr. L.K. Maharana,
For Respondent : Mr. J. Bhuyan, Ms. J. Sahoo

Judgment/Order

Judgment

ARINDAM SINHA, J.

1. The appeal has been preferred by the husband in the marriage. He had petitioned for divorce, admitted by the Family Court pursuant to order no.1 dated 19th November, 2019. In the petition he took ground of cruelty and desertion. Reproduced below is said order.

> *"1. The petitioner files a petition U/s-13(i)(b) of the Hindu Marriage Act, 1955 Register. Advocate S. Senapati & Associates files power on behalf of the petitioner without application of the petitioner seeking permission of the Court to engage him. Put up on 2.1.2020 with office note."*

2. Mr. Maharana, learned advocate appears on behalf of appellant and submits, by impugned judgment dated 2nd January, 2023 the Family Court dismissed his client's petition. The judgment is erroneous inasmuch as his client specifically pleaded desertion and, respondent had chosen not to contest the suit. His client filed evidence on affidavit. There was no crossexamination. The Family Court failed to appreciate, on requisite pleading and proof furnished by his client, he was entitled to the declaration. The judgment be reversed in appeal.

3. Mr. Bhuyan and Ms. Sahoo, learned advocates appear on behalf of respondent-wife. Mr. Bhuyan submits, the Family Court correctly appreciated the facts. Said Court noticed that particulars regarding allegation of desertion were not provided. In absence of the particulars, requirement by clause (i-b) in section 13(1) of Hindu Marriage Act, 1955, for presenting petition on the ground after expiry of

two years of the alleged desertion, could not be pronounced upon as satisfied. Hence, the Family Court dismissed the petition as not maintainable. Without prejudice he adds, appellant failed to make out a case of attempting to bring back his client. There be no interference in appeal.

4. By aforesaid order no.1 the Family Court appreciated that the petition was for dissolution of marriage on ground of desertion. We find from order dated 10th February, 2020 of the Family Court, respondent had refused to accept the summons. However, she thereafter entered appearance. Paragraph-3 from impugned judgment is reproduced below.

> *"3. Though the respondent appeared in this case, but did not file her objection. On the day of hearing as she failed to appear before this court, her evidence was closed. She did not cross examine the petitioner."*

5. The petition carries flowery language. We reproduce part of a sentence from paragraph-4.

> *"4. … … …ferociously excommunicated the petitioner on dt.1.2.2016 in a volatile and fluid state downgrading the very cardinal purpose of marriage as an apple of discord. ... … …"*

In paragraph 6, part of the cause of action pleaded by petitioner was asserted to have arisen lastly on 1st February, 2016, when respondent left her in-laws house. As aforesaid, the Family Court admitted the petition by order no.1 dated 19th November, 2019. There is no averment in the petition that in between respondent had come back. In context of the petition, therefore, it was presented more than two years after date of desertion asserted in it.

6. Petitioner had filed evidence on affidavit dated 19th August, 2022. In it he stated, inter alia, the summons was refused. Respondent lived with him for a short period for only three months and even during said period she frequently went away to her parents' house at Puri and that too without consent of either himself or his widowed mother. Suddenly, without any reasonable cause and incident, on 1st February, 2016 she left company of her husband with her mother without giving proper intimation to him or his mother. That respondent had filed for maintenance under section 125 in Code of Criminal Procedure, 1973 was also stated in the evidence on affidavit.

7. The Family Court, Puri dealt with the matrimonial case. Respondent's parental home is in Puri. She filed for maintenance in the competent Court at Puri. In spite thereof she refused service of summons but thereafter appeared in the matrimonial case but did not file written statement nor cross-examined petitioner. We can only interpret her conduct to presume that she did not have a defence.

8. Clause (i-b) in section 13(1) is reproduced below.

> *"(i-b) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or … …"*

There is no requirement in the provision regarding a spouse alleging desertion to prove attempt to bring back the other to the matrimonial home. Be that as it may, there are several statements in the evidence on affidavit regarding petitioner having tried to do so, including taking steps for her treatment when he came to know she was unwell. In the circumstances, lack of pleading of attempt to bring back respondent to the matrimonial home cannot be found to be fatal to his case for dissolution on ground of desertion. As such, the uncontroverted evidence also cannot be disregarded.

9. Impugned judgment is reversed in appeal. The marriage solemnized on 5th June, 2015 is dissolved by our decree of divorce on the ground of desertion.

10. On query made Mr. Bhuyan submits, his client had obtained judgment dated 3rd November, 2023 from the same Family Court for maintenance under section 125 in the Code, at ₹3,000/- per month. Appellant had filed for revision and got the judgment set aside with direction for remand. The proceeding is pending and is likely to be rendered infructuous because of our judgment in appeal. We are told she has crossed 34 years of age. Considering petitioner got set aside the judgment directing maintenance at ₹3,000/- per month and parties were together for a short time, we proceed to exercise discretion to determine direction for permanent alimony by starting with figure of ₹2,500/- per month. We direct the gross sum as permanent alimony at ₹3,00,000/- being aggregate maintenance calculated at ₹2,500/- per month for ten years.

11. The appeal is allowed and disposed of.

12. List under heading 'To Be Mentioned' on 20th November, 2024 for compliance, to tender the permanent alimony by demand draft.

Headnotes prepared by : *Result of the case :*
Smt. Madhumita Panda, Law Reporter Appeal is accordingly allowed and disposed of.
(Verified by : Shri Pravakar Ganthia, Editor-in-Chief)

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2024 (III) ILR-CUT-620

M/s. MAGNUM POLYMERS PRIVATE LIMITED.
V.
INDUSTRIAL PROMOTION AND INVESTMENT CORPORATION OF ODISHA LIMITED & ORS.

[W.P.(C) NO. 513 OF 2017]

8 OCTOBER 2024

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

Issue for Consideration

Whether "applicability" of a scheme can be challenged without challenging the scheme.

Headnotes

(A) CONSTITUTION OF INDIA, 1950 — Article 226 — Petitioner availed term loan from IPICOL between 1990-2003 by mortgaging and hypothecating all its assets – The petitioner company could not repay the loan amount, one time settlement scheme was floated by the IPICOL in the year 2009 – Petitioner applied for the settlement of the outstanding loans as per the OTS scheme – As per the decision of Board the IPICOL withdrew the earlier scheme by introducing the one time settlement scheme 2016 which was intimated to the petitioner – The petitioner also applied for the 2016 scheme – Whether the petitioner can challenge the applicability of 2016 scheme.

Held: No – As there is no challenge to the decision of the Board and scheme of the IPICOL authorities, rather the applicability of such new scheme is under challenge – This court finds no merit with the contention of the petitioner as to prescription and application of the OTS, 2016 vis-a-vis the petitioner. (Paras 10-11)

(B) CONSTITUTION OF INDIA, 1950 – Article 226 – Writ of mandamus – Petitioner prays for a direction to the finance company (IPICOL) to implement the MDF-OTS-2007 scheme in favor of petitioner/company – Whether writ of mandamus can be issued to a financial institution to grant the OTS benefit to a borrower.

Held: No – The same is the exclusive prerogative of the lending authority. (Para 12)

Citation Reference

State of Gujarat Financial Corporation vrs. Lotus Hotel Ltd., **AIR 1983 SC 848**; Orissa Alloys Ltd. Vrs. Secretary Deptt. of Industry and others, **2009 (1) OLR 891;** M/s Sardar Associates and others vrs. Punjab and Sindh Bank and others, **2009 Vol.II OLR SC 597**; M/S Devidayal Castings Pvt Ltd vs Haryana Financial Corporation and Anr, **(2016) SCC OnLine SC 1134**; The Bijnor Urban Cooperative Bank Limited, Bijnor Vs. Meena Agarwal & Ors., **(2023) 2 SCC 805**; State Bank of India Vs. Arvindra Electronics Pvt. Ltd., **2023 (1) SCC 540** – **referred to**.

List of Scheme

MDF-OTS-2007 Scheme, OTS Scheme 2014, OTS Scheme 2016.

Keywords

IPICOL, Scheme, Loan, OTS, OSFC, Liability, Repayment, BIFR, COSBOARD.

Appearances of Parties

For Petitioner : Mr. D.P. Nanda, Sr. Adv.
For Opp.Parties : Mr. S.K. Padhi, Sr. Adv., Mr. Subham Sharma

Judgment/Order

Judgment

V. NARASINGH, J.

1. The petitioner has filed this writ petition with a prayer to issue direction to the Opp. Party no.1 i.e. IPICOL and their authorities to implement the MDF-OTS 2007 scheme published under Annexure-2 and to issue appropriate direction to them for acceptance of the OTS proposal submitted by the petitioner company and to consider it under letter and spirit of the said '**MDF-OTS-2007** scheme. The petitioner has further prayed to declare the decision inserted by the Opp. Party No.1 IPICOL in clause VII (a) contained in para no.1 of the impugned Annexure-8 i.e. One Time Settlement (OTS) scheme 2016 is not binding on the petitioner company and accordingly to declare the said scheme non-est in the eye of law.

For convenience of reference the prayer of the writ petition is extracted hereunder:

> *"In view of the above noted facts and circumstances, it is most respectfully prayed that this Hon"ble Court may kindly be pleased to Admit this writ petition, Call for the Records, Issue Rule Nisi calling upon the O. Ps to show cause as to why the O. P Nos. 1 and 2 with their authorities shall not be directed to implement the „MDF – OTS ~ 2007 Scheme" published under Annexure - 2 to this writ petition in case of the petitioner - company.*
>
> *If the O. Ps fail to show cause or show in-sufficient cause, issue appropriate writ/s, direction/s and order/s commanding the O.Ps and their authorities to implement the „MDF - OTS - 2007 Scheme" published under Annexure - 2 to this writ petition in case of the petitioner - Company and direct them to accept the proposal for OTS submitted by the petitioner - Company and to consider it under letter and spirit of the said „MDF - OTS - 2007 Scheme".*
>
> *Further, be pleased to hold and decide that the impugned decisions inserted by TPICOL" i.e. O. P Nos. 1 in Clause vii), a) contained Para- 1 of the aforesaid „One Time Settlement (OTS) Scheme, 2016" published under Annexure - 8 of this writ petition is not binding on the petitioner - Company and accordingly nonest."*

2. It is submitted by the petitioner that the Opp. Party No.1 IPICOL introduced a scheme called One time Settlement Scheme under the MDF-OTS 2007 which was floated in the year 2009 w.e.f. 4.8.2009 being ratified by the state government,

keeping in view of the guideline issued by the Reserve Bank of India as well as basing upon recommendation given by the SIDBI.

It is contended by the petitioner that after keeping the proposal submitted by the petitioner pending for a long period of 7 years, the IPICOL cannot apply a new scheme introduced in the name and style of 'One Time Settlement scheme 2016' making it applicable to the pending case like that of the petitioner.

3. The undisputed facts as advanced by the petitioner are as follows :-

3-A. The petitioner company had set up a PP Rope and HOPE twine manufacturing unit at Mancheswar Industrial Estate, Bhubaneswar availing Term Loan of Rs.269.68 lakhs, Cyclone loan of Rs. 49.00 lakhs and Short Term Loan of Rs. 35.00 lakhs from the Opposite party No.1- Industrial Promotion and Investment Corporation of Odisha Limited (IPICOL) between 1990 to 2003 by mortgaging and hypothecating all its assets. Further the company had also availed Term Loan and working Capital assistance from OSFC and State Bank of India respectively. The company had executed agreements with IPICOL to repay the loan along with interest as per the schedule. For the compelling reasons the petitioner company could not repay the loan even after rephasement of said loan.

3-B. In the year 2009, one time settlement scheme was floated in the name and style of MDF-OTS 2007 scheme (Annexure-2) by the Opp. Party No.1-IPICOL, with the approval of the State Govt as well as following the RBI Guidelines, to give relief to loss-making industrial units.

Under the above MDF-OTS-07 scheme, proposals were invited by IPICOL in July 2009 to give relief to the loss making industrial Units. The petitioner being an eligible loss-making SSI unit accepted the promise/offer of IPICOL & OSFC for settlement of the outstanding Loans as per the MDF-OTS-07 Scheme.

3-C. After assessing the petitioner company as a non performing industrial unit, to settle its loan outstanding dues within the parameter of said scheme, the petitioner company was qualified as a beneficiary and accordingly it submitted its application after making the initial deposit prescribed under the said scheme on 27.08.2009 (Annexure-4) acting in terms of IPICOL"s letter dated 04.08.2009 at Annexure-3.

3-D. It is the stand of the petitioner that once a loanee qualified within the frame work of the scheme, the authority has no option but to extend the benefit of the scheme to the loanee and it is obligatory on the part of the authority to implement the scheme in its letter and spirit.

However, in the present case as the Opp. Party No.1IPICOL has backed on of its obligation, by introducing the 'One Time Settlement Scheme 2016' more particularly incorporating prejudicial terms at para no.1 (vii) (a), which is not permissible as it is hit by the principle of promissory estoppel.

For convenience of ready reference the same is extracted hereunder:

"1. (vii) Switch-over from earlier OTS schemes

(a) The earlier scheme of Amended OTS-07 Scheme and MDF Amended OTS-07 Scheme stand withdrawn. Borrower who had applied under MDF'OTS-07 or Amended -MDF-OTS-07 or had opted for switchover from MDF-OTS-07 to Amended MDF-OTS-07 are eligible to apply under OTS-2016 scheme."

3-E. In such background of facts it is contended by the petitioner company that being a commercial production unit starting its function w.e.f. 30thJune 1984,it availed loan both from Orissa State Finance Corporation (OSFC) and IPICOL to meet the investment and for the expansion of unit from time to time in joint financing by both OSFC and IPICOL having paripasu charge over the assets.

The petitioner company never defaulted in making payment of its loan dues rather very promptly cleared its loan liability. However due to global and international bleak scenario of petrochemical industries during the period from 2006-2009 all plastic industries across the world and all over India including the petitioner‟s company were facing acute crisis in running their respective units as the basic raw materials HDPE granite required for the manufacturing process was in dearth and beyond to the affordable limit of the manufactures concerned to procure them in order to meet even their minimum demand. Consequently it affected the financial backbone of the petitioner company causing it incapable to repay its loan liabilities for the first time since its inception since 1984.

3-F. In the meantime both OSFC as well as IPICOL invited proposal from the loss making units to avail the said facilities and to close loan liabilities under the parameter of the scheme MDF-OTS 2007 scheme. After introduction of such scheme the petitioner company applied for the settlement of its loan liabilities after establishing that the petitioner company satisfies all the essential parameters and criterion prescribed under the scheme. The petitioner also made the initial deposit of 10% of the outstanding dues to the tune of Rs.95,65,202/- obtaining receipt thereof on 27.8.2009. It is submitted by the petitioner that the proposal for OTS alongwith the initial deposit as stated above were accepted by both Opp. Party No.1 and 2 for the purpose of consideration and acceptance of the same in terms of 2007 scheme in force.

3-G. However, it is further added that the settlement formula laid down under 2007 scheme are quite reasonable and keeping in view the interest of both IPICOL and commercial unit whose accounts have become NPA. More so, the basic aim of the said policy is to recover the total loan amount outstanding from the NPA loan accounts with 12% interest which does not affect the interest of IPICOL in any way. Accordingly, the 2007 scheme was approved by IPICOL in its 214th Board of Directors meeting held on 17.06.2009. 3-H. It is contended by the petitioner that both OSFC and IPICOL had launched their respective OTS scheme in 2009. The schemes have identical and having similar parameter and were introduced being ratified by the state government. The petitioner company had also submitted the proposal for settlement of the entire outstanding of the term loan before the OFSC in

terms of 2007 scheme and after acting upon it, the OFSC had issued No Due Certificate as per letter dt. 2.2.2010 in favour of the petitioner.

3-I. While the proposal for OTS under the OTS scheme 2007 was under consideration before the IPICOL, a new amended OTS scheme was introduced by the IPICOL in the year 2011 (Annexure6). As per the said amended scheme, the provisions of switch over option was available to the units who had already made their application under the aforesaid 2007 scheme. The petitioner did not accept the said option and in its letter dt. 16.08.2011 (Annexure-7) requested the authorities of the IPICOL settle its account under the 2007 scheme itself.

It is contended that, although the petitioner is pursuing since 2009 to settle the loan account under the 2007 scheme but it could not materialized and it is learnt by the petitioner from reliable sources that IPICOL had kept said scheme in abeyance for reasons best known to them.

Accordingly the petitioner after submission of its OTS application did not pay any further amount to the IPICOL. On the other hand, IPICOL also did not pursue its loan recovery as the aforesaid OTS proposal was open and the application filed by the petitioner was under consideration.

While the matter stood thus, the IPICOL through its letter 21.7.2016 at Annexure-L/1 intimated the petitioner with regard to introduction of a new scheme i.e. OTS scheme 2016 withdrawing the aforesaid earlier two OTS Scheme of 2007 and amended 2007 scheme.

3-J. It is the submission of the petitioner that by way of bringing such new scheme of OTS in the year 2016, the Opp. Party No.1 has illegally, arbitrarily withdrawn the former scheme which has cause prejudice to the right of the petitioner.

More particularly on account of insertion of stringent conditions making the repayment terms for the industrial units more onerous.

It is submitted that under the new OTS scheme; such as under the new scheme the IPICOL tries to gain the incremental value of the fixed assets based on present market price though the original loan was disbursed against the then price of mainly plant, machinery and building. Similarly, the new OTS scheme has been redesigned linking assets value along with the computation of principal and interest and the cut-off date as the date of making of application under the new OTS scheme, 2016.

A new concept of Minimum Expected Amount i.e. MEA has been introduced in the new scheme 2016 which is calculated as the amount disbursed by IPICOL with simple interest @ 10% till the date of application minus repayment. So also the concept of value of security has been introduced to evaluate present market valuation of the total capital assets of the defaulter loanee.

3-K. It is also contended that under the new scheme, OTS amount would not fall below the principal outstanding which is exfacie discriminatory qua the bonafide

loanees like the petitioner‟s unit which has already paid substantially towards principal and interest till date.

It is submitted by the petitioner that by introducing a new scheme, during pendency of its OTS application under the old OTS scheme, fixing a cutoff date being the date of making application under new scheme, the petitioner is arbitrarily being saddled with huge unpaid interest between 2009-2016 and also interest prior to 2009 notwithstanding that in terms of OTS 2009 floated by IPICOL the application of the petitioner along with initial deposit was pending consideration in terms of OTS 2009. It is asserted that the opposite parry IPICOL is undue advantage of its inaction.

3-L. In view of the aforesaid factual backdrop as advanced by the petitioner and relying upon principle in the case of ***State of Gujarat Financial Corporation vrs. Lotus hotel ltd. reported AIR 1983 SC 848***, the petitioner has raised his grievance with respect to non applicability of new scheme to his pending application contending that the withdrawal of the previous scheme of 2007 pending consideration of its OTS application and introduction of a new scheme incorporating conditions different to the earlier schemes which have been introduced with the cut-off date attracts the application of doctrine of promissory estoppel and the Opp. Party No.1 has no authority to act in contrary to the same and has prayed for a direction to dispose of its application pending since 2009 in terms of the MDF-OTS-2007.

The petitioner has also relied upon another decision of this Court in the case of ***Orissa Alloys Ltd. Vrs. Secretary Deptt. of Industry and others reported 2009 (1) OLR 891*** wherein it has been held by this Court that it is obligatory on the part of the corporation to implement the scheme in its letter and spirit.

Under such factual background and legal position, it is further argued by the petitioner that the proposition of the law as decided by Hon‟ble Supreme Court in case of ***M/s Sardar Associates and others vrs. Punjab and Sindh Bank and others reported in 2009 Vol.II OLR SC 597***, the Opp. Party No.1 &2 being the state owned corporation are bound to follow the policies formulated by the Reserve Bank of India and direction can be issued by this Court under Article 226 of the Constitution of India, for one time settlement in terms of the guidelines issued by the RBI.

As the OTS scheme introduced IPICOL in the year 2007 in terms of which the petitioner‟s company has already submitted its application since 2009 has been formulated as per the RBI guidelines, therefore, the manner in which it has been withdrawn by introducing the new scheme under 2016 before finalizing the application pending under the old scheme, is not sustainable in the eye of law.

COUNTER AFFIDAVIT

4. Answering the aforesaid issues more particularly the competency of O.P. no1-IPICOL to issue a new OTS scheme in the year 2016 in terms of the RBI guideline when the proposal under the OLD OTS scheme 2007 were pending, the Opposite party No.1 has filed a counter justifying their action as follows :

4-A. The OTS scheme of 2007 was introduced with the approval of the Board of Directors of IPICOL. Under such OTS policy the petitioner company had applied on 21.7.2009. However, few anomalies were observed during processing of the said OTS application under the policy of 2007. Accordingly suggestions, amendments were placed before 215th meeting of Board of Directors of IPICOL held on 23.9.2009 at Annexure-A/1. There the Board observed that the scheme of 2007 was not suitable for IPICOL as the sacrifices were to be made under the said scheme were substantial. Accordingly, in public interest the said policy was kept under suspension.

After that a modified policy namely amended MDF-OTS-2007 were approved by 217th Board of Directors meeting held on 23.02.2010 at Annexure-B/1 subject to approval of the state govt. The same was approved by the government of Odisha in Industries Deptt. vide its letter dt. 26.5.2011 and the same was placed in 222ndBoard of Directors meeting held 25.6.2011 for adoption and on the said day Board accorded its approval for adoption of such amended scheme.

4-B. Accordingly, it was intimated to the petitioner company regarding adoption of the modified amended policy, 2007 as much as suspension of 2007 scheme as per their letter no.2003 dt. 4.7.2011 at Annexure- C/1 with a request to the petitioner to apply afresh under the new OTS scheme. But the petitioner company without applying afresh vide letter dt. 16.8.2011 at Annexure-D/1 questioned the new amended scheme. Accordingly, IPICOL issued a letter on 11.01.2012 at Annexure-E/1 by justifying the implementation of new scheme and requested the petitioner company to apply afresh. But the petitioner company did not apply for OTS under the amended MDS scheme.

It is stated by O.P.1-IPICOL that 17 numbers of applicants have requested for settlement of outstanding dues amounts for the corporation under the amended scheme 2007 either through switch over or by way of applying afresh. However, the petitioner company did not apply.

4-C. Out of the above two proposals of the OTS were placed before IPICOL Board in its meeting held on 28.01.2013 at Annexure-F/1. The board discussed the proposal and approved one proposal on account of decision of BIFR and rejected the other as it was not in the interest of the O.P.1 as well as the Govt.

In the meantime the Board had authorized CMD, IPICOL to move the govt. for amendment of the then OTS policy i.e. Amended MDF-OTS-07 as it is not linked with the assets and securities of the defaulting company which may result in huge sacrifices of public money with the changing scenario and sky rocketing of land price in urban areas.

The Board further resolved that till the receipt of the government orders, the CMD IPICOL will be authorized to keep the existing OTS scheme in abeyance.

4-D. The O.P.No.1 vide letter dt. 01.03.2014 at Annexure-G/1 intimated the petitioner company that a new OTS policy is in the process of formulation with an

advice to render all possible cooperation to IPICOL officers for verification of fixed assets of the company.

The new OTS policy i.e. OTS-2014 was drafted after due consultation and inputs from the different authorities and it was placed before 235thBoard of Directors meeting held on 05.05.2014 and the board suggested some modification. Thereafter such OTS was prepared incorporating such modifications and the proposal was sent to the government on 23.5.2014 at Annexure-H/1.

The Industries Deptt. vide their letter dtd. 14.01.2015 at Annexure-J/1 sought for more clarification regarding tentative sacrifices for implementation of OTS policy 2014 which was clarified by IPICOL 24.02.2015. After that the Industries Dept. vide their letter dtd.05.07.2016 at Annexure-K/1 has intimated that the OTS scheme 2016 of IPICOL has been approved by the cabinet in its 27th meeting held on 26.6.2016.

4-E. Accordingly, the petitioner company vide letter dt.21.7.2016 at Annexure-L/1 was intimated that IPICOL has launched a new OTS Scheme 2016 and the scheme is effective from 15.7.2017.

4-F. The petitioners company applied for settlement of dues under OTS 2016 scheme with the condition that the filing of this application shall be subject to the final verdict of the Hon"ble High Court in the present writ petition.

Although it is required under the scheme to withdraw all the pending cases but the petitioner did not submit any undertaking for withdrawal of the case.

4-G. It is further contended by the OP no.1 that in terms of the new scheme the earlier applicants under MDS-OTS scheme 2007 and amended MDSOTS 2007 can switch over to the new scheme.

Therefore, the OP No.1 has expressed his intention to settle the dues of the petitioner company as per the new OTS Scheme 2016.

4-H. It is submitted by the Opposite party no.1-IPICOL that the recovery strategy followed by IPICOL cannot be comparable with that of OSFC.

IPICOL had financed the borrowers having higher equity base. Hence, the scheme introduced by OSFC was not suitable for IPICOL, for recovery from the defaulting borrowers. IPICOL being an independent public institution with different set up has to act as per its policies and decisions. It is neither fair nor reasonable to compare both the institutions on the same scale.

REJOINDER

5. In reply to the stand taken by the OP No.1 in their counter, that the petitioner has submitted his application in terms of OTS 2016 scheme without prejudice to his right, it has been clarified by the petitioner by submitting rejoinder that the application submitted under new scheme 2016 was rejected by the IPICOL as per their letter dt. 05.12.2017 at Annexure-10.

It is further contended that the stand taken by the petitioner in his writ petition regarding applicability of different case laws and the principles decided therein not being specifically controverted by the OP 1, otherwise establishes that such principles are applied to the present case. As a result the OTS application of the petitioner deserves to be considered under the old Scheme under which it had applied and the authorities had accepted his application. His case ought not to be covered under the new OTS scheme of 2016.

ADDITIONAL AFFIDAVIT BY IPICOL

6. The OP 1-IPICOL by way of affidavit, further clarified that the MDF-OTS 2007 scheme was recommended by its Board of Directors and was approved by the government for which the provisions of MDF-OTS 2007 scheme automatically gets superceded. It is contended that the IPICOL being the public financial institution is the custodian of public money. OTS is considered as the last resort for recovery of loan dues. There are other alternatives available for recovery due to involvement of the high value of security borrowing units, the financer becomes duty bound to adopt ultimate scheme or other avenues to maximise recovery. Accordingly to ensure the same earlier OTS scheme was withdrawn in public interest to safeguard the public money.

With respect to rejection of the application submitted under the OTS 2016 while considering the case of the petitioner company it is clarified that though the petitioner company had submitted an undertaking to withdraw the pending case while submitting application under OTS Scheme in terms of letter dt. 01.05.2017, but at the time of consideration under OTS 2016, the OTS offer was withdrawn vide IPICOL dt.5.12.2017 at Annexure-10 for non payment of the settlement amount.

7. The petitioners rely upon following decisions of Apex court in order to fortify their claim.

i. M/s. Devidayal Castings Pvt. Otd. Vs. Haryana Financial Corporation & Ars (2016) SCC OnLine SC 1134)

ii. Orissa Alloys Ltd. Vs. Secretary, Department of Industry 2009 (1) OLR 891)

iii. Gujurat State Financial Corporation Vs. Lotus Hotels Pvt. Reported in AIR 1983 SC 848:

iv. U.P.Power Corp and Alloys (P) Ltd. & Ors. vrs Sant steel (2008) 1 SCC 90

v. Anu Bhalla and Ors. vs. District Magistrate, Pathankot (MANU/PH/1689/2020

vi. Order in W.P(C) No-6118 of 2012 (COSBOARD Industries Limited Vs. Industrial Promotion and Investment of Odisha Limited.) of this Court.

vii. SARDAR ASSOCIATES vrs P & S BANK (2009)8SCC257

ANALYSIS OF THE JUDGMENTS RELIED UPON BY THE PETITIONER

7-A. In case of M/S Devidayal Castings Pvt Ltd vs Haryana Financial Corporation relied upon by the petitioner, issue for consideration before the Apex court runs thus:-

"The short issue that would require consideration of the Court is whether the decision of the Executive Committee dated 22nd December, 2005 as approved by the Board of Directors of the Corporation not to accept the settlement amount under the policy in force in cases where the value of the secured properties is more than the said settlement amount, amounts to a change of policy to the detriment of the borrower and, therefore, the Corporation should be held bound to accept the settlement amount as per the policy in force."

Applying the said issue discussed in Devidyal case' in the present case it can be safely concluded that the facts are completely at variance.

In Devidayal case the policy and scheme was in vogue whereas the Board took different decision but in the present case the scheme has been amended from time to time after due deliberation and such changed schemes are not under challenge rather the applicability of such new amended scheme is under challenge. Therefore, the case law relied upon by the petitioner is completely distinguishable on facts and as such do not enure to the benefit of the petitioner.

7-B. In the matter of **Gujarat State Financial Corporation Vs. Lotus Hotels Pvt. Ltd. reported in AIR 1983 SC 848**, the Apex court took note of the fact that the Financial Institution cannot make a "u" turn in denying to finance a loanee after sanctioning the same when on such promise to finance the company has already invested a huge amount and any such back track shall affect the company in terms of the well settled principle of Promissory Estoppel.

The facts and the issue in the present case are completely distinguishable and decision has been relied upon by the petitioner bereft of its factual context.

7-C. Similarly, the petitioner has placed reliance upon in the matter of **Orissa Alloys Ltd. Vs. Secretary, Industry and Ors, reported in 2009 OLR(1) 891** ,wherein this Court has held that the One Time Settlement, 2007 Scheme was floated and it was obligatory on the part of the O.S.F.C to implement the Scheme in its letter and spirit. Once a loanee qualifies within the frame-work thereof there is no option but to extend the benefits of the Scheme.

In this case there is no denial on the part of IPICOL to extend the benefit of OTS rather the dispute revolves around the applicability of amended OTS in supersession of the existing OTS. As such the principle decided therein has no application.

7-D. The other decisions relied upon by the petitioner are also completely distinguishable in the present factual backdrop of the case and do not lend any assistance to the case at hand.

8. From a perusal of record and after hearing the learned senior Counsel Sri D.P. Nanda for the Petitioner and Sri S.K. Padhi for IPICOL at length and on close scrutiny of the pleading, the moot point that arises for adjudication is that whether the Petitioner-loanee has a right to claim for one time settlement and whether a direction can be passed by this Court to the opposite party to implement MDS-OTS-2007 when admittedly the said scheme is not in vogue being superseded by OTS-2016.

9. Admittedly one Time Settlement Scheme of MDF-OTS2007 is not in Vogue being superseded by OTS Amendment in the year 2011 since unimplementable anomalies were detected and the resultant sacrifices of public money thereunder were substantial. The Petitioner admittedly did not opt for switch over to the OTS Amendment scheme and in the meanwhile the MDS-OTS 2007 as well as OTS Amendment scheme were scrutinised keeping in view its cascading impact over the public money held by the IPICOL and in this premises MDS-OTS-2016 was introduced.

The events leading to supersession of old OTS-2007 and introduction of new OTS-2016 being of seminal significance for adjudication of the case are reiterated hereunder at the cost of brevity.

The OTS scheme of 2007 was introduced by IPCOL (Opposite party no.1) in the year 2009. Since, few anomalies were observed during processing of the said OTS application under the policy of 2007, suggestions, amendments were placed before 215th meeting of Board of Directors of IPICOL held on 23.09.2009 at Annexure-A/1. There the Board observed that the scheme of 2007 was not suitable for IPICOL as the sacrifices were to be made by IPICOL a Public sector undertaking under the said scheme were substantial. Accordingly, the said policy was kept under suspension.

After that a modified policy namely amended MDF-OTS2007 was approved by 217th Board of Directors meeting held on 23.2.2010 subject to approval of the state govt. The same was approved by the government of Odisha in Industries Deptt. vide its letter dt. 26.5.2011 and the same was placed in 222ndBoard of Directors meeting held 25.6.2011 for adoption and on the said day Board accorded its approval for adoption of such amended scheme.

On 04.07.2011 (Annexure-C/1 of the counter affidavit) the petitioner was intimated regarding suspension of the OTS, 2007.

Justification of the implementation of new scheme is on record in IPICOL"S letter on 11.01.2012 at Annexure-E/1 which was addressed to the petitioner.

It is also on record that 17 numbers of applicants have requested the IPICOL for settlement of their outstanding dues under the amended scheme 2007 either through switch over or by way of applying afresh. However, the petitioner company did not choose to apply.

Be that as it may, OTS proposal of the Petitioner as well as COSBOARD were taken up for consideration. And the IPICOL Board Meeting held on 28.1.2013 at Annexure-F/1 discussed the proposal and approved one proposal of COSBOARD in the background of BIFR award and rejected the proposal of the Petitioner since the same was found to be not in the interest of the O.P.1-IPICOL as well as the Govt.

In the meantime the Board had authorized CMD, IPICOL to move the Govt. for amendment of the then OTS policy as it is not linked with the assets and

securities of the defaulting company which may result in huge sacrifices of public money with the changing scenario and sky rocketing of land price in urban areas by following extant procedure. The Board further resolved that till the receipt of the government orders, the CMD IPICOL will be authorized to keep the existing the OTS scheme in abeyance.

Accordingly the new OTS policy was drafted by IPICOL considering the views of different authorities and it was placed before 235th Board of Directors meeting held on 5.5.2014 and the board suggested some modification and recommendation to send the OTS proposal of IPICOL to the government for necessary approval. Accordingly, with necessary modification/amendments the proposal was sent to the government on23.5.2014. The Industries Deptt. vide their letter dtd. 14.1.2015 sought for more clarification regarding tentative sacrifices for implementation of OTS policy 2014 which was clarified by IPICOL 24.2.2015. After that the Industries Dept. vide their letter dtd.5.7.2016 has intimated that the OTS scheme 2016 of IPICOL has been approved by the cabinet in its 27th meeting held on 26.6.2016.

Thereafter, the petitioner company vide letter dt.21.7.2016 at Annexure-L/1was intimated that IPICOL has launched a new OTS Scheme 2016 and the scheme is effective from 15.7.2017.

The petitioner‟s company applied for settlement of dues under OTS 2016 scheme with the condition that the filing of such application shall be subject to the final verdict of this Court in the present writ petition.

10. Admittedly, in the present case the OTS scheme has been amended from time to time after taking into account chaning scenario and keeping in view public interest, and such changed schemes are not under challenge rather the applicability of such new amended scheme is under challenge. As there is no challenge to such decision and scheme of the authorities this court finds no merit with the contention of the petitioner as to prescription and application of the OTS, 2016 vis-à-vis the petitioner.

11. It is apposite to note that letter dated 04.07.2011 at Annexure- C/1 by which the IPICOL intimated the petitioner regarding suspension of OTS-2007 is not assailed. Having not done so the petitioner is precluded from making any prayer for disposal of his application under the OTS 2007.

From the record it can be seen that a conscious decision was taken by the Board/IPICOL after due deliberation which is reflected from the Board‟s resolutions from time to time, to protect public money and such decision taken by the IPICOL is not arbitrary, but in public interest, as rightly asserted by Opposite party no.1-IPICOL.

It is also on record that such changes and decisions were intimated to the petitioner from time to time.

Further, the petitioner being fully aware of the terms and conditions of the OTS-2016 applied for the same and having done so it is not open for the petitioner to challenge the applicability of the said scheme vis-à-vis the petitioner company.

12. As held by the Apex Court in catena of judgments, borrower cannot claim one time settlement as matter of right and directing the lending authority to consider the OTS application of the borrower would amount to rewriting the contract. Law is well settled that High Court cannot invoke writ jurisdiction to grant the benefits of one time settlement of loan since the same is the exclusive prerogative of the lending authority.

So far as the second relief claimed by the petitioner, it is covered by the Apex Court decision in the case of ***The Bijnor Urban Cooperative Bank Limited, Bijnor Vs. Meena Agarwal & Ors. reported in (2023) 2 SCC 805*** , wherein in it has been unequivocally held that no writ of mandamus can be issued by the High Court in exercise of power under Article 226 of the Constitution of India directing a financial institution/Bank to positively grant the benefit of OTS to a borrower. The Apex Court has further held that the OTS is always subject to eligibility criteria mentioned under the OTS Scheme and the guidelines issued from time to time and any decision has to be be left to commercial wisdom of the lending institution. Relevant observation of the Apex Court thereunder germane for adjudication in the present case runs thus:-

> *"Even otherwise, as observed hereinabove, no borrower can, as a matter of right, pray for grant of benefit of One Time Settlement Scheme. In a given case, it may happen that a person would borrow a huge amount, for example Rs. 100 crores. After availing the loan, he may deliberately not pay any amount towards installments, though able to make the payment. He would wait for the OTS Scheme and then pray for grant of benefit under the OTS Scheme under which, always a lesser amount than the amount due and payable under the loan account will have to be paid. This, despite there being all possibility for recovery of the entire loan amount which can be realised by selling the mortgaged/secured properties. If it is held that the borrower can still, as a matter of right, pray for benefit under the OTS Scheme, in that case, it would be giving a premium to a dishonest borrower, who, despite the fact that he is able to make the payment and the fact that the bank is able to recover the entire loan amount even by selling the mortgaged/secured properties, either from the borrower and/or guarantor. This is because under the OTS Scheme a debtor has to pay a lesser amount than the actual amount due and payable under the loan account. Such cannot be the intention of the bank while offering OTS Scheme and that cannot be purpose of the Scheme which may encourage such a dishonesty. 10. If a prayer is entertained on the part of the defaulting unit/person to compel or direct the financial corporation/bank to enter into a one-time settlement on the terms proposed by it/him, then every defaulting unit/person which/who is capable of paying its/his dues as per the terms of the agreement entered into by it/him would like to get one time settlement in its/his favour. Who would not like to get his liability reduced and pay lesser amount than the amount he/she is liable to pay under the loan account? In the present case, it is noted that the original writ petitioner and her husband are making the payments regularly in two other loan accounts and those accounts are regularised. Meaning thereby, they have the capacity to make the payment even with respect to the present loan account and despite the said fact, not a single*

amount/installment has been paid in the present loan account for which original petitioner is praying for the benefit under the OTS Scheme.

The sum and substance of the aforesaid discussion would be that no writ of mandamus can be issued by the High Court in exercise of powers under Article 226 of the Constitution of India, directing a financial institution/bank to positively grant the benefit of OTS to a borrower. The grant of benefit under the OTS is always subject to the eligibility criteria mentioned under the OTS Scheme and the guidelines issued from time to time. If the bank/financial institution is of the opinion that the loanee has the capacity to make the payment and/or that the bank/financial institution is able to recover the entire loan amount even by auctioning the mortgaged property/secured property, either from the loanee and/or guarantor, the bank would be justified in refusing to grant the benefit under the OTS Scheme. ***Ultimately, such a decision should be left to the commercial wisdom of the bank whose amount is involved and it is always to be presumed that the financial institution/bank shall take a prudent decision whether to grant the benefit or not under the OTS Scheme, having regard to the public interest involved and having regard to the factors which are narrated hereinabove."***

(Emphasised)

12A. The said decision of the Apex Court is followed by it in the case of State Bank of India Vs. Arvindra Electronics Pvt. Ltd. reported in 2023 (1) SCC 540.

13. In the factual matrix of the case at hand as discussed the claim of the petitioners militates against the settled law that a borrower/guarantor has no vested right to claim OTS and that financial institution/bank should not be directed to positively grant benefit of OTS to a borrower and neither can extension of time granted in terms of an OTS be directed to be afforded as it would tantamount to rewriting/modification of contract.

And more so in the case at hand there is no ground to accept the submission of the learned senior Counsel for the petitioner that there has been discrimination refers to the claim of the COSBOARD. Since the alleged claim of discrimination referring to extending the benefits of OTS to COSBOARD another loanee is per se misconceived. Extending the benefits of OTS to COSSBORD is ex-facie distinguishable in the background of the award of BIFR.

14. By applying the aforesaid principle of law, the petitioner"s prayer seeking a direction to consider its application under the One time Settlement Scheme-2007, which has been admittedly suspended in the year 2011 and superseded by OTS-2016, cannot be entertained.

15. This court is also not persuaded to accept the contention of the petitioner that since its application under OTS-2007 is pending consideration before the IPICOL, the petitioner is entitled to the benefit under the said scheme, in as much, it is well established on the basis of record that the circumstances warranting changes and consequential suspension and supersession of the OTS Scheme 2007 by OTS-2016 were well within the knowledge of the petitioner. Rather by applying under new OTS 2016 the petitioner has surrendered its right to be considered under the old OTS 2007 and prayer to be governed by the said scheme is thus untenable.

16. This Court finds no merit in the writ petition and accordingly, the writ petition is dismissed. No costs.

Headnotes prepared by : *Result of the case :*
Smt. Madhumita Panda, Law Reporter Writ petition is dismissed
(Verified by : Shri Pravakar Ganthia, Editor-in-Chief)

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2024 (III) ILR-CUT-635

ASHOK KUMAR PRADHAN & ORS.
V.
UNION OF INDIA & ORS.

(W.P(C) NO.5820 OF 2021)

08 OCTOBER 2024

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

Issue for Consideration

Whether retrospective regularization of service is admissible.

Headnotes

NATIONAL HIGHWAY AUTHORITY OF INDIA (RECRUITMENTS, SENIORITY AND PROMOTION) AMENDMENT REGULATIONS, 2015 ─ Clause 13(A)(F) ─ Regularization of service – The NHAI regularized the service of petitioners prospectively w.e.f. 1st June, 2018 in terms of clause 13 (A)(F) of the 2015 Regulations instead of regularizing from the date of completion of five years of service in the post of Jr. Accountants Officer w.e.f. 2005 – The petitioners have never challenged the amended regulation 2015 – on the contrary consciously subjected themselves to the assessment as prescribed under 13A(1)(m) of NHAI Regulations, 2015 and accepted consequential regularization – Whether the petitioners can claim retrospective regularization at this stage.

Held: No – The petitioners are estopped from challenging the consequential prospective promotion – It is trite law that once a person has accepted a benefit flowing from an order, he cannot turn around and challenge a part of the same order. (Paras 28-30)

Citation Reference

GP Doval & Ors. V/s Chief Secretary Govt. of UP & Ors., **AIR 1984 SC 1527;** S. Sumnyan V/s. Limi Niri & Ors. **AIR 2010 SC 2159 – referred to.**

List of Regulations

National Highway Authority of India (Recruitments Seniority and Promotion) Amendment Regulations, 2015

Keywords

Claim of retrospective regularization, maintainability

Case Arising From

Order dated 13.05.2020 passed by Central Administrative Tribunal, Cuttack Bench, Cuttack in O.A. No. 260/00510/2019.

Appearances of Parties

For Petitioners : Mr. Budhadev Routray, Sr. Adv.

For Opp.Parties : Mr. P.K. Parhi, DSGI for UOI
Mr. Abhay Ku. Behera & Mr. Durga Prasad Nanda,Sr. Adv. with Ms. Payal Roy, for NHAI (O.P. No.2)
Mr. M. K. Mishra, Sr. Adv. with Mr. T. Mishra, (O.P.Nos.3 to 15)
Mr. Swapna Ku. Ojha, (O.P.Nos.16 to 24)

Judgment/Order

Judgment

V. NARASINGH, J.

1. In this writ petition under Article 226 and 227 of the Constitution of India, the petitioners assail the order dated 13.05.2020 at Annexure-4 passed by the Central Administrative Tribunal, Cuttack Bench, Cuttack (herein after referred to as "CAT") whereby Original Application bearing Number O.A. No. 260/00510/2019 filed by the petitioners, application has been dismissed, rejecting the petitioners' prayer for regularization of their services from the date of completion of five years of continuous service under the Opp. Party No. 2 establishment (NHAI).

The petitioners have approached this Court with the following prayer:

"i) Admit the writ application.

ii) Call for the record.

iii) Issue Rule Nisi calling upon the opposite parties to show cause as to why the impugned order dated 13.05.2020 passed by the learned Tribunal in O.A. No. 260/510 of 2019 under Annexure-4 shall not be quashed.

iv) If the opposite parties do not show cause or show insufficient cause issue a writ in the nature of certiorari or any other appropriate writ/writs ,order/ orders, direction/directions quashing the order dated 13.05.2020 passed by the learned Tribunal in O.A. No. 260/510 of 2019 under Annexure-4.

v) Issue a writ in the nature of mandamus or any other appropriate writ/writs directing the opposite party No.2 to regularize the services of the petitioners on completion of five years of continuous service in NHAI from the date of their respective initial appointment along with all consequential service benefits including promotion to the post of Manager (F&A) at par with six numbers of employees who were appointed in the year 1999 and got promotion w.e.f. May 2012."

2. At this juncture it may be noted that the petitioners by filing the aforesaid OA No. 260/00510/2019 before learned CAT, challenged the action of the Opp. Parties/NHAI regularizing their service prospectively w.e.f. 1st June, 2018 instead of regularizing them from the date of completion of five years of service in the post of Jr. Accounts Officer w.e.f. 2005.

2-A. The preliminary ground of challenge to the order of the Learned Tribunal rests upon the argument that even though the, similarly circumstanced employees who were appointed in the year 1999 on contractual basis like the petitioners were regularised in the normal course whereas the petitioners continued on contract basis till 2018 when their services were regularised. Accordingly, the petitioners have claimed regularisation and promotion with retrospective effect at par with the other appointees who were allegedly similarly placed.

3. Heard Mr. B. Routray, learned Senior Advocate for the petitioners and Mr. P. K. Parhi, DSGI for UOI, Mr. Abhay Kumar Behera and Mr. Durga Prasad Nanda, Sr. Advocates appearing along with Ms. Payal Roy, Adv for NHAI, Mr. Manoj Mishra, Sr. Advocate along with Mr. Tanmay Mishra Advocate for Opposite Party Nos.3 to 15 and Mr. S. K. Ojha, advocate for Opposite Party Nos.16 to 24.

4. Before adverting to the rival submissions made by the learned counsels, it is apt to note the facts germane for just adjudication, which runs thus:-

4-A. The Opp. Party-NHAI had issued advertisement on 16.07.1997 (Annexure-1 of the Counter filed by the NHAI before CAT) for recruitment of 3 nos. of Accountants and such advertisement was finalised and however the appointment orders were issued in favour of 7 persons for appointment as Accountant on regular basis as per designated pay scale, based on the interview held on 15.02.1999 to meet immediate requirement of NHAI vis-a-vis the accountants. Thereafter, the appointment orders were issued on 01.03.1999 and these 07 persons joined as Accountant in NHAI on the appointed dates and upon completion of successful probation, their services were confirmed/regularised with effect from their date of Joining on regular basis i.e. the date of completion of probation.

4-B. Subsequently, it was decided by the Board of NHAI in its 27th Board Meeting held on 25.01.2000 to engage the Accountants and Secretarial staff on contract basis. Accordingly, all the employees i.e. Accountant/Steno were appointed on contract basis.

4-C. To meet the urgent requirement of Secretarial staffs like Accountants, the Opp. Party No.2-NHAI issued further advertisement and invited applications from the eligible candidates for contractual appointment for selection and appointment on All India basis for 29 posts on contract basis and subsequently for further 12 nos. of posts purely on contract basis for a period of 2 years with consolidated remuneration, stipulating last date of submission of application by 10.01.2000 and 30.06.2000, respectively. The said advertisements are at Annexure-A/3 of the OA filed before the learned Tribunal.

4-D. Pursuant to such Advertisement, the present petitioners and similarly situated (Private Opp. Parties who are at Sl No.3 to 24) also were appointed as accountant on contract basis in the NHAI for a period of 2 years. Subsequently, their services/contracts were renewed from time to time with consolidated pay.

4-E. As per Policy, in terms of order dated 25.06.2008, on completion of five years of services, all the accountants who were appointed in the year 1999 on regular basis were granted upgradation as Junior Accounts Officer (Now Assistant Manager (F&A) vide office order dated 20.08.2008. In case of Accountant who were appointed in the year 2000 on Contract basis they were upgraded on consolidated remuneration as Junior Account Officer vide above mentioned office order. Subsequently, the vacancies for the post of Manager (F&A) requirement with criteria for promotion as 5 years regular service in GP Rs.5400 or 06 years regular service in GP Rs.4800 were advertised in which the internal candidate (6 Accountants) appointed on regular basis had also applied and after following the recruitment procedure they were promoted as Manager (F&A) w.e.f. May, 2012, as per RR (recruitment Regulation) Policy of 2011.

Admittedly, said promotion was not challenged by the petitioner.

5. Since the petitioners and other similarly situated persons even though posted as Jr. Accountant officer on contract basis and were allowed with the regular scale of pay with GP Rs.4800/- and had completed six years of service were not considered for promotion on the ground that their services were not declared as regular, the petitioners and similarly situated persons submitted their grievances. And, the Board of Directors, Opposite Party No.2-NHAI, Board of Directors considered the proposal of regularization of long term contract employees in their agenda No. 9 of 93rd meeting dtd. 26.3.2013 and agenda no.7 of the 95th Board Meeting dtd. 14.8.2013, wherein it was resolved that a scheme for regularization of the contractual employees of financial and secretarial cadre should be framed and accordingly in the 102nd Board meeting dtd. 17.11.2014 the proposal for regularizing long term contractual services was approved in form of a onetime scheme.

6. After due deliberation a scheme namely NHAI (Recruitment, Seniority and Promotion) Amendment Regulations, 2015(Regulation 2015) was formulated and notified in Gazette Notification on 07.01.2015.

7. The present petitioners filed OA No.3031/2015 before the CAT, Principal Bench, Delhi, with a prayer to complete the process of regularization in terms of the statutory regulation dated 07/01/2015 at Annexure-A/17 of OA. (Referred to in paragraph-31)

8. All of them submitted to the assessment made by the Selection Committee as stipulated in Regulation 13 A(1)(m) of the Regulation, 2015 being conscious of the stipulations in Regulation 13 A(1)(f) that regularization shall have prospective effect i.e. from the date of orders of regularization. The Selection Committee admittedly assessed the petitioners in the year 2018 and by order dated 04.06.2018

the services of the Petitioners were regularised prospectively from the date of such order.

9. Thereafter, the petitioner submitted their representation dated 19.03.2019 to the Opposite Party No.2-NHAI to antedate their regularisation w.e.f. date of completion of 5 years of their service.

10. In the mean time, on 28.03.2019 the Opp. Party/NHAI issued advertisement to fill up 41 nos. posts in the grade of Manager (F&A) on deputation basis, which was challenged by the petitioners in Original Application No. 510/2019 filed before CAT, Cuttack Bench, Cuttack, praying for a direction to treat their services as regular on completion of five years of service at par with the Accountants appointed in the year, 1999 in NHAI and also for grant of consequential promotions and other service benefits and declare that part of the regularisation order dtd.04.06.2018 as arbitrary, unreasonable and discriminatory in ignoring their past service.

11. The Opp. Party/NHAI filed its counter before the learned CAT, Cuttack Bench, Cuttack, specifically pleading that the present petitioners who were the applicants cannot be equated with the Accountants who were appointed in the year, 1999 in NHAI, as they are appointed as regular Accountants, whereas the petitioners and similarly situated persons were appointed on contractual basis and continued as long term contract Employee and they have no legal right to claim regularisation and further promotions to the higher cadres more so since they were regularised on 4.6.2018 w.e.f 1.6.2018. Further, as they had not completed five years of regular services in the cadre of Junior Accounts Officer, they are not eligible to claim for further promotion in the higher grade as per the Recruitment Regulation, 2016.

The NHAI in a tabular form by making a comparative statement clarified the disparity between the two sets of appointees i.e. 1999 and 2000. For convenience of reference said comparative statement is culled out hereunder :-

1999	2000
a) The advertisement dt.16.7.1997 was issued for regular appointment with proper pay scale without mentioning any contractual engagement duration in the same. However, in terms of the prevailing policy since appointment was to be given based upon verification of credentials as well as other administrative procedures like police verification, health verification, etc.	A) The advertisement itself stated that the appointment to be given is purely on contract basis for a period of 02 years and with a consolidated pay, unlike the advertisement dt.16.7.97 which clearly mentioned that the appointees shall get the consolidated pay and allowances as per Central Govt. Rules. The other criterias mentioned were also different from the advertisement which was issued in 1997.

1999	2000
b) The appointees were given OFFER OF APPOINTMENT ON REGULAR BASIS however, they were given opportunity to work on contract period till receipt of antecedent reports and medical reports. Their probation period was also completed after one year from the date of their regular joining on various dates of the year 1999 not from the date of contract. 06 Accounts 05 worked on contract for less than 27 days only. One Accountant joined as REGULAR only, as his police verification & medical fitness report had been received till then.	b) The contract period were renewed from time to time for 02 years each till their regularisation only in the year 2018 vide order dt.4.6.2018 which included both Financial Personnel as well as Secretarial Personnel in NHAI. (Ann-A/19).

On the pleadings of the parties and taking note of the rival contention of the respective parties, learned Tribunal meticulously framed the following issues for adjudication:-

> (i) Whether the provisions of the Recruitment Rules regarding the eligibility condition stipulating the minimum years of "regular" service for promotion to the post of Manager (F&A) are sustainable in view of the claim in the OA that these are unreasonable and discriminatory for long term contractual employees like the applicants.
>
> (ii) Whether the applicants" claims that they are similarly placed as the accountants appointed by NHAI on regular basis in the year 1999 and they have not been allowed similar benefits in matters relating to regularization of services and promotion to higher posts, are tenable.
>
> (iii) Whether promotion to the post of Manager (F&A) is to be done under the Recruitment Rules of 2011 (Annexure-A/13 of the OA) since the vacancies in question had arisen prior to the date when the amended Recruitment Rules of 2016 (Annexure-A/18) was notified.
>
> (iv) Whether under the notification dated 7.1.2015 (Annexure-A/17 of the OA), the applicants and the respondent nos. 3 to 24 are entitled for regularization against the post of JAO from the date they had completed 5 years of service as JAO on contractual basis.

12. The Tribunal, Cuttack by the impugned order dated 13.05.2020 at Annexure-4 rejected the claim of the petitioners/applicants therein.

13. It is contended by the petitioners that on the date of their appointment way back in the year 2000 there was no regular recruitment regulation for the post of Accountant and Jr. Accounts Officer rather NHAI was empowered by government of India vide letter dtd.02.05.1997 for creating the post up to the level of General Manager and accordingly the Board of NHAI had delegated power in its meeting dt. 28.11.1997 to its Chairman to give appointment on contractual basis. Accordingly,

on 22.06.1999 seven numbers of accountants were given appointment on contractual basis and their appointments were regularized within a short span of about six months whereas the present petitioners and similarly placed persons were deprived of such regularization benefit even though the Chairman was authorized by the NHAI Board in its meeting dtd. 15.01.2000 to engage the accountants and other support staff for the purpose of completion of projects.

13-A. The present petitioners were appointed by the NHAI authorities in terms of the advertisement issued by NHAI for filling up 3 posts of Accountant for the places located at Gurugaon, Durgapur and Vijawada. But after about two years the NHAI held the interview on 15.2.1999 and issued appointment order in respect of seven persons as accountant for a period of six months on contract basis with a stipulation that their services as Accountant and seniority in the said grade shall be determined as per the decision to be taken by the authorities. Their services were regularized on 28th July, 1999. Further, the Board of Directors of NHAI in their 27th meeting dtd.25.1.2000 resolved that a staffing norm would be applied in a flexible manner having regard to the administrative feasibility in the operation of the NHAI and with regard to the engagement of the support staff like PA/Stenographer/Accountant. Accordingly, the Board directed that they may be engaged on contract basis for the duration of NHAI project. One open advertisement was issued on all India basis for recruitment of staffs so as to manage the affairs of the NHAI relating to the finance wing in January, 2000 for recruitment of 29 numbers of personnel and in June, 2000 for 12 nos. of Accountants on contract basis with stipulation about their required qualification and working experience and the eligibility on consolidated pay.

In terms of such advertisement, the present petitioners along with similarly situated persons so also the private Opp. Parties having being eligible participated in the selection process and on being selected, they got the appointment to the post of Accountant on contractual basis for a period of two years and keeping in view the increasing work load, all the petitioners were allowed to continue uninterruptedly. While continuing as such, they were granted with the regular scale of pay in the year 2005 on completion of five years of continuous service in NHAI including annual increment benefits of sixth CPC at par with so called regular appointee Accountants of 1999. Further, the petitioners including those 1999 appointees and similarly situated persons were allowed to discharge similar responsibility and function with higher scale of pay and were designated as Jr. Accounts Officer w.e.f. 25.6.2008 by a common office order. As such all of them discharged similar nature of duties and functions with same degree and responsibility in every aspect.

While continuing as such, all the 38 Jr. Accounts Officer were given the benefit of the 6th Central Pay revision and were extended with the scale of pay Rs.9300-34800/- with GP of Rs.4800/- w.e.f. 1.1.2006 or 1.7.2006 depending upon completion of five years of service as Accountant.

In the meantime the finance cadre of NHAI was restructured on 30.11.2011 by creating 80 posts of Accountants, 46 posts of Manager (F&A) and 17 posts of

Deputy General Manager (Finance) and a set of new recruitment regulation was framed in the year 2011 providing that suitable officers who have rendered five years of regular service in the grade pay of next below with grade pay Rs.5400/- or six years of service in the grade pay of Rs.4800/-will be eligible for promotion to the post of Manager (F&A).

14. It is submitted by the petitioners referring to cadre strength of Manager (F&A) of 46 nos. and personnel manning the said posts in different capacity such as regular, deputationist, etc, claimed that there were 19 clear vacancies against which the Accountant recruited in the year 1999 on regular basis were only given promotion as Manager (F&A) on regular basis in the year 2012. But, the petitioners and other similarly situated persons even though posted as Jr. Accountant officer on contract basis and were allowed with the regular scale of pay with GP Rs.4800/- and had completed six years of service they were not considered for promotion merely on the untenable ground that their services have not been declared as regular service.

15. On being aggrieved with such action of the authorities, the petitioners and similarly situated persons submitted their grievances time and again for which the NHAI, Board of Directors were pleased to consider the proposal of regularization of long term contract employees in their agenda No. 9 of 93rd meeting dtd. 26.03.2013 and agenda No.7 of the 95th Board Meeting dtd. 14.08.2013 wherein it was resolved that a scheme for regularization of the contractual employees of financial and secretarial cadre should be framed and accordingly in the 102nd Board meeting dtd. 17.11.2014 the proposal for regularizing long term contractual services were approved.

16. It is further contended by the petitioner that the similarly situated officers of NHAI namely Sri A.S. Dibendra and J.S.B.S. Prabhakar who were on deputation to the post of Manager (F&A) in NHAI and later on appointed on contractual basis w.e.f. 27.1.2003 and 17.07.2003 respectively had filed OA No.3280/2011 and 3281/2011 before the CAT, Principal Bench, New Delhi claiming promotion to the higher rank by counting their past service on deputation as well as the contractual period. Both the original applications were allowed directing the NHAI to grant them promotion by counting their past service in NHAI including the service rendered on contractual basis and the said order of the CAT were challenged before the Hon"ble High Court of Delhi but the respective writ petitions were dismissed by a common judgment dtd.11.11.2014 upholding the decision of CAT.

17. The petitioners and similarly situated persons had also approached in OA 3031/2015 before the CAT, Principal Bench, New Delhi, to regularize them in terms of Regulation, 2015 dated 07.01.2015. During pendency of the said Original Application, the NHAI authorities issued the notification vide office order No.11041 dtd.04.06.2018 regularizing the service of the long-term contract employees (JAO) along with secretarial cadre candidates who were functioning also on long term contractual basis. In the said Order dated 04.06.2018 it has been mentioned that with the approval of executive committee granted on 30.5.2018 and in exercise of power

delegated to the authorities to regulate the services of the petitioners and similarly persons like them appointed between 2000-2001 w.e.f. 01.06.2018.

17-A. Taking note of such facts, the original application preferred by the petitioners in OA No.3031/2015 before the CAT, Principal Bench, New Delhi was disposed of 29.11.2018 granting liberty to the petitioners to avail remedies in accordance with law if the petitioners still have any other grievances.

18. The petitioners submitted their respective representations on 19.03.2019 before the NHAI authorities claiming discrimination as well as disparity in not treating them at par with the different other employees who were allegedly appointed on contractual basis pending issuance of formal regularization order. According to the petitioners, those representations were never considered by the NHAI authorities.

19. It is further contended by the petitioners that instead of regularizing them in the post of Manager (F&A), the NHAI authorities issued an advertisement for recruitment of 41 posts out of total posts of 46 posts of Manager (F&A) on deputation basis and as such finding no other way, the petitioners were constrained to approach the learned Tribunal in Cuttack Bench, Cuttack in OA NO.510/2019 (Annexure-1 of the writ petition) with a prayer as quoted above which was rejected by the impugned order dated 13.05.2020 at Annexure-4 of the writ petition.

20. In the said background the petitioners submitted that the petitioners have been subjected to discrimination and have been regularized w.e.f. 01.06.2018 though similarly circumstanced persons have been regularized in due course and as such the petitioners are entitled for regularization of their service with retrospective effect from 2005 i.e. date of completion of 5 years of service and prayed for consequential relief.

Counter Affidavit by NHAI

21. The NHAI authorities filed counter and sum and substance of their stand is reproduced below:

21-A. The claim of the petitioners that 7 nos. of Accountants were recruited in the year 1999 on contractual basis is not a fact. An advertisement was issued in July, 1997 by the NHAI for the post of Accountant and there is no stipulation to show that such recruitment has been done on contractual basis. Whereas in respect of the petitioners the advertisement dated 10.01.2000 and 30.06.2000 clearly indicates that recruitment would be on contractual basis. As such, the appointment of said 7 nos. of Accountants in the year 1999 was on regular basis whereas the petitioners were appointed on contractual basis. Referring to the conditions stipulated in the appointment letters in respect of the petitioner and other persons appointed in the year 1999, it is vehemently argued that both of them are not similarly placed.

21-B. The NHAI authorities have vehemently opposed the stand of the petitioners treating equally both contractual as well as regular employees because for granting similar scale of pay.

21-C. It is the specific stand of the NHAI Authorities that merely granting the similar pay scale to the regular and contractual employees do not mean that they are equal in other matters also. Further, it is clarified that the re-designation of accountant as Jr. Accounts Officer on contractual basis cannot be termed as a promotion. The promotion can only be granted to the regular employees holding the feeder post on regular basis.

Referring to the RR (Recruitment Regulation) for the post of Jr. Accountant Officer, it has been argued that the different provision for recruitment, promotion and contract are available in the RR policy. For promotion a departmental candidate holding the post of Accountant on regular basis in NHAI for a period of at least five years is eligible for promotion as Jr. Accounts Officer whereas an employee holding post in NHAI on contract for a period of at least five years is eligible for appointment as Jr. Accounts Officer on contract basis.

Since the present petitioners being the applicants before the CAT, were holding the post of Accountants and Jr. Accounts Officer on contractual basis, the question of promotion to them does not arise. In view of specific provision available in RR which is statutory in nature for the post of Jr. Accounts Officer published in the Gazette of India containing two distinct and different set of method of recruitment, one being by promotion other being by contract, the claim of the petitioners to be similarly placed with that of the regular employees because for availing similar pay scale is nothing but a misnomer of facts. That apart the RR of Manager (F&A) also prescribes the method of recruitment that an officer should have rendered five years of regular service in the grade next below with grade pay of Rs.5400/- or six years of service with grade of Rs.4800/-. While the RR for the post of Jr. Accounts Officer permits a method of induction into the service on contract basis in addition to promotion, such provision is not available while filling the post of Manager (F&A) that is there is no provision for contract.

21-D. It is further clarified by the authorities that the meeting held on 17.11.2014 it was directed that the proposal contained for considering the modalities as per Department of Personal of Training norms to regularize the long term contract employees appointed in NHAI and fulfillment of prescribed recruitment rules applicable to relevant posts were taken into consideration and it was decided that henceforth there would be no recruitment on long term contract basis. Pursuant to such decision, the Gazette notification dtd. 7.1.2015 was published in the Gazette of India.

It is submitted by the Opposite party-NHAI that to address the grievances of the petitioners and similarly circumstanced employees who were working since long term on contract basis, the Opposite Party No.2-NHAI, Board of Directors considered the proposal of regularization of long term contract employees in their agenda no. 9 of 93rd meeting dtd. 26.3.2013 and agenda no.7 of the 95th Board Meeting dtd. 14.8.2013 wherein it was resolved that a scheme for regularization of the contractual employees of financial and secretarial cadre should be framed and

accordingly in the 102nd Board meeting dtd. 17.11.2014 the proposal for regularizing long term contractual services was approved in form of a onetime scheme.

21-E. After due deliberation a scheme namely NHAI (Recruitment, Seniority and Promotion) Amendment Regulations, 2015 was formulated and published in Gazette Notification on 07.01.2015 which is at Annexure-A/17 of the OA. Regulation 13A(1)(f) of the Regulation, 2015 stipulates that regularization shall have prospective effect i.e. from the date of orders of regularization.

Regulation 13A(1)(m) of the Regulation, 2015 stipulates that suitability of the officer/employee for regularisation shall be assessed by a selection committee.

21-F. The Senior Counsel appearing for the NHAI vehemently submits that even though the Regulation, 2015 was within the knowledge of the petitioners, at point of time the petitioners have challenged the said Regulation. On the contrary the present petitioners filed OA No.3031/2015 before the Learned CAT, Principal Bench, Delhi, with a prayer to complete the process of regularization in terms of the statutory regulation dated 07/01/2015. Thus the petitioners are precluded from challenging the Regulation, 2015.

21-G. So far placing reliance on the decision of the learned CAT, New Delhi in OA NO.3280/2011 and OA No.3281/2011, it is submitted by Opposite party no.2-NHAI that the cases are primarily related to absorption on the respective applicants in those OAs who were initially appointed on deputation basis and the advertisement against which they were appointed also contained a clause relating to absorption. Such not being the case at hand, the principle decided therein will have no application in the facts of the present case. Relying upon the office memorandum dtd. 23.12.2014 of DOPT, it is submitted by the NHAI that appointment on contractual basis is not a recognized method of recruitment. DoPT has not issued any instruction for regularization of contract employees. Further, no instruction has been issued for appointment of contractual employees to the regular post in absence of recruitment rules.

21-H. It is further submitted by the Opp. Parties that the applicants had previously approached before the learned CAT, New Delhi in OA No.3031/2015 with a prayer to regularize their service in terms of Amendment Regulation, 2015 with all consequential benefits, which was disposed of on 18.01.2016 directing the Secretary, Ministry of Road, Transport and Highway to take a final view with consultation with the Department on the issue of regularization of long term contract employees including the applicants as per the Rules. Subsequently, these applicants filed RA 44/2016 in OA No.3031/2016 before the learned CAT, Principal Bench, New Delhi which was disposed of on 09.11.2016 where as per the order dtd.18.01.2016 in OA No.3031/2015 was recalled and was restored to its original file and listed for hearing. At no point of time, the applicants had ever questioned the validity of Gazette notification dtd. 07.01.2015 at Annexure-A/17 of the OA whereby the NHAI had framed one time scheme for regularization of the long term

contract employees. In fact, they had made a specific prayer before the learned CAT, Principal Bench, New Delhi for completing the process for regularization in terms of Gazette notification dtd. 07.01.2015 which is at Annexure-A/17 of OA. Accordingly, the petitioners were considered for regularization and after completion of process of regularization in terms of Gazette notification dtd. 07.01.2015, the benefit of regularization has been extended to the petitioners as such they are precluded from questioning the validity and condition stipulated in Gazette notification dtd. 07.01.2015 basing upon which their services were regularized w.e.f. 01.06.2018.

21-I. It is further submitted by the Opposite Party No.2-NHAI that the petitioners/applicants have made incorrect statement that the employees of secretarial cadre who were appointed on contract basis were promoted to higher rank without being declared regular in service as per Office order dtd. 05.01.2018. The stand of the petitioners with respect to filling the post of Manager (F&A) in terms of the old Rule instead of New Rule, it is opposed by the NHAI citing plethora of decisions and distinguishing the facts in the decision of Y.B.Rangeya on various grounds inter alia taking a stand that the facts in Rangeya case is related to promotion of regular employees and officers and not that of contract employees. Since, the applicants were engaged on contract basis and they joined the NHAI after accepting the terms of the contracts and they have been regularized w.e.f. 01.06.2018, there is no scope for regularizing taking into consideration the date of their initial appointment. The advertisement for filling up the post of Manager (F&A) has been made strictly taking into consideration the RR governing the field and there is no reason to deviate the policy and to accept the claim of the petitioner who know the condition of their services since the date of their joining and accepting such conditions, they are continuing with the benefit whatever it is accrued to them in terms of the conditions of the service, regulating their service condition.

21-J. The Opposite party-NHAI contended that the reliefs claimed by the petitioners are barred by limitation since cause of action arose in 2005 when the petitioners were not regularized even after completion of five years of service, but the petitioners did not challenge the same within the prescribed period of limitation. Thus after regularization in the year 2018, praying for a relief in the year 2019 to antedate their regularization to 2005 is hit by section 21 of the Administrative Tribunal Act.

21-K. The Opposite party-NHAI further contended that even though the NHAI Amendment Regulation, 2015, came into force on 07.10.2015, containing the stipulation that the services would be regularized prospectively in 13 A (1) (f) of the said Regulation and the said Regulation was well within the knowledge of the petitioners, by not challenging the same, the petitioners have forgo their right and as such cannot claim a relief which runs contrary to the Regulation 13 A (1) (f) of the NHAI Amendment Regulation, 2015.

21-L. Further the petitioners consciously subjected themselves to the assessment as prescribed under Regulation 13 A (1) (m) of the NHAI Amendment Regulation, 2015 and accepted consequential regularization. Having acted upon the same and having accepting the regularization in terms of the NHAI Amendment Regulation, 2015, the petitioners are estopped and cannot be permitted to approbate and reprobate.

Analysis of the judgments relied upon by the petitioners

22. The petitioners relied upon several decision of the Apex Court in order to fortify their claim to treat their date of initial contractual appointment as the determining factor in considering their case to make them eligible for their promotion to the next higher rank, instead of the date of regularisation and the 'regular' service as has been done and impugned.

22-A. Relying on the decision in GP Doval and others versus Chief secretary Government of UP and others, AIR 1984 SC 1527 the petitioners claim to count the length of continuous officiation for the purpose of drawing the seniority list from the date of their first Appointment.

There is no cavil about such proposition of law. But this has no application to decide the issue in the present case where the dispute is not with regard to the seniority inter se among the employees but with respect to satisfying the minimum eligibility of service that too on regular basis as required for promotion to the post of Manager (F&A).

Therefore, the decision relied upon by the petitioner in GP Doval (Supra) has no application in the present case at hand 22-B. In the case of S. Sumnyan V/s. Limi Niri & Others, AIR 2010 SC 2159 relied upon by the petitioners, relates to counting the period of ad-hoc services for the purpose of seniority.

Keeping in view the facts and the issue involved in the present case, the principle decided in the said decision has no application to the case at hand and has been relied upon bereft of its context.

22-C. So far the principle decided in W.A. No. 936 of 2021 this Court finds that a division bench of this Court by their judgement dated 15.02.2023 upheld the decision of learned single judge granting the benefit to the petitioner in that case taking into consideration the background of facts and the decision of authorities from time to time dealing with regularization. This court finds that facts and issues of the present case are ex-facie distinguishable qua the facts and issues involved in the W.A. No. 936 of 2021 and the batch of case as decided. As such the ratio in the cited writ appeal has no application to the present case.

23. During the course of submission, it was argued before this Court that the CAT, Cuttack did not consider the materials available on record and also the arguments advanced by the petitioners to justify their claim that they should be treated at par with appointees of the year 1999 and arrived at the erroneous finding that the petitioners are not similarly circumstanced as appointees of the year 1999.

24. This Court, on a comparative scrutiny of the materials on record, finds that i.e. Advertisement of the year 1997 and consequential letter of appointment issued in the year 1999 appointing 7 number of accountants and the Advertisement of the year 2000 relating to the petitioners and the terms of consequential appointment letters are materially different.

The Advertisement dated 16.07.1999 clearly shows the recruitment was on regular basis whereas the recruitment in the Advertisement of the year 2000 was on contract basis for a period of two years. Recruitment and eligibility assessment criteria were also different in the recruitment process of Advertisement of the year 1997 and 2000. The appointment letter of the petitioners also stipulates the condition that the appointment is on contract basis which is not so in case of appointees of 1999. As such the claim of the petitioners that they are similarly circumstances with the appointees of the year 1999 have no legs to stand.

25. This court is also not persuaded to accept the contention of the petitioners to find the similarity and equality between the present petitioners and the accountants engaged during the year 1999 solely on the basis of grade pay and inter transferability among them. Rather this Court finds that the stand of opposite party-NHAI authorities in treating both the categories as distinct and different was rightly considered by the CAT in the impugned judgment.

26. Learned counsel for the Opposite Party-NHAI relying on Section 21 of the Administrative Tribunal Act also urged that the OA before the CAT, Cuttack was liable to be dismissed on the ground of limitation as prescribed under Section 21 of the Administrative Tribunals Act, 1985.

For convenience of reference the said Section 21 of the Administrative Tribunals Act, 1985 is extracted hereunder:-

> **21. Limitation.** - (1) A Tribunal shall not admit an application,-
>
> (a) in a case where a final order such as is mentioned in clause (a) of sub-section (2) of section 20 has been made in connection with the grievance unless the application is made, within one year from the date on which such final order has been made;
>
> (b) in a case where an appeal or representation such as is mentioned in clause (b) of sub-section (2) of section 20 has been made and a period of six months had expired thereafter without such final order having been made, within one year from the date of expiry of the said period of six months.
>
> (2) Notwithstanding anything contained in sub-section(1), where-
>
> (a) the grievance in respect of which an application is made had arisen by reason of any order made at any time during the period of three years immediately preceding the date on which the jurisdiction, powers and authority of the Tribunal becomes exercisable under this Act in respect of the matter to which such order relates; and (b) no proceedings for the redressal of such grievance had been commenced before the said date before any High Court, the application shall be entertained by the Tribunal if it is made within the period referred to in clause (a), or, as the case may be, clause (b), of sub-section (1) or within a period of six months from the said date, whichever period expires later.

(3) Notwithstanding anything contained in sub-section (1) or sub-section (2), an application may be admitted after the period of one year specified in clause (a) or clause (b) of sub-section (1) or, as the case may be, the period of six months specified in sub-section (2), if the applicant satisfies the Tribunal that he had sufficient cause for not making the application within such period.

It is the submission of the learned counsel for the Opposite Party-NHAI that the cause of action in the case at hand arose in 2005 when the petitioners were not regularized even after completion of 5 years of service yet the petitioners admittedly did not challenge the same within the prescribed period of limitation as noted above and only woke up from their slumber after regularization in the year 2018 praying for a relief in the year 2019 by filing the OA in question i.e. OA No.260/00510/2019 before the Tribunal, Cuttack seeking relief to antedate their regularization to 2005 which is as such hit by section 21 of 21 of the Administrative Tribunal Act. There is no explanation to negate such contention.

Question of limitation being a point of law and it is trite that the same can be raised at any time in the considered view of this Court the relief claimed by the petitioner seeking to antedate their regularization to 2005 is liable to be rejected on this score alone.

27. It is submitted that the Opposite Party-NHAI Amendment Regulation, 2015, came into force on 07.01.2015, containing the stipulation that the services would be regularized prospectively in terms of 13A(1)(f) of the said Regulation.

For convenience of reference the said regulation is extracted hereunder:-

xxx xxx xxx

"2. These Regulations shall be inserted as Regulation 13 of the National Highways Authority of India (Recruitment, Seniority and Promotion), Regulations, 1996 (hereinafter referred to as the principal regulations) with the following clause:-

13A. **Definition of Long Term Contract Employees.- The Long Term Contract employees are those employees/officers**:

(i) Who were initially selected for appointment on deputation basis and after due process of selection. However, when their parent department was wound up/they took VRS, they ceased to be on deputation for want of any parent organisation but keeping the need of the Authority they were continued on contract basis on the same terms and conditions as regards the posts and the pay scales as was applicable to them as deputationists.

(ii) Who were recruited after following the regular process of recruitment i.e., open advertisement, all India competition which includes written tests and skill tests/computer tests /interview, as the case may be.

13A(1) **Scheme for one time Regularisation of long-term contract employees**: Only those officers/employees appointed on long term contract who fulfill the following terms and conditions shall be considered for regularisation below the post of Manager:-

(a) Should not be more than 55 years of age as on 01.01.2014.

(b) Would be eligible for regularization after completion of five years of continuous service on long term contract basis (including their initial period of deputation, if any)

and this five years of continuous service should either be complete or should be completed on or before 30.06.2015.

(c) This is a one-time scheme and it would lapse once long term contract employees who complete five years of continuous service on or before 30.6.2015 are regularized. Henceforth, there would be recruitment on long term contract basis.

(d) The officer/employee should have been initially appointed in NHAI after following the due process of selection.

(e) The officer/employee shall be considered for regularization only against the sanctioned post(s).

(f) The regularization shall have prospective effect i.e. from the date of the orders of regularization.

(g) The regularization shall be made strictly on the basis of seniority subject to fitness and fulfilment of eligibility conditions prescribed in the Regulations.

(h) The regularization shall be made in compliance of the instructions issued by the Central Government regarding reservation in service for Scheduled Castes,
Scheduled Tribes and Other Backward Classes,

(i) The regularization shall be made on the basis of "Satisfactory work and Conduct Report" from the concerned controlling officer of the officer/employee being considered for regularization.

(j) The officer/employee regularized on the basis of this Regulation shall be liable to be posted anywhere in India and shall be required to furnish an undertaking to this effect before being considered for regularization.

(k) The officer' employee being considered for regularization should be clear from vigilance and disciplinary cases.

(l) The consolidated pay of contractual employees being considered under this Scheme shall be protected.

(m) Suitability of the officer/employee being considered for regularization shall be assessed by a Selection Committee as applicable for the post for which he/she is being considered."

xxx xxx xxx

It is ascertained on behalf of the Opposite Party-NHAI that though such regularization was well within the knowledge of the petitioners the same not having been assailed, it is not open for the petitioners at this stage to claim the regulation which runs contrary to such regulation.

28. Admittedly the petitioners have never challenged the Amended Regulation, 2015 dated 07.01.2015, on the contrary the petitioners consciously subjected themselves to the assessment as prescribed under Regulation 13 A (1) (m) of the NHAI Amendment Regulation, 2015 and accepted consequential regularization.

Having been regularized in terms of the Amendment Regulation, 2015 as rightly pointed out on behalf of the NHAI the petitioners are estopped from challenging the consequential prospective promotion granted to them in terms of Regulation, 2015 when the Regulation, 2015 stipulating the clause of prospective regularization is not under challenge.

29. That apart, it is for the authorities in the matter of regularization to take a decision of their own by formulating a scheme which in the present case the authorities have done so far, the present petitioner is concerned. The present petitioners being the beneficiary of such scheme and could recognise themselves as the regular employee and admittedly as there is no challenge to such decision and scheme of the authorities this court finds no merit with the contention of the petitioner that Learned CAT had not considered the facts as required and relied upon by the petitioners.

30. So far the argument advanced by the petitioners referring to the amendment regulation of 2015 where in the attention of this court was brought to the provision of Rule 13 (A)(1)(b) prescribing that the contractual employees would be eligible for regularization after completion of 5 years of continuous service and this 5 years of contractual service should either be completed or should be completed on or before 30th June 2015.

This court finds the conditions stipulated in the said amended regulation of 2015 is unambiguous with respect to the eligibility for regularization only on completion of five years of continuous service for which the concept of regular service upon regularization in service cannot relate back to the date of initial engagement on contractual basis.

At the cost of brevity, it may be noted here that admittedly, such Regulation though was well within the knowledge of the petitioners since 2015, was never challenged by the petitioners. On the contrary they sought for implementation of the same by seeking consequential regularization at par with the petitioner in OA no.3031/2015 as noted (CAT, Delhi). After completion of process, the petitioners were granted regularization w.e.f.01.06.2018 which was accepted by the petitioners without any demur.

The petitioners, made a representation only on 19.03.2019 for the first time seeking antedating their date of regularization.

Law is no more res integra that a person who had not challenged the basis cannot challenge the consequential order based on such foundation. In the instant case, the basic order is the statutory regulation dated 07/01/2015 and the consequential order is the regularization office order dated 04/06/2018. As noted, the petitioners have not challenged the Regulation 13A(1)(f) in any manner.

It is trite law that once a person has accepted a benefit flowing from an order, he cannot turn around and challenge a part of the same order. In the instant case, the petitioners have accepted the regularisation w.e.f. 01.06.2018 granted to them in the order dated 04/06/2018(Annexure-A/19 of the OA) without any protest the reservation as noted. As such cannot turn around to assail the same.

In absence of any challenge to such provisions of the amendment regulation of 2015 the finding arrived at by the CAT in the impugned judgement cannot be faulted. Further this Court is of the considered view that the notification of regulation

dated 07.01.2015 at Annexure-A/17 of the OA, which is not in dispute in the present case, clearly stipulates that the regularisation order shall be effected from the date of publication. In the absence of any challenge to regulation dated 07.01.2015 at Annexure-A/17 of the OA which stipulates that regularisation order should be effective from the date of publication. The finding arrived by the impugned order cannot be faulted.

31. On a conspectus of the materials on record and after hearing the Counsels for the parties at length, this Court finds that the CAT has delved into all the probable facets which could cover the prayer of the petitioners in the original application. Such issues as framed were answered with sound reasoning taking into account the facts of the case in the light of decisions cited.

32. In view of the aforesaid discussion, the argument made by the learned senior counsel for the petitioners that the impugned order dated 13.05.2020 is perverse and unsubstantiated does not hold any water, hence, rejected.

33. In view of the foregoing paragraphs, this Court does not find any infirmity in the impugned order passed by the learned Tribunal dated 13.05.2020 (Annexure-4 of the writ petition) denying the prayer of the petitioners to antedate their regularization and also not entertaining their prayer to regularize their services on completion of five years of continuous service in NHAI from the date of their respective initial appointment along with all consequential service benefits including promotion to the post of Manager (F&A) at par with seven numbers of employees who were appointed in the year 1999 and got promotion w.e.f. May 2012.

34. The writ petition being devoid of merit stands dismissed. No costs.

Headnotes prepared by : *Result of the case :*
Smt. Madhumita Panda, Law Reporter Writ petition stands dismissed.
(Verified by : Shri Pravakar Ganthia, Editor-in-Chief)

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2024 (III) ILR-CUT-652

NABAKISHORE NAIK
V.
STATE OF ODISHA

(CRLA NO.159 OF 2016)
13 AUGUST 2024

[S.K. SAHOO, J. & C.R. DASH, J.]

Issue for Consideration

Whether the act of the appellant comes within the ambit of Section 302 or 304 of IPC.

Headnotes

(A) CODE OF CRIMINAL PROCEDURE, 1973 – Appeal U/s. 374 of Cr.P.C. filed against the judgement dt. 24.02.2016 passed by the Sessions Judge, Mayurbhanj, Baripada in Sessions Case No. 168 of 2011 – Appellant was found guilty U/s. 302 of IPC and sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs. 10,000/-, in default of payment of fine to suffer further R.I. for a period of six months – Defence took the plea of false implication.

(B) INDIAN EVIDENCE ACT, 1872 – Section 134 – Law is well settled that in the matter of appreciation of evidence of witnesses, it is not the number of witnesses, but the quality of their evidence is important – There is no requirement in the law of evidence that a particular number of witnesses must be examined in order to prove/disprove a fact – The evidence has to be weighed and not counted – The legal system is opposed to the multiplicity or plurality of witnesses – It is thus, the quality and not quantity, which determines the adequacy of evidence, as has been provided under section 134 of the Evidence Act – If the evidence of a solitary witness is cogent, credible and trustworthy, the same can be acted upon. (Para 9)

The act of the appellant comes within the ambit of Section 302 or 304 of IPC.

Held: There is no opinion that the bodily injury caused to the deceased was sufficient in the ordinary course of nature to cause death, we are of the view that the act has been done with the intention of causing such bodily injury as he knew to be likely to cause the death of the deceased which comes under clause second of section 300 of I.P.C. – To decide the question of provocation, an objective test has to be applied as to whether in the opinion of the Court, the provocation would have made a reasonable man lose his self-control, whether he would have retaliated in the same way as the accused in fact did, which requires affirmative answers – Whether the provocation was such as to deprive the accused of his self-control, the condition of the mind of the accused at the time of provocation is required to be taken into consideration – The case would not come with the purview of section 302 of the I.P.C and it would come within the ambit of culpable homicide not amounting to murder and fall within the first part of section 304 of the I.P.C. (Para 11)

(C) ALTERATION OF SENTENCE – The conviction of the appellant is altered from section 302 of IPC to one U/s. 304 Part-I of IPC – Resultantly, the appellant is sentenced to undergo R.I. for ten years.

Citation Reference

Ganesan -Vrs.- State, **2012 SCC OnLine Mad 4502**; Maghar Singh -Vrs. State of Punjab, **A.I.R. 1975 Supreme Court 1320**; State of Orissa -Vrs.- Khagapati Majhi, **1973 Criminal Law Journal 1699**; Jai Prakash -Vrs.- State of Delhi Administration, **(1991) 2 S.C.C. 32**; Chandrika & Anr. -Vrs.- State of Uttar Pradesh, **(1954) 2 Supreme Court Cases 334**; Kra Chan U -Vrs.- King Emperor, **A.I.R. 1923 Rang 247**; Public Prosecutor -Vrs.- Ramaswami Nadar, **A.I.R. 1940 Mad 745 – referred to**.

List of Acts

Indian Evidence Act, 1872, Code of Criminal Procedure, 1973, India Penal Code,1860.

Keywords

False implication, appreciation of evidence, plurality of witnesses, alternation of sentence, number of witness, quality of evidence.

Case Arising From

Judgment and order dated 29.02.2016 by the Court of learned Sessions Judge, Mayurbhanj, Baripada in Sessions Case No.168 of 2011

Appearances of Parties

For Appellant : Mr. Lalitendu Bhuyan
For Respondent : Mr. Arupananda Das, A.G.A.

Judgment/Order

Judgment

BY THE BENCH:

The appellant Nabakishore Naik faced trial in the Court of learned Sessions Judge, Mayurbhanj, Baripada in Sessions Case No.168 of 2011 for commission of offence punishable under section 302 of the Indian Penal Code (hereinafter „I.P.C.") on the accusation that on 27.04.2011 at about 8.00 p.m. at village Halpur, he committed murder of one Kunu Naik (hereinafter „the deceased") by intentionally causing his death.

The learned trial Court vide impugned judgment and order dated 29.02.2016 found the appellant guilty under the offence charged and sentenced him to undergo rigorous imprisonment for life and to pay a fine of Rs.10,000/- (rupees ten thousand), in default of payment of fine, to suffer further R.I. for a period of six months.

Prosecution Case:

2. The prosecution case, as per the first information report (hereinafter 'F.I.R.') (Ext.1) lodged by Biswambar Naik (P.W.1) before P.W.13 Sachidananda Giri, the

A.S.I. of police, Chadheibhol outpost on 27.04.2011, in short, is that in the evening hours on that day at about 8 o‟ clock, while he was engaged in kirtan in the prayer hall of the village, at that point of time, the appellant came there with an amputated hand of someone. Seeing the appellant in such condition, all the persons present there became panic and asked the appellant as to what he had done, to which he replied that since the deceased was quarrelling with him, he had cut his hand and was going to the outpost. He showed them the cut hand with the focus of torch light. Then the informant (P.W.1) along with Harihar Naik (P.W.2) rushed to the house of the deceased and found that the deceased was lying with bleeding injuries. P.W.1 gave some water to the deceased to drink but after some time, he died.

On the basis of such written report presented by P.W.1, P.W.13 made station diary entry no.384 dated 27.04.2011 in the outpost and took up preliminary investigation of the case after sending the written report to the I.I.C., Karanjia police station for registration and accordingly, Karanjia P.S. Case No.72 dated 27.04.2011 was registered under section 302 of the I.P.C. against the appellant. P.W.13 visited the spot and found the deceased lying on the verandah of his house with the left hand cut from the elbow portion. While at spot, a constable from the outpost informed P.W.13 over phone that one person had come to the outpost with a cut hand and Parsuram tangia.

P.W.14 Ramesh Chandra Parida, the Inspector incharge of Karanjia police station after registering the F.I.R. on the basis of written report of P.W.1 sent by P.W.13, took up investigation of the case. He examined the informant (P.W.1), visited the spot on that night and directed the staff to guard the dead body and he also reached at Chadheibhol outpost where he examined the appellant and seized one Parsuram tangia having blood stains on being produced by the appellant as per the seizure list Ext.2. He asked the staff to guard the cut hand of the deceased, which was kept by the appellant at the outpost till the inquest. The wearing apparels of the appellant were seized under seizure list Ext.11. The I.O. (P.W.14) again visited the spot in the early morning at 6.30 a.m. and prepared the spot map vide Ext.12, took the photograph of the dead body of the deceased without cut hand, prepared the inquest report vide Ext.6. Then he held inquest over the cut hand of the deceased at Chadheibhol outpost and prepared the inquest report vide Ext.4. Then he again came to the spot with the cut hand and held inquest over the dead body of the deceased along with the cut hand and prepared the inquest report vide Ext.7. The dead body was sent for post mortem examination. Sample earth and blood stained earth were collected from the spot and the I.O. seized the same as per the seizure list vide Ext.3. The appellant was sent for medical examination to S.D.H., Karanjia and then he was forwarded to Court. The constable produced the blood sample of the appellant taken during the course of his medical examination which was seized as per seizure list Ext.15 and the wearing apparels of the deceased with blood sample were also seized as per seizure list Ext.16. The I.O. received the post mortem examination report and seized the station diary of Chadheibhol outpost as per the seizure list Ext.9. On 23.06.2011, he sent the exhibits to R.F.S.L., Balasore through S.D.J.M., Karanjia for

chemical analysis and received the Chemical Examination Report vide Ext.18. On completion of investigation, he submitted charge sheet on 22.08.2011 under section 302 of the I.P.C. against the appellant.

Framing of Charge:

3. After submission of charge sheet, the case was committed to the Court of Session after complying due formalities. The learned trial Court framed charge against the appellant as aforesaid and since the appellant refuted the charge, pleaded not guilty and claimed to be tried, the sessions trial procedure was resorted to prosecute him and establish his guilt.

Prosecution Witnesses, Exhibits and Material Objects:

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

P.W.1 Biswambar Naik is the informant in this case. He stated that at about 08.30 p.m. on the date of occurrence, the appellant came to „Kirtan Ghara‟ with the amputated hand of the deceased and informed that he was proceeding to the police station. Upon hearing the same, he along with others went to the house of the deceased where they found the deceased lying dead at the entrance of his house with cut injury on his person and one of his hands was amputated.

P.W.2 Harihar Naik stated that upon being called by P.W.1, he went to the house of the deceased where he found the deceased lying dead in front of his house and his left hand was amputated.

P.W.3 Sashikanta Karua was working as the Grama Rakhi under Chadheibhol outpost. He is a witness to the seizure of one blood stained tangia (M.O.I) as per seizure list Ext.2 from the possession of the appellant.

P.W.4 Sushil Chandra Naik stated that at about 07.30 p.m. on the date of occurrence, the appellant came with a cut hand and a torch light to the „kirtan mandap‟. He further stated that the appellant confessed to have killed the deceased and he also informed them that he was proceeding to Chadheibhol outpost with the cut hand of the deceased.

P.W.5 Jharana Naik is the daughter-in-law of the deceased. She stated that she was not present at the spot of occurrence when the incident took place and she came to know that the appellant had killed the deceased. She is a witness to the seizure of blood stained earth and sample earth as per seizure list Ext.3.

P.W.6 Anil Kumar Sethi was working as a constable in the Chadheibhol outpost. He stated that on the date of occurrence, the appellant came to the outpost with cut hand and tangia. He further stated that the appellant confessed to have killed the deceased as he chastised him as “bahurakha, bahuchoda”. He is also a witness to the preparation of the inquest report vide Ext.4.

P.W.7 Dr. Manjurani Singh was working as the Assistant Surgeon at the Sub-Divisional Hospital, Karanjia. On police requisition, she medically examined the appellant and prepared her report vide Ext.5.

P.W.8 Kathia Naik did not support the prosecution case and was declared hostile.

P.W.9 Laxmi Giri is the daughter of the deceased. She stated that upon getting information that the appellant had killed the deceased, she came to the spot of occurrence and saw that the deceased had sustained injury on his hand for which she became senseless. She is also a witness to the preparation of the inquest reports vide Exts.6 and 7 and seizure of sample earth and blood stained earth as per seizure list Ext.3.

P.W.10 Sapana Naik is the daughter of the deceased. She stated that the appellant was having relationship with P.W.5 and as the deceased protested to the same, the appellant committed murder of the deceased.

P.W.11 Dr. Manas Ranjan Dandapat was working as the Gynecology Specialist at Sub-Divisional Hospital, Karanjia. On police requisition, he conducted post mortem examination over the dead body of the deceased and proved his report vide Ext.8.

P.W.12 Arun Kumar Parida was working as a constable at Chadheibhol outpost. He is a witness to the seizure of one station diary entry of the outpost as per seizure list Ext.9.

P.W.13 Sachidananda Giri was working as the Assistant Sub-Inspector of police at Chadheibhol outpost and he was the preliminary investigating officer of the case.

P.W.14 Ramesh Chandra Parida is the Inspector-inCharge of Karanjia police station and he is the investigating officer of this case who upon completion of investigation, submitted charge sheet against the appellant.

The prosecution exhibited eighteen documents. Ext.1 is the F.I.R., Exts.2, 3, 9, 11, 15 and 16 are the seizure lists, Exts.4, 6 and 7 are the inquest reports, Ext.5 is the injury report of the appellant, Ext.8 is the post mortem report, Ext.10 is the zimanama, Ext.12 is the spot map, Ext.13 is photograph of the deceased, Ext.14 is the dead body challan, Ext.17 is office copy of the forwarding report of exhibits and Ext.18 is the chemical examination report.

The prosecution also produced one Parsuram tangia as M.O.I.

Defence Plea:

5. The defence plea of the appellant was one of denial and it was further pleaded that on account of conspiracy, he has been falsely implicated in the case. He was the ward member of the village and whatever works he received for execution, he was asked to handover those works to others but since he did not hand over, out of anger and animosity, he has been falsely implicated the case.

Findings of the Trial Court:

6. The learned trial Court after assessing the oral as well as documentary evidence on record came to hold that there is no dispute regarding the cause of death of the deceased, i.e. due to haemorrhage and shock due to bleeding, which is homicidal. The learned trial Court assessed the extra judicial confession of the appellant before P.W.4 and constable of Chadheibhol police outpost (P.W.6) and though it did not accept the confession made before the police constable (P.W.6) on the ground that it is not admissible in view of the bar under section 25 of the Evidence Act, the confession made before P.W.4, who is an independent witness was accepted and the appellant was found guilty under section 302 of the I.P.C.

Contentions of the Parties:

7. Mr. Lalitendu Bhuyan, learned counsel appearing for the appellant argued that there are no eye witnesses to the occurrence and the case is based on circumstantial evidence. The main circumstance against the appellant is the extra judicial confession stated to have been made before P.W.4, which is a very weak piece of evidence and when there is no corroboration to the same even though it was made to P.W.4 in presence of others, therefore, the learned trial Court should not have placed reliance on such evidence. The learned counsel further argued that the hand of the deceased is stated to have been amputated due to the assault by the tangia (M.O.I) but since the doctor (P.W.11) has not opined that the injury was sufficient in ordinary course of nature to cause death, hence the ingredients of the offence under section 302 of the I.P.C. would not be attracted. To substantiate his arguments, he placed reliance on the Division Bench decision of Madras High Court in the case of **Ganesan -Vrs.- State reported in 2012 SCC OnLine Mad 4502**.

Mr. Arupananda Das, learned Additional Government Advocate, on the other hand, supported the impugned judgment and submitted that the evidence of P.W.4 is very clear and he has stated the manner in which the appellant came with a cut hand and confessed before him to have killed the deceased and he also stated about the appellant going to Chadheibhol outpost with the cut hand of the deceased. It is argued that the appellant produced the cut hand with the Parsuram tangia before P.W.6, the constable at the outpost and even though the learned trial Court has not placed reliance on the extra-judicial confession made before P.W.6 but the evidence of P.W.4 coupled with the evidence of the doctor (P.W.11) would indicate that the cut hand was that of the deceased and the doctor has specifically stated that the cause of death was due to haemorrhage and shock and the weapon of offence which was seized from the possession of the appellant was produced before the doctor (P.W.11), who on examining the same opined that the injury found on the body of the deceased could have been caused by such weapon and therefore, the learned trial Court is quite justified in holding the appellant guilty under section 302 of the I.P.C. He further argued that P.W.10 Sapana Naik, who is the daughter of the deceased, has stated that the appellant was having illicit relationship with her sister-in-law and it was protested by the deceased and thus being enraged by such opposition, he

committed murder of the deceased. According to the learned counsel for the State, the motive behind the commission of the crime is apparent.

Whether the deceased met with a homicidal death?:

8. Adverting to the contentions raised by the learned counsel for the respective parties, let us first examine as to whether the prosecution has successfully established the case to be homicidal death or not.

P.W.11 conducted the post mortem examination over the dead body of the deceased on 28.04.2011 and noticed the following injuries:

> *(i) Rigor mortis was present. Left hand was cut 1" below the elbow. In the cut area, the humerus bone was exposed both epicondyle and avulsion upper end of radius and ulna and muscle of upper limb.*
>
> *(ii) Upper circumference of left upper limb 10 inch length 14 inch, the age of injury was within 24 hours from the time of his examination i.e. 1.00 p.m. on 28.04.2011. The injury was ante mortem in nature.*

P.W.11 has opined the cause of death of the deceased to be haemorrhage and shock due to bleeding.

In the cross-examination, the learned defence counsel has brought that the circumference of the cut hand was same as the circumference of the cut end of the hand attached to the dead body and the weapon of offence was not sealed when it was produced for his examination. Thus, nothing has been brought out in the cross-examination to demolish the evidence of the doctor and we are of the view that the learned trial Court has rightly placed reliance on the evidence of the doctor.

Considering the three inquest reports under Exts.4, Ext.6 and Ext.7 so also the post mortem report (Ext.8) findings and the evidence of the doctor, we are of the view that the learned trial Court has rightly held that the deceased met with a homicidal death. The learned counsel for the appellant has also not challenged the finding of the learned trial Court in that respect.

Whether the extra judicial confession by the appellant before P.W.4 can be acted upon?:

9. P.W.4 has stated that on the date of occurrence at about 7.30 p.m., the appellant came with a cut hand near the 'kirtan mandap' and told them that he had killed the deceased and was going with the cut hand of the deceased to Chadheibhol outpost. In the cross-examination, it is stated that twenty persons were present in the kirtan mandap at that point of time. He has specifically stated that no other person was with the appellant when he confessed regarding killing of the deceased and that he was going to Chadheibhol outpost. It is further brought that they saw the appellant through electric light though it was a dark night. He has further stated that the appellant was his nephew by village courtesy. Nothing has been brought out in the cross-examination to disbelieve the evidence relating to the extra judicial confession made by the appellant before P.W.4.

P.W.1, the informant has stated that the appellant arrived there with a cut hand of the deceased and told them that he was going to the police station and thereafter, they went to the house of the deceased and saw the deceased was lying on the entrance of the house with cut injury on his person i.e. one of his hands was cut and removed and he was dead. The extra judicial confession part is also mentioned in the F.I.R.

P.W.2 has stated that seeing the cut hand of the deceased, P.W.1 called him for which he along with P.W.1 went to the house of the deceased and saw that the dead body of the deceased was lying in front of the house and the left hand was missing from the body. Nothing has been brought out in the cross-examination of P.W.2 which could potentially harm the prosecution case.

It is of course true that others present in the kirtan mandap were not examined, but law is well settled that in the matter of appreciation of evidence of witnesses, it is not the number of witnesses, but the quality of their evidence which is important. There is no requirement in the law of evidence that a particular number of witnesses must be examined in order to prove/disprove a fact. The evidence has to be weighed and not counted. The legal system is opposed to the multiplicity or plurality of witnesses. It is thus, the quality and not quantity, which determines the adequacy of evidence, as has been provided by section 134 of the Evidence Act. If the evidence of a solitary witness is cogent, credible and trustworthy, the same can be acted upon.

The Court should not start with the presumption that extra judicial confession is a weak piece of evidence. It would depend on the nature of the circumstances, time when the confession was made and credibility of the witness who speaks about such confession. In the case of ***Maghar Singh -Vrs.State of Punjab reported in A.I.R. 1975 Supreme Court 1320***, it has been held that an extra judicial confession, if satisfactorily proved to have been voluntarily made, may form the basis of conviction even in the absence of corroboration. In the case of ***State of Orissa -Vrs.- Khagapati Majhi reported in 1973 Criminal Law Journal 1699***, a Division Bench of this Court held that voluntarily extra judicial confession can be acted upon even though the accused resiles there from during the trial.

Nothing has been brought on record as to why P.W.4 would depose falsehood against the appellant to have made extra judicial confession before him. Therefore, we find that the evidence of P.W.4 is believable and the learned trial Court has rightly placed reliance on the evidence of P.W.4. The evidence of P.W.6, so far as the confessional part of the appellant is concerned, has rightly not been believed by the learned trial Court in view of the bar under section 25 of the Evidence Act, however the conduct of the appellant in producing the cut hand with a blood stained tangia before P.W.6 is a fact which corroborates the evidence of P.W.1 and P.W.4, who had seen the appellant going with a cut hand to the outpost. Section 8 of the Evidence Act makes the conduct of an accused relevant, if such conduct influences or is influenced by any fact in issue or relevant fact. It could be either

previous or subsequent conduct. The conduct, in order to be admissible, must be such that it has close nexus with a fact in issue or relevant fact. The conduct of the appellant in producing the amputated hand of the deceased along with Parsuram tangia in Chadheibhol outpost before P.W.6 is not only relevant under section 8 of the Evidence Act but is also one of the major circumstances to arrive at a conclusion about his guilt. The appellant has not given any explanation on this aspect in the accused statement.

Moreover, the evidence of the doctor (P.W.11) also corroborates the evidence relating to the extra judicial confession and it has also been proved through the evidence of the doctor that the cut hand which the appellant was holding when he was seen by P.W.1 and P.W.4 and also produced before the constable (P.W.6) was that of the deceased. The weapon which was produced before the doctor after its seizure by the I.O. from the appellant was also examined and the doctor has specifically stated that the injury found on the body of the deceased could be caused by the weapon (M.O.I) which also corroborates the extra judicial confession made by the appellant before P.W.4 that he had killed the deceased. Therefore, the learned trial Court has rightly placed reliance on the extra judicial confession evidence.

Motive:

10. The evidence of P.W.10, who is the daughter of the deceased indicates the motive behind the commission of crime inasmuch as P.W.10 has stated that the appellant was having illicit relationship with the wife of his (P.W.10‟s) brother who was dead and when her father (the deceased) protested, the appellant killed the deceased. Learned counsel for the appellant drew our attention to the contradiction, which has been proved through the I.O. (P.W.14) by confronting the previous statement that P.W.10 has not stated before him that her sister-in-law was having illicit relationship with the appellant. P.W.5 is the sisterin-law of P.W.10 and she has stated that after death of her husband, she was staying in her parental home and she used to visit the house of the appellant when she was coming to Chitraposi Panchayat Office. The deceased perhaps was suspecting the illicit relationship between the appellant and P.W.5, her deceased son‟s wife and according to the prosecution case, when he protested, the occurrence in question took place. Thus, motive behind the commission of crime has been established.

On the basis of extra judicial confession, the conduct of the appellant in producing the cut hand with the tangia (M.O.I) in the outpost, which is relevant under section 8 of the Evidence Act and the findings arrived by P.W.11 in the post mortem report (Ext.8), we are of the humble view that the appellant is the author of the crime and he has caused the injury to the hand of the deceased which ultimately resulted in the death of the deceased.

Whether the appellant is guilty for commission of murder or culpable homicide not amounting to murder?:

11. Now the question crops up for consideration as to whether the act of the appellant would come within the ambit of section 302 or 304 of the I.P.C.

In this connection, the decision cited by the learned counsel for the appellant in the case of **Ganesan** (supra) is relevant. In the said case, the first accused cut the right hand of the deceased with aruval and that right hand was severed at the level of lower 1/3rd and then the first accused cut the deceased with aruval on his left hand. The second accused thereafter assaulted the deceased with an iron pipe which resulted in fracture injury on the left thigh. The doctor, who conducted post mortem examination, noticed that the right upper limb was amputated at the level of lower 1/3rd of arm and amputated upper limb was seen separately with cut injury and the doctor opined that the death was due to shock on account of blood loss due to injury on the right upper limb. After considering the ratio laid down by the Hon"ble Supreme Court in the case of **Jai Prakash -Vrs.- State of Delhi Administration reported in (1991) 2 Supreme Court Cases 32**, the Division Bench of the Madras High Court, while holding the appellant to be guilty under section 304 part-II of the I.P.C., observed as follows:

> *"37. The learned Additional Public Prosecutor would, however, contend that the injury to the right hand, severing the forearm, is sufficient, in the ordinary course of nature, to cause the death. We are unable to agree with the said argument advanced by the learned Additional Public Prosecutor. In our considered view, the said injuries on the deceased were neither sufficient to cause death in terms of the third limb of section 300 I.P.C. nor was it likely to cause death in terms of the second limb of section 299 I.P.C. Our reasons are as follows: here, "sufficient to cause death" means more than a mere likelihood of the death being caused. In other words, it is almost a certainty. Likely to cause the death means, not a mere possibility. The word, „likely" conveys the sense of „probability". Probable means, something more than mere possibility. When chances of death are more than that of survival, one may say that the death is a probability. Where chances of death and survival are equally possible, one may say that the death is a possibility, but not a probability. In this regard, we may say that it is possible that the death may result when the forearm is amputated. But, chances for survival are more than the chance for death. Thus, the death is neither certain, nor probable, but only possible. In the instant case, P.W.5, the Doctor Ayyanar, who conducted autopsy on the body of the deceased, has not opined that the injuries found on the deceased were either sufficient to cause the death or likely to cause death of the deceased. Therefore, we are forced to hold that the injuries found on the deceased are neither sufficient to cause the death in the ordinary course of nature nor likely to cause death.*
>
> *xxx xxx xxx*
>
> *42. A close reading of these two provisions would make it manifestly clear that -*
>
> *(i) if the act of the accused is a culpable homicide, not amounting to murder, falling within the first or second limb of section 299 of the Code, then, the offender is punishable under section 304 (I) of the Code.*
>
> *(ii) If the act of the accused is culpable homicide, not amounting to murder, falling within the third limb of section 299 of the Code, then, the offender is punishable under section 304 (II) of the Code.*

(iii) Similarly, if the act of the accused falls within the ambit of first, second or third limb of section 300 of the Code, and if the same falls under any one of the special Exceptions to section 300 of the Code, the act of the accused is only a culpable homicide not amounting to murder punishable under section 304 (I) of the Code.

(iv) If the act of the accused falls within the fourth limb of section 300 of the Code and if any one of the special Exceptions to section 300 of the Code is attracted, the said act is only a culpable homicide, not amounting to murder, which is punishable under section 304 (II) of the Code.

43. In the instant case, we have already concluded that the act of the accused falls within the ambit of third limb of section 299 of the Code, and therefore, he is liable to be punished under section 304 (II) of the Code."

In the case of **Chandrika and another -Vrs.- State of Uttar Pradesh reported in (1954) 2 Supreme Court Cases 334**, the assailant chopped off the left forearm and not the main upper arm of the deceased and the question came up for consideration as to whether it would attract the ingredients of the offence under section 302 of the I.P.C. or any other offence. The Hon"ble Supreme Court placed reliance in the case of **Kra Chan U -Vrs.- King Emperor reported in A.I.R. 1923 Rang 247** and **Public Prosecutor -Vrs.- Ramaswami Nadar reported in A.I.R. 1940 Mad 745** and came to hold as follows:

"10. Relying upon these cases, it was urged before us that in the present case also Chandrika when he chopped off the left forearm of the deceased must have known that he would be causing arterial bleeding and the injury which he was inflicting was an injury which in the ordinary course of nature was sufficient to cause death thus bringing the offence committed by him within Section 302 of the Penal Code. In order to bring the offence committed by the appellants within Section 302 of the Penal Code, it is necessary to establish that the injury was inflicted with the intention of causing bodily injury sufficient in the ordinary course of nature to cause death and unless and until that intention is brought home to the accused, the case would not fall under Section 300 (thirdly) of the Penal Code. The requisite knowledge also would be essential in order to arrive at the conclusion in regard to the intention of the person inflicting the injury. Every chopping off of a limb would not necessarily result in arterial bleeding and the ultimate death of the deceased. It all depends on the circumstances of each case and no general proposition can be enunciated that every chopping off of a limb even though it may not be a vital part of the body would necessarily result in death or would be sufficient in the ordinary course of nature to cause death. The doctor who performed the post-mortem examination of the dead body was examined and no question was put to him as to whether the injury inflicted by the appellants on the deceased by chopping off of his left forearm in the manner in which it was done was sufficient in the ordinary course of nature to cause death. The only relevant answer in this connection which is to be found in the evidence of the doctor was that two medium sized arteries of the forearm were cut and it was a case of arterial bleeding which is a dangerous bleeding. It is difficult from this evidence to come to the conclusion that the injury inflicted by reason of the amputation of the left forearm of the deceased was an injury sufficient in the ordinary course of nature to cause death. It might as well have been an injury which was likely to cause the death of the deceased thus bringing the offence committed by the appellants within Section 304 (I) of the Penal Code.

11.We are therefore of the opinion that under the circumstances of this case, the conviction of the appellants under Section 302 read with Section 34 of the Penal Code

> cannot be sustained. The appellants were guilty of the offence under Section 304 Part I read with Section 34 of the Penal Code and they should have been convicted of that offence." **(Emphasis supplied)**

In the case in hand, though on the basis of available materials on record, we have already held that the appellant caused the injury to the hand of the deceased as a result of which the hand was amputated and the doctor (P.W.11) has also opined that the cause of death of the deceased was due to haemorrhage and shock due to bleeding, but since there is no opinion that the bodily injury caused to the deceased was sufficient in the ordinary course of nature to cause death, we are of the view that the act has been done with the intention of causing such bodily injury as he knew to be likely to cause the death of the deceased which comes under clause secondly of section 300 of I.P.C., however it appears that the deceased caused provocation to the appellant in suspecting the illicit relationship between his daughter-in-law (P.W.5) with the appellant since she was staying in the house of the appellant whenever she was coming to Chitraposi Panchayat and the deceased protested to the appellant, which might have been the reason on the part of the appellant to have been deprived of the power of self-control by such provocation, cutting the hand of the deceased which ultimately resulted in his death, therefore, it would attract Exception I to section 300 of I.P.C. To decide the question of provocation, an objective test has to be applied as to whether in the opinion of the Court, the provocation would have made a reasonable man lose his self-control, whether he would have retaliated in the same way as the accused in fact did, which requires affirmative answers. Whether the provocation was such as to deprive the accused of his self-control, the condition of the mind of the accused at the time of provocation is required to be taken into consideration. A reasonable man is likely to lose his self-control when he is suspected of having illicit relationship with a lady and aspersions are casted on him. It is said, "weak people revenge. Strong people forgive. Intelligent people ignore." Keeping in view the background of the case, the apparent reason for which the occurrence seems to have taken place, the weapon used by the appellant and the part of the body on which the assault was made and further taking into account the opinion given by the doctor (P.W.11), we are of the view that the case would not come with the purview of section 302 of the I.P.C. and it would come within the ambit of culpable homicide not amounting to murder and fall within the first part of section 304 of the I.P.C.

Conclusion:

12. In view of the foregoing discussions, the conviction of the appellant under section 302 of the Indian Penal Code cannot be sustained. The conviction of the appellant is altered from section 302 of the I.P.C. to one under section 304 Part-I of the I.P.C. and the appellant is sentenced to undergo R.I. for ten years for such offence.

It appears from the record that the appellant was taken into judicial custody in connection with this case on 28.04.2011. He was neither released on bail in the trial Court nor he was granted bail by this Court during pendency of the Criminal

Appeal and thus, he has already undergone the substantive sentence which has been imposed by us. Therefore, the appellant be set at liberty forthwith, if his detention is not required in any other case.

In the result, the CRLA is allowed in part. The trial Court records with a copy of this judgment be communicated to the concerned Court forthwith for information and necessary action.

Headnotes prepared by : *Result of the case :*
Shri Pravakar Ganthia, Editor-in-Chief CRLA is allowed in part

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2024 (III) ILR-CUT-665

RAIKISHORE JENA
V.
STATE OF ODISHA

(JCRLA NO.74 OF 2010)

28 OCTOBER 2024

[S.K. SAHOO, J. & C.R. DASH, J.]

Issue for Consideration

Can the testimony of a child witness be accepted?

Headnotes

(A) INDIAN EVIDENCE ACT, 1872 ─ Section 118 ─ The appellant was convicted under Section 302 of the Indian Penal Code, 1860 on 27.11.2009 and sentenced to undergo imprisonment for life (L.I.) and to pay a fine of Rs. 5000/-(Rupees five thousand), in default, to undergo R.I. for six months more ─ Defence raised a contention about the acceptance of solitary evidence of the child witness (P.W.12) ─ Whether the testimony of the child witness be accepted.

Held: Yes – When a child witness is capable enough to give rational answers to the questions put to him/her after understanding the same, his/her evidence is admissible. (Para 9)

(B) DUTY OF THE TRIAL COURT WHILE RECORDING TESTIMONY OF A CHILD WITNESS – The preliminary examination of a child witness is nothing but a rule of caution – The trial Court is required to record its query to a child witness in the form of questions and answers so that the Appellate Court will be in a position to see whether child witness understands the duty of speaking truth – Even though it is desirable to make such preliminary examination but it is not always imperative – There is no rule that in case of every child witness, the trial Court

should conduct a preliminary examination. It is only a rule of prudence and not a legal obligation. When questions are raised regarding the intellectual capacity of the child witness, the Court can peruse the evidence of the victim in its entirety to find out as to whether he/she was capable enough to give rational answers to the questions put to him/her after understanding the same. Absence of preliminary examination of the child witness would not render his/her evidence inadmissible. (Para 9)

(C) CRIMINAL TRIAL – Offence charged U/s. 302 of Indian Penal Code – The appellant on return home from the field asked his wife to give him food and the deceased asked him to wait for some time as the preparation of food is under process – In such a state the appellant became furious and assaulted the deceased by means of a "katuri" – Whether the case of the appellant would come under culpable homicide not amount to murder.

Held: No – It is clear that on the day of the incident nothing had happened to cause sudden provocation which was grave enough to make the appellant lose his balance of mind and assault mercilessly to his helpless wife in front of his minor daughter. (Para 10)

Citation Reference

Shyamlal Kissan -Vrs.- State of Odisha **2019 Criminal Law Journal 2780**; Balaji -Vrs.- State **(2010) 12 Supreme Court Cases 545**; Panchhi and others -Vrs.- State of U.P. **A.I.R. 1998 S.C. 2726**; Ratansinh Dalsukhbhai Nayak -Vrs.- State of Gujarat **(2004) 1 S.C.C. 64**; State of U.P. -Vrs.- Krishna Master & Ors. **(2010) 12 Supreme Court Cases 324 – referred to**.

List of Acts

Indian Evidence Act, 1872; Indian Penal Code, 1860.

Keywords

Testimony of child witness; Grave and sudden provocation; Solitary evidence; Katuri; Culpable homicide; Murder.

Case Arising From

An appeal from the judgment and order dated 27.11.2009 passed by the Adhoc Addl. Sessions Judge (Fast Track Court), Jajpur in C.T.Case No. 27 of 2009/11 of 2009.

Appearances of Parties

For Appellant : Smt. Mina Kumari Das
For Respondent : Mr. Rajesh Tripathy

Judgment/Order

Judgment

BY THE BENCH:

The appellant Raikishore Jena faced trial in the Court of learned Adhoc Addl. Sessions Judge (F.T.C.), Jajpur in C.T. Case No.27 of 2009/11 of 2009 for the offence punishable under section 302 of the Indian Penal Code (in short 'I.P.C.') on the accusation that on 25th September 2008 at about 1.30 p.m. in village Kuansha under Mangalpur police station in the district of Jajpur, he committed murder of his wife Benga @ Sinia Jena (hereafter 'the deceased').

The learned trial Court, vide judgment and order dated 27.11.2009, found the appellant guilty of the offence charged and sentenced him to undergo imprisonment for life and to pay a fine of Rs.5000/- (Rupees five thousand), in default, to undergo R.I. for six months more.

Prosecution Case:

2. The prosecution case, in short, is that on 25.09.2008 at about noon, the appellant Raikishore Jena returned home from his cultivable land and asked the deceased to serve him food. The deceased told him to wait for some time, as the cooking was in process. Hearing this, the appellant became furious and entered inside the house and brought out a 'Katuri' and assaulted the deceased by dealing successive blows on her neck, face, head, ear, etc., as a result the deceased died at the spot. The Ward Member of mouza Kuansha namely Seshadev Jena (P.W.10) lodged F.I.R. before the Officer-in-charge, Mangalpur police station at the spot which was scribed by the Sarpanch, on the basis of which Mangalpur P.S. Case No.91 dated 25.09.2008 was registered under section 302 of I.P.C. against the appellant.

Prasant Kumar Majhi (P.W.13), the Officer-in-Charge of Mangalpur P.S., after registering the case, took up the investigation. He visited the spot where he noticed the dead body of the deceased, held inquest over the dead body, prepared the inquest report vide Ext.2 and then the dead body was sent to the District Headquarters Hospital, Jajpur for post-mortem examination. P.W.13 seized the blood-stained 'Katuri' (M.O.I), which was used as the weapon of offence so also the bloodstained earth and the blood-stained saree of the deceased in presence of the witnesses from the spot as per the seizure list Ext.1/2. The appellant was arrested on 25.09.2008 and forwarded to Court on the next day. The I.O. made a query to the doctor (P.W.9), who conducted post-mortem examination, by sending the weapon of offence (M.O.I) regarding possibility of the injuries sustained by the deceased by such weapon and the opinion was given in affirmative. The exhibits were sent to the State Forensic Science Laboratory, Rasulgarh, Bhubaneswar through Court for expert opinion and on completion of the investigation, charge sheet was submitted against the appellant under section 302 of the I.P.C.

Framing of Charge:

3. After submission of charge sheet, the case was committed to the Court of Session where the learned trial Court framed charge against the appellant as aforesaid and since he refuted the charges, pleaded not guilty and claimed to be tried, the sessions trial procedure was resorted to prosecute him and establish his guilt.

Prosecution Witnesses, Exhibits & Material Objects:

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

P.W.1 Bhaskar Jena is a co-villager of both the appellant and he stated that after the occurrence, the police had taken his signature on a blank paper and he denied of having any knowledge about the incident.

P.W.2 Basudev Jena is a co-villager of the appellant and he stated that after the occurrence, the police had been to the village where it conducted inquest over the dead body of the deceased and in his presence, prepared the inquest report at the spot vide Ext.2.

P.W.3 Manoj Jena is the younger brother of the appellant and brother-in-law of the deceased. He stated that on the date of occurrence, he was absent from his house and upon his return from the field, the police detained him on the way and took his signature on a paper. However, he denied of having any further knowledge about the case for which he was declared hostile and was allowed to be cross-examined by the prosecution.

P.W.4 Ranjulata Jena is the sister-in-law of the appellant. She stated that the unfortunate incident took place in her house when she had been to outside to tend her cattle. After returning to the home, she heard about the murder of the deceased. However, she pleaded ignorance as to who committed the said murder and also denied of having any further knowledge about the incident for which she was declared hostile by the prosecution.

P.W.5 Urmila Jena is the niece of the appellant. She stated that she was not present at the spot of occurrence at the relevant time and upon returning to the house, she learned about the death of the deceased, but she pleaded ignorance about the cause of death of the deceased.

P.W.6 Tilottama Jena is the mother of the appellant and mother-in-law of the deceased. She stated to have been absent from the spot of occurrence at the relevant time. She further stated that upon her return to the house, she came to know about the death of the deceased, but she pleaded ignorance about the cause thereof.

P.W.7 Babaji Jena is the brother of the appellant. He stated that the occurrence took place at about 02.30 p.m. near the house of the appellant. He further stated that at the time of occurrence, he had been to Mangalpur and upon returning to the house, he saw the deceased was lying dead. He pleaded ignorance as to any further details of the case for which he was declared hostile and was allowed to be cross-examined by the prosecution.

P.W.8 Prakash Mohanty is a co-villager of the appellant. He stated that while he was returning from Mangala temple of his village, the police detained him and took his signature on a paper.

P.W.9 Dr. Sudhiranjan Nayak was working as the Medical Officer in the District Headquarters Hospital, Jajpur. He, on police requisition, conducted post mortem examination over the dead body of the deceased and proved his report vide Ext.3. Further, on query made by the I.O., he examined the katuri (M.O.I) and opined that the injuries found on the body of the deceased could be caused by using such weapon.

P.W.10 Seshadev Jena was the ward member of the village and he is the informant of this case. He stated that on the date of occurrence at about 01.30 p.m., while he was at his agricultural field, he received information from some children that the appellant had killed the deceased. He proceeded to the house of the appellant and found the deceased was lying dead with bleeding injury on her head.

P.W.11 Rajani Jena @ Gandhi is the younger sister of the deceased and she stated that the deceased was staying with the appellant at the time of occurrence.

P.W.12 Dipika Jena is the minor daughter of both the appellant as well as the deceased. She is an eye witness to the occurrence. She stated that as to how the appellant dealt repeated blows to the deceased by dragging her with a katuri. She further elaborated that the appellant dealt fatal blows to the face, neck, head and ear of the deceased, for which she raised hullah as a result of which some persons came to the spot. The deceased succumbed to the injuries on the spot and the appellant was standing nearby. She further stated that prior to the incident, the appellant had assaulted the deceased on certain occasions.

P.W.13 Prasanta Kumar Majhi was working as the Officer-in-Charge of Mangalpur police station. He is the Investigating Officer of this case, who upon completion of investigation, submitted charge sheet against the appellant under the aforesaid charge.

The prosecution proved eight numbers of documents. Ext.1/2 is the seizure list, Ext.2 is the inquest report, Ext.3 is the post mortem report, Ext.4 is the query report, Ext.5 is the F.I.R., Ext.6 is the dead body challan, Ext.7 is the forwarding letter and Ext.8 is the chemical examination report.

The prosecution also produced four numbers of material objects to fortify its case. M.O.I is the katuri, M.O.II is the saree, M.O.III is the blood stained earth and M.O.IV is the sample earth.

Defence Plea:

5. The defence plea of the appellant is one of denial.

Findings of the Trial Court:

6. The learned trial Court after assessing the oral as well as documentary evidence on record, came to hold that the prosecution has established the case

beyond all reasonable doubt that the death of the deceased Benga @ Sinia Jena was homicidal in nature and it was caused by a heavy sharp cutting object. Learned trial Court considered the evidence of the minor daughter of the deceased and the appellant, who was examined as P.W.12 and found her evidence to be cogent, reliable and trustworthy and thoroughly corroborated by the medical evidence adduced by the Medical Officer (P.W.9). Though three witnesses, i.e. P.W.3, P.W.4 & P.W.7 did not support the prosecution case, but basing on the solitary evidence of P.W.12, the learned trial Court came to the conclusion that the prosecution has successfully established that the appellant caused the death of the deceased and found him guilty under section 302 of I.P.C. The learned trial Court discarded the submission of the defence counsel to the effect that the conviction should be under section 304 of I.P.C. instead of section 302 of I.P.C. by holding that it cannot be said that the deceased gave sudden provocation to the appellant and thereby the case of the appellant would come under culpable homicide not amounting to murder.

Contentions of the Parties:

7. Smt. Mina Kumari Das, learned counsel for the appellant argued that since three witnesses, i.e. P.W.3, P.W.4 & P.W.7 have not supported the prosecution case, the learned trial Court should not have acted on the solitary evidence of the child witness (P.W.12) to convict the appellant, in as much as the said witness was staying in the house of her maternal uncle after the occurrence and therefore, the chance of tutoring her to depose against her father (the appellant) cannot be ruled out. It is further argued that even if the evidence of P.W.12 is accepted, it appears that when the appellant returned home from the field, he was very hungry for which he asked the deceased to give him food (meal) and since the deceased did not provide him meal rather asked him to wait for some time, in such a state the appellant became furious and on grave and sudden provocation, he dealt number of blows to the deceased by means of a 'katuri' and therefore, the case would fall within the ambit of section 304 Part-I of I.P.C. and not under section 302 of I.P.C. She further argued that since the appellant is in judicial custody for more than sixteen years, his case may be considered sympathetically. Learned counsel for the appellant placed reliance on the decision of this Court in the case of **Shyamlal Kissan -Vrs.- State of Odisha reported in 2019 Criminal Law Journal 2780.**

Mr. Rajesh Tripathy, learned Addl. Standing Counsel for the State, on the other hand, supported the impugned judgment and argued that it is not the quantity but the quality of evidence that matters. Learned trial Court, before recording the evidence of the child witness (P.W.12), examined her competence by putting some general questions about her education, family members, relations, locality etc. and on being satisfied that the witness was intelligent enough to understand the questions and give rational answers and also understands the duty of speaking the truth, recorded the evidence. He further argued that P.W.12 had no axe to grind against the appellant who is none else than her father and she narrated how the appellant dealt katuri blows on the neck, face, head, ear etc. of the deceased. Though she was

subjected to lengthy crossexamination, even suggestion was given to her that she had been tutored while she was staying in her maternal uncle's house in order to depose against the appellant, but she answered it in the negative and her evidence in chief examination has not been shaken at all in the cross-examination. Learned counsel for the State further submitted that this is not a case where it can be said that the crime was committed under grave and sudden provocation as when the appellant asked the deceased to serve meal after returning from the field, the deceased asked him to wait for some time and it cannot be said that the conduct of the deceased was such that it caused grave and sudden provocation to the appellant which triggered him to bring a 'katari' and deal successive blows on the vital parts of the body of the deceased like her face, head, neck, ear etc. It is further argued that the doctor (P.W.9), who conducted postmortem examination, has noticed as many as nine external injuries and opined that the injuries were sufficient in ordinary course of nature to cause death. The doctor also examined the weapon of offence ('katuri'), which was seized from the spot and he opined that the injuries sustained by the deceased were possible by such weapon. Therefore, the learned Court is quite justified in arriving at the conclusion that it was not a case of grave and sudden provocation which led the appellant to commit the heinous murder of the deceased. Learned counsel further submitted that the testimony of P.W.12 is getting corroboration from the medical evidence which buttresses the case of the prosecution and therefore, the appellant has been rightly found guilty under section 302 of I.P.C.

Whether the deceased met with a homicidal death?:

8. Adverting to the contentions raised by learned counsel for the respective parties, let us first examine whether the prosecution has successfully established that it is a case of homicidal death.

P.W.9, the Medical Officer of District Headquarters Hospital, Jajpur, conducted post-mortem examination over the dead body of the deceased on 25.09.2008 and he noticed the following injuries –

> "(i) One cut injury situated on left side forehead 2" above of upper eyebrow of size 3" x ¼" x bone deep up to membrane. Margin everted clean cut edge;
>
> (ii) Cut injury over left eye brow of size 2.5" x ¼" into depth of fracture up to bone;
>
> (iii) Cut injury over the left side nose fracture in nasal bone of size 1.5" x ¼" x bone deep;
>
> (iv) Cut injury over left maxillary fracture in the maxillary bone with loss of left upper teeth of size 4.5" x ¼" x bone deep;
>
> (v) Cut injury over left upper lip of size 3" x ¼" x bone deep;
>
> (vi) Cut injury over left mandible extending from the left lobe of ear to the chin of size 7" x ¼" x bone deep;
>
> (vii) Cut injury of the left side of the neck of size 3" x ¼" x muscle depth and injured the carotid vessels;
>
> (viii) Cut injury of size 3" x ¼" x muscle depth situated over left ear;

(ix) Cut injury situated over upper lateral aspect of the left shoulder joint of size 3" x ¼" bone deep cutting the head of humours with dislocations."

He opined that the cause of death was due to hypovolemic shock caused by extensive cut injuries to the head, face and neck by heavy sharp cutting weapon. The time since death was within 24 hours at the time of the post mortem examination. He also opined that the above injuries were sufficient in ordinary course of nature to cause death.

In view of the available materials on record, particularly the evidence of P.W.12, the inquest report (Ext.2), post-mortem report (Ext.3) and the evidence of the doctor (P.W.9), which has not been shaken at all, we are of the humble view that the learned trial Court is quite justified in holding that the deceased died a homicidal death.

Whether testimony of the child witness (P.W.12) can be accepted?:

9. The learned trial Court, before recording the evidence of the child witness (P.W.12), conducted preliminary examination and put some questions on her education, family members, relations, locality etc. and the Court being satisfied with the answers given to such questions, recorded his findings that the witness was intelligent enough to comprehend and understand the questions and to give rational answers and the Court was also satisfied that the witness understood the duty of speaking the truth. However, since the witness did not understand the implications of oath, no oath was administered to her.

In view of section 118 of the Evidence Act, all persons are competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions due to tender years etc. No particular age has been prescribed as a demarcating line for treating a witness incompetent to testify by reason of his/her tender age. Competency to testify depends on ability to understand questions and to give rational answers. It depends on the capacity and intelligence of the child witness, his appreciation of difference between the truth and falsehood as well as his duty to speak truth. When a witness is called upon to give evidence and there is reason to suspect that he/she may not be capable of giving rational answers to the questions put to him/her, it is but necessary for the Court to put some questions to such witness with a view to ascertain whether he/she is a competent witness to give evidence or not. There is no dispute that since a child witness is prone to tutoring, his/her evidence should be scanned carefully and preliminary questions are required to be put to such witness to ascertain as to whether he/she has intellectual capacity to understand the questions and give rational answers thereto. The preliminary examination of a child witness is nothing but a rule of caution. The trial Court is required to record its query to a child witness in the form of questions and answers so that the Appellate Court will be in a position to see whether child witness understands the duty of speaking truth. Even though it is desirable to make such preliminary examination but it is not always imperative. There is no rule that in case

of every child witness, the trial Court should conduct a preliminary examination. It is only a rule of prudence and not a legal obligation. When questions are raised regarding the intellectual capacity of the child witness, the Court can peruse the evidence of the victim in its entirety to find out as to whether he/she was capable enough to give rational answers to the questions put to him/her after understanding the same. Absence of preliminary examination of the child witness would not render his/her evidence inadmissible.

In the case in hand, the child witness (P.W.12) was aged about 13 years at the time of her deposition. In her evidence, she has stated that on the date of occurrence, at about 12 noon, while her mother (the deceased) was cooking food on the veranda of the house, she was sitting near her mother and at that time her father (appellant) came to the house from the cultivable land and asked the deceased to serve him food. The deceased told the appellant to wait for sometime ("TIKIYE RUHA, KHAIBA"). P.W.12 further stated that, at this, the appellant became angry and entered inside the house, brought a 'katuri' and by dragging the deceased holding her tuft, dealt 'katuri' blows on her neck, face, head and ear. Seeing the same, P.W.12 raised hulla and her paternal uncle, aunt, elder father and some villagers rushed to the spot, but the deceased died at the spot instantly and the appellant was standing there and her paternal uncle tied the appellant by means of a rope. In the crossexamination, a question was put to P.W.12 that whether in her uncle's house, she was tutored by her aunt to tell in connection with the case, to which she answered in negative. She was asked about the topography of her house and neighbourhood by the defence counsel and she answered to all the questions. P.W.12 further stated that on the date of occurrence, she had not gone to school and when her father assaulted her mother by means of a 'katuri', no other person except she was present at the spot, though other persons came to the spot only after hearing her hulla. She further deposed in the cross-examination that she was at a distance of about five cubits away from her mother and she was sitting outside the 'Chali'. She stated that she did not raise any hulla when her father assaulted the deceased by means of a 'katuri' and that her father dragged her mother only about one cubit to two cubits and then assaulted her. Nothing has been brought out in the cross-examination to disbelieve the evidence of P.W.12 and there was also no reason for P.W.12 to depose falsehood against the appellant, who is none else than her father. In the case of **Balaji -Vrs.- State reported in (2010) 12 Supreme Court Cases 545**, the Hon'ble Supreme Court held that there is no reason why a child would falsely implicate her mother for murder of her father.

In the case of **Panchhi and others -Vrs.- State of U.P. reported in A.I.R. 1998 S.C. 2726**, it was held that the evidence of a child witness must find adequate corroboration before it is relied on. However, it is more a rule of practical wisdom than of law. It cannot be held that the evidence of a child witness would always stand irretrievably stigmatized. It is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection

because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring.

In the case of **Ratansinh Dalsukhbhai Nayak -Vrs.- State of Gujarat reported in (2004) 1 Supreme Court Cases 64**, the Hon'ble Supreme Court dealing with the child witness has observed as under:

> "7…..The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial Court may, however, be disturbed by the higher Court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped and moulded, but is also an accepted norm that if after careful scrutiny of their evidence the Court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness."

In the case of **State of U.P. -Vrs.- Krishna Master & Ors. reported in (2010) 12 Supreme Court Cases 324**, the Hon'ble Supreme Court held that there is no principle of law that is inconceivable that a child of tender age would not be able to recapitulate the facts in his memory. A child of tender age is always receptive to abnormal events which takes place in his life and would never forget those events for the rest of his life. The child would be able to recapitulate correctly and exactly when asked about the same in the future.

There is nothing in the evidence of P.W.12 that she had been tutored while staying in the house of her maternal uncle to depose against her father (the appellant). The manner in which she withstood the long gruelling cross-examination and gave minute details of the incident, clearly indicates that she had attended a measure of mature understanding and there is no infirmity in her understanding of the facts perceived and her ability to narrate the same correctly.

The other witnesses, like P.W.3, P.W.4 & P.W.7 have not supported the prosecution case. However, under the Evidence Act, no particular numbers of witnesses are required for the proof of any fact; it is a sound and well-established rule of law that quality and not quantity of evidence matters. In each case, the Court has to consider whether it can be reasonably satisfied to act even upon the testimony of a single witness for the purpose of convicting a person. If the evidence of a solitary eye-witness is found to be clear, cogent, trustworthy and aboveboard, the same can be acted upon. The evidence of P.W.12 having not been shaken in the cross-examination and more particularly when her evidence is getting corroboration from the finding of the dead body of the deceased in the courtyard and seizure of blood stained earth and blood stained katuri and the medical evidence adduced by the doctor (P.W.9) and the chemical examination report (Ext.8) which indicates that blood of human origin of group 'A' was found on the katuri so also on the earth

seized at the spot, we are of the view that the learned trial Court is quite justified in accepting her evidence and holding that the appellant is the author of the crime.

Whether the case of the appellant would come under culpable homicide not amounting to murder?:

10. The contention of the learned counsel for the appellant so far as grave and sudden provocation is concerned, reliance is placed upon the case of **Shyamlal Kissan** (supra), however, we see striking distinguishing features in the factual scenario in both the cases. In the aforesaid case, the accused and the deceased, who were husband and wife, quarrelled with each other and then the accused forcefully sat over the chest of the deceased and pressed her neck due to which the deceased died. This Court has been pleased to hold that there is lack of evidence regarding motive and the act was committed by the accused on the spur of the moment on a petty quarrel between the husband and wife and the appellant did not have the requisite intention to commit the offence of murder, though he knew the action of pressing the neck could cause death of the deceased and accordingly, instead of convicting the accused under section 302 of I.P.C., the conviction was altered to one under section 304 of Part-I of I.P.C.

However, the factual scenario of the present case is completely different. The background does not indicate that there was any kind of grave and sudden provocation caused by the deceased to the appellant merely by asking him to wait for some time to serve food as it was under process. The appellant might have been hungry when he returned from the field and it is said in Panchatantra Verse 4.16 that "Bubhuksitah Kim Na Karoti Papam i.e. A hungry person can commit any sin" and Jean de La Fontaine quotes, "A hungry stomach has no ears", but the manner in which the appellant reacted and brought the 'katuri' from inside the house and assaulted the deceased on the vital parts of her body like face, head, neck, ear, etc., and caused as many as nine numbers of extensive cut injuries which were sufficient in ordinary course of nature to cause death, show his intention to commit the murder. Exception 1 to section 300 of I.P.C. says, interalia, that culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation. This exception is no doubt subject to certain limitations, like the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person. As per the explanation to the Exception 1, whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact. Grave and sudden provocation is a mixed question of law and facts. Exception 4 to section 300 of I.P.C. states that culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner. Neither there is any quarrel nor fight in this case. A housewife cannot be said to have caused grave and sudden provocation to her hungry husband when she requests her to wait for a while as the

preparation of food is under process. It is clear in this case that on the day of the incident nothing had happened to cause sudden provocation which was grave enough to make the appellant lose his balance of mind and assault mercilessly to his helpless wife in front of his minor daughter.

We are of the view that the act of the appellant does not come under any of the exceptions as laid down under section 300 of I.P.C. Therefore, the submission of the learned counsel for the appellant that it would be a case of culpable homicide not amounting to murder is not acceptable. We are of the view that the learned trial Court is quite justified in holding the appellant guilty under section 302 of I.P.C.

Conclusion:

11. Accordingly, we find no fault in the impugned judgment and order of the learned trial Court which is upheld. Resultantly, the appeal stands dismissed.

The appellant is stated to have remained in custody for about sixteen years. If the appellant is entitled to get any benefit under sections 432 & 433 of Cr.P.C. (sections 473 & 474 of BNSS), the appropriate Government may consider the same in accordance with the principles laid down and the guidelines framed in that respect. It is up to the appropriate Government to consider the same as per rules.

Before parting with the case, we would like to put on record our appreciation to Smt. Mina Kumari Das, learned counsel for her preparation and presentation of the case and rendering valuable help in arriving at the decision above mentioned. This Court also appreciates the valuable help and assistance rendered by Mr. Rajesh Tripathy, learned Additional Standing Counsel for the State.

Headnotes prepared by :
Smt. Madhumita Panda, Law Reporter
(Verified by : Shri Pravakar Ganthia, Editor-in-Chief)

Result of the case :
Appeal stands dismissed.

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2024 (III) ILR-CUT-676

SWARNA PRAKASH ROUTRAY
V.
THE GENERAL MANAGER, RBI, BHUBANESWAR, ODISHA & ORS.

[WP(C) NO. 11749 OF 2022]

SWARNA PRAKASH ROUTRAY V. HARI BIJAY KUMAR, KARUR VYSYA BANK LTD., BHUBANESWAR
(CONTC NO. 6770 OF 2021)

08 OCTOBER 2024

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

Issue for Consideration

Whether Writ is maintainable inspite of statutory remedy available U/s. 17 of SARFAESI Act.

Headnotes

CONSTITUTION OF INDIA, 1950 — Article 226 r/w section 17 of the SARFAESI Act, 2002 – Availability of alternative remedy – Exercise of writ jurisdiction – The petitioner challenges the e-auction sale notice issued by the bank in compliance to SARFAESI Act – Whether any challenge to the action of the bank under SARFAESI Act, 2002 is maintainable under Article 226 of the Constitution if an alternative statutory remedy exists.

Held: No – The petitioner had the statutory remedy of filing an application before the DRT U/s. 17 of the SARFAESI Act challenging the action of the bank – Instead of following the prescribed statutory process, the petitioner has chosen to bypass the Tribunal's jurisdiction and sought to invoke the extraordinary powers of this Court under Article 226 of the Constitution – This conduct not only undermines the legislative intent behind the SARFAESI Act but also reflects an attempt to stall the recovery proceedings initiated by the Bank inasmuch as the law is clear that the SARFAESI Act provides a complete mechanism for adjudicating disputes between borrowers and secured creditors. (Paras 9 -12)

Citation Reference

Phoenix ARC Pvt Ltd. vs. Vishwa Bharati Vidya Mandir & Ors. **AIR 2022 SC1045**; Celir vs. BAFNA Motors (Mumbai) Pvt. Ltd. & Ors. **C.A. Nos. 5542-5543 of 2023**; United Bank of India v. Satyawati Tondon **(2010) 8 SCC 110**; State Bank of Travancore v. Mathew K.C.**(2018) 3 SCC 85**; CIT v. Chhabil Dass Agarwal **(2014) 1 SCC 603**; Thansingh Nathmal v. Supt. of Taxes : **AIR 1964 SC 1419**; Titaghur Paper Mills Co. Ltd. v. State of Orissa **(1983) 2 SCC 433 : 1983 SCC (Tax) 131**; Punjab National Bank v. O.C. Krishnan **(2001) 6 SCC 569**; United Bank of India v. Satyawati Tondon **(2010) 8 SCC 110: (2010) 3 SCC (Civ) 260**; Baburam Prakash Chandra Maheshwari v. Antarim Zila Parishad **AIR 1969 SC 556**; Whirlpool Corpn. v. Registrar of Trade Marks **(1998) 8 SCC 1**; Harbanslal Sahnia v. Indian Oil Corpn. Ltd. **(2003) 2 SCC 107**; Phoenix ARC (P) Ltd. v. Vishwa Bharati Vidya Mandir **(2022) 5 SCC 345**; Praga Tools Corpn. v. C.A. Imanual **(1969) 1 SCC 585**; Ramesh Ahluwalia v. State of Punjab **(2012) 12 SCC 331: (2013) 3 SCC (L&S) 45: 4 SCEC 715**; State Bank of Travancore v. Mathew K.C. **(2018) 3 SCC85: (2018) 2 SCC(Civ) 41**; Varimadugu Obi Reddy v. B. Sreenivasulu **(2023) 2 SCC 168**; Surinder Pal Singh vs. Vijaya Bank & Ors. **Civil Appeal No. 6843 of 2023** arising from **SLP (C) NO.16771/2018 – referred to**.

List of Acts

Constitution of India, 1950; SARFAESI Act, 2002; SARFAESI Security Interest (Enforcement) Rules, 2002

Keywords

One-Time Settlement (OTS); Non-Performing Assest (NPA); Alternative remedy; Maintainability of writ petition; Sale certificate; Loan agreement; Borrower; Creditor; Guarantor; e-auction.

Case Arising From

e-Auction Sale Notice dated 12.08.2021 by Karur Vysya Bank Ltd.

Appearances of Parties

For Petitioner : Mr. S. K. Dalai, Mr. Kabiraj Pradhan
For Opp.Parties : Mr. M. Balakrishna Rao (O.P. Nos. 2 & 3)
Mr. Krishna Ch. Sahu (O.P. No. 4)

Judgment/Order

Judgment

CHITTARANJAN DASH, J.

1. Heard Mr. S.K. Dalai, learned counsel appearing on behalf of the Petitioner and Mr. Balakrishna Rao, learned counsel representing the O.P. Nos. 2 & 3, Bank (hereinafter referred to as 'the Bank').

2. Challenge in this writ application has been made to the action of the O.P. Nos. 2 & 3, Bank in proceeding with the e-auction sale notice dated 12.08.2021 under Annexure-8, and consequential actions thereto, and for having not settled the loan account of the Petitioner.

3. The background facts of the case are that the wife of the Petitioner obtained a loan from O.P. Nos. 2 & 3, Bank which was extended to her in cash credit loan form limiting the amount to Rs. 30,00,000/- for the purpose of expansion of her business. The Petitioner was the guarantor of the said loan and presented his property with the Bank to secure the loan. The description of property submitted by the Petitioner before the Bank to secure loan was a residential plot measuring an area Ac. 0.055D out of total area Ac. 0.090D vide Plot No. 309 corresponding Plot No. 309/3387, Khata No. 644/263 corresponding to Hal Khata No. 644/1579, situated at Mouza: Bhubaneswar Sahar Unit No. 34, Meherpalli, P.S.: Laxmisagar, Bhubaneswar, Tahasil: Bhubaneswar, Dist.: Khorda. After obtaining the loan, the wife of the Petitioner i.e. the Borrower, invested it for her business but as the business did not run well she could not repay the loan smoothly to the satisfaction of the Bank. As a result, the loan account became a Non-Performing Asset (NPA) on 28.11.2018 in terms of the agreement as well as the guideline issued by the Reserve Bank of India (RBI) in that respect.

The O.P. Nos. 2 & 3, Bank accordingly issued a notice u/s 13(2) of the SARFAESI Act, 2002 (hereinafter referred to as 'the Act') under Annexure-1 dated 15.02.2019. Subsequent to the issuance of the notice under Section 13(2) as the Petitioner did not come forward to comply with the direction, the Bank issued notice under section 13(4) of the Act. It is alleged by the Petitioner that no such notice was served upon the Petitioner's wife as she was staying with her father and she had no scope to be aware of this fact. So, she could not inform the same to the Petitioner who was staying away from his wife. According to the Petitioner, another notice was issued on 29.07.2019 by the O.P. Nos. 2 & 3 – Bank wherein it was indicated that the Bank has redeemed the secured asset i.e. the immovable property in pursuance to the last notice and thereby the Bank took the symbolic possession. The claim of the Petitioner is that all the events took place behind the back of the Petitioner. However, again the O.P. Nos. 2 & 3, Bank issued a letter on 03.12.2019 individually upon the wife-borrower and the Petitioner, thereby, the Petitioner and the borrower could know that the Bank has initiated proceedings against the loan account which is at its fag end. It is only thereafter that the Petitioner came to know about the fact that an e-auction sale notice for the suit property has been issued on 20.01.2020 under Annexure-3.

The Petitioner accordingly moved this Court in a Writ Petitioner vide WP(C) No. 1668 of 2020, wherein, this Court considering the submission of the Petitioner disposed of the Writ Petition vide its order dated 17.01.2020, with an observation that, in case, the Petitioner deposits a sum of Rs. 5,00,000/- before the O.P. Nos. 2 & 3, Bank on or before 24.01.2020**,** and files an application for loan settlement, the Bank shall consider the application within a period of two weeks from the filing of such application and the result thereof shall be communicated to the Petitioner. It is indicated in the said order by the Court, dated 17.01.2020, that, the e-auction for sale of the immovable property shall not be confirmed till a decision is taken with regard to the application of the Petitioner. The Court also made it clear that in case the Petitioner fails to deposit the amount, it is open to the O.P. Nos. 2 & 3, Bank to take consequential step for the recovery of the amount. Pursuant to the order dated 17.01.2020 passed by this Court, Petitioner deposited the sum of Rs. 5,00,000/- with the O.P. Nos. 2 & 3, Bank on 18.01.2020 and filed an application for settlement of the loan account.

After submission of the application, before the O.P. Nos. 2 & 3, Bank, the Bank issued a letter on 04.02.2020 intimating that the offer given by the Petitioner for settlement of loan account to have not been accepted by the Bank and further advised the Petitioner to submit a revised proposal with substantial increase in the compromise amount along with upfront deposit immediately. As per the direction of the Bank, the Petitioner deposited a further sum of Rs. 2,00,000/- on 15.02.2020 and submitted another application for loan settlement vide letter dated 03.03.2020 under Annexure-6. On 10.03.2020, the Bank once again turned down the proposal of the Petitioner allowing further opportunity for a revised proposal referring to the discussion that the Petitioner had with the Bank on 29.02.2020. It is submitted by the

Petitioner that as the pandemic situation arrived due to Covid-19, the Petitioner simply deposited a sum of Rs. 2,00,000/-. In the process, he deposited altogether a sum of Rs. 9,00,000/-. The Bank authorities denied settlement of the account on the basis of the proposal of the Petitioner and finally issued the e-auction notice for the sale of the immovable property under Rule 8(6) the SARFAESI Security Interest (Enforcement) Rules, 2002 on 15.09.2021. The Petitioner submits the aforesaid e-auction sale notice issued by the Bank on 12.08.2021 as illegal and arbitrary and in violation of the RBI guidelines, so also, in violation of Article 300A of the Constitution of India and as such moved the Writ Petition in WP(C) No. 26724 of 2021. The coordinate bench of this Court having heard the Petitioner as well as the counsel for the Bank, though, the cause title in the order did not reveal any name of the counsel representing the Bank and passed the order as here under:

> "2. Heard learned counsel for the Petitioner and learned counsel for the Bank.
>
> 3. Having heard learned counsel for the parties, we are of the opinion that this matter may be settled out of the Court in OTS Scheme. Hence, we give liberty to the Petitioner to file an application for OTS rephasement/ resettlement/reschedule of the loan within a period of two weeks by making upfront deposit of Rs.8,50,000/- (Rupees eight lakh fifty thousand) only before the opposite parties-Bank. On such event, his application shall be considered according to law and as per the guidelines of the Reserve Bank of India.
>
> 4. We hope and trust that if any representation is made by the Petitioner with the upfront deposit mentioned above within the time stipulated, the Bank shall not take any further coercive steps against him"

In view of the order passed in the said Writ Petition, it is the case of the Petitioner that he deposited a sum of Rs.8,50,000/- in the loan account of the Petitioner on 24.09.2021. The Petitioner also asserts that since the amount deposited by him was returned to the account, he visited the Bank with an application and after the lapse of one hour, the Petitioner was given the account details wherein he deposited Rs. 27,00,000/- in the above-mentioned account through RTGS i.e. Rs. 7,00,000/- from Account No. 10067331437 and Rs. 20,00,000/- from 10066722936 standing in State Bank of India, Laxmisagar Branch though RTGS and an application was annexed thereto. According to the Petitioner, the Bank authority received the application at 06:01p.m. on 04.05.2022. The Petitioner therefore claims that he complied with the direction of the Court dated 25.04.2022, by depositing a sum of Rs. 27,00,000/- but the Bank issued letter dated 16.10.21 disclosing that the e-auction sale in respect of the mortgaged property was completed and it has gotten a successful bidder for the said property who is ready to make the payment on the entire overdue amount along with all the interim expenditure and expenses till date and accordingly the Bank intimated the recovery as per the SARFAESI Act, 2002. The Petitioner held the aforesaid action of the O.P. Nos. 2 & 3 – Bank to be a willful and deliberate neglect of the Court's order dated 24.09.2021 and moved CONTC No. 6770 of 2021 praying to initiate a contempt proceeding for violation of the order of this Court dated 13.09.2021 in W.P(C) No. 26724 of 2021 and to suitably punish

the contemnor. This Court in the aforesaid contempt petition, passed Order No. 7 dated 25.04.22, as under -

> "2. Mr. Rao very graciously accepts that the proper course for the Bank should have been to inform the Court before proceeding to issue the Sale Certificate in the light of deposit of a heavy amount (almost 1/4th of the outstanding liability) in compliance of the directions passed on 13th September, 2021 by this Court. He however, submits that after waiting for a substantial period of time and incomplete proposal submitted for an amicable settlement, the Bank was obligated to issue a sale certificate on account of the deposit of the entire sale price by the auction purchaser. Still further to resolve the issue, the Bank may consider reversing the process provided the Petitioner deposits the entire outstanding liabilities along with some reasonable compensation for the auction purchaser.
>
> 3. At this stage, learned counsel for the Petitioner prays for short adjournment to enable the Petitioner to file a separate writ petition with necessary particulars and by impleading the auction purchaser."

In the above background the Petitioner filed the present Writ Petition i.e. WP(C) No. 11749 of 2022 challenging the e-auction sale notice under Annexure-8 and the consequential action thereto initiated by O.P. Nos. 2 & 3, Bank and for settlement of the account and for adjustment of the final account as submitted by the Petitioner in pursuance to the direction of this Court.

4. Mr. S. K. Dalai, learned counsel for the Petitioner humbly submits that the e-auction sale notice dated 12.08.2021 under Annexure-8, issued by the O.P. Nos. 2 & 3, Bank, is illegal and in clear violation of the Petitioner's rights under law. According to Mr. Dalai, the actions of the Bank, as a secured creditor under the SARFAESI Act, 2002, are not only arbitrary but also in contravention of the procedural safeguards provided under the Act. He asserts that the Petitioner was neither properly informed nor was there adequate service of the demand notice, possession notice, or the e-auction sale notice, all of which are mandatory requirements under the Act. The Petitioner, standing as guarantor for the cash credit facility availed by the borrower, has always acted in good faith and with the intent of resolving the outstanding debt amicably. However, despite the genuine efforts made by the Petitioner, including the offer of a One-Time Settlement (OTS), the Bank chose to proceed with the auction process without considering the Petitioner's representation vide Annexure-10. Mr. Dalai submits that the Bank's rejection of the OTS offer was arbitrary and lacked transparency. The OTS offer was submitted by the Petitioner with the bona fide intent of settling the outstanding dues, particularly in light of the economic difficulties arising from the COVID-19 pandemic. The Bank's refusal to consider the OTS, despite the unique circumstances, is unjust and contrary to the principles of fairness. Mr. Dalai further submits that the O.P. Nos. 2 & 3, Bank's actions are in direct violation of this Court's order dated 13.09.2021 passed in WP(C) No. 26724/2021, wherein, the Court had specifically directed the Petitioner to deposit Rs. 8,50,000/- along with a representation for OTS, which the Petitioner complied with in full. The Petitioner deposited the said amount on 24.09.2021, and any claim by the Bank that the representation was not accompanied

by the deposit is baseless. Despite the Petitioner's compliance, the Bank hastily proceeded with the confirmation of the e-auction sale and issued the sale certificate to the e-auction purchaser, thereby completely disregarding this Court's order.

The learned counsel further contends that the e-auction sale was conducted in undue haste and without affording the Petitioner a fair opportunity to resolve the matter. The Petitioner's affidavit dated 15.09.2021, informing the Bank of the Court's order, was dispatched to the Bank on time. The subsequent issuance of the sale demonstrates lack of good faith and amounts to wilful disobedience of the Court's order. Mr. Dalai asserts that the actions of the Bank have caused undue hardship to the Petitioner, who has been diligently trying to resolve the outstanding loan in a fair and reasonable manner. The Petitioner has complied with all directions of this Court and has made earnest efforts to settle the matter. The Bank's continued refusal to cooperate and its high-handed actions, including the confirmation of the e -auction sale, have deprived the Petitioner of a fair opportunity to protect the secured property.

5. O.P. Nos. 2 & 3, through the Chief Manager-cum-Authorised Officer, Karur Vysya Bank Ltd., Bhubaneswar, in their counter affidavit, through Mr. Sreedhar, contended that Petitioner's challenge to the e-auction sale notice dated 12.08.2021 under Annexure-8 in the present writ petition is entirely misplaced and not maintainable before this Court. The actions taken by the Bank as a secured creditor are in strict compliance with the SARFAESI Act, 2002. As per the decision laid down by the Hon'ble Supreme Court in ***Phoenix ARC Private Limited vs. Vishwa Bharati Vidya Mandir and others*** reported in **AIR 2022 SC 1045**, any challenge to the actions of the Bank under the SARFAESI Act, 2002 cannot be entertained by this Court under Article 226 of the Constitution if an alternative statutory remedy exists. Hence, the Writ Petition is liable to be dismissed as not maintainable. The Bank categorically denies the Petitioner's allegations of non-service of demand notice, possession notice, and e-auction sale notice while submitting the proof of notice in the form of postal receipts under Annexures-C/3, D/3, and E/3 demonstrating that all statutory notices were duly served as required under the SARFAESI Act, 2002. Any claim of non-service is thus baseless and should be dismissed.

In response to the Petitioner's plea for One-Time Settlement (OTS), it is reiterated that OTS offers are discretionary and subject to the Bank's commercial judgment. No borrower has an automatic right to OTS, especially when the value of the secured asset exceeds the outstanding loan amount. In the present case, the secured asset is worth more than the debt, and the decision to not grant OTS was taken in accordance with sound Banking principles. The Petitioner's allegations of mala fide are unfounded and unsupported by any factual basis. It is further submitted that with respect to the compliance of this Court's order dated 13.09.2021 in WP(C) No. 26724 of 2021, the e-auction was conducted on 15.09.2021, prior to any intimation of the said order. The Petitioner's affidavit dated 15.09.2021 was received by the Bank only on 16.09.2021, through a DTDC courier as per Annexure-F/3. Upon receiving the affidavit, the Bank acted promptly and reasonably, by

issuing a letter dated 17.09.2021, requesting the Petitioner to provide a copy of the Court's order, which was only received by the Bank on 21.09.2021.

Despite this, the Petitioner failed to submit any valid representation as directed by this Court. The Petitioner instead deposited Rs. 8,50,000/- on 24.09.2021 without the requisite representation, and even the Bank waited for a reasonable period before proceeding with the confirmation of the e-auction and issuing the sale certificate to the successful bidder, O.P.No. 4. It is asserted that the Petitioner's failure to submit the representation as directed, despite multiple opportunities afforded by the Bank, left the Bank with no option but to proceed with the e-auction sale and issue the sale certificate. The Petitioner's inaction and lack of response to the Bank's letter dated 16.10.2021 forced the Bank to complete the transaction with the auction purchaser, who had deposited the full bid amount.

Moreover, the allegations of non-cooperation and harassment by the Bank officials are entirely baseless. The Bank has acted in full compliance with the provisions of the SARFAESI Act, 2002, as well as this Court's orders. It is the Petitioner who failed to comply with the directions of this Court, and thus any allegations of contempt or non-compliance by the Bank are unjustified. The Bank submits that it has acted in a diligent, lawful, and reasonable manner throughout the proceedings. The Petitioner's allegations of mala fide and violation of Court orders are without merit, and the Bank should not be held liable for the Petitioner's own inaction. The Bank requests this Court to dismiss the writ petition and contempt petition, as there has been no violation of any Court order or statutory provision on its part.

6. O.P. No. 4, Mrs. Sudhanshubala Chhatoi, the auction purchaser, in her counter affidavit, contended that the application filed by the Petitioner is not maintainable as the e-auction process was conducted strictly in accordance with the SARFAESI Act, 2002 and the SARFAESI Security Interest (Enforcement) Rules, 2002, following all formalities necessitated. The property in question was mortgaged with O.P. Nos. 2 and 3, Bank's, and after the borrower defaulted on repayment obligations, the loan account was classified as a Non-Performing Asset (NPA). Following the due legal process, the Bank initiated steps for the recovery of dues by conducting an e-auction of the mortgaged property, as authorised. Mrs. Chhatoi further submits that she participated in the e-auction process after the issuance of a public e-auction notice dated 12.08.2021. The e-auction was held on 15.09.2021, in which she emerged as the highest bidder, with a winning bid amount of Rs. 78,90,000/-. Upon the successful completion of the e-auction, the entire bid amount was duly deposited by her, and the sale was confirmed by the Bank in accordance with Rule 9(2) of the Security Interest (Enforcement) Rules, 2002. A Sale Certificate was issued to her on 15.11.2021, and physical possession of the property was handed over accordingly. On 17.12.2021, the Bank executed a registered sale deed in favour of her, thereby legally transferring the title and interest in the property to the her as the auction purchaser. Mrs. Chhatoi asserts that she has since mutated the property in her name and obtained the RoR from the concerned authorities and has

been in peaceful and undisputed possession of the property, paying all applicable dues, including land revenue and other taxes.

She further submits that it is clear that the e-auction process was conducted lawfully, and she acquired valid and legal title to the property. The writ petition filed by the borrower, seeking to challenge the e-auction sale, is an afterthought and is not maintainable, as the borrower had ample opportunity to redeem the property under the SARFAESI Act, 2002 but failed to do so. The borrower's failure to avail of the statutory remedies within the stipulated time frames does not entitle him to challenge the lawful rights of the auction purchaser. Mrs. Chhatoi finally concludes that given the lawful and bona fide actions of herself in purchasing the property and the fact that the borrower has no valid claim to redeem the secured asset after the completion of the sale process, the present writ petition deserves no consideration and is liable to be dismissed.

7. From the submissions made by Mr. Dalai, the Petitioner's grievance lies on the issue that his right to redeem the mortgaged property has been violated by the Opposite Party-Bank, which proceeded with the e-auction sale despite the Petitioner having deposited substantial amounts towards the settlement of the loan account backed by the Order of this Court under its writ Jurisdiction.

8. The Hon'ble Supreme Court, in a catena of decisions, has consistently reiterated the limitations on the exercise of writ jurisdiction by High Courts in matters arising out of actions taken under the SARFAESI Act, 2002.

9. The Apex Court, in its decision in the matter of ***Celir vs. BAFNA Motors (Mumbai) Pvt. Ltd. & Ors.*** passed in **Civil Appeal Nos. 5542-5543 of 2023,** has made the aforementioned stance very clear, as follows –

> 92. This Court has time and again, reminded the High Courts that they should not entertain petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person under the provisions of the SARFAESI Act. This Court in ***Satyawati Tondon*** (supra) made the following observations:
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> *"43. Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of Banks and other financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc. the High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are a code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi-judicial bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, the High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute.*
>
> *44. While expressing the aforesaid view, we are conscious that the powers conferred upon the High Court under Article 226 of the Constitution to issue to any person or authority, including in appropriate cases, any Government, directions, orders or writs*

including the five prerogative writs for the enforcement of any of the rights conferred by Part III or for any other purpose are very wide and there is no express limitation on exercise of that power but, at the same time, we cannot be oblivious of the rules of self imposed restraint evolved by this Court, which every High Court is bound to keep in view while exercising power under Article 226 of the Constitution.

45. It is true that the rule of exhaustion of alternative remedy is a rule of discretion and not one of compulsion, but it is difficult to fathom any reason why the High Court should entertain a petition filed under Article 226 of the Constitution and pass interim order ignoring the fact that the Petitioner can avail effective alternative remedy by filing application, appeal, revision, etc. and the particular legislation contains a detailed mechanism for redressal of his grievance.

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55. It is a matter of serious concern that despite repeated pronouncement of this Court, the High Courts continue to ignore the availability of statutory remedies under the DRT Act and the SARFAESI Act and exercise jurisdiction under Article 226 for passing orders which have serious adverse impact on the right of Banks and other financial institutions to recover their dues. We hope and trust that in future the High Courts will exercise their discretion in such matters with greater caution, care and circumspection."

96. More than a decade back, this Court had expressed serious concern despite its repeated pronouncements in regard to the High Courts ignoring the availability of statutory remedies under the RDBFI Act and the SARFAESI Act and exercise of jurisdiction under Article 226 of the Constitution. Even after, the decision of this Court in ***Satyawati Tondon*** (supra), it appears that the High Courts have continued to exercise its writ jurisdiction under Article 226 ignoring the statutory remedies under the RDBFI Act and the SARFAESI Act.

105. We summarise our final conclusion as under:

(i) The High Court was not justified in exercising its writ jurisdiction under Article 226 of the Constitution more particularly when the borrowers had already availed the alternative remedy available to them under Section 17 of the SARFAESI Act.

(ii) The confirmation of sale by the Bank under Rule 9(2) of the Rules of 2002 invests the successful auction purchaser with a vested right to obtain a certificate of sale of the immovable property in form given in appendix (V) to the Rules i.e., in accordance with Rule 9(6) of the SARFAESI.

(iii) In accordance with the unamended Section 13(8) of the SARFAESI Act, the right of the borrower to redeem the secured asset was available till the sale or transfer of such secured asset. In other words, the borrower's right of redemption did not stand terminated on the date of the auction sale of the secured asset itself and remained alive till the transfer was completed in favour of the auction purchaser, by registration of the sale certificate and delivery of possession of the secured asset. However, the amended provisions of Section 13(8) of the SARFAESI Act, make it clear that the right of the borrower to redeem the secured asset stands extinguished thereunder on the very date of publication of the notice for public auction under Rule 9(1) of the Rules of 2002. In effect, the right of redemption available to the borrower under the present statutory regime is drastically curtailed and would be available only till the date of publication of the notice under Rule 9(1) of the Rules of 2002 and not till the completion of the sale or transfer of the secured asset in favour of the auction purchaser……"

10. It is further held in the following decisions of the Hon'ble Supreme Court –

- ***United Bank of India v. Satyawati Tondon*** reported in **(2010) 8 SCC 110 –**

"42. There is another reason why the impugned order should be set aside. If Respondent 1 had any tangible grievance against the notice issued under Section 13(4) or action taken under Section 14, then she could have availed remedy by filing an application under Section 17(1). The expression "any person" used in Section 17(1) is of wide import.

It takes within its fold, not only the borrower but also the guarantor or any other person who may be affected by the action taken under Section 13(4) or Section 14. Both, the Tribunal and the Appellate Tribunal are empowered to pass interim orders under Sections 17 and 18 and are required to decide the matters within a fixed time schedule. It is thus evident that the remedies available to an aggrieved person under the SARFAESI Act are both expeditious and effective.

43. Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of Banks and other financial institutions.

In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc. the High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are a code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasijudicial bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, the High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute.

44. While expressing the aforesaid view, we are conscious that the powers conferred upon the High Court under Article 226 of the Constitution to issue to any person or authority, including in appropriate cases, any Government, directions, orders or writs including the five prerogative writs for the enforcement of any of the rights conferred by Part III or for any other purpose are very wide and there is no express limitation on exercise of that power but, at the same time, we cannot be oblivious of the rules of selfimposed restraint evolved by this Court, which every High Court is bound to keep in view while exercising power under Article 226 of the Constitution.

45. It is true that the rule of exhaustion of alternative remedy is a rule of discretion and not one of compulsion, but it is difficult to fathom any reason why the High Court should entertain a petition filed under Article 226 of the Constitution and pass interim order ignoring the fact that the Petitioner can avail effective alternative remedy by filing application, appeal, revision, etc. and the particular legislation contains a detailed mechanism for redressal of his grievance.

55. It is a matter of serious concern that despite repeated pronouncement of this Court, the High Courts continue to ignore the availability of statutory remedies under the DRT Act and the SARFAESI Act and exercise jurisdiction under Article 226 for passing orders which have serious adverse impact on the right of Banks and other financial institutions to recover their dues. We hope and trust that in future the High Courts will exercise their discretion in such matters with greater caution, care and circumspection."

- ***State Bank of Travancore v. Mathew K.C.*** reported in **(2018) 3 SCC 85** –

"5. We have considered the submissions on behalf of the parties. Normally this Court in exercise of jurisdiction under Article 136 of the Constitution is loath to interfere with an

interim order passed in a pending proceeding before the High Court, except in special circumstances, to prevent manifest injustice or abuse of the process of the Court. In the present case, the facts are not in dispute.

The discretionary jurisdiction under Article 226 is not absolute but has to be exercised judiciously in the given facts of a case and in accordance with law. The normal rule is that a writ petition under Article 226 of the Constitution ought not to be entertained if alternate statutory remedies are available, except in cases falling within the welldefined exceptions as observed in **CIT v. Chhabil Dass Agarwal [(2014) 1 SCC 603],** as follows: (SCC p. 611, para 15)

"15. Thus, while it can be said that this Court has recognised some exceptions to the rule of alternative remedy i.e. where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions which are repealed, or when an order has been passed in total violation of the principles of natural justice, the proposition laid down in **Thansingh Nathmal v. Supt. Of Taxes [AIR 1964 SC 1419], Titaghur Paper Mills Co. Ltd. v. State of Orissa [(1983) 2 SCC 433: 1983 SCC (Tax) 131]** and other similar judgments that the High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance still holds the field. Therefore, when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation."

8. The Statement of Objects and Reasons of the SARFAESI Act states that the Banking and financial sector in the country was felt not to have a level playing field in comparison to other participants in the financial markets in the world. The financial institutions in India did not have the power to take possession of securities and sell them.

The existing legal framework relating to commercial transactions had not kept pace with changing commercial practices and financial sector reforms resulting in tardy recovery of defaulting loans and mounting non-performing assets of Banks and financial institutions. Narasimhan Committee I and II as also the Andhyarujina Committee constituted by the Central Government Act had suggested enactment of new legislation for securitisation and empowering Banks and financial institutions to take possession of securities and sell them without Court intervention which would enable them to realise long-term assets, manage problems of liquidity, asset liability mismatches and improve recovery.

The proceedings under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereinafter referred to as "the DRT Act") with passage of time, had become synonymous with those before regular Courts affecting expeditious adjudication. All these aspects have not been kept in mind and considered before passing the impugned order.

9. Even prior to the SARFAESI Act, considering the alternate remedy available under the DRT Act it was held in **Punjab National Bank v. O.C. Krishnan [(2001) 6 SCC 569**] that: (SCC p. 570, para 6)

"6. The Act has been enacted with a view to provide a special procedure for recovery of debts due to the Banks and the financial institutions. There is a hierarchy of appeal provided in the Act, namely, filing of an appeal under Section 20 and this fast-track procedure cannot be allowed to be derailed either by taking recourse to proceedings under Articles 226 and 227 of the Constitution or by filing a civil suit, which is expressly barred.

Even though a provision under an Act cannot expressly oust the jurisdiction of the Court under Articles 226 and 227 of the Constitution, nevertheless, when there is an alternative remedy available, judicial prudence demands that the Court refrains from exercising its jurisdiction under the said constitutional provisions.

This was a case where the High Court should not have entertained the petition under Article 227 of the Constitution and should have directed the respondent to take recourse to the appeal mechanism provided by the Act."

15. It is the solemn duty of the Court to apply the correct law without waiting for an objection to be raised by a party, especially when the law stands well settled. Any departure, if permissible, has to be for reasons discussed, of the case falling under a defined exception, duly discussed after noticing the relevant law. In financial matters grant of ex parte interim orders can have a deleterious effect and it is not sufficient tosay that the aggrieved has the remedy to move for vacating the interim order. Loans by financial institutions are granted from public money generated at the taxpayer's expense.Such loan does not become the property of the person taking the loan, but retains its character of public money given in a fiduciary capacity as entrustment by the public. Timely repayment also ensures liquidity to facilitate loan to another in need, by circulation of the money and cannot be permitted to be blocked by frivolous litigation by those who can afford the luxury of the same. The caution required, as expressed in **United Bank of India v. Satyawati Tondon [(2010) 8 SCC 110: (2010) 3 SCC (Civ) 260]**, has also not been kept in mind before passing the impugned interim order: (SCC pp. 123-24, para 46)

"46. It must be remembered that stay of an action initiated by the State and/or its agencies/instrumentalities for recovery of taxes, cess, fees, etc. seriously impedes execution of projects of public importance and disables them from discharging their constitutional and legal obligations towards the citizens. In cases relating to recovery of the dues of Banks, financial institutions and secured creditors, stay granted by the High Court would have serious adverse impact on the financial health of such bodies/institutions, which (sic will) ultimately prove detrimental to the economy of the nation.

Therefore, the High Court should be extremely careful and circumspect in exercising its discretion to grant stay in such matters. Of course, if the Petitioner is able to show that its case falls within any of the exceptions carved out in **Baburam Prakash Chandra Maheshwari v. Antarim Zila Parishad [AIR 1969 SC 556], Whirlpool Corpn. v. Registrar of Trade Marks [(1998) 8 SCC 1] and Harbanslal Sahnia v. Indian Oil Corpn. Ltd. [(2003) 2 SCC 107]** and some other judgments, then the High Court may, after considering all the relevant parameters and public interest, pass an appropriate interim order."

- **Phoenix ARC (P) Ltd. v. Vishwa Bharati Vidya Mandir,** reported in **(2022) 5 SCC 345 –**

"18. Even otherwise, it is required to be noted that a writ petition against the private financial institution - ARC - the appellant herein under Article 226 of the Constitution of India against the proposed action/actions under Section 13(4) of the SARFAESI Act can be said to be not maintainable. In the present case, the ARC proposed to take action/actions under the SARFAESI Act to recover the borrowed amount as a secured creditor.

The ARC as such cannot be said to be performing public functions which are normally expected to be performed by the State authorities. During the course of a commercial transaction and under the contract, the Bank/ARC lent the money to the borrowers

herein and therefore the said activity of the Bank/ARC cannot be said to be as performing a public function which is normally expected to be performed by the State authorities.

If proceedings are initiated under the SARFAESI Act and/or any proposed action is to be taken and the borrower is aggrieved by any of the actions of the private Bank/Bank/ARC, borrower has to avail the remedy under the SARFAESI Act and no writ petition would lie and/or is maintainable and/or entertainable. Therefore, decisions of this Court in **Praga Tools Corpn. v. C.A. Imanual, [(1969) 1 SCC 585]** and **Ramesh Ahluwalia v. State of Punjab, [(2012) 12 SCC 331: (2013) 3 SCC (L&S) 45: 4 SCEC 715]** relied upon by the learned counsel appearing on behalf of the borrowers are not of any assistance to the borrowers.

21. Applying the law laid down by this Court in **State Bank of Travancore v. Mathew K.C., [(2018) 3 SCC 85: (2018) 2 SCC (Civ) 41]** to the facts on hand, we are of the opinion that filing of the writ petitions by the borrowers before the High Court under Article 226 of the Constitution of India is an abuse of process of the Court. The writ petitions have been filed against the proposed action to be taken under Section 13(4).

As observed hereinabove, even assuming that the communication dated 13-8-2015 was a notice under Section 13(4), in that case also, in view of the statutory, efficacious remedy available by way of appeal under Section 17 of the SARFAESI Act, the High Court ought impugned orders passed by the High Court directing to maintain the status quo with respect to the possession of the secured properties on payment of Rs 1 crore only (in all Rs 3 crores) is absolutely unjustifiable. The dues are to the extent of approximately Rs 117 crores.

The ad interim relief has been continued since 2015 and the secured creditor is deprived of proceeding further with the action under the SARFAESI Act. Filing of the writ petition by the borrowers before the High Court is nothing but an abuse of process of Court. It appears that the High Court has initially granted an ex parte ad interim order mechanically and without assigning any reasons. The High Court ought to have appreciated that by passing such an interim order, the rights of the secured creditor to recover the amount due and payable have been seriously prejudiced.

The secured creditor and/or its assignor have a right to recover the amount due and payable to it from the borrowers. The stay granted by the High Court would have serious adverse impact on the financial health of the secured creditor/assignor. Therefore, the High Court should have been extremely careful and circumspect in exercising its discretion while granting stay in such matters. In these circumstances, the proceedings before the High Court deserve to be dismissed."

- ***Varimadugu Obi Reddy v. B. Sreenivasulu*** reported in **(2023) 2 SCC 168 –**

"36. In the instant case, although the respondent borrowers initially approached the Debts Recovery Tribunal by filing an application under Section 17 of the SARFAESI Act, 2002, but the order of the Tribunal indeed was appealable under Section 18 of the Act subject to the compliance of condition of pre-deposit and without exhausting the statutory remedy of appeal, the respondent borrowers approached the High Court by filing the writ application under Article 226 of the Constitution.

We deprecate such practice of entertaining the writ application by the High Court in exercise of jurisdiction under Article 226 of the Constitution without exhausting the alternative statutory remedy available under the law. This circuitous route appears to have been adopted to avoid the condition of pre-deposit contemplated under 2nd proviso to Section 18 of the 2002 Act."

×××

27. From the statutory scheme and decisions noted hereinabove, it is clear that this Court, in exercise of its jurisdiction, cannot go into the decision of respondent- Bank in classifying the Petitioner's account as NPA. If the respondent-Bank proceeds further and reaches Section 13(4) of the SARFAESI Act stage, the Petitioner-firm can file application under Section 17 of the SARFAESI Act. The DRT can go into the aspect of classifying the account as NPA and also whether RBI guidelines have been violated on any aspect leading to declaring the account as NPA and taking recourse under the SARFAESI Act.

28. It has also been repeatedly held that the aspect of classifying an account as NPA is not justiciable in exercise of power of judicial review under Article 226 of the Constitution.

11. It is well established in light of the settled legal position and the principles reiterated in the afore-mentioned decisions that SARFAESI Act, 2002 provides a comprehensive mechanism for addressing grievances related to actions taken by Banks or financial institutions. The borrower has the statutory remedy under Section 17 of the Act to challenge the Bank's actions, including the classification of the account as NPA.

As observed in these rulings, Courts have consistently held that writ petitions should not be entertained when there exists an effective alternative remedy, such as those provided under the SARFAESI Act, 2002. The statutory process for recovery of dues and redressal of grievances is already in place, including Debt Recovery Tribunals (DRTs) and appellate authorities, which are equipped to deal with such matters. The High Courts, therefore, have repeatedly been urged by the Hon'ble Supreme Court to exercise their discretion with greater caution, and not interfere in matters where statutory remedies are available. Therefore, the petition is clearly an attempt to evade the procedural safeguards and the Petitioner is misusing the judicial process without exhausting the alternate statutory remedy provided by the Act.

12. In the instant case, the Petitioner had the statutory remedy of filing an application before the DRT under Section 17 of the SARFAESI Act, 2002 challenging the Bank's actions. The Act provides a detailed mechanism under Section 17, whereby the Petitioner could have approached the DRT to challenge the Bank's actions, including the issuance of the e-auction sale notice. However, instead of following the prescribed statutory process, the Petitioner has chosen to bypass the Tribunal's jurisdiction and sought to invoke the extraordinary powers of this Court under Article 226 of the Constitution. This conduct not only undermines the legislative intent behind the SARFAESI Act but also reflects an attempt to stall the recovery proceedings initiated by the Bank in as much as the law is clear that the SARFAESI Act provides a complete mechanism for adjudicating disputes between borrowers and secured creditors.

13. The Petitioner has relied upon the decision of Hon'ble Supreme Court in the matter of ***Surinder Pal Singh vs. Vijaya Bank & Ors.*** passed in **Civil Appeal No.6843 of 2023** arising from **SLP (C) NO.16771/2018**, as follows –

> "12. The net result is that the right of the Borrower to redeem would be available till the sale certificate is registered and the possession is handed over after which the Borrower will not have a right for redemption under the unamended provision of Section 13 (8) of the SARFAESI Act.
>
> 13. Considering the above facts and circumstances of the case, we are not inclined to interfere with the impugned judgment and order passed by the High Court dismissing the Writ Petition. However, in the interest of justice and to do equity between the parties, we are of the view that the borrowers must pay a reasonable amount to the appellant."

14. In the case of the Petitioner, the e-auction notice was published on 12.08.2021. In the amended provision of section 13(8), which applies to the Petitioner's case, the right of redemption extinguishes on the date the publication of notice for public auction under Rule 9(1) of the SARFAESI Security interest (Enforcement) rules, 2002 is made. This means that once the auction notice is published, the borrower no longer has the right to redeem the secured asset by clearing the dues. The Petitioner's case squarely falls within the ambit of this amended provision as the e-auction notice was published and sale was conducted with SARFAESI Act, 2002 by the time the Petitioner approached this Court under the Writ jurisdiction. The amended Section 13(8), therefore, limits the Petitioner's right of redemption to point before publication of the e-auction notice, which had already occurred in this case. The decision referred to by Mr. Dalai in the matter of ***Surinder Pal Singh vs. Vijaya Bank & Ors.*** *(Supra)* giving a right of redemption being one in connection with un-amended provision is not applicable to the present case. Consequently, any subsequent payments made by the Petitioner towards the loan account cannot revive the right of redemption.

15. In view of the above, the contentions of the Petitioner that the Bank's action violated her constitutional right to property under Article 300A of the Constitution of India bears no significance. At the same time, it may be clarified here that the SARFAESI Act, 2002 and its provisions are part of statutory framework aimed at enabling secured creditors to recover their dues. The right to property under Article 300A is subject to operation of laws such as SARFAESI Act, 2002 which provide enforcement of Security interest. As such, the Petitioner's claim of violation of his constitutional rights under Article 300A is untenable, as the Bank has acted within the bounds of law.

16. As held in ***Celir vs. BAFNA Motors*** *(supra*), interpreting the law otherwise would undermine the sanctity of the e-auction process and deter public participation in auctions under the SARFAESI Act, 2002. Therefore, the Petitioner cannot claim the right to redeem the property once the e-auction notice was issued, and the Respondent Bank was well within its rights to proceed with the e-auction and finalise the sale.

17. The judicial discipline dictates that Courts must be cautious while exercising extraordinary jurisdiction under Article 226, particularly when statutory remedies exist within the framework of a specialized statute like the SARFAESI Act, 2002.

The rule of judicial discipline and the doctrine of precedents ensure consistency and certainty in judicial decisions, promoting fairness and clarity in the judicial process. This not only strengthens the confidence of individuals in the legal system but also prevents misuse of judicial orders to thwart the legitimate recovery process initiated by Banks and financial institutions. In the present case, the Petitioner's conduct clearly demonstrates an attempt to misuse the interim protection granted by this Court while failing to avail the remedies provided under the SARFAESI Act, 2002 which were specifically designed to address such grievances.

18. The Petitioner's failure to approach the DRT, and the deliberate choice to come before this Court time and again under different guise also raises concerns of forum shopping. Forum shopping occurs when a litigant, instead of following the correct legal process, seeks out a forum that they believe will be more favorable to their case, thereby attempting to manipulate the judicial process. This Court must be cautious of such tactics and should not lend its hand to litigants seeking to misuse judicial orders to delay or obstruct the recovery proceedings under the SARFAESI Act, 2002.

Furthermore, it is crucial for this Court to act within the bounds of the law and not pass orders that fall outside its jurisdiction or interfere with statutory mechanisms designed to provide relief. In ***Authorised Officer, State Bank of Travancore v. Mathew K.C.*** reported in **(2018) 3 SCC 85**, the Hon'ble Supreme Court held that it is not appropriate for the High Courts to interfere in recovery proceedings under the SARFAESI Act, 2002 unless exceptional circumstances warrant such interference.

The purpose of the SARFAESI Act, 2002 is to provide a speedy and effective remedy for Banks and financial institutions, and judicial interference at every stage of the recovery process would defeat the very object of the statute. In view of the above, the prayer of the Petitioner invoking the Writ jurisdiction of this Court being not in consonance with fact and law deserves no merit for consideration.

19. It is also incumbent upon this Court to highlight the fact that the Petitioner in this case is not the borrower but the guarantor of the loan in question. This raises a significant question regarding his locus standi to challenge the e-auction sale and other proceedings initiated. As per the established legal principles, the primary responsibility for repayment of the loan lies with the borrower, while the role of the guarantor is secondary and contingent upon the borrower's default. In the present case, the borrower has not come forward to challenge the actions of the Bank or the e-auction sale.

The role of a guarantor is fundamentally to provide assurance to the creditor that the loan will be repaid, either by the borrower or, in the event of the borrower's failure, by the guarantor.

However, unless the specific terms of the loan agreement explicitly assign the guarantor a more active or equal role in the repayment process, the guarantor's

liability arises only after the borrower defaults, although the guarantor's liability is co-extensive.

20. In the instant case, no such loan agreement has been filed by either party, leaving the exact terms of the Petitioner's liability as guarantor unclear. Without these terms on record, it cannot be assumed that the guarantor has any immediate right or responsibility to intervene in the auction process initiated after the borrower's default. The borrower, who is primarily liable, has chosen not to contest the e-auction or the measures taken by the Bank. Therefore, the Petitioner's attempt to challenge the proceedings, without the borrower's participation or support, seems to be an indirect attempt to shield the borrower from the consequences of default. This, coupled with the lack of any challenge by the borrower himself, calls into question the legitimacy of the Petitioner's objections and highlights the limited scope of the guarantor's role under these circumstances.

21. As far as the contempt petition, in CONTC No. 6770 of 2021 filed by the Petitioner against the Bank for violating this Court's order dated 13.09.2021 in WP(C) No. 26724 of 2021, is concerned, the Petitioner argues that the Bank proceeded with the e-auction of the secured asset despite the directions of this Court. After examining the pleadings and the Bank's show cause reply, we find that the petition does not have merit for the following reasons.

22. The O.P. Nos. 2 & 3, Bank argues that the order passed by this Court on 13.09.2021 was an ex-parte order and that the Bank had no knowledge of the same. The said order was communicated to the Bank by the Petitioner only on 21.09.2021, as per Annexure A/1. In any case the e-auction had already been conducted on 15.09.2021 prior to any intimation of the order in question. The successful bidder, Mrs. Sudhanshubala Chhatoi, had emerged as the highest bidder during the auction process, offering an amount of Rs. 78,90,000/- as per Annexure-B/1. The O.P. Nos. 2 & 3, Bank submits that they received notice of the Court's order only after the e-auction had already concluded. Furthermore, it is important to address the Petitioner's claim that he complied with the Court's order by depositing Rs. 8,50,000/- on 24.09.2021. While the Bank acknowledges this deposit, the record reflects that the Petitioner failed to submit a valid representation for One-Time Settlement (OTS) scheme as was specifically directed by the Court. The mere deposit of funds without the accompanying OTS proposal, as required by the Court, cannot be construed as full compliance with the order.

23. In view of these facts, the O.P. Nos. 2 & 3, Bank's actions were consistent with its obligations under law. After receiving the Petitioner's affidavit on 16.09.2021, the Bank sought clarification by issuing a letter on 17.09.2021, requesting a copy of the Court's order. Despite this, the Petitioner did not submit a valid OTS proposal or make any effort to resolve the matter. Only after waiting a reasonable time and without any proper response from the Petitioner did the Bank confirm the sale to the highest bidder and issue the sale certificate. The delay in

finalising the sale was to give the Petitioner ample opportunity to comply with the Court's directions, which he failed to do.

24. Based on the discussion as above, it is clear that the O.P. Nos. 2 & 3, Bank acted in a diligent and lawful manner throughout the proceedings. The Petitioner's assertion that the Bank wilfully and deliberately violated this Court's order is unfounded. The Bank's actions were taken in good faith, following all necessary procedures, and allowing sufficient time for the Petitioner to comply. There is no infirmity found on the O.P. Nos. 2 & 3, Bank's part, as a result of which, the contempt petition is liable to be dismissed.

25. On the contrary, it is also evident that the Petitioner has attempted to delay the proceedings and misuse the orders of this Court. As a result of which, the Petitioner has also lost the right of redemption upon the publication of the e-auction notice dated 12.08.2021. Such actions not only hinder the recovery process but also lead to judicial overreach where Courts are called upon to intervene in matters already covered by specialized laws and forums. Therefore, it is imperative for this Court to dismiss the present writ petition and remind the Petitioner of the importance of adhering to statutory processes before seeking relief from a writ Court.

26. In view of the discussions above, and the availability of an alternative statutory remedy, this writ petition is dismissed as not maintainable. However, the Petitioner is at liberty to pursue the alternative remedy available under the SARFAESI Act, if so advised.

It is made clear that we have not expressed any opinion on the merits of the case and all the issues are left open to be urged before the competent authority as per the SARFAESI Act, 2002. The CONTC also stands disposed of. There will be no order as to costs.

Headnotes prepared by :
Smt. Madhumita Panda, Law Reporter
(Verified by : Shri Pravakar Ganthia, Editor-in-Chief)

Result of the case :
Writ petition is dismissed.

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2024 (III) ILR-CUT-694

SASMITA NAYAK
V.
ANITA PATTNAIK & ORS.

(CMP NO. 492 OF 2020)

3 OCTOBER 2024

[K.R. MOHAPATRA, J.]

Issue for Consideration

Is a *lis pendens* purchaser necessary party to a suit for specific contract?

Headnotes

SPECIFIC RELIEF ACT, 1963 – Section 19(b) – One contract for sale was executed by the original defendant in favor of the plaintiff – Suit for specific performance of such agreement for sale has been filed against the defendant (and after his death, the legal heirs) – Plaintiff filed an application under Order VI Rule 17 read with Order 1 Rule 10 Code of Civil Procedure to amend the plaint as well as to implead eleven *lis pendens* purchasers as parties to the suits alleging that the owner of the suit properties executed eleven sale deeds in favor of those persons in respect of different portion of the suit property on payment of consideration – Whether a *lis pendens* purchaser is a necessary party to a suit for specific contract.

Held: No – The parties to be impleaded in the present suit are not necessary parties as no relief is claimed against them in the suit and a decree for specific performance may be passed in their absence. (Para 9)

(B) INTERPRETATION OF STATUTES – Doctrine of *lis pendens* discussed with reference to case laws.

Citation Reference

Kasturi Vs. Iyyamperumal & Ors. **AIR 2005 SC 2813**; Robin Ramji Bhai Patel Vs. Anandibai Rama @ Rajaram Pawar & Ors. **(2018) 15 SCC 614**; Gurmit Singh Bhatia Vs. Kiran Kant Robinson & Ors. **(2020) 13 SCC 773**; Thomson Press (India) Ltd vs Nanak Builders and Investors Private Limited & Ors. **(2013) 5 SCC 397**; Khemchand Shankar Choudhari & Anr. Vs. Vishnu Hari Patil & Ors. **(1983) 1 SCC 18**; Amit Kumar Shaw & Anr. Vs. Farida Khatoon & Anr. **(2005) 11 SCC 403**; Shri Rikhu Dev, Chela Bawa Harjug Dass vs Som Dass (Deceased) through his Chela Shiam Dass **AIR 1975 SC 2159**; Prasanna Kumar Mohapatra Vs. Gokuli Bhoi & Ors. **2024 SCC OnLine SC 1692**; Yogesh Goyanka Vs. Govind & Ors. **2024 (II) OLR 399 – referred to.**

List of Acts

Specific Relief Act, 1963; Transfer of Property Act, 1882; Code of Civil Procedure, 1908

Keywords

Lis pendens; Necessary party; *Dominus litis*; *Pendente lite;* Purchaser*; Inter alia; Status quo*

Case Arising From

Order dated 19.03.2020 passd by Additional Civil Judge (Senior Division), Dhenkanal in CS No. 86 of 2014

Appearances of Parties

For Petitioner : Mr. Hrudananda Mohapatra
For Opp.Parties : Mr. Soumya Mishra

Judgment/Order

Judgment

K.R. MOHAPATRA, J.

1. This matter is taken up through hybrid mode.

2. Order dated 18th March, 2020 (Annexure-5) passed in CS No.86 of 2014 is under challenge in this CMP, whereby learned Additional Civil Judge (Senior Division), Dhenkanal rejected an application filed by the Plaintiff/Petitioner under Order 1 Rule 10 CPC read with Order VI Rule 17 CPC filed with a prayer to implead the *lis pendens* purchasers as parties to the suit.

3. Short narration of facts necessary for proper adjudication of this case is that the Petitioner as Plaintiff filed the suit for specific performance of agreement for sale dated 10th August, 2005 entered with the Defendant through his Power of Attorney. It is alleged in the plaint that pursuant to the agreement for sale, the Petitioner paid a sum of Rs.20.00 lakh out of total consideration amount of Rs.30,50,000/- to the Power of Attorney of the Defendant. Accordingly, possession of the suit land was delivered to the Plaintiff. But before execution of the sale deed, the Power of Attorney of the Defendant died on 2ndFebruary, 2006. Thus, the Plaintiff approached the Defendant to execute the sale deed on receipt of balance consideration of Rs.10,50,000/- to which the Defendant turned a deaf ear. During pendency of the suit, Defendant alienated the suit land to different purchasers for which the Plaintiff filed an application to implead the lis pendens purchasers as Defendants and to make necessary amendment in the plaint. The said application was rejected vide order under Annexure-5. Hence, this CMP has been filed. The Defendant raised objection stating that the purchasers are no way connected with the agreement for sale, which is put to specific performance in the suit.

3.1 During pendency of the suit, Defendant died and his legal heirs, namely, Opposite Parties were substituted. During pendency of the suit, Plaintiff filed an application under Order XXXIX Rules 1 and 2 read with Section 151 CPC praying, inter alia, to restrain the Defendant from alienating the suit property. Although initially an order of *status quo* was passed by learned trial Court but subsequently vide order dated 1st November, 2014, application for temporary injunction was rejected. Assailing the same, Plaintiff filed FAO No.755 of 2014, which was also dismissed vide order dated 21st April, 2017 with an observation that any alienation

of the suit property that may take place during pendency of the suit that may be governed under the principles of *lis pendens*.

3.2 The Defendant had also filed an application under Order VII Rule 11 CPC praying, *inter alia*, to reject the plaint, which was dismissed by learned trial Court. Assailing the same, the Defendant preferred CRP No.38 of 2014 before this Court, wherein, both the parties were directed to maintain status quo in respect of the suit property. But subsequently, this Court dismissed the CRP No.38 of 2014 vide order dated 21st April, 2017.

4. Mr. Mohapatra, learned counsel for the Petitioner submitted that during continuance of the order of status quo, the Defendant executed eleven numbers of registered sale deeds alienating the suit property. Thus, the Plaintiff filed the above captioned petition for impletion of those *lis pendens* purchasers as parties to the suit. Opposite Parties filed objection to the said petition stating that subsequent purchasers became rightful owner of respective portions of the suit property purchased by them by virtue of the registered sale deeds executed in their favour and they mutated their names in the revenue records. If the lis pendens purchasers are impleaded as parties the scope of the suit will be expanded from a suit for specific performance to a suit for title. It was also stated in their objection that since this Court while disposing of the FAO No.755 of 2014 observed that any alienation of the suit property that may take place during pendency of the suit that would be governed by the principles of *lis pendens*, a petition for impletion of parties should not be entertained and prayed for dismissal of the application.

4.1 Learned trial Court dismissed the petition vide order under Annexure-5 holding that the lis pendens purchasers are neither necessary nor proper parties to the suit as they were not concerned with the present suit filed for specific performance of agreement for sale. Learned trial Court, while adjudicating the petition, relied upon the ratio in the case of ***Kasturi Vs. Iyyamperumal and others***, reported in AIR 2005 SC 2813 and also observation made by this Court while disposing of FAO No.755 of 2014 vide order dated 21st April, 2017. Mr. Mohapatra, learned counsel relied upon the case of ***Robin Ramji Bhai Patel Vs. Anandibai Rama @ Rajaram Pawar and others***, reported in, reported in (2018) 15 SCC 614, wherein, Hon'ble Supreme Court applying the principles of dominus litis at para-8, held as under:-

> *"8. In the aforesaid context, this Court also considered the provisions of Order I Rule 10 CPC and in paragraph 7 it expressed its view that the relevant provisions show that the necessary parties in a suit for specific performance of a contract for sale are not only parties to the contract or their legal representatives but also a person who had purchased the contracted property from the vendor. It was further elaborated that:* ***Kasturi case (supra)***
>
> *"in equity as well as in law, the contract constitutes rights and also regulates the liabilities of the parties. A purchaser is a necessary party as he would be affected if he had purchased with or without notice of the contract, but a person who claims adversely to the claim of a vendor is, however, not a necessary party. From the above, it is now clear that two tests are to be satisfied for determining the question who is a necessary party."*

4.2 Thus, when the Plaintiff wants to implead certain persons as Defendants on the ground that they may be adversely affected by the outcome of the suit then the interest of justice requires allowing such prayer for impletion so that the persons likely to be affected may be aware of the proceedings and may take appropriate defence as suitable to their vendors. Mr. Mohapatra, learned counsel also made an endeavour to persuade the Court that the ratio in the case of ***Gurmit Singh Bhatia Vs. Kiran Kant Robinson and others***, reported in (2020) 13 SCC 773, has no application to this case, as it is held therein that a stranger cannot be impleaded as a party to the suit against the wish of the Plaintiff in a suit for specific performance of contract for sale. But in the instant case, the Plaintiff herself seeks to implead the lis pendens purchasers as parties to the suit. Mr. Mohapatra, learned counsel also referring to the decision in the case of ***Thomson Press (India) Ltd vs Nanak Builders and Investors Private Limited and others***, reported in (2013) 5 SCC 397 submitted that although learned counsel for the Opposite Parties relied upon the said caselaw, but the ratio decided therein supports the case of the Petitioner. In the said case, Hon'ble Supreme Court relying upon the case of ***Khemchand Shankar Choudhari and another Vs. Vishnu Hari Patil and others,*** reported in (1983) 1 SCC 18 held that the position of a person on whom any interest has devolved on account of a transfer during the pendency of any suit or a proceeding is somewhat similar to the position of an heir or a legatee of a party who dies during the pendency of a suit or a proceeding, or an official receiver who takes over the assets of such a party on his insolvency. An heir or a legatee or an official receiver or a transferee can participate in the execution proceedings even though his name may not have been shown in the decree, preliminary or final. Mr. Mohapatra also referred to para-6 of ***Khemchand Shankar Choudhari (supra)***, which reads as under:-

> *"Section 52 of the Transfer of Property Act no doubt lays down that a transferee pendente lite of an interest in an immovable property which is the subject matter of a suit from any of the parties to the suit will be bound in so far as that interest is concerned by the proceedings in the suit. Such a transferee is a representative in interest of the party from whom he has acquired that interest. Rule 10 of Order 22 of the Code of Civil Procedure clearly recognises the right of a transferee to be impleaded as a party to the proceedings and to be heard before any order is made. It may be that if he does not apply to be impleaded, he may suffer by default on account of any order passed in the proceedings. But if he applies to be impleaded as a party and to be heard, he has got to be so impleaded and heard. He can also prefer an appeal against an order made in the said proceedings but with the leave of the appellate court where he is not already brought on record. The position of a person on whom any interest has devolved on account of a transfer during the pendency of any suit or a proceeding is somewhat similar to the position of an heir or a legatee of a party who dies during the pendency of a suit or a proceeding, or an official receiver who takes over the assets of such a party on his insolvency. An heir or a legatee or an official receiver or a transferee can participate in the execution proceedings even though their names may not have been shown in the decree, preliminary or final. If they apply to the court to be impleaded as parties they cannot be turned out."*

He also referred to the case of ***Amit Kumar Shaw and another Vs. Farida Khatoon and another***, reported in (2005) 11 SCC 403, wherein, Hon'ble Supreme

Court held that the doctrine of lis pendens applies only where the lis is pending before a Court. Further, in a pending suit, the transferee is not entitled as of right to be made a party to the suit, though the Court has discretion to make him a party. But the transferee pendente lite can be added as a proper party if his interest in the subject matter of the suit is substantial and not just peripheral. A transferee pendente lite to the extent he has acquired interest from the Defendant is vitally interested in the litigation, where the transfer is of the entire interest of the Defendant; the latter having no more interest in the property may not properly defend the suit. He may collude with the plaintiff. Thus, when the Plaintiff is under no obligation to make a lis pendens transferee a party under Order XXII Rule 10 CPC, an alienee pendente lite may be joined as party. However, power of the Court to add a party to the proceeding cannot be dependent solely on the question whether he has interest in the suit property or not. The question is whether right of a person may be affected, if he is not added as a party. Such right, however, will include necessarily an enforceable legal right. The Court has held that a transferee pendente lite of an interest in immovable property is a representative-in-interest of the party from whom he has acquired that interest. He is entitled to be impleaded in the suit or other proceeding where his predecessorin-interest is made a party to the litigation and to be heard in the matter on the merits of the case. An alienee pendente lite is bound by the final decree that may be passed in the suit. Such an alienee can be brought on record both under Order XXII Rule 10 CPC and also under Order 1 Rule 10 CPC. Since under the doctrine of lis pendens a decree passed in the suit during the pendency of which a transfer is made, binds the transferee, his application to bring him on record should ordinarily be allowed. He also relied upon the case of ***Shri Rikhu Dev, Chela Bawa Harjug Dass vs Som Dass (Deceased) through his Chela Shiam Dass***, reported in AIR 1975 SC 2159 and submitted that a lis pendens purchaser being an assignee of the Defendant vendor is entitled to be impleaded as a party. These material aspects were lost sight of by the learned trial Court while adjudicating the matter. Hence, he prays for setting aside the impugned order and to implead the lis pendens purchasers/transferees as parties to the suit.

5. Mr. Mishra, learned counsel for the Defendants/Opposite Parties submitted that the legal issue that requires adjudication in the instant case is whether the lis pendens purchasers/transferees in the instant case should be impleaded as parties to the suit or not. It was his submission that admittedly the alienations were made by the original Defendant during pendency of the suit. During pendency of the suit, original Defendant died and his legal heirs have already been substituted and are contesting the suit as Defendants. They filed objection to the petition under Order VI Rule 17 read with Order I Rule 10 CPC stating that the lis pendens transferees are neither necessary nor proper parties to the suit. Their interest in the suit properties is governed under the principles of lis pendens enumerated under Section 52 of the Transfer of Property Act, 1882.

5.1 It is well-settled position of law that none other than the parties to the agreement for sale is necessary and/or proper party to a suit for specific performance

of contract. Two tests laid down by Hon'ble Supreme Court to determine whether or not a party/person is a necessary party, which are as follows:-

> *i)* There must be a right of some relief against such party in respect of the controversies involved in the proceeding*;*
>
> *ii)* no effective decree can be passed in absence of such party;

He also referred to the Section 19 (b) of the Specific Relief Act, 1963, which stipulates as under:-

> *19.* ***Relief against parties and persons claiming under them by subsequent title****.— Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against—*
>
> *(a) xx xx xx;*
>
> *b) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract;*
>
> *xx xx xx"*

He, therefore, submits that specific performance of contract may be enforced against the parties to the contract and the persons mentioned in Clause (b) of Section 19 of the Specific Relief Act, which makes it clear that a specific performance cannot be enforced against a parson who is a subsequent transferee for the vendor for a valuable consideration without notice to the original contract which sought to be enforced in the suit. It was thus submitted that the lis pendens transferees are not necessary parties to the suit as no relief is claimed against them and an effective decree can be passed in their absence. It was also submitted that at para-11 of the Kasturi (supra) a 'necessary party' has been elaborated and it is held that lis pendens alienees cannot be said to be necessary at all in a suit for specific performance of contract. Elaborating status of transferee *pendent lite*, Mr. Mishra, learned counsel stressed upon the scope of Section 52 of the Transfer of Property Act. It was his submission that the doctrine of *lis pendens* is based on the ground that is necessary for administration of justice, i.e., when the decision of a Court should be binding not only on the litigating parties but also those who had derived right as to the immovable property during pendency of the suit or proceedings under the provisions under Section 52 of the Transfer of Property Act. It does not annul said conveyance or the transfer or otherwise, but renders it subservient to right of a party or the litigant from whom he derived the right. In the instant case, alienation of the suit property having been undertaken by the original Defendant during pendency of the suit, the same is governed under the principles of Section 52 of the Transfer of Property Act thereby rendering right of the transferees *pendente lite* subservient to the right of the Defendant in the suit. Since the *lis pendens* transferees purchased the contracted property for a value, the provision of Clause (b) under Section 19 of the Specific Relief Act, would have no application to them, meaning thereby that in the event, the Plaintiff's suit for specific performance is decreed, the original contract is *ipso facto* enforceable against the transferees *pendente lite* in view of provisions

under Section 52 of the Transfer of Property Act. Thus, it was submitted that the entire exercise to bring the transferees *pendente lite* on record for the purpose of enforcement of the contract is a futile and meaningless exercise at the instance of the Plaintiff. As such, they are also not proper parties to the suit.

5.2 It was further submitted that Plaintiff sought for impletion of the transferees *pendente lite* heavily relying upon the principles of *dominus litis* submitting that since the Plaintiff seeks addition of the transferees pendente lite, learned Court should not have denied the same. The principles enumerated in ***Robin Ramjibhai Patel (supra)*** although relate to impletion of pendente lite purchasers in a suit for specific performance of contract, but in the said case, the Plaintiff was not in possession and there were materials on record to demonstrate that the transferees pendente lite were repeatedly changing the nature and character of the property. Therefore, Hon'ble Supreme Court thought it apposite to allow impletion of lis pendens purchasers as parties to the suit. In the instant case, the Plaintiff claims to be in possession of the suit property pursuant to the agreement for sale and no allegation of threat to her possession is made in the plaint by the *lis pendens* purchasers. As such, the principle laid down therein is not applicable to the case at hand. It is also submitted that the principles of *dominus litis* cannot be allowed to be overstretched in the present case more particularly when their absence will not prevent the learned trial Court in passing an effective decree. Further, no prayer in the suit is required to be made to declare the subsequent sale deeds executed by the original Defendant in favour of the *lis pendens* purchasers as valid and illegal. In support of his submission, he relied upon the case of ***Thomson Press (India) Limited (supra)***, wherein, the principles for impletion of lis pendens purchasers as parties to the suit has been discussed. He also relied upon the case of ***Prasanna Kumar Mohapatra Vs. Gokuli Bhoi and others***, reported in 2024 (II) OLR 399, wherein, this Court discussed the scope of Section 28 (3) (b) of the Specific Relief Act and held that an application for delivery of possession in a suit for specific performance of contract would necessarily be filed in the same suit, as after passing of the decree of specific performance, the Court does not cease to have jurisdiction to give delivery of possession to the Plaintiff/DHr. Mr. Mishra, learned counsel also placed reliance upon the case of ***Yogesh Goyanka Vs. Govind and others, reported in 2024 SCC OnLine SC 1692***, wherein, it is held that merely because alienation was made during pendency of a suit or proceeding, it does not automatically render such alienation, as null and void. It merely renders the right arising out of such transfer subservient to the right of the parties to the pending litigation and subject to direction, if any, of that Court. As such, the presence of lis pendens purchasers is not at all necessary for just adjudication of the suit. On the other hand, there is every likelihood that it may enlarge the scope of the suit by converting a suit for specific performance to a suit for declaration, which is not permissible in the eye of law. He, therefore, submitted that learned trial Court has committed no error in dismissing the petition filed under Order VI Rule 17 read with Order I Rule 10 CPC. As such, the CMP being devoid of any merit is liable to be dismissed.

6. Heard learned counsel for the parties. Perused the record and the case laws cited. From the case record, it is apparent that the Plaintiff filed an application under Order VI rule 17 read with Order I Rule 10 CPC (Annexure-3) to amend the plaint as well as to implead eleven *lis pendens* purchasers as parties to the suit alleging that the Defendant (owner of the suit property) executed eleven sale deeds in favour of those persons in respect of different parcels of the suit property on payment of consideration. The Plaintiff in unequivocal terms admitted that the persons sought to be impleaded are lis pendens transferees in respect of the property for which the contract for sale was executed by the original Defendant in her favour. Suit for specific performance of such agreement for sale has been filed against the Defendant (and after his death, the legal heirs). It is alleged by the Plaintiff that in the event the suit is decreed in her favour, right of the parties sought to be impleaded are likely to be affected. Thus, the question that arises for consideration in this CMP is *"whether in the fact and circumstances of the case of the present suit for specific performance of contract against the Defendant, the lis pendens transferees should be impleaded as parties and foundational pleading thereof should be incorporated in the plaint by way of amendment?'* Lengthy arguments, as stated above, were made by learned counsel for the parties in support of their respective cases.

7. ***Kasturi (supra)*** discussing second part of Order I Rule 10 (2) CPC observes that necessary parties in a suit for specific performance of contract for sale are the parties to the contract or if they are dead, their legal representatives as also a person who had purchased the contracted property from the vendor. In equity as well as in law, the contract constitutes rights and also regulates the liabilities of the parties. A purchaser is a necessary party as he would be affected if he had purchased with or without notice to the contract, but a person who claims adversely to the claim of the vendor is, however, not a necessary party. Thus, it is clear that two tests are to be satisfied for determining the question as to who is a necessary party. Those tests are reproduced hereunder:-

> *i) There must be a right of some relief against such party in respect of the controversies involved in the proceeding;*
>
> *ii) No effective decree can be passed in absence of such party;*

8. Section 19 of the Specific Relief Act provides relief against the parties and persons claiming under them by subsequent title in a suit for specific performance of contract. The provision makes it clear that except otherwise provided in Chapter-II, specific performance for a contract may be enforced against.—

> *"a) either of the parties thereto;*
> *b) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract;*
> *c) any person claiming under a title which, though prior to the contract and known to the plaintiff, might have been displaced by the defendant;*
> *d) xx xx xx*
> *e) xx xx xx"*

On the aforesaid premises, Hon'ble Supreme Court proceeded to test/determine whether a subsequent purchaser is a necessary party or not. Discussing different case laws, the Hon'ble Supreme Court in para-12 of ***Kasturi (supra)*** came to hold that necessary parties are those persons in whose absence no decree can be passed by the Court or that there must be right of some relief against some parties in respect of the controversy involved in the proceedings and proper parties are those whose presence before the Court would be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit although no relief in the suit was claimed against such person.

9. In the light of the aforesaid discussions, it can be safely concluded that the parties sought to be impleaded in the present suit are not necessary parties as no relief is claimed against them in the suit and a decree for specific performance may be passed in their absence. Hence, question remains as to whether they are proper parties to the suit or not? Discussing the scope of Order I Rule 10 (2) CPC, Hon'ble Supreme Court in ***Kasturi (supra)*** held that the term '*all questions involved in the suit*' clearly meant that controversy raised as between the parties to the litigation must be gone into only, that is to say, controversies with regard to right which is set up and relief claimed on one side and denied on the other and not other controversies which may arise between the Plaintiff and the Defendants *inter se* or questions between the parties to the suit and a third party. Thus, the Hon'ble Supreme Court opined that a Court cannot allow adjudication of collateral matters so as to convert a suit for specific performance of contract for sale into a complicated suit for title between the plaintiff/appellant in one hand and defendant/respondents on the other, as it would totally dilute the scope of the suit for specific performance of contract for sale.

10. From the above discussions, it is clear that the right of a third party over the suit property cannot be decided in a suit for specific performance of contract for sale, as essentially the Plaintiff in such a suit claims performance of the contract entered into between two parties for sale. Sub-section (a) and (b) of Section 19 of the Specific Relief Act, however, makes it more specific that specific performance of a contract may be enforced against either of the parties to the contract or any other person under them by a title arising subsequently to the contract except a transferee, for value, who has paid his money in good faith and without notice to the original contract. Thus, it is clear that specific performance cannot be claimed against a third party who purchased the land from any of the parties to the original contract for value in good faith and without notice to the original contract. In the instant case, no such pleading is sought to be incorporated by way of amendment while seeking for impletion of the third parties.

11. The circumstance is different when a property of a previous contract is purchased by a third party before filing of suit for specific performance of contract. It will be certainly governed under the principles laid down under Section 19 of the Specific Relief Act. But in the instant case, the parties sought to be impleaded are *lis*

pendens purchasers and thus they are governed under the principles enumerated under Section 52 of the Transfer of Property Act. In absence of any pleading in terms of Section 19(b) of the Specific Relief Act, a contract is enforceable against them, as it is claimed that they have purchased the property from the original Defendant during pendency of the suit. In such a case, their impletion as parties is neither necessary nor proper. They are neither necessary nor proper parties to the suit. In that view of the matter, the ratio in the case of ***Thomson Press (India) Limited (supra)*** is squarely applicable to the instant case.

12. Mr. Mohapatra, learned counsel for the for the Petitioner placed reliance on the observation made by Hon'ble Sri Thakur, J, while concurring the majority view that 'no one other than parties to the agreement for sale is a necessary or property party to a suit.' While concurring the view, Hon'ble Mr. Thakur, J relied upon the ratio of ***Khemchand Shankar Choudhari (supra),*** which was verily relied upon by Mr. Mohapatra, learned counsel for the Petitioner, which has taken note of the provision under Order XXII Rule 10 C.P.C to bring legal representatives and assignees etc on record. Order XXII Rule 10 CPC operates in a different field unlike a suit for specific performance of contract. There is no doubt that possession of a person on whom any interest has devolved on account of transfer during pendency of a suit or a proceeding is some what similar in position as heir or legatee of a party, who died during pendency of a suit or proceeding or an official receiver, who takes over all assets of such a party on his insolvency. In the instant case, the legal heirs of original Defendant have already been substituted and are defending the suit. They also objected to the impletion of the subsequent purchasers as parties to the suit. Further, the Plaintiff claims that she is in possession over the suit property pursuant to the unregistered deed of agreement for sale. Thus, the question of impletion of *lis pendens* purchasers as parties, as heirs or legatee of the vendor does not arise at all. It is also not the case of the Plaintiff who seeks amendment and impletion of parties that the Defendants (legal heirs of the original Defendant) may no longer take interest in the property or may not properly defend the suit, which has been emphasised by Hon'ble Mr. Thakur, J in ***Khemchand Shankar Choudhari (supra)***. Thus, the contention of Mr. Mohapatra, learned counsel for the Plaintiff/Petitioner on that count cannot be accepted. There cannot be any quarrel on the settled position that the sale deeds executed by the original Defendant in favour of the lis Pendens purchasers sought to be impleaded are not void ab initio, as Section 52 of the Transfer of Property Act renders the right of the transferee pendente lite subservient to the right of the parties in the suit. Thus, in the event of a specific performance is granted in favour of the Plaintiff, it can be enforced against the transferee *pendente lite*. Thus, the exercise of amending the plaint and impleading the *lis pendens* transferees as parties to the suit will serve no purpose for enforcement of the contract against the Defendants. Rather it will lengthen the journey of the litigation and may enlarge the scope of the suit from specific performance of a contract for sale to a suit for declaration, which is not permissible in the eyes of law.

13. The principles of *dominus litis* shall not apply to the instant case in view of the scope of Order I Rule 10 (2) CPC, which in clear terms provides that the Court may in its discretion at any stage of the suit or proceedings either upon or without application of either party and on such terms as may appear to the Court just, any party improperly joined whether as Plaintiff or Defendant, be struck out and that any person who ought to have joined whether as Plaintiff or Defendant or whose presence before the Court '*may be necessary in order to enable the Court effectually and completely adjudicate upon and settle all questions involved in the suit*' be added. Thus, it is crystal clear that the Court may in its discretion add any of the parties, whose presence is necessary to completely and effectively adjudicate upon and settle all the questions involved in the suit. In the instant case, the question is with regard to specific performance of contract for sale. Admittedly, the parties sought to be impleaded are not parties to such contract. Thus, their presence is not at all necessary to completely and effectually adjudicate all questions involved in the suit. As such, the doctrine of *dominus litis* takes back seat in view of the exhaustive provisions under Sub-rule (2) of Order 1 Rule 10 CPC. Thus, the principles decided in ***Robin Ramjibhai Patel (supra)*** as relied upon by Mr. Mohapatra, learned counsel for the Petitioner, is of no assistance to him. Moreover, in the said case, the Plaintiff was not in possession whereas in the instant case, the Plaintiff claims to have taken over possession pursuant to unregistered agreement for sale executed between the Plaintiff and the original Defendant.

14. In view of the discussions made above, prayer to declare the sale deeds executed by the original Defendant during pendency of the suit in favour of the parties sought to be impleaded, is not at all necessary. On a close reading of the order under Annexure-5, it appears that learned trial Court has exercised its discretion in refusing the prayer for amendment as well as impletion of parties judiciously and diligently. Thus, the same warrants no interference.

15. Accordingly, the CMP being devoid of any merit stands dismissed, but in the facts and circumstances, there shall be no order as to costs.

16. Interim order dated 1st December, 2020 passed in IA No.480 of 2020 stands vacated.

17. Record in disposed of FAO No.755 of 2014 brought for reference be sent concerned Section forthwith.

Headnotes prepared by : *Result of the case :*
Smt. Madhumita Panda, Law Reporter CMP dismissed
(Verified by : Shri Pravakar Ganthia, Editor-in-Chief)

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2024 (III) ILR-CUT-706

LAXMI GOUDA & ORS.
V.
THE DISTRICT COLLECTOR, GANJAM & ORS.

(CMP NO. 1271 OF 2022)

22 OCTOBER 2024

[K.R. MOHAPATRA, J.]

Issue for Consideration

Whether the condonation of delay of 1774 days without sufficient cause is sustainable under law.

Headnotes

LIMITATION ACT, 1963 – Section 5 r/w Order XLI Rule 3-A of Code of Civil Procedure – Condonation of delay – There is a delay of 2336 days in filing the appeal – Learned Appellate Court taking into consideration the ratio of the Apex Court in Miscellaneous Application No. 665 of 2021 arising out of *Suo Motu* Writ Petition (Civil) No. 03 of 2020 excluded the period of Covid pandemic (i.e. from 15/03/2020 to 02/10/2021) and calculated the delay as 1774 days in filing the appeal and condoned the same – Whether the condonation of delay of 1774 days without sufficient cause is sustainable under law.

Held: No – By efflux of time, a right has accrued in favour of the Petitioners/Respondents by virtue of the judgment and decree passed in CS No.95 of 2014 – The same cannot be taken away so lightly without even discussing the objection raised by them opposing condonation of delay as has been done by learned Additional District Judge, Chatrapur – Exclusion of period of COVID-19 is immaterial and inconsequential for consideration of petition to condone the delay in filing the Appeal, as the statutory period for filing the appeal had expired four years before the outbreak of COVID-19 pandemic. (Para 11)

No doubt, public interest plays a vital role while considering the petition for condonation of delay, but that does not take away the responsibility of the party seeking for condonation of delay to provide sufficient cause for the same – Learned Court below could not have condoned the delay in filing the Appeal, as the finding of latches on the part of the revenue authorities itself makes it clear that no sufficient cause has been shown by the Government functionaries for condonation of delay.

(Paras 9-13)

Citation Reference

State of Odisha & Ors. Vs. Sumitra Das & Ors. **2021 (II) ILR-CUT-241**; Pathapati Subba Reddy (Died) by LRs. & Ors. Vs. Special Deputy Collector **2024 SCC OnLine SC 513**; State of Uttar Pradesh & Ors.Vs. Subha Narain & Ors. **(2022) 9 SCC 266**; Majji Sannemma @ Sanyasirao Vs. Reddy Sridevi & Ors. **(2021)18 SCC 384**; State of Odisha & Ors. Vs. Bishnupriya Routray & Ors. **2014 (II) ILR-CUT 847**; Sheo Raj Singh (Dead) through Lrs. & Ors. vs Union of India & Anr. **(2023) 10 SCC 531**; State of Manipur & Ors. Vs. Koting Lamkang **(2019) 10 SCC 408**; State of Orissa and four Ors. Vs. Kantilata Sarangi **2008 (II) OLR 942**; Postmaster General & Ors. Vs. Living Media India Ltd. & Anr. **(2012) 3 SCC 563**; Krushna Chandra Behera Pradhan & Anr. Vs. Govt. of Odisha **2024 (II) ILR-CUT-936 – referred to**.

List of Acts

Limitation Act, 1963; Code of Civil Procedure, 1908.

Keywords

Condonation of delay; Cause; Sufficient Cause; Adverse possession; Right,title and interest; Confirmation of possession; Limitation; Explanation; Excuse.

Case Arising From

Order dated 22.10.2022 passed in CMA No. 5 of 2021 (arising out of RFA No.12 of 2021) passed by the learned Addl. District Judge, Chatrapur, Ganjam.

Appearances of Parties

For Petitioners : Mr. Budhadev Routray, Sr. Adv., Mr. Jagadish Biswal.
For Opp.Parties : Mr. Ajodhya Ranjan Dash, AGA

Judgment/Order

Judgment

K.R. MOHAPATRA, J.

1. This matter is taken up through hybrid mode.

2. Petitioners in this CMP seek to assail the order dated 22nd October, 2022 (Annexure-4) passed in CMA No. 5 of 2021 (arising out of RFA No.12 of 2021), whereby learned Additional District Judge, Chatrapur, Ganjam allowed an application under Section 5 of the Limitation Act, 1963 and thereby condoned the delay of 1774 days in filing the Appeal (RFA No.12 of 2021) by the Opposite Parties subject to payment of cost of Rs.10,000/-.

3. Case of the Petitioners as narrated by Mr. Routray, learned Senior Advocate is that assailing the judgment and decree dated 30th June, 2015 and 15th July, 2015 respectively passed by learned Civil Judge (Senior Division), Chatrapur in CS No.95 of 2014, the Opposite Parties (Government functionaries) filed RFA No.12 of 2021,

which is at present pending in the Court of learned Additional District Judge, Chatrapur, Ganjam. As there was a huge delay in filing the Appeal under Section 96 CPC, an application under Section 5 of the Limitation Act read with Order XLI Rule 3-A CPC was also filed along with the memorandum of appeal.

3.1 The suit was filed by one Siba Gouda for declaration of his right, title, interest and confirmation of possession over the suit schedule property, for issuance of ROR in respect of the suit property in his favour and also for a decree of permanent injunction restraining the Defendants–State functionaries from evicting and interfering with his possession over the suit property. The suit land pertains to Khata No.583, Plot No.1676 to an extent of Ac.0.035 decimal, Plot No.1678 to an extent of Ac.0.135 decimal, Plot No.1677 to an extent of Ac.0.045 decimal, Plot No.1679 to an extent of Ac.0.055 decimal, Plot No.1680 to an extent of Ac.0.215 decimal, Plot No.1681 to an extent of Ac.0.160 decimal, Plot No.1684 to an extent of Ac.0.067 decimal, Plot No.1692 to an extent of Ac.0.077 decimal, Plot No.1691 to an extent of Ac.0.087 decimal, Plot No.1693 to an extent of Ac.0.050 decimal and Plot No.1690 to an extent of Ac.0.050 decimal admeasuring a total area of Ac.0.978 decimal in mouza Nuagada under Hinjlicut tahasil in the district of Ganjam (hereinafter referred to as 'the suit land').

3.2 The suit was decreed in part on contest vide judgment dated 30th June, 2015 by learned Civil Judge (Senior Division), Chatrapur against the Defendants declaring the Plaintiff, namely, Siba Gouda to be a tenant over the suit property and his possession over the suit land was confirmed. The Defendants were permanently restrained from interfering with the peaceful possession of the Plaintiff over the suit land. The Opposite Parties, namely, Government functionaries preferred the Appeal beyond the statutory period. There was a delay of 2336 days in filing the Appeal. Accordingly, the Opposite Parties filed an application under Section 5 of the Limitation Act read with Order XLI Rule 3-A CPC for condonation of delay in filing the Appeal. Learned Additional District Judge, Chatrapur, vide order dated 22nd October 2022 (Annexure-4), allowed the application for condonation of delay in filing the Appeal subject to payment of cost of Rs.10,000/- to the present Petitioners (Respondents therein) on or before 22nd November, 2022. Assailing the said order under Annexure-4, this CMP has been filed by the Respondents/Petitioners. Needless to say that the Petitioners are legal heirs of the Plaintiff late Siba Gouda and have been brought on record during pendency of the Appeal.

4. Mr. Routray, learned Senior Advocate appearing for the Petitioners submitted that the impugned order suffers from non-consideration of material facts on record. Although there is a delay of 2336 days in filing the Appeal, learned Appellate Court taking into consideration the ratio in Miscellaneous Application No.665 of 2021 arising out of *Suo Motu* Writ Petition (Civil) No.03 of 2020 reported in 2021 (II) OLR 779 (SC) excluded the period from 15th March, 2020 to 2nd October, 2021 and calculated the delay as 1774 days in filing the Appeal. It is submitted that although the Appellate Court held that the delay in filing the Appeal

occurred due to latches of the then revenue officials, but holding that due to such latches of the Public Officers, public at large should not be debarred from getting justice, allowed the petition for condonation of delay. Learned appellate Court although referred to different case laws relied upon by the Petitioners/ Respondents but did not discuss the applicability of the same to the case at hand. Brushing aside the ratio decided therein, learned appellate Court came to hold that the claim of the Plaintiffs/Petitioners is in respect of a public property, i.e., the suit land and refusal to condone the delay would result in grave miscarriage of justice.

4.1 Mr. Routrary, learned Senior Advocate submitted that when there is admittedly latches on the part of the State functionaries in preferring the Appeal and a right thereby created in favour of the Petitioners, it should not be taken away lightly by condoning the delay of 2336 days in filing the Appeal. In this regard, he placed reliance on the following judicial pronouncements: -

(i) ***State of Odisha and others Vs. Sumitra Das and others,*** *reported in* 2021 (II) ILR-CUT-241

(ii) ***Pathapati Subba Reddy (Died) by LRs. And others Vs. Special Deputy Collector*** (LA) [SLP (Civil) 31248 of 2018]; *reported in* 2024 SCC OnLine SC 513

(iii) ***State of Uttar Pradesh and others Vs. Subha Narain and others*** [SLP (Civil) Diary No.25743 of 2020 decided on 22ndJanuary,2021]; *reported in* (2022) 9 SCC 266

(iv) ***Majji Sannemma @ Sanyasirao Vs. Reddy Sridevi and others*** [Civil Appeal No.7696 of 2021 decided on 16th December, 2021; *reported in* (2021)18 SCC 384

(v) ***State of Odisha and others Vs. Bishnupriya Routray and others*** [FAO No.86 of 2013 decided on 22nd April, 2014] *reported in* 2014(II) ILR-CUT 847

Therefore, he submitted that the impugned order being unreasoned and non-speaking one is liable to be set aside.

5. Mr. Dash, learned AGA vehemently objected to the above submission. It was his submission that learned Additional District Judge observed that delay though occurred due to lackadaisical approach of the revenue officials and their frequent transfers, yet keeping in mind the benefit that would accrue to the public at large, condoned the delay holding that for the latches of the Public Officer, a public interest should not suffer. It was also held by learned Additional District Judge that delay was neither intentional nor deliberate. While condoning the delay, learned appellate Court also kept in mind the loss that the Petitioners/Respondents would suffer and compensated the same by directing the Opposite Parties to pay a cost of Rs.10,000/- to the Petitioners.

5.1 Referring to affidavits filed by the Tahasildar, Hinjili on 11th July, 2023 and 8th January, 2024, Mr. Dash, learned AGA submitted that due to bifurcation of Chatrapur tahasil, the case records concerning the suit land was firstly transferred to Purusottampur tahasil. Thereafter, Purusottampur tahasil was bifurcated and the concerned case record was transferred to Hinjili tahasil. There was also frequent transfer of revenue officials during that period. During 2015 to 2021 nine tahasildars were transferred. Thus, during their short tenure at Hinjili tahasil and in absence of

any intimation regarding disposal of CS No.95 of 2014, proper attention could not be given to file the Appeal in time. In addition to the above, due to cyclone 'Fani' in the year 2019 followed by outbreak of COVID-19 pandemic, tahasildars posted during the said period remained pre-occupied with emergent public duty under the direct supervision of the higher authorities. When the original Plaintiff, namely, Siba Gouda applied for ROR, he never mentioned about the judgment passed in CS No.95 of 2014. However, Tahasildar, Hinjili, by order dated 31st January, 2019, rejected the application for mutation of the land in favour of said Siba Gouda against which an Appeal was preferred. Tahasildar, Hinjili on 25th March, 2021 received an order dated 16th March, 2021 passed by Additional Sub-Collector, Chatrapur in Mutation Appeal No.5 of 2019 by which the case was remanded for fresh adjudication by Tahasildar, Hinjili referring to the judgment passed in CS No.95 of 2014. On receipt of the said order, Tahasildar, Hinjili contacted learned AGP, Chatrapur and thereafter steps were taken to file Appeal against the said judgment and decree. Thus, learned Additional District Judge has committed no error in holding that the delay in filing the Appeal was neither deliberate nor intentional. He further submitted that an endeavour should be made by the Court to adjudicate the litigation on merit and not on mere technicalities including the ground of delay. Since larger public interest is involved in respect of the suit property, learned Additional District Judge adopted a pragmatic approach and condoned the delay so that the Appeal can be disposed of on merit. In the suit, the Plaintiff claims right and title over the suit property by adverse possession. As such, no error of law has been committed by learned Additional District Judge, Chatrapur in condoning the delay in filing the Appeal.

5.2 In support of his submission, Mr. Dash, learned AGA relied upon the following decisions: -

(i) ***Sheo Raj Singh (Dead) through Lrs. and others. Vs Union of India and another****, reported in* (2023) 10 SCC 531;

(ii) ***State of Manipur and others Vs. Koting Lamkang****, reported in (2019) 10 SCC 408;*

(iii) ***State of Orissa and four others Vs. Kantilata Sarangi****, reported in, 2008 (II) OLR 942;*

He, therefore, submitted that the CMP being devoid of any merit is liable to be dismissed.

6. Heard learned counsel for the parties. Perused the case record as well as the case laws relied upon by learned counsel for the parties.

7. Civil Suit No.95 of 2014 was filed by one Siba Gouda for declaration of his right, title, interest and confirmation of possession over the suit land as well as decree of permanent injunction against the Defendants, namely, Government functionaries by restraining them from interfering with the possession of said Siba Gouda. Petitioners are legal heirs of said Siba Gouda, who are brought on record on the death of said Siba Gouda. The suit was partly decreed on contest vide judgment dated 30th June, 2015 (Annexure-1) passed by learned Civil Judge, Senior Division,

Chatrapur declaring that the Plaintiff, namely, Siba Gouda is a tenant over the suit land. His possession over the suit land was confirmed and the Defendants are permanently restrained from interfering with the peaceful possession of the Plaintiff over the suit land without taking recourse of law. Assailing the said judgment and decree dated 30th June, 2015 and 15th July, 2015 respectively passed in the suit, the Opposite Parties-Government functionaries preferred RFA No.12 of 2021, which is at present pending in the Court of learned Additional District Judge, Chatrapur. Stamp Reporter pointed out a delay of 2336 days in filing the Appeal. As such, an application (CMA No.5 of 2021) was filed by the Appellants/Opposite Parties for condonation of delay in filing the Appeal. In the petition for condonation of delay (Annexure-2), it was stated that after the judgment and decree was passed, the State Authorities dealing with the matter sought for clarification from the higher authorities to file Appeal. At the relevant time, Chatrapur tahasil was bifurcated and the case record concerning the suit land was transferred to Purusottampur tahasil. Subsequently, Purusttoampur tahasil was also bifurcated and concerned case record was transferred to Hinjili tahasil under which the suit land situates at present. The then incumbents of the office of Tahasildar could not know about the matter due to their engagement in emergent public works. It was submitted by Mr. Dash, learned AGA that in the year 2019, Cyclone 'Fani' hit the locality and created devastation. Further in the year 2020 onwards, pandemic of COVID-19 completely jeopardized and paralyzed the normal functioning of the government offices including the office of Tahasildar, Hinjili. The matter came to the notice of Tahasildar, Hinjili when he received an order of remand from the office of the Additional Sub-Collector, Chatrapur. Mr. Dash, learned AGA referring to the affidavit dated 8th January, 2024 filed by the Tahasildar, Hinjili in this CMP submitted that on 25th March, 2021, the Tahasildar Hinjili received a copy of the order dated 16th March, 2021 from the Court of Additional Sub-Collector, Chatrapur passed in Mutation Appeal No.5 of 2019 remanding the Mutation Case for fresh adjudication referring to the judgment and decree passed in CS No.95 of 2014. On receipt of the said order, the Tahasildar, Hinjili came to know about the judgment and decree passed in the aforesaid suit and took steps to file the Appeal seeking clarification/opinion of the Additional Government Pleader, who advised to seek opinion of learned Advocate General. Thus, the Tahasildar wrote to the office of learned Advocate General of Odisha seeking for opinion and sought for clarification from the Authority with regard to settlement of land in urban area. Such clarification was not received by the office of the Tahasildar, Hinjili. As such, delay occurred in filing the Appeal against the judgment and decree passed in CS No. 95 of 2014. It was also submitted that in addition to the above, there was frequent change of tahasil and tahasildars for which clarification could not be obtained from the higher authorities to file Appeal in time within the prescribed period of limitation. Counter affidavit to the said petition for condonation of delay under Annexure-2 was filed by the Petitioners who were Respondents in the Appeal. In their Counter affidavit at Annexure-3, it was stated that CS No.95 of 2014 was decreed on contest in presence of the State Counsel on 30th June, 2015. Thus, an Appeal should have been filed on or before 30th July, 2015

excluding the days spent for obtaining certified copy. No step was taken by the State Authorities dealing with the matter. Sufficient cause was also not shown by the Appellants/Opposite Parties for condonation of delay. No special treatment should be given to the State functionaries in the matter of condonation of delay, as the Limitation Act neither creates any such classification nor does it contain any provision to give special treatment to the Government functionaries in the matter of condonation of delay. It was also stated, *inter alia*, that the delay in filing the Appeal was not properly explained by providing detail particulars in support of the averments made in the petition for condonation of delay. There was negligence and deliberate inaction on the part of the revenue officers more particularly the Tahasildar and his predecessors in filing the Appeal. As it appears from the averments made in the petition under Annexure-2, the Tahasildar, Hinjili was aware of the judgment and decree passed in the suit. Since the judgment and decree passed in the suit was not implemented, the Petitioners/Respondents approached this Court in W.P.(C) No.17180 of 2021 for a direction to obey the orders of Additional Sub-Collector passed in Mutation Appeal No.5 of 2019. In spite of the same, the Tahasildar did not carry out the order, which compelled the Petitioners to file Contempt petition before this Court. Thus, the revenue authorities had notice of the judgment and decree passed in CS No.95 of 2014 throughout, but due to sheer negligence and latches on their part, they did not prefer the Appeal in time. Further, the plea of bifurcation of tahasils and Cyclone 'Fani' as well as pandemic of COVID-19 are sheer excuses not explanation for condonation of delay.

8. Taking note of the rival contentions made by the parties before learned Additional District Judge, Chatrapur, it appears that after the judgment and decree in CS No.95 of 2014 was passed, the concerned Tahasildar intimated the higher authorities for clarification. Although a plea of bifurcation of tahasils was taken, but no detail particulars of the same was given either in the petition for condonation of delay or in the affidavit dated 11th July, 2023 as well as 8th January, 2024 filed in this CMP. In addition to the above, it appears from the Judgment (Annexure-1) passed in CS No. 95 of 2014 that Tahasildar, Hinjili has been arrayed as Defendant No. 3 to the suit. Thus, bifurcation of tahasil, if any, had already taken place before the judgment in the suit was passed. As such, bifurcation of Chatrapur tahasil and subsequently Purusottampur tahasil and creation of Hinjil tahasil are immaterial for causing delay in filing the Appeal, as alleged, as those cannot be said to have created any impediment in filing the Appeal in time. No detail particulars of the communication made to the higher authorities either for clarification or for opinion, as stated in the petition for condonation of delay (Annexure-2), has also been given. It is, however, stated in the affidavit dated 8th January, 2024 that on 25th March, 2021, the Tahasildar, Hinjili received copy of the order dated 16th March, 2021 passed by the Additional Tahasildar, Chatrapur in Mutation Appeal No.5 of 2019. Even after receipt of the said letter/order, immediate step was not taken to file the Appeal, as would be apparent from the averments made therein. Calamities like Cyclone 'Fani' occurred in the year 2019 and outbreak of COVID-19 are of no

significance for causing delay in filing the appeal, as the judgment and decree was passed in the year 2015, i.e., on 30th June, 2015 and 15th July, 2015 respectively. By that time, four years had already elapsed.

9. Learned Additional District Judge excluded the period of pandemic of COVID-19 from the period of delay relying upon the observations made in *Suo Motu* Writ Petition (Civil) No.3 of 2020. Since the limitation period had already expired five years before outbreak of COVID-19, the ratio in *Suo Motu* Writ Petition (Civil) No.3 of 2020 is of no assistance to the State Authorities-State functionaries. It is not the quantum of delay that matters but the explanation given/cause shown for condonation of delay, which is relevant for consideration. On a plain reading of the petition for condonation of delay filed under Section 5 of the Limitation Act read with Order XLI Rule 3-A CPC no cause much less any sufficient cause has been given for condonation of inordinate delay in filing the Appeal. In the case of the ***Postmaster General and others Vs. Living Media India Limited and another***, reported in (2012) 3 SCC 563, it is held as under:-

> *"27. It is not in dispute that the person(s) concerned were well aware or conversant with the issues involved including the prescribed period of limitation for taking up the matter by way of filing a special leave petition in this Court. They cannot claim that they have a separate period of limitation when the Department was possessed with competent persons familiar with court proceedings. In the absence of plausible and acceptable explanation, we are posing a question why the delay is to be condoned mechanically merely because the Government or a wing of the Government is a party before us.*
>
> *28. Though we are conscious of the fact that in a matter of condonation of delay when there was no gross negligence or deliberate inaction or lack of bona fide, a liberal concession has to be adopted to advance substantial justice, we are of the view that in the facts and circumstances, the Department cannot take advantage of various earlier decisions. The claim on account of impersonal machinery and inherited bureaucratic methodology of making several notes cannot be accepted in view of the modern technologies being used and available. The law of limitation undoubtedly binds everybody including the Government.*
>
> *29. In our view, it is the right time to inform all the government bodies, their agencies and instrumentalities that unless they have reasonable and acceptable explanation for the delay and there was bona fide effort, there is no need to accept the usual explanation that the file was kept pending for several months/years due to considerable degree of procedural red-tape in the process. The government departments are under a special obligation to ensure that they perform their duties with diligence and commitment. Condonation of delay is an exception and should not be used as an anticipated benefit for government departments. The law shelters everyone under the same light and should not be swirled for the benefit of a few.*
>
> *30. Considering the fact that there was no proper explanation offered by the Department for the delay except mentioning of various dates, according to us, the Department has miserably failed to give any acceptable and cogent reasons sufficient to condone such a huge delay.*
>
> *Accordingly, the appeals are liable to be dismissed on the ground of delay"*

In the case of ***Sumitra Das and others (supra),*** this Court relying upon the ratio in the case of ***Chief Postmaster General (supra)*** has observed at para-5, relevant portion of which is as under:-

> "5…..5. *A preposterous proposition is sought to be propounded that if there is some merit in the case, the period of delay is to be given a go-by. If a case is good on merits, it will succeed in any case. It is really a bar of limitation which can even shut out good cases. This does not, of course, take away the jurisdiction of the Court in an appropriate case to condone the delay.*
>
> *6. We are also of the view that the aforesaid approach is being adopted in what we have categorized earlier as "certificate cases". The object appears to be to obtain a certificate of dismissal from the Supreme Court to put a quietus to the issue and thus, say that nothing could be done because the highest Court has dismissed the appeal. It is to complete this formality and save the skin of officers who may be at default that such a process is followed. We have on earlier occasions also strongly deprecated such a practice and process. There seems to be no improvement. The purpose of coming to this Court is not to obtain such certificates and if the Government suffers losses, it is time when the concerned officer responsible for the same bears the consequences. The irony is that in none of the cases any action is taken against the officers, who sit on the files and do nothing. It is presumed that this Court will condone the delay and even in making submissions, straight away counsels appear to address on merits without referring even to the aspect of limitation as happened in this case till we pointed out to the counsel that he must first address us on the question of limitation.*
>
> *7. We are thus, constrained to send a signal and we propose to do in all matters today, where there are such inordinate delays that the Government or State authorities coming before us must pay for wastage of judicial time which has its own value. Such costs can be recovered from the officers responsible.*
>
> *8. Looking to the period of delay and the casual manner in which the application has been worded, we consider appropriate to impose costs on the petitioner- State of Rs.25,000/- (Rupees twenty-five thousand) to be deposited with the Mediation and Conciliation Project Committee. The amount be deposited in four weeks. The amount be recovered from the officers responsible for the delay in filing the special leave petition and a certificate of recovery of the said amount be also filed in this Court within the said period of time. ……"*

In the aforesaid case laws, the Hon'ble Supreme Court as well as this Court has sent a signal to the Government officials to be alert and diligent in exercising their duties and responsibilities, which includes the responsibility to move Court within the statutory period. It is not the case of the Opposite Parties that they were unaware of the judgment and decree passed in CS No.95 of 2014. Their approach to prefer an Appeal was an outcome of sheer negligence and indifferent attitude to respect the verdict of a competent Court of law. The explanation offered, as stated above in the petition for condonation of delay, cannot be termed as '*cause*' much less any '*sufficient cause*' to condone the inordinate delay. These are mere excuses and not explanation. In the case of ***Krushna Chandra Behera Pradhan and another Vs. Government of Odisha***, reported in 2024 (II) ILR-CUT-936, this Court relying upon the ratio in the case of ***Sheo Raj Singh (supra)*** has explained the difference between '*explanation*' and'*excuse*', which reads as under:-

"7. From an analysis of the submissions made by learned counsel for the parties and on perusal of the record more particularly the ground taken in the petition under Order IX Rule 13 CPC under Annexure-6, it is crystal clear that those are not the explanations but mere excuses of the State Government. As held in Sheo Raj Singh (supra), there is a distinction between 'explanation' and 'excuses'. It is held therein that condonation of delay being a discretionary power available to Courts, exercise of discretion must necessarily depend upon sufficiency of the cause and degree of acceptability of the explanation, the length of delay being immaterial. Sometimes, due to want of sufficient cause being shown or an acceptable explanation being offered, delay of shortest range may not be condoned whereas in certain other cases delay of long period can be condoned if the explanation is satisfactory and acceptable. Of course, Courts must distinguish between 'explanation' and 'excuse'. Explanation is designed to give someone all of the facts and lay out a cause for something. It helps clearly the circumstances of a particular event and allows the person to point out that something that has happened is not his fault. Care must however be taken to distinguish an 'explanation' from an 'excuse'. Although common people tend to see 'explanation' and 'excuse' in same parlance and struggled to find out the difference between the two, but the Court of law has the obligation to find out that distinction which though fine, is real. An excuse is often offered by a person to deny responsibility and consequences when under attack. It is sort of a defensive action. Calling something just an 'excuse' would imply that 'explanation' offered is believed not to be true. Thus, the Hon'ble Supreme Court has observed that length of delay is not a matter of consideration but the explanation that is offered has a dominant role in considering the case of the parties in taking a decision for condonation of delay. The Hon'ble Supreme Court has also observed that a delay whatsoever minimal may be, should not be condoned on a mere excuse. In the instant case, on a bare perusal of the petition under Order IX Rule 13 CPC, it appears that the Government has admitted its negligence stating that for the negligence of the officials, the State should not suffer. The officials being employees of the State, State Government has a vicarious liability for the loss caused by its officials. Further, no explanation for condonation of delay much less any sufficient cause is offered in the petition under Order IX Rule 13 CPC, only because an ex-parte decree has been passed declaring right, title and interest of the Petitioners over a valuable piece of land, the same cannot be a ground to condone the inordinate and un-explained delay of more than 12 years." (Underlined for emphasis)

In the aforesaid case law, this Court relying upon the case of ***Sheo Raj Singh (supra)***, held that there is a distinction between '*explanation*' and '*excuse*'. Explanation is designed to give someoneall of the facts and lay out a cause for something. It helps clearly the circumstances of a particular event and allows the person to point out that something that has happened is not his fault. An excuse on the other hand is often offered by a person to deny responsibility and consequences when under attack. It is sort of a defensive action. Calling something just an '*excuse*' would imply that 'explanation' offered is believed not to be true. In ***Sheo Raj Singh (supra),*** it has also been stated the length of delay being immaterial sometimes, due to want of sufficient cause being shown or an acceptable explanation being offered, delay of the shortest range may not be condoned whereas, in certain other cases, delay of long periods can be condoned if the explanation is satisfactory and acceptable.

10. Thus, in the instant case, the Court should not delve into the period of delay occurred in filing the Appeal, but the explanation that has been offered for such delay is material for consideration. As discussed earlier, the so-called explanation for condonation of delay are mere excuses and a defensive plea has been taken by the Tahasildar, Hinjili to save his skin by shifting the responsibility to his predecessors without explaining what the Government functionaries did during all the aforesaid period to file the Appeal in time. In view of the above, the case laws cited by Mr. Dash, learned AGA, as stated above, are of no assistance to him.

11. By efflux of time, a right has accrued in favour of the Petitioners/Respondents by virtue of the judgment and decree passed in CS No.95 of 2014. The same cannot be taken away so lightly without even discussing the objection raised by them opposing condonation of delay as has been done by learned Additional District Judge, Chatrapur. Exclusion of period of COVID-19 is immaterial and inconsequential for consideration of petition to condone the delay in filing the Appeal, as the statutory period for filing the appeal had expired four years before the outbreak of COVID-19 pandemic.

12. No doubt, public interest plays a vital role while considering the petition for condonation of delay, but that does not take away the responsibility of the party seeking for condonation of delay to provide sufficient cause for the same. In the case of ***Sumitra Das (supra)*** as well as in ***Chief Postmaster General (supra)***, it has been held that law shelters everyone under the same umbrella and should not be swirled for the benefit of a few. In the instant case, it appears that learned Additional District Judge had categorically held that there were latches on the part of the revenue authorities in filing the Appeal in time. Having observed so, learned Additional District Judge could not have proceeded further to condone the delay in filing the Appeal, as the finding of latches on the part of the revenue authorities itself makes it clear that no sufficient cause has been shown by the Government functionaries for condonation of delay.

13. The Government might suffer for refusal of the prayer to condone the delay in filing the Appeal, but that cannot be a ground to consider the application in favour of the Government functionaries who are at fault in not preferring the Appeal in time. It is open to the Government to take appropriate action and recover the loss, if any, caused for the latches of their Officers/staff, but that cannot be a ground to drag the poor litigants/Petitioners to Court in the garb of public interest.

14. In view of the discussions above, I am of the considered view that Opposite Parties have not made out any ground much less any sufficient ground for condonation of delay in filing the Appeal, i.e., RFA No.12 of 2021 pending in the Court of learned Additional District Judge, Chatrapur.

15. Accordingly, order under Annexure-4 is set aside and the CMP is allowed. Consequentially, the petition for condonation of delay in CMA No.5 of 2019 is dismissed and the Appeal, i.e., RFA No.12 of 2021 is also dismissed. However, in the facts and circumstances, there shall be no order as to costs.

Headnotes prepared by :
Smt. Madhumita Panda, Law Reporter
(Verified by : Shri Pravakar Ganthia, Editor-in-Chief)

Result of the case :
CMP allowed.

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2024 (III) ILR-CUT-717

Sk. HAIDER ALI
V.
Sk. KHALID

(GUAP NO. 9 OF 2023)

30 OCTOBER 2024

[K.R. MOHAPATRA, J.]

Issue/s for Consideration

Whether question of 'guardianship' of the minor is distinct from 'custody' of the minor.

Headnotes

(A) GUARDIANS AND WARDS ACT, 1890 – Sections 17(1)(2), 19(1)(b), 25 r/w sections 352, 353 of Mulla's Mohammad law – The learned family court granted custody of the minor to the father/respondent by adjudicating an application filed by father U/s. 25 of the Act – Whether question of guardianship' of the minor is distinct from 'custody' of the minor.

Held: No – The principle for custody of a minor child under the personal law shall not be read in isolation and divorced from the provisions of Guardians and Wards Act, which confers the Court a discretion to return the custody of a minor to his guardian, who leaves or removed from his custody in appropriate cases where Court thinks that exercise of such a discretion is necessary for welfare of the ward. (Para 19)

Welfare of a child is the paramount consideration to determine the custody of the ward (minor child) including a female child. (Para 20)

(B) WORDS & PHRASES – 'WELFARE' meaning of – 'Welfare' includes material welfare both in sense of adequacy of resources to provide a pleasant home and a comfortable standard of living – While considering the welfare of the ward, adequacy of care to ensure that good health and due personal pride should be given due weightage. More important are the stability and the security, the loving and understanding care and guidance, the warm and compassionate relationships that are essential for the full development of the child's own character, personality and talents – Reference made to Walker Vs. Walker and Harrison: **1981 New Ze Recent Law 257**. (Para 21)

Citation Reference

Ather Hussain Vs. Syed Siraj Ahmed and others. **(2010) 2 SCC 654**; Anjali Kapoor (Smt.) Vs. Rajiv Baijal **(2009) 7 SCC 322**; Walker Vs. Walker and Harrison **1981 New Ze Recent Law 257**; Sheoli Hati Vs. Somnath Das **(2019) 7 SCC 490**; Abdulsattar Husen Kudachikar Vs. Shahina Abdulsattar Kudachikar **AIR 1996 Bom 134**; Rosy Jacob Vs. Jacob A. Chakramakkal **(1973) 1 SCC 840**; Nil Ratan Kundu and another Vs. Abhijit Kundu **(2008) 9 SCC 413**; Siddiq-Un-Nissa Bibi Vs. Nizam-Uddin Khan and Ors. **AIR 1932 All 215**; Poolakkal Ayisakutty v. Parat Abdul Samad **AIR 2005 Ker 68**; J. Sadiq Batcha & Anr. Vs. A. Mohamed Kasim & Anr. **2014 (1) CTC 459**; Siddiq-un-Nissa Bibi Vs. Nizam-Uddin Khan and others. **AIR 1932 All 215**; Rafiq Vs. Bashiran **AIR 1963 Raj 239**; Isar Ahmed Vs. Azazul Hussain Ahmad & Anr. **2019 SCC OnLine All 5315 – referred to**.

List of Acts

Guardians and Wards Act, 1890; Family Courts Act, 1984

Keywords

Guardianship, Custody of minor, Welfare; *De facto* custody; leaves; removed.

Case Arising From

Judgment dated 16.03.2023 passed by Family Court, Mayurbhanj in GMC No. 57 of 2022.

Appearances of Parties

For Appellant : Mr. Soumya Mishra
For Respondent : Mr. Abhishek Dash

Judgment/Order

Judgment

K.R. MOHAPATRA, J.

1. This matter is taken up through hybrid mode.

2. This Appeal has been filed under Section 47 of the Guardians and Wards Act, 1890 (for brevity 'the Act') read with Section 19(1) of the Family Courts Act, 1984 assailing the judgment dated 16th March, 2023 passed in GMC No.57 of 2022, whereby learned Judge, Family Court, Mayurbhanj at Baripada allowed an application under Section 25 of the Act filed by the Respondent-father for custody of his minor daughter (for brevity 'minor') has been granted directing the Appellant (maternal uncle) to handover the custody of the minor to the Respondent within one month from the date of the judgment.

3. Parties to the proceeding before learned Judge, Family Court are governed under their personal law, i.e., Mohammedan Law.

4. Brief statement of facts necessary for adjudication of the Appeal are as under: -

4.1 The Respondent got married to one Ayesha Khatoon, the sister of the Appellant on 31st January, 2017 as per the customs under Mohammedan Law. The couple blessed with a son and a daughter. On 5th July, 2022, wife of the Respondent was admitted in Pandit Raghunath Murmu Medical College and Hospital, Baripada. Subsequently, she was referred to SCB Medical College and Hospital, Cuttack. However, she breathed her last on 24th July, 2022 at Sum Hospital, Bhubaneswar. After observing necessary formalities at the hospital, the Respondent brought the corpse of his wife to Baripada where she was buried as per their customs.

4.2 It is alleged by the Respondent that taking advantage of the situation, the Appellant forcibly took away the minor with the assistance of Police. Later, the Respondent and his father were called to the Police Station where they were allegedly compelled to execute a document not to claim the custody of the minor or to file any case in future for her custody. As the Appellant did not hand over the custody of the minor to the Respondent, he filed GMC No.57 of 2022 under Section 25 of the Act claiming custody of the minor.

4.3 The Respondent stated, inter alia, that he has sufficient means to look after the minor. His family consisted of his son who desperately waiting for his sister who is the minor and is missing her company. The Respondent has also his parents and unmarried daughter living with him. Thus, the welfare of the minor would be best achieved being with the Respondent. The Respondent being the father is the natural guardian and has no disqualification and is not unfit to take custody of the minor. The minor was with her parents from her birth. She was illegally removed from the custody of her natural guardian, the Respondent. On the other hand, the Appellant did not have sufficient means to look after the minor, as he has a minor daughter to look after. The family of the Appellant did not have sufficient means to meet with the expenses of the minor.

4.4. The Appellant, who is the maternal uncle filed his objection/written statement stating that the marital relationship between the Respondent and his spouse was not cordial. The Respondent was always behaving roughly with his wife.

He was interested for a second son and no sooner they were blessed with the minor, the Respondent inhumanly treated his wife. As a result, the wife of the Respondent suffered from various diseases and died prematurely as Sum Hospital, Bhubaneswar. Although the wife of the Respondent was at Sum Hospital, Bhubaneswar, it was not informed to the Appellant or his family members. After getting information from other sources, the Appellant attended his sister at Sum Hospital and borne the entire expenses of her treatment. After the death of his sister, the Appellant lodged an FIR against the Respondent alleging negligence and cruelty towards his wife. At the Police Station, an agreement of understanding was executed wherein the Respondent undertook not to claim custody of the minor. It was also agreed that the Respondent would not file any petition before the competent Court of law to claim custody of the minor. It was further alleged that the Respondent's father was old and ailing person of 72 years and his mother was of 66 years. The unmarried sister of the Respondent was mentally unsound. Thus, the Respondent was unable to take care of the minor for which out of his own volition, he executed an agreement at the Police Station, as aforesaid. It was also stated by the Appellant that he himself is a man of means and can maintain the minor along with his minor daughter. It is also claimed that welfare of the minor can be best achieved being with her maternal uncle, the Appellant. Hence, he prayed for dismissal of the petition filed by the Respondent claiming custody of the minor.

4.5 Learned Judge, Family Court allowed the application filed by the Respondent under Section 25 of the Act directing the Appellant to handover the custody of the minor to the Respondent within the period of one month from the date of the judgment.

5. It also appears that the Respondent has filed Execution Case No.6 of 2023 for implantation of the judgment, which is sub-judice before learned Judge, Family Court, Baripada. IA No.9 of 2023, has been filed in this Appeal enclosing copy of the order dated 3rd August, 2023 passed in aforesaid Execution Case, wherein, learned Judge, Family Court, Baripada directed the IIC, Baripada Town Police Station to rescue the minor from the custody of the Appellant following due procedure and handover her custody to the Respondent.

6. Mr. Mishra, learned counsel for the Appellant submitted that learned Judge, Family Court committed patent error of law in adjudicating the application as one under Section 17 of the Act for appointment of a guardian, although it was filed under Section 25 of the Act for custody of the minor. The question of guardianship of the minor is distinct from custody of the minor as held in the case of ***Ather Hussain Vs. Syed Siraj Ahmed and others***; (2010) 2 SCC 654. Though a father is the natural guardian in both Mohammedan Law as well as the Act, but learned Judge, Family Court unnecessarily delved into the question of guardianship of the minor. While adjudicating the matter, learned Judge, Family Court discussed the ingredients of Section 17 of the Act, which refers the matter to be considered by the Court in appointing guardian. The provision under Section 19 of the Act makes it

clear that unless a father is found, in the opinion of the Court, to be unfit, he is the only person entitled to be appointed / declared as guardian of the minor. No such restriction is available in Section 25 of the Act while determining the custody of the minor. Two ingredients are to be satisfied to consider the custody of the minor; *viz*; *firstly*, the ward '*leaves*' or is '*removed*' from the custody of a guardian and *secondly*, if it is in the opinion of the Court, return of the ward to the custody of the guardian is required for his/her welfare. Thus, the welfare of the ward is to be borne in mind to determine his/her custody. Learned Judge, Family Court misdirected itself in considering the nature of the application made by the Respondent observing that once the father is found to be fit, the maternal uncle is not entitled to be custodian of the minor and directed to handover her custody to the Respondent.

7. Emphasising that the welfare of the minor can be best achieved being in custody of the Appellant, Mr. Mishra relied upon the ratio in the case of the ***Anjali Kapoor (Smt.) Vs. Rajiv Baijal***; (2009) 7 SCC 322, wherein, the Hon'ble Supreme Court referring to the case ***Walker Vs. Walker and Harrison***; 1981 New Ze Recent Law 257, wherein, it is held as under:-

> *"Welfare is an all encompassing word. It includes material welfare; both in the sense of adequacy of resources to provide a pleasant home and a comfortable standard of living and in the sense of an adequacy of care to ensure that good health and due personal pride are maintained. However, while material considerations have their place they are secondary matters. More important are the stability and the security, the loving and understanding care and guidance, the warm and compassionate relationships that are essential for the full development of the child's own character, personality and talents."*

7.1 Mr. Mishra, learned counsel for the Appellant also relied upon the following case laws to buttress his contention that welfare of the minor is the paramount consideration while determining his/her custody.

(i) ***Sheoli Hati Vs. Somnath Das***; (2019) 7 SCC 490;

(ii) ***Abdulsattar Husen Kudachikar Vs. Shahina Abdulsattar Kudachikar***; AIR 1996 Bom 134;

(iii) ***Rosy Jacob Vs. Jacob A. Chakramakkal***; (1973) 1 SCC 840;

(iv) ***Nil Ratan Kundu and another Vs. Abhijit Kundu***; (2008) 9 SCC 413;

8. In the instant case, the custody of a minor female child is in question. Hence, Mr. Mishra, learned counsel for the Appellant referred to Sections 352 and 353 of the Mulla's Mohammedan Law, which are stated hereunder:-

> *"Sec.352.* ***Right of mother to custody of infant children****.- The mother is entitled to the custody of (hizanat) of her male child until he has completed the age of seven years and of her female child until she has attained puberty. The right continues though she is divorced by the father of the child, unless she marries a second husband in which case the custody belongs to the father.*
>
> *353.* ***Right to female relations in default of mother****.--Failing the mother, the custody of a boy under the age of seven years, and of a girl who has not attained puberty, belongs to the following female relatives in the order given below:--*
>
> *1) mother's mother, how highsoever;*

2) father's mother, how highsoever;
3) full sister;
4) uterine sister;
5) consanguine sister;
6) full sister's daughter;
7) uterine sister's daughter;
8) consanguine sister's daughter;
9) maternal aunt, in like order as sisters; and
10) paternal aunt, also in like order as sisters."

He, therefore, submitted that in absence of the mother, the custody of a girl who has not attained puberty belongs to the family and relatives as prescribed in Section 353 of the Mulla's Mohammedan Law. Section 353 of Mohammedan Law does not make any provision to give custody of a minor girl child to the father in absence of her mother. As such, he submitted that Respondent-father is not entitled to the custody of the minor under personal Law. In support of his submission, Mr. Mishra, learned counsel relied upon the case of ***Siddiq-Un-Nissa Bibi Vs. Nizam-Uddin Khan and ors***; AIR 1932 All 215 in which it is held as under: -

> *"A question has been raised before us whether the right under the Mohamedan Law of the female relation of a minor girl under the age of puberty to the custody of the person of the girl is identical with the guardianship of the person of the minor or whether it is something different and distinct. The right to the custody of such a minor vested in her female relations, is absolute and is subject to several conditions including the absence of residing at a distance from the father's place of residence and want of taking proper care of the child. It is also that the supervision of the child by the father continues in spite of the fact that she is under the care of her female relation, as the burden of providing maintenance for the child rests exclusively on the father."*

He also relied upon the case of Ather Husain (supra), wherein, it is held as under: -

> *"42. ….In our opinion, as far as the question of custody is concerned, in the light of the aforementioned decisions, the personal law governing the minor girl dictates her maternal relatives, especially her maternal aunt, shall be given preference. ……."*

In the case of ***Poolakkal Ayisakutty v. Parat Abdul Samad; AIR 2005 Ker 68*** in which, it is held as under:-

> *"4. We are of the view when the question of the custody of the child is involved, the primary consideration which weigh with the Court is the welfare of the child. Legal position is wellsettled by a catena of decisions of this Court as well as that of the Apex Court. Reference may be made to the decisions of the Apex Court ……It is settled principle of law that custody orders, by their very nature, can never be final but a challenge should only be made if it is in the paramount interest of the child concerned. Custody of a minor is also a matter involving sentimental attachment. Such a matter is to be approached and tackled carefully. A balance has to be struck between the attachment and sentiments of the parties towards the minor children and the welfare of the minors which is of paramount importance. Principles exported by Personal Law and the provisions referred to hereinbefore cannot read in isolation and be divorced under the provisions of the Guardians and Wards Act. The overriding consideration is welfare of the child and the Personal Law would yield the provisions of the Guardians and Wards Act. ….."*

He further relied upon the case of ***J. Sadiq Batcha and another Vs. A. Mohamed Kasim and another; 2014 (1) CTC 459***, wherein, it is held as under : -

> *"6. As rightly pointed out by the learned Senior Counsel, a close reading of Section 17 of the Act makes it clear that, while appointing or declaring the guardian of a minor, the Court shall be guided by what consistently with law to which the minor is subject. Sub-clause (2) of the Section further makes it clear that the Court shall give prime importance of the welfare of the minor by taking into account the age, sex and religion of the minor. Therefore, when the provision contained in the General Law is vividly clear that the Court, in such cases, shall apply the Law to which the minor is subject, in this case, the issue shall have to be dealt with in the light of the Mahomedan Law. Principles exported by Personal Law and the provisions contained therein cannot be read in isolation and be divorced under the provisions of the Guardian and Wards Act, for, the Personal Law would yield the provisions of the Guardian and Wards Act.*
>
> *7. xx xx xx*
>
> *8. Though Section-352 speaks about mother's Hizanat (custody) of the minor i.e., in the case of male child until he has completed the age of 7 and regarding female child till she attains puberty, in the present case, since the mother is no more, it is better to look into Section 353 which gives direct answer to the issue on hand. Section-353 contains a list of female relations in default of mother, and it says that failing mother, the custody of a girl who has not attained puberty, goes to the persons listed therein and the first person in the list is mother's mother, how highsoever. Therefore, when the minor is a tender-child, the custody given to the respondents in consonance with what is provided under Section 353 cannot be found fault with*

He, therefore, submitted that in view of the categorical pronouncements, the personal law, i.e., Mohammedan Law governing custody of minor cannot be read in isolation and divorced under the provisions of the Guardians and Wards Act, as the Personal Law would yield to the provisions of the Guardian and Wards Act keeping in mind the welfare of the minor, which is the paramount consideration. Thus, the legal right of a party seeking custody of a minor cannot override the welfare of the minor. In the instant case, the Appellant-maternal uncle took custody of the minor when she was 7(seven) months old. At the time of filing of the petition for custody of the minor by the Respondent-Father, she was 3(three) and half years old. Thus, removal of the child from the custody of the Appellant would certainly affect her intellectual, psychological and physical growth, which cannot be said to be in the welfare of the child. The said principle is elaborated in the case of Ather Hussain (supra). Relying upon the case of Rosy Jacob (supra), Mr. Mishra, learned counsel further submitted that removal of custody of the minor girl from the female relation as per Section 353 of Mulla's Mohammedan Law was necessitated for her welfare. But learned Judge, Family Court adopted an erroneous approach in considering the fitness of the father/natural guardian to have her custody as a matter of right. The minor is in the custody of her maternal uncle since she was seven months old. She is accustomed to the environment and atmosphere where she is residing at present. Stability and consistency in the affairs and routines of a child plays a pivotal role in determining custody of the child. Any dislocation may cause emotional strain, which is not the object and spirit of Section 25 of the Act. Except advocating his legal right, the Respondent has not made out any case to take custody of the minor. Thus,

it is prayed that the impugned judgment is not sustainable in the eye of law and is liable to be set aside. The minor should be allowed to stay with her maternal uncle, which is in the best interest and welfare of the child.

9. Mr. Dash, learned counsel for the Respondent-father did not dispute the factual position as stated above. He, however, submitted that the Appellant-maternal uncle of the minor had never visited his sister (mother of the minor) when she was admitted in Sum Hospital, Bhubaneswar for her treatment. The Appellant in his crossexamination has also admitted the same. It was his submission that the minor since her birth was along with her sibling and parents till the death of her mother. On the next date of the death of her mother, she was forcibly removed by the Appellant from the custody of the Respondent-father with the assistance of Police. There is no allegation in the written statement filed by the Appellant that the minor was not looked after properly by the Respondent. There is also no disqualification of the Respondent making him unfit as per Section 19 of the Act to have the custody of the minor. Learned Family Court considering the principles of Hizanat (custody) and keeping in mind the principles enumerated in the Mohammedan Law held the petition under Section 25 of the Act filed at the behest of the Respondentfather as maintainable. He further answering Issue No.2 held that the Respondent–father is entitled to claim custody of the minor. He submitted that welfare of the child is paramount consideration to determine its custody. The Respondent resides with his parents, an unmarried sister and his minor son (sibling of the minor). Thus, welfare of the minor can be best achieved being in custody of the Respondent-father, who is also her natural guardian.

10. It is further submitted by Mr. Dash, learned counsel for the Respondent that learned counsel for the Appellant advanced an argument that learned Judge, Family Court misconstrued the petition under Section 25 of the Act to be one for declaring the Respondentfather as the guardian of the minor. Such an argument would not be sustainable, inasmuch as, the question of guardianship of the minor has to be gone into to determine the custody of the minor in view of Section 25 of the Act. The instant case is squarely covered under the provisions of Section 25 of the Act. The child was forcibly removed from the custody of the natural guardian, namely, the Respondent when she was only seven months old. There is nothing on record to suggest that the Respondent is unfit to be the guardian of the minor. Considering the matter from any angle, it will be for the welfare of the minor to return to the custody of her natural guardian, namely, the Respondent. Section 352 of the Mulla's Mohammedan Law stipulates that a mother is entitled to the custody (Hizanat) of her male child until he has completed the age of seven years and of her female child until she attains puberty. The right continues though she is divorced by the father of the child, unless she marries a second husband in which case the custody belongs to the father. In the instant case, mother of the minor though not divorced by the Respondent-father, but died untimely when the minor was in their custody. Thus, the Respondent-father is entitled to the custody of the child. Further, Section 353 of Mulla's Mohammedan Law stipulates that failing the mother, custody of a boy of

seven years and a girl, who has not attained puberty, belong to the following female relatives more fully enumerated therein. The Appellant-maternal uncle is not amongst them. Thus, he is liable to return the custody of the minor under the personal Law to her father. It is more so in view of Section 355 of the Mulla's Principles of Mohammedan Law, which includes father qua male paternal relations. In any case, personal Law is of no assistance to the Appellant, as he neither comes under the female nor male relations entitled for custody in deprivation of natural guardian.

11. A natural guardian would always act in the child's welfare unless otherwise proved. In absence of any material to the contrary available on record, there is no reason to deprive the minor from the love, affection, sentiment, emotion and congenial understanding of her own father, brother and grandparents as well as from growing up in the household to which she belongs. In support of his contention, Mr. Dash, learned counsel for the Respondent relied upon the case of ***Siddiq-un-Nissa Bibi Vs. Nizam-Uddin Khan and others***; AIR 1932 All 215. He also relied upon the case of ***Rafiq Vs. Bashiran***, reported in AIR 1963 Raj 239 and submitted that when the father of a Mohammedan minor girl is living and there is nothing to show that he is unfit to be the guardian he is entitled to retain custody of the minor as against the preferential right under the Mohammedan Law.

11.1 It is further submitted that no female relation of the minor was examined by the Appellant to show that they are really interested to retain the custody of the minor and act in the welfare of the minor. On the other hand, mother of the Respondent was examined on his behalf as PW-2, who categorically stated that she is interested to look after and take care of the minor. Admittedly, the Appellant is not entitled either under the Act or under the personal Law to retain the custody of the minor. No female member of his family was also examined to establish that they are really interested to retain custody of the child and act for her welfare. Only because the minor is with her maternal uncle since she was seven months old and at present, she is more than three years old; that cannot be a ground to refuse the prayer to return the custody to her father.

12. Mr. Dash, learned counsel for the Respondent also relied upon the case of ***Rosy Jacob (supra)*** and submitted that undoubtedly 'guardianship' and 'custody' are two different components under Law. While 'guardian' means a person having care of the person to a minor or of his property or both, as per Section 4(2) of the Act; the 'custody' though not defined under the Act, in ordinary parlance means under whose care the minor resides. Custody does not only include the de facto but a constructive custody. Being the natural guardian, Act vests right of custody of the minor on the Respondent by virtue of Section 24 of the Act. In case of removal of ward/minor from the custody of a guardian, an application under Section 25 of the Act would be maintainable.

13. In one hand, none of the female members of the Appellant's family came forward to exhibit their interest to look after welfare of the minor; on the other, in

the family of the Respondent-father two female members, namely, the mother as well as unmarried sister of the Respondent is available to take care of the minor girl. Mother of the Respondent, namely, PW-2 has also deposed before learned Judge, Family Court and expressed her keen interest to look after the welfare of the minor. By retaining the custody, the Appellant is depriving the minor from the love, affection, mental attachment of her father, sibling (elder brother), grandmother as well as other members of the family in which she is born. Thus, learned Judge, Family Court has not committed any error in allowing the petition filed by the Respondent under Section 25 of the Act.

14. In response to the case laws cited by learned counsel for the Appellant, Mr. Dash, learned counsel for the Respondent submitted that in the case of ***Isar Ahmed Vs. Azazul Hussain Ahmad and another***; 2019 SCC OnLine All 5315, the dispute was with regard to custody of the minor between her father and mother, wherein, father was denied custody holding that minor's welfare would not be served if the custody is given to its father. However, it has discussed the principle and adjudicated the issue of custody, which is exclusively and solely based on welfare of the minor. While determining the custody of a minor, the Court should at the first instance determine the guardianship of the minor applying the negative test, i.e., whether a person is unfit to be a guardian under Section 19(1)(b) of the Act. The Court while making such determination will be guided by the parameter set out under Section 17 (1) of the Act, viz., personal Law and circumstance like welfare of the minor as well as Section 17 (2) of the Act with regard to age, sex and religion of the minor, the character and capacity of the proposed guardian and its nearness of kin to the minor, the wishes, if any, of a deceased parent and any existing or previous relations of the proposed guardian with the minor or his property.

15. In the instant case, there is nothing on record to deny return of custody of the minor to the Respondent-father. As such, learned Judge, Family Court, Baripada has not committed any error in allowing the petition under Section 25 of the Act. He, therefore, prays for dismissal of the Appeal being devoid of any merit.

16. On consideration of the submissions made by learned counsel for the parties and on perusal of the pleadings of the respective parties, the question crops up for consideration in this Appeal is.—

> *Whether the custody of the minor should continue with the Appellant and whether learned Judge, Family Court has committed any error in directing the Appellant to handover the custody of the minor to the Respondent?*

17. It is not disputed that the parties are governed under the Mohammedan Law. Initially, the minor (minor girl) was with her parents from her birth. When she was only seven months old her mother (wife of the Respondent) died. Since then, she is in custody of the Appellant. At the time of filing of the petition under Section 25 of the Act, the minor was only three and half years old. Respondent being the father is the natural guardian of the minor. Appellant is her matrimonial uncle. The minor has also a sibling (minor son of the Respondent), who is residing with the Respondent

since his birth. The Respondent-father has his parents, an unmarried sister living with him besides his minor son (sibling of the minor).

18. It is alleged in the petition under Section 25 of the Act that the minor was forcibly removed from the custody of the Respondent by the Appellant with the assistance of the Police just on the next day of death of his wife. In the objection, it is alleged by the Appellant that the Respondent out of his own volition handed over custody of the minor to him and had also executed an agreement before the Police not to claim custody of the minor in future. It was also alleged that the Respondent agreed not to file any case before any Court of Law claiming custody of the minor in future. In the aforesaid backdrop, the issue as aforesaid has to be decided.

19. Learned Judge, Family Court discussing the pleadings of the parties and evidence available on record, held that the Respondent is entitled to the custody of the minor and directed the Appellant to hand over custody of the minor to the Respondent within one month from the date of the judgment impugned herein. In order to consider the entitlement of the parties to the custody of the minor, relevant provisions of the Act are to be carefully gone through. Section 25 of the Act deals with entitlement of the guardian to the custody of the ward. It provides that if a ward leaves or is removed from the custody of a guardian of his person, the Court if it is of the opinion that it will for the welfare of the ward to return to the custody of his guardian may make an order for his return. Section 25 of the Act further emphasizes that for the purpose of enforcing the order, the Court may cause the ward to be arrested and to be delivered to custody of the guardian. In the instant case, the minor was with the Respondent (guardian) and his wife from her birth. She was removed from the custody of the Respondent and was handed over to the Appellant when she was seven months old only. Allegation of forcible removal of the minor from the custody of the Respondent-father and handing over her custody to the Appellant (maternal uncle) is of little significance in the instant case, as admittedly the minor was removed from custody of her guardian and was handed over to the Appellant. Admittedly, the Appellant has never been declared as guardian of the minor. Ordinarily, the guardian should be the custodian of the minor, unless the guardian is held to be unfit by any competent Court of Law to be appointed as guardian. No such declaration appears to have been made in respect of the Respondent. But in the instant case, the peculiarity is that the parties are governed under their personal Law, i.e., the Mohammedan Law. Section 352 of Mulla's principles of Mohammedan Law provides that a mother is entitled to the custody (Hizanat) of a minor male child until he completed the age of seven years and in respect of female minor child until she attained puberty. The right continues though she is divorced by the father of the child, unless she marries a second husband in which case the custody belongs to the father. Thus, the provision makes it clear that in all cases, mother is the custodian of a male child until he has completed seven years and a female child until she attains puberty. In the instant case, the minor (female child) was with her parents till the mother died. The question of divorce of the mother of the minor by her father does not arise, as mother of the minor died in Sum Hospital, Bhubaneswar due to her

illness. The intent and purport of Section 352 of Mulla's principles of Mohammedan Law indicates that in absence of mother, the father would be the guardian of the ward. But Section 353 of the said Law provides the right to custody of a minor child to the female relations in default of mother. It provides as under:-

1) mother's mother, how highsoever;
2) father's mother, how highsoever;
3) full sister;
4) uterine sister;
5) consanguine sister;
6) full sister's daughter;
7) uterine sister's daughter;
8) consanguine sister's daughter;
9) maternal aunt, in like order as sisters; and
10) paternal aunt, also in like order as sisters."

Undoubtedly, the Appellant is not a female relation of the mother of the minor as enumerated in Section 352 of Mulla's Mohammedan Law. The Appellant in his objection, does not dispute that the minor is in his custody from the next date of death of her mother (Appellant's sister). As propounded by the aforesaid case laws, the principle for custody of a minor child under the personal Law shall not be read in isolation and divorced from the provisions of Guardians and Wards Act, which confers the Court a discretion to return the custody of a minor to his guardian, who leaves or removed from his custody in appropriate cases where Court thinks that exercise of such a discretion is necessary for welfare of the ward.

20. Thus, welfare of a child is the paramount consideration to determine the custody of the ward (minor child) including a female child.

21. In the case of ***Anjali Kapoor (supra)***, the Hon'ble Supreme Court referring to the observation made in the case of ***Walker Vs. Walker and Harrison (supra)*** held that 'welfare' includes material welfare both in sense of adequacy of resources to provide a pleasant home and a comfortable standard of living. While considering the welfare of the ward, adequacy of care to ensure that good health and due personal pride should be given due weightage. More important are the stability and the security, the loving and understanding care and guidance, the warm and compassionate relationships that are essential for the full development of the child's own character, personality and talents. Those aspects are to be given due weightage while considering the welfare of the child. There cannot be any doubt that the provisions of personal Law are supplemental to the substantive law in determining custody of the child. The provisions under the personal Law are to be read in harmony with the substantive Law, i.e., Guardians and Wards Act and in case any provision of personal Law is repugnant to the substantive law, the substantive Law would prevail and be guiding factor. In all cases, the entitlement of a party to the custody of the ward under any law yields to the welfare of the child. No doubt, the Respondent being the natural guardian is entitled under Law to claim custody of the minor. Further, the Appellant has not yet been declared as the guardian of the minor.

But custody of a child presupposes constructive custody and not de facto custody. Although the Appellant in his written statement/objection to the petition under Section 25 of the Act has not specifically averred about his family members, but from the materials available on record, it appears that the Appellant has his wife, minor daughter and his parents living with him. Admittedly, none of the female members of the Appellant's family came forward to adduce evidence to take care of the minor. On the other hand, mother of the Respondent was examined as PW-2 and categorically deposed that she is interested to look after and take care of the minor. It is borne out from the record that the Appellant was working as a medicine representative and let out a car on rent from which he was earning his livelihood. On the other hand, the Respondent has a mobile shop and has household properties at Baripada part of which is given on rent. The Respondent has also ancestral landed property at Kakatpur in the district of Puri from which a constant income was being generated. Thus, it appears that the minor will get a better care and protection being in the family of the Respondent.

22. An argument was advanced by learned counsel for the Appellant that the Respondent had executed an agreement in the Police Station not to claim custody of the minor. He also agreed not to file any case claiming custody of the minor. When it is alleged by the Appellant that the Respondent voluntarily handed over the custody of the minor to the Appellant on the next day of death of his wife (mother of the minor), it is not understood as to why an agreement was required to be executed that too in the Police Station. In any event, the agreement in question was not admitted in evidence before learned Judge, Family Court. Thus, no weightage can be given to such agreement, if any, executed between the Appellant and the Respondent. The minor has a sibling who was aged about five years old on the date of filing of the application under Section 25 of the Act. The Respondent has also his unmarried sister and parents living with him out of whom, mother of the Respondent being examined as PW-2 expressed her interest to take care of the minor. No material was produced before learned Judge, Family Court except some bald pleadings to establish that welfare of the child cannot be achieved being in the family where she is born. The brother of the minor is also missing her company

23. It is not disputed that the Respondent is not unfit to be the guardian of the minor, as provided under Section 19 of the Act. Section 17 (2) of the Act provides that while considering the welfare of the minor, the Court shall have due regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of the kin of the minor, wishes of any of the deceased parents or any existing or previous relations of the proposed guardian and the minor or his property. Discussing the above learned Judge, Family Court, Baripada proceeded to adjudicate fitness of the Respondent-Father to be the guardian. Thereafter, it proceeded to adjudicate rival claims of the parties for the custody of the minor. Thus, in order to determine the custody of the minor learned Judge, Family Court was required to go into the question of guardianship of the minor while determining the issue of her custody. In the instant case, keeping in mind the age,

sex and religion of the minor as well as the character and capacity of the Respondent to act as the guardian of the minor, it can be safely said that welfare of the minor can be best achieved if she is in the custody of the Respondent. It is more so because none of the female relations of the deceased wife, as available under Section 353 of Mulla's principles of Mohammedan Law, came forward to take care and custody of the child.

24. There cannot be any quarrel over the case laws cited by learned counsel for the parties. The case laws relied upon by learned counsels for the parties propound the general principles for consideration of custody of the minor. Thus, no further discussion of the case laws relied upon by learned counsel for the parties is required in the instant case. Keeping in mind the peculiarity in the facts and circumstances of the case and the materials available on record, together with discussions made above, I am of the firm opinion that learned Judge, Family Court, Bairpada has committed no error in directing the Appellant to handover custody of the minor to the Respondent.

25. Accordingly, the Appeal being devoid of any merit stands dismissed. However, in the facts and circumstances of the case there shall be no order as to costs.

Headnotes prepared by : *Result of the case :*
Smt. Madhumita Panda, Law Reporter Appeal dismissed.
(Verified by : Shri Pravakar Ganthia, Editor-in-Chief)

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2024 (III) ILR-CUT-730

E. CHINA BABU
V.
ODISHA LEGISLATIVE ASSEMBLY & ORS.

(W.P.(C) NO. 24337 OF 2022)

28 OCTOBER 2024

WITH

SABITRI PATRA [IN W.P(C) NO.17095/2021]
MANJUSHREE TRIPATHY [IN W.P(C) NO. 39811/2021] V. ODISHA LEGISLATIVE ASSEMBLY & ORS.

[B.P. ROUTRAY, J.]

Issue for Consideration

What should be the appropriate modality for fixing *inter se* seniority of the employees in absence of the merit list?

Headnotes

ORISSA LEGISLATIVE ASSEMBLY SECRETARIAT (RECRUITMENT AND CONDITIONS OF SERVICE) RULES, 1983 – Rule 10(3) – As per Rule 10(3) a merit list has to be prepared for direct recruitment – In the present case merit list is absent – What should be the appropriate modality for fixing *inter se* seniority of the employees in absence of the merit list?

Held : No merit list of the candidates is available with the employer – It is true that the date of joining in service of respective candidate as mentioned in the final gradation list under the impugned order is never disputed by either party – Therefore, their date of joining can be safely taken as their date of entry in the service and their seniority can be counted from said dates as they borne into the service from that date.

When the date of entry of respective candidates into the service is remaining an undisputed fact, the safest procedure would be to rely upon such undisputed fact to fix *inter se* seniority between the parties. (Para 13)

Citation Reference

K. Meghachandra Singh & Ors. v. Ningam Siro & Ors. **(2020) 5 SCC 689**; Union of India & Ors. v. N.R.Parmar **(2012) 13 SCC 340**; State of Uttar Pradesh & Ors. v. Ashok Kumar Srivastava & Anr. **(2014) 14 SCC 720**; Pawan Pratap Singh & Ors. v. Reevan Singh & Ors. **(2011) 3 SCC 267**; Jagdish Chandra Patnaik v. State of Orissa **(1998) 4 SCC 456 – referred to**.

List of Rules

Odisha Legislative Secretariate (Recruitment and conditions of service) Rules, 1983

Keywords

Modality for fixation of *inter se* seniority; Gradation list; Termination; Advertisement; Vacancy.

Case Arising From

Order dated 12.05.2021 passed by the Odisha Legislative Assembly.

Appearances of Parties

For Petitioner : Ms. Madhumita Panda
Mr. Sadasiva Patra-1

For Opp.Parties : Mr. S. Palit, Sr. Adv. (for O.P. No.1)
Mr. D.P. Nanda, Sr. Adv., Mr. A.N. Pattnaik (for O.P. No.9)
Mr. S.P. Mishra, Sr. Adv. (for O.P. 3 to 8)

Judgment/Order

Judgment

B.P. ROUTRAY, J.

1. Heard Ms. M. Panda, learned counsel for the Petitioner in WP(C) No.24337 of 2022, Mr. S. Patra-1, learned counsel for the Petitioner in WP(C) No.17095 of 2021 and Mr. D.P. Nanda, learned senior counsel along with Mr. A.N. Pattnaik, learned counsel for Petitioner in WP(C) No.39811 of 2021 as well as Mr. S. Palit, learned Senior counsel for Odisha Legislative Assembly (OLA) in all the cases, Mr. D.P. Nanda, learned Senior counsel for Opposite Party No.9 in WP(C) No.24337 of 2022 and Opposite Party No.15 in WP(C) No.17095 of 2021 and Mr. S.P. Mishra, learned senior counsel for other private Opposite Parties in all the three writ petitions.

2. In the above three writ petitions the Petitioners have challenged the common impugned order dated 12th May 2021 along with the final gradation list appended to the same. The Petitioners in these three writ petitions have though taken different grounds to challenge the same order of preparing the gradation list, but all the writ petitions are heard together and disposed of by this common judgment.

3. The case of the Petitioner in WP(C) No.24337 of 2022 is that, the private Opposite Parties in the said writ petition being appointed after him in service should be placed below in the gradation list. The case of the Petitioner in WP(C) No.17095 of 2021 is that, the private Opposite Parties therein being appointed illegally and irregularly cannot be placed above her in the gradation list. According to said Petitioner, she is the only candidate appointed in due process of selection and all such private Opposite Parties named in her writ petition are illegally and irregularly appointed.

The case of the Petitioner in WP(C) No.39811 of 2021 is that she being an appointee of the recruitment test and vacancy of the year 1997, should have been treated as a recruitee of the year 1997 and consequently to be placed above in the gradation list to the recruitees of the year 1998.

4. All the Petitioners and private Opposite Parties in three writ petitions are the employees of OLA Secretariat, and were initially appointed as Junior Assistants or like posts and have been now redesignated as Assistant Section Officers. The date of joining of each of the parties mentioned in the gradation list, as impugned in the present writ petitions, is not disputed by either party.

The Secretary of OLA who is the common Opposite Party in all the writ petitions has filed the counter affidavit in three respective cases. According to the Secretary of OLA, the gradation list has been finalized as per the merit of the candidates at the time of their initial appointment. It is further stated that in the matter of finalization of *inter se* seniority of the employees, the opinion of the Advocate General was sought for and based on his opinion the gradation list has been finalized upon rejection of the objections raised by the respective Petitioners to the draft gradation list.

5. The Petitioner in WP(C) No.24337 of 2022 namely E. China Babu raised his serious objection to the effect that there was no merit list available with the employer for finalization of *inter se* seniority and based on the select list prepared on 17th August, 1998 for two batches of recruitees, i.e. 1997 and 1998, the seniority *inter se* has been fixed with the opinion of learned Advocate General.

6. Ms. Panda, learned counsel for Petitioner E. China Babu contends that the impugned order itself speaks clearly that the select list dated 17th August 1998 relied on by the authorities is never the merit list and therefore, the placement of the employees based on said select list in the gradation list is liable to be disturbed, since the persons entered to the service later to the Petitioner have been placed above the Petitioner in the gradation list.

7. The private Opposite Parties as well as OLA never denies the list dated 17th August, 1998 as mere select list, but admits it as the merit list. According to Mr. Palit, learned senior counsel for the Secretary of OLA and Mr. Mishra, learned senior counsel for the private Opposite Parties, they draw support to their contentions for treating the select list dated 17th August, 1998 as the merit list in terms of the contents of Annexure-A/1 which is the proceeding of the DPC held on 17th August, 1998.

8. Before entering into the controversy of *inter se* seniority of the parties, it is relevant to see the rules governing the service conditions of the staff of OLA Secretariat. The Orissa Legislative Assembly Secretariat (Recruitment and Conditions of Service) Rules, 1983 governs the service condition of the employees of Assembly Secretariat including the recruitment and promotion. Said rule does not specifically prescribe norms or measures for fixing *inter se* seniority. The only relevant rule according to learned counsels for the parties is Rule 10. Said Rule 10 reads as follows:-

> "10. (1) The Speaker shall constitute a Selection Committee to advise Secretary in the matter of appointment to be made to the Class III and Class IV posts of the service by direct recruitment and by promotion.
>
> (2) The Committee shall consist of more than one senior officer of the Secretariat, other than Secretary: Provided that the services of an expert to aid to the Committee in the matter of selection of candidates for appointment may be requisitioned as and when directed by the Speaker.
>
> (3) The Selection Committee may conduct tests and prepare list of candidates as per merit for direct recruitment to the post in the service.
>
> (4) The Selection Committee for recommending persons for appointment by promotion shall consider the C.C.Rs. of all eligible persons and prepare a list of candidates on the basis of merit and suitability with due regard to seniority."

9. As evident from the above rule, sub-rule 3 speaks that the Selection Committee may conduct tests and prepare list of candidates as per merit for direct recruitment to the posts. So it is implied that a merit list must be prepared for direct recruitment. By relying on said Rule 10(3), Mr. Palit as well as Mr. Mishra contend

that the select list dated 17th August 1998 under Annexure-2 or Annexure-A/1 is the merit list prepared by the Selection Committee and therefore, there should not be any doubt for fixing the inter se seniority.

10. I completely disagree with the submissions made by Mr. Palit as well as Mr. Mishra. It is for the reason that while Rule 10(3) speaks of preparation of merit list, the list prepared under Annexure-2 never says the same as merit list, but refers it as a select list instead. The list prepared under Annexure-2 is mentioned as select list as per the written test and it is kept in the order of unreserved candidates, then SEBC candidates, then ST candidates and then SC candidates. Therefore, the interpretation advanced by the employer as well as the private Opposite Parties that this is the merit list, but named as select list, is found unacceptable for the simple reason that candidates cannot be expected to be placed in merit serially according to the categories like UR, SEBC, ST and SC. Further, the document under Annexure-A/1 as referred to by the Opposite parties also speaks of merit list and never says about preparation of select list. The impugned order under Annexure-9 also speaks that the merit list of the recruitees of 1997 and 1998 batches of Junior Assistants (presently designated as Assistant Section Officers) is absent and therefore opinion of the Advocate General was sought for to fix *inter se* seniority. As reveals from said impugned order, the learned Advocate General finding the merit list of candidates absent has opined that, in absence of merit list/marks and further in absence of any executive directions/orders, the select list prepared by the Selection Committee dated 17th August, 1998 should be taken as merit list. Therefore, from bare perusal of the impugned order, it is clear that the select list dated 17th August, 1998 has been treated as the merit list to fix the seniority *inter se* between the parties based on the opinion of learned Advocate General in absence of any merit list / marks or other documents. From the above analysis it can thus be concluded that the select list dated 17th August, 1998 at Annexure-2 is not the merit list and in absence of the merit list and other documents, the select list has been treated as the merit list.

11. Accordingly the question falls for determination is, what should be the right modality for fixing *inter se* seniority of the employees in absence of the merit list ?

12. In such situation, where there is any merit list of the candidates is available to found out their order of merit, the rule relating *inter se* seniority has to be looked into first. As stated earlier, the Orissa Legislative Assembly Secretariat (Recruitment and Conditions of Service) Rules, 1983 is silent about *inter se* seniority of the candidates in absence of merit. According to Rule 10(3) a merit list has to be prepared for direct recruitment and since the same is absent in the present case, the rules are of no help in fixing the *inter se* seniority of the employees. Of course, had the merit of the employees being known there should not have been any dilemma in fixing the *inter se* seniority of the parties.

The Hon'ble Supreme Court in the case of ***K. Meghachandra Singh and Others v. Ningam Siro and Others, (2020) 5 SCC 689*** after taking note of several earlier decisions including ***Union of India and Others v. N.R. Parmar, (2012) 13***

SCC 340, State of Uttar Pradesh and Others v. Ashok Kumar Srivastava and Another, (2014) 14 SCC 720, Pawan Pratap Singh and Others v. Reevan Singh and Others, (2011) 3 SCC 267 and ***Jagdish Chandra Patnaik v. State of Orissa, (1998) 4 SCC 456*** and many other cases, have discussed as follows:-

> "**28.** Before proceeding to deal with the contention of the appellants' counsel vis-à-vis the judgment in *N.R. Parmar* [(2012) 13 SCC 340], it is necessary to observe that the law is fairly well settled in a series of cases, that a person is disentitled to claim seniority from a date he was not borne in service. For example, in *Jagdish Ch. Patnaik* v. *State of Orissa*, [(1998) 4 SCC 456] the Court considered the question whether the year in which the vacancy accrues can have any bearing for the purpose of determining the seniority irrespective of the fact when the person is actually recruited. The Court observed that there could be time-lag between the year when the vacancy accrues and the year when the final recruitment is made. Referring to the word "*recruited*" occurring in the Orissa Service of Engineers Rules, 1941 the Supreme Court held in *Jagdish Ch. Patnaik* v. *State of Orissa*, [(1998) 4 SCC 456] that person cannot be said to have been recruited to the service only on the basis of initiation of process of recruitment but he is borne in the post only when, formal appointment order is issued.
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> **29.** The above ratio in *Jagdish Ch. Patnaik* v. *State of Orissa*, [(1998) 4 SCC 456] is followed by this Court in several subsequent cases. It would however be appropriate to make specific reference considering the seniority dispute in reference to the Arunachal Pradesh Rules which are in parimateria to the MPS Rules, 1965 vide *Nani Sha* v. *State of Arunachal Pradesh*, [(2007) 15 SCC 406]. Having regard to the similar provisions, the Court approved the view that seniority is to be reckoned not from the date when to the post. The Court particularly held that retrospective seniority should not be granted from a day when an employee is not even borne in the cadre so as to adversely impact those who were validly appointed in the meantime.
>
> **30.** We may also benefit by referring to the judgment in *State of U.P.* v. *Ashok Kumar Srivastava* [(2014) 14 SCC 720] . This judgment is significant since this is rendered after the *N.R. Parmar* [*Union of India* v. *N.R. Parmar*, (2012) 13 SCC 340] decision. Here the Court approved the ratio in *Pawan Pratap Singh* v. *Reevan Singh* (2011) 3 SCC 267, and concurred with the view that seniority should not be reckoned retrospectively unless it is so expressly provided by the relevant Service Rules. The Supreme Court held that seniority cannot be given to an employee who is yet to be borne in the cadre and by doing so it may adversely affect the employees who have been appointed validly in the meantime. The law so declared in *State of U.P.* v. *Ashok Kumar Srivastava*, (2014) 14 SCC 720 being the one appealing to us, is profitably extracted as follows : (SCC p. 730, para 24)
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> "*24*. The learned Senior Counsel for the appellants has drawn inspiration from the recent authority in *Pawan Pratap Singh* v. *Reevan Singh*, (2011) 3 SCC 267 where the Court after referring to earlier authorities in the field has culled out certain principles out of which the following being the relevant are produced below : (SCC pp. 281-82, para 45)
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> '*45*. (*ii*) Inter se seniority in a particular service has to be determined as per the service rules. The date of entry in a particular service or the date of substantive appointment is the safest criterion for fixing seniority inter se between one officer or the other or between one group of officers and the other recruited from different sources. Any departure therefrom in the statutory rules, executive instructions or otherwise must be consistent with the requirements of Articles 14 and 16 of the Constitution.
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> * * *

(iv) The seniority cannot be reckoned from the date of occurrence of the vacancy and cannot be given retrospectively unless it is so expressly provided by the relevant service rules. It is so because seniority cannot be given on retrospective basis when an employee has not even been borne in the cadre and by doing so it may adversely affect the employees who have been appointed validly in the meantime.' "

31. With the above understanding of the law on seniority, the provisions of the MPS Rules, 1965 and more specifically Rule 28(*i*), Rule 28(*iii*) and Rule 16(*iii*) will now bear consideration. For ready reference they are extracted:

"In the case of persons appointed on the result of competitive examination or by selection under clause (*b*) of sub-rule (1) of Rule 5, seniority in the service shall be determined by the order in which appointments are made to the service."

31.2. ***Rule 28(iii)***

"The relative seniority of direct recruits and promotes shall be determined according to rotation of vacancies between direct recruits and promotees as determined under Rule 5 for that year and the additional direct recruits selected against the carried-forward vacancies of the previous year would be placed en bloc below the last promotees (or direct recruits, as the case may be).

The seniority of the officer so appointed under sub-rule (3) of Rule 16, shall be counted from the date, he/she is appointed to the service."

31.3. ***Rule 16(iii)***

"*In the case of a person who had been appointed to a post which is subsequently declared as duty post he shall be deemed to have been appointed to the service from the date of encadrement of the post in the MPS Schedule*."

32. As can be seen from the above, the MPS Rules, 1965 never provided that seniority should be counted from the date of vacancy. For those covered by the MPS Rules, 1965 the seniority for them will be reckoned only from the date of appointment and not from the stage when requisition for appointment was given.

33. In the above context, it is also necessary to refer to the relevant advertisement issued in 2005 for direct recruitment which allowed the aspirants to apply even if their result in the qualification examination is awaited. Even more intriguing and significant is the relaxation that those proposing to appear in the qualifying examination are also allowed to respond to the advertisement. If such be the nature of the process initiated (in the year 2005) for making direct recruitment, we can easily visualise a situation where, in the event of granting seniority from the stage of commencing the process, a person when eventually appointed, would get seniority from a date even before obtaining the qualification, for holding the post.

34. The judgment in *Union of India* v. *N.R. Parmar*, (2012) 13 SCC 340 is now to be considered in some detail as this is heavily relied on by the appellants' counsel. At the outset, it must however be cleared that the cited case had nothing to do with the MPS Rules, 1965 and that litigation related to the Income Tax Inspectors who were claiming benefits of various Central Government OMs (dated 22-12-1959, 7-2-1986, 3-7-1986 and 3-3-2008). The judgment was rendered in respect of the Central Government employees having their own Service Rules. The applicable Rules for the litigants in the present case however provide that the seniority in the service shall be determined by the order in which appointments are made to the service. Therefore, the memorandums concerned referred to in *Union of India* v. *N.R. Parmar*, (2012) 13 SCC 340 which deal with general principles for determination of seniority of persons in the Central

Government service, should not according to us, have any overriding effect for the police officers serving in the State of Manipur.

35. After the judgment in *Union of India* v. *N.R. Parmar*, (2012) 13 SCC 340 was delivered, the Union of India issued the Office Memorandum on 4-3-2014 defining the recruitment year to be the year of initiating the recruitment process against the vacancy year and that the rotation of quota, would continue to operate for determination of inter se seniority between direct recruits and promotees. This Memo was not made applicable to the State of Manipur till the issuance of the OM dated 21-12-2017, adopting the OM dated 4-3-2014 prospectively with effect from 1-1-2018. Significantly, the said OM specifically provided that " … *appointments/promotions made before the issue of this OM will not be covered by this OM. The seniority already fixed as per existing rules followed earlier in the State prior to the issue of this OM may not be reopened*." It was also specifically stated therein that "*this OM will come into effect from 1-1-2018 with the publication in the Gazette*…."

36. From the above, it is not only apparent that the above OM was only to be given prospective effect from 1-1-2018 but it contains an express acknowledgment that this was not the position prior to the issuance of the OM and that a different rule was followed earlier in the State. The conclusion is, therefore, inevitable that at least prior to 1-1-2018, direct recruits cannot claim that their seniority should be reckoned from the date of initiation of recruitment proceedings and not from the date of actual appointment.

37. When we carefully read the judgment in *Union of India* v. *N.R. Parmar*, (2012) 13 SCC 340, it appears to us that the referred OMs (dated 7-2-1986 and 3-7-1986) were not properly construed in the judgment. Contrary to the eventual finding, the said two OMs had made it clear that seniority of the direct recruits be declared only from the date of appointment and not from the date of initiation of recruitment process. But surprisingly, the judgment while referring to the illustration given in the OM in fact overlooks the effect of the said illustration. According to us, the illustration extracted in *Union of India* v. *N.R. Parmar*, (2012) 13 SCC 340 itself, makes it clear that the vacancies which were intended for direct recruitment in a particular year (1986) which were filled in the next year (1987) could be taken into consideration only in the subsequent year's seniority list but not in the seniority list of 1986. In fact, this was indicated in the two OMs dated 7-2-1986 and 3-7-1986 and that is why the Government issued the subsequent OM on 3-3-2008 by way of clarification of the two earlier OMs.

38. At this stage, we must also emphasise that the Court in *Union of India* v. *N.R. Parmar*, (2012) 13 SCC 340 need not have observed that the selected candidate cannot be blamed for administrative delay and the gap between initiation of process and appointment. Such observation is fallacious inasmuch as none can be identified as being a selected candidate on the date when the process of recruitment had commenced. On that day, a body of persons aspiring to be appointed to the vacancy intended for direct recruits was not in existence. The persons who might respond to an advertisement cannot have any service-related rights, not to talk of right to have their seniority counted from the date of the advertisement. In other words, only on completion of the process, the applicant morphs into a selected candidate and, therefore, unnecessary observation was made in *Union of India* v. *N.R. Parmar*, (2012) 13 SCC 340 to the effect that the selected candidate cannot be blamed for the administrative delay. In the same context, we may usefully refer to the ratio in *Shankarsan Dash* v. *Union of India*, (1991) 3 SCC 47, where it was held that even upon empanelment, an appointee does not acquire any right.

> **39.** The judgment in *Union of India* v. *N.R. Parmar*, (2012) 13 SCC 340 relating to the Central Government employees cannot in our opinion, automatically apply to the Manipur State Police Officers, governed by the MPS Rules, 1965. We also feel that *Union of India* v. *N.R. Parmar*, (2012) 13 SCC 340 had incorrectly distinguished the long-standing seniority determination principles propounded in, inter alia, *Jagdish Ch. Patnaik* v. *State of Orissa*, (1998) 4 SCC 456, *Suraj Parkash Gupta* v. *State of J&K*, (2000) 7 SCC 561 and *Pawan Pratap Singh* v. *Reevan Singh* (2011) 3 SCC 267. These three judgments and several others with like enunciation on the law for determination of seniority makes it abundantly clear that under service jurisprudence, seniority cannot be claimed from a date when the incumbent is yet to be borne in the cadre. In our considered opinion, the law on the issue is correctly declared in *Jagdish Ch. Patnaik* v. *State of Orissa*, (1998) 4 SCC 456 and consequently we disapprove the norms on assessment of inter se seniority, suggested in *Union of India* v. *N.R. Parmar*, (2012) 13 SCC 340. Accordingly, the decision in *N.R. Parmar* (2012) 13 SCC 340 is overruled. However, it is made clear that this decision will not affect the inter se seniority already based on *N.R. Parmar* (2012) 13 SCC 340 and the same is protected. This decision will apply prospectively except where seniority is to be fixed under the relevant rules from the date of vacancy/the date of advertisement."

13. In the instant cases, as discussed earlier, it is found that no merit list of the candidates is available with the employer. It is true that the date of joining in service of respective candidate as mentioned in the final gradation list under the impugned order is never disputed by either party. Therefore, their date of joining can be safely taken as their date of entry in the service and their seniority can be counted from said dates as they borne in to the service from that date. The principles, as settled in the afore-cited case, that the date of entry in the service is the safest criterion for fixing seniority *inter se* in absence of specific rule in the particular service regarding seniority. When the date of entry of respective candidates into the service is remaining an undisputed fact, the safest procedure would be to rely upon such undisputed fact to fix the *inter se* seniority between the parties. This principle is also found supported from the law discussed above in **K. Meghachandra**' case (supra).

14. Accordingly the claim of the Petitioner E. China Babu in WP(C) No.24337 of 2022 is decided.

15. The case of the Petitioner Sabitri Patra in WP(C) No.17095 of 2021 is that she should be placed above the private Opposite Parties who have been illegally and irregularly appointed. To substantiate such contention of the Petitioner, Mr. Patra, learned counsel appearing for the Petitioner Sabitri Patra, submits that there was a proceeding initiated against the members of the Selection Committee and report was submitted by the then Secretary who has stated that the appointments of the Opposite Parties as irregular being not sponsored by the Employment Exchange validly.

16. To answer the contention raised on behalf of the Petitioner Sabitri Patra to accept the appointment of private Opposite Parties therein as illegal, it is found that such appointment of private Opposite Parties have never been questioned as illegal from their respective dates of appointment and now when the question of fixing of

seniority *inter se* is raised, the Petitioner has come up to challenge such appointment of the private Opposite Parties as illegal. The documents produced in this regard to term the appointment of the private Opposite Parties as illegal are found without any sanctity since there is neither any decision taken on the part of the employer nor any direction of any competent authority is there to opine their appointments as illegal or irregular. Nonetheless, undisputedly such private Opposite Parties are continuing since 1997 or 1998 or subsequently, as the case may be, uninterruptedly till now and therefore it would be inappropriate on the part of the court at this stage to opine the appointments of those private Opposite parties as illegal or irregular only for the purpose of satisfaction of fixing of seniority of Petitioner (Sabitri Patra) above them. As such the claim of the Petitioner in WP(C) No.17095 of 2021 is without merit and rejected.

17. So far as the case of the Petitioner Manjushree Tripathy in WP(C) No.39811 of 2021 is concerned, she claims her seniority over the private Opposite Parties being a recruitee of 1997 batch. While opposing her prayer, it is submitted on behalf of the Secretary of OLA and the private Opposite Parties that the services of this Petitioner being found illegal was terminated earlier on 26th June, 2001 and challenging the same a writ petition bearing OJC No.8416 of 2001 was filed by her. This court by order dated 10th September, 2003 (reported in **Vol.97 2004 CLT 111**) confirmed said termination of the Petitioner and further directed her to participate for the post of Junior Assistant advertised in the year 2003 for her appointment to the post. Therefore the claim of the Petitioner Manjushree Tripathy to be placed above such Opposite Parties does not merit any consideration.

18. It is seen that under Annexure-1 & 2 in WP(C) No.39811 of 2021, the then Speaker has directed for reinstatement of the Petitioner after the judgment of this court dated 10th September, 2003. The then Speaker in his order dated 26th February, 2004 has directed that her termination is illegal as the same has been passed without any fault of the Petitioner and directed for her reinstatement as Junior Assistant. Subsequently on 10th February, 2009 an office order was issued by the Secretariat of OLA pursuant to the subsequent order of the Speaker not only reinstating the Petitioner in service but also restoring her seniority as a recruitee of the 1997 batch held pursuant to the written examination dated 30th November 1997, and also released all other consequential benefits in her favour. This office order of the Secretariat of OLA (Annexure-2) was never questioned till date by any one and stands as good till date, even after filing of the writ petition. Therefore, what is now submitted on behalf of Mr. Palit that such order of the Speaker reinstating the Petitioner in service along with restoration of her seniority with the recruitees of 1997 batch cannot be acted upon only for the purpose of fixing of seniority *inter se* between the parties, is found completely unacceptable. Had the seniority of the Petitioner been not restored along with her reinstatement in service by the authorities, the consideration would have been different for her seniority *inter se*. Since Annexure-2 clearly speaks that the seniority of the Petitioner has been restored

as per the merit list of the batch of recruitees of 1997, no question of deviation there-from at the present stage arose. Since the seniority of the Petitioner has been settled since 2009 without being questioned by anyone, it would be illegal and gross injustice to her to not reckon her seniority as per said 1997 batch.

19. It needs to be mentioned that the candidates of 1997 batch has to be placed above to the candidates selected in 1998 for the reason that the advertisement and the vacancies of 1997 was earlier than 1998 and therefore, the candidates belonging to 1997 batch should be treated earlier to the candidates of 1998 batch. Undoubtedly, the select list under Annexure-2 reveals two separate select lists for 1997 batch and 1998 batch respectively, and constitution of two Selection Committees for the written test held on 30th November, 1997 and 5th April, 1998.

Therefore, as observed earlier, the Petitioner's (Manjushree Tripathy) seniority should be fixed as per the 1997 batch, i.e. pursuant to the written test held on 30th November, 1997 mentioned in the select list dated 17th August, 1998 (Annexure-2 in WP(C) No.24337 of 2022).

20. In view of the discussions made above, the prayer of the Petitioner E. China Babu in WP(C) No.24337 of 2022 and Manjushree Tripathy in WP(C) No.39811 of 2021 has to be re-fixed in the final gradation list with suitable modification. The Opposite Parties are directed to modify the final gradation list accordingly within a period of 15 days from the date of receipt of certified copy of this judgment.

21. The prayer of the Petitioner Sabitri Patra in WP(C) No.17095 of 2021 is rejected.

22. In the result, WP(C) No.24337 of 2022 and 39811 of 2021 are disposed of as allowed and WP(C) No.17095 of 2021 is dismissed.

Headnotes prepared by :
Smt. Madhumita Panda, Law Reporter
(Verified by : Shri Pravakar Ganthia, Editor-in-Chief)

Result of the case :
WP(C) No.24337 of 2022 and 39811 of 2021 are disposed of as allowed and WP(C) No. 17095 of 2021 is dismissed.

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2024 (III) ILR-CUT-740

TUSARA RANJAN PATRA
V.
STATE OF ODISHA & ORS.

(W.P.(C) NO. 16486 OF 2020)

30 OCTOBER 2024

[B.P. ROUTRAY, J.]

Issue for Consideration

Whether rejection of regularisation on the ground of non-compliance of Odisha Group-C and Group-D Posts (Contractual Appointment) Rules, 2013 is sustainable, when the petitioner is an *ad hoc* appointee.

Headnotes

ODISHA GROUP-C AND GROUP-D POSTS (CONTRACTUAL APPOINTMENT) RULES, 2013 – Regularization – The Authority rejected the recommendation for regularization of petitioner on the ground that the appointment is not as per 2013 Rules and without due procedure of selection – Whether the rejection is sustainable.

Held: No – The initial appointment of petitioner was made in the year 1996, when no such rules for contractual posts were there and the continuance of the petitioner for the post was never objected by the Government at any point of time – So the objection made in the counter affidavit of the State with regard to initial appointment of the petitioner as irregular cannot be allowed to sustain for the reason that his employment and continuance in service was though irregular but never stated as illegal and the long continuance of the petitioner in service for last 28 years without any interruption would definitely justify his requirement in the post for substantial discharge of duty necessitated for the employer. (Para 7)

Citation Reference

State of Karnataka and Others. V. Umadevi and Others **(2006) 4 SCC 1**; State of Karnataka and Others. V. M.L. Kesari and Others **(2010) 9 SCC 247**; Nihal Singh and Others. V. State of Punjab and Others **(2013) 14 SCC 65**; Amarkant Rai v. State of Bihar and Others **(2015) 8 SCC 265 – referred to**.

List of Rules

Odisha Group-C and Group-D Posts (Contractual Appointment) Rules, 2013

Keywords

Regularization of service; *inter alia*; *ad hoc* appointee.

Case Arising From

Out of Govt. of Odisha Order dated 19.06.2020.

Appearances of Parties

For Petitioners : Mr. Sameer Kumar Das
For Opp. Parties : Mr. S.P. Panda, AGA

Judgment/Order

Judgment

B.P. ROUTRAY, J.

1. Heard Mr. S.K. Das, learned counsel for the Petitioner and Mr. S.P. Panda, learned AGA for State – Opposite Parties.

2. The Petitioner was initially appointed as Junior Clerk in the office of Assistant Controller of Legal Meteorology, Dhenkanal on ad-hoc basis on 18th October 1996 by the Government of Odisha in the Food Supplies and Consumer Welfare Department. Then his pay was revised at par with the pay of regular Ministerial staff of District Forum in the composite cadre of Food Supplies and Consumer Welfare Department. He continues in service and his pay was also revised from time to time including grant of grade pay at par with the regular employees in the same cadre. Further, a high power committee constituted for the purpose of regularization of the service of the Petitioner and similarly situated persons considered the case of the Petitioner and recommended to the Government for regularization. Since no action was taken on such recommendation, the Petitioner approached this court in W.P.(C) No.29515 of 2019, wherein this Court directed the Government to work out on the recommendation of the Petitioner within the stipulated period. Then the Commissioner-cum-Secretary of Government in Food Supplies and Consumer Welfare Department in his order dated 19th June, 2020 (Annexure-7) rejected the recommendation for regularization of the Petitioner. Said order of the Government under Annexure-7 is impugned in the present writ petition with the prayer for regularization of service of the Petitioner.

3. The Government has filed its counter supporting its stand in the impugned order that the appointment of the Petitioner is inter alia not as per the Odisha Group-C and Group-D Posts (Contractual Appointment) Rules, 2013 and not in consonance with the circular of G.A. Department dated 16th January, 2014. It is also averred in the counter that the initial appointment of the Petitioner is without due procedure of selection and therefore, the claim of the Petitioner for regularization of his service is liable to be rejected.

4. It is seen that the initial appointment of the Petitioner as Junior Clerk on ad hoc basis was made against a sanctioned vacant post and the same is never disputed. The continuance of the Petitioner in service with grant of such pay and grade pay at par with his counterpart regular employees is also admitted. It is further admitted that the Petitioner is continuing as such since 18th October 1996 till date and the authorities have recommended in favour of regularization of the Petitioner upon his satisfactory discharge of duty.

5. For the question of regularization of the Petitioner, the first thing to be counted is that, the Petitioner is continuing in the post uninterruptedly for last 28 years without any blemish from the authority. His initial appointment is against a sanctioned vacant post which continues to be as such till date, in confirmity with the continuance of the Petitioner.

6. The law on regularization of service has been well settled in different decisions of Hon'ble Supreme Court. By taking note of the principles decided in the cases of ***State of Karnataka and Others. V. Umadevi and Others, (2006) 4 SCC 1, State of Karnataka and Others. V. M.L. Kesari and Others, (2010) 9 SCC 247, Nihal Singh and Others. V. State of Punjab and Others, (2013) 14 SCC 65***, the Hob'ble Supreme Court in the case of ***Amarkant Rai v. State of Bihar and Others, (2015) 8 SCC 265*** have observed as follows:-

> "11. As noticed earlier, the case of the appellant was referred to a three-member Committee and the three-member Committee rejected the claim of the appellant declaring that his appointment is not in consonance with the ratio of the decision laid down by this Court in *Umadevi case* [(2006) 4 SCC 1]. In *Umadevi case* [(2006) 4 SCC 1], even though this Court has held that the appointments made against temporary or ad hoc are not to be regularised, in para 53 of the judgment, it provided that irregular appointment of duly qualified persons in duly sanctioned posts who have worked for 10 years or more can be considered on merits and steps to be taken as a one-time measure to regularise them. In para 53, the Court observed as under:
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> "53. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in *S.V. Narayanappa* [*State of Mysore v. S.V. Narayanappa*, AIR 1967 SC 1071] , *R.N. Nanjundappa* [*R.N. Nanjundappa v. T. Thimmiah*, (1972) 1 SCC 409] and *B.N. Nagarajan* [*B.N. Nagarajan v. State of Karnataka*, (1979) 4 SCC 507 : 1980 SCC (L&S) 4] and referred to in para 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of the courts or of tribunals. The question of regularisation of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases abovereferred to and in the light of this judgment. In that context, the Union of India, the State Governments and their instrumentalities should take steps to regularise as a one-time measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of the courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily-wagers are being now employed. The process must be set in motion within six months from this date. We also clarify that regularisation, if any already made, but not subjudice, need not be reopened based on this judgment, but there should be no further bypassing of the constitutional requirement and regularising or making permanent, those not duly appointed as per the constitutional scheme."
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> The objective behind the exception carved out in this case was prohibiting regularisation of such appointments, appointed persons whose appointmdents is irregular but not illegal; ensure security of employment of those persons who served the State Government and their instrumentalities for more than ten years.
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> 12. Elaborating upon the principles laid down in *Umadevi* (3) case [(2006) 4 SCC 1 : 2006 SCC (L&S) 753] and explaining the difference between irregular and illegal appointments in *State of Karnataka v. M.L. Kesari* [(2010) 9 SCC 247], this Court held as under:
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> "7. It is evident from the above that there is an exception to the general principles against 'regularisation' enunciated in *Umadevi* [(2006) 4 SCC 1], if the following conditions are fulfilled:

(i) The employee concerned should have worked for 10 years or more in duly sanctioned post without the benefit or protection of the interim order of any court or tribunal. In other words, the State Government or its instrumentality should have employed the employee and continued him in service voluntarily and continuously for more than ten years.

ii) The appointment of such employee should not be illegal, even if irregular. Where the appointments are not made or continued against sanctioned posts or where the persons appointed do not possess the prescribed minimum qualifications, the appointments will be considered to be illegal. But where the person employed possessed the prescribed qualifications and was working against sanctioned posts, but had been selected without undergoing the process of open competitive selection, such appointments are considered to be irregular."

13. Applying the ratio of *Umadevi case* [(2006) 4 SCC 1] , this Court in *Nihal Singh v. State of Punjab* [(2013) 14 SCC 65] directed the absorption of the Special Police Officers in the services of the State of Punjab holding as under:

"35. Therefore, it is clear that the existence of the need for creation of the posts is a relevant factor with reference to which the executive government is required to take rational decision based on relevant consideration. In our opinion, when the facts such as the ones obtaining in the instant case demonstrate that there is need for the creation of posts, the failure of the executive government to apply its mind and take a decision to create posts or stop extracting work from persons such as the appellants herein for decades together itself would be arbitrary action (inaction) on the part of the State.

36. The other factor which the State is required to keep in mind while creating or abolishing posts is the financial implications involved in such a decision. The creation of posts necessarily means additional financial burden on the exchequer of the State. Depending upon the priorities of the State, the allocation of the finances is no doubt exclusively within the domain of the legislature. However in the instant case creation of new posts would not create any additional financial burden to the State as the various banks at whose disposal the services of each of the appellants is made available have agreed to bear the burden. If absorbing the appellants into the services of the State and providing benefits on a par with the police officers of similar rank employed by the State results in further financial commitment it is always open for the State to demand the banks to meet such additional burden. Apparently no such demand has ever been made by the State. The result is the various banks which avail the services of these appellants enjoy the supply of cheap labour over a period of decades. It is also pertinent to notice that these banks are public sector banks."

14. In our view, the exception carved out in para 53 of *Umadevi* [(2006) 4 SCC 1] is applicable to the facts of the present case. There is no material placed on record by the respondents that the appellant has been lacking any qualification or bear any blemish record during his employment for over two decades. It is pertinent to note that services of similarly situated persons on daily wages for regularisation viz. one Yatindra Kumar Mishra who was appointed on daily wages on the post of clerk was regularised w.e.f. 1987. The appellant although initially working against unsanctioned post, the appellant was working continuously since 3-1-2002 against sanctioned post. Since there is no material placed on record regarding the details whether any other night guard was appointed against the sanctioned post, in the facts and circumstances of the case, we are inclined to award monetary benefits to be paid from 1-1-2010."

7. In the instant case neither the appointment of the Petitioner nor his continuance in the post of Junior Clerk for last 28 years was ever questioned by the Government for lack of regular process of selection. What is stated in the impugned order to refuse the regularization of the Petitioner is that, the appointment of the Petitioner was against the principles of engagement of contractual posts guided by the circular of General Administration Department Resolution No.1066 dated 16th January, 2014 and the Group-C and Group-D Posts (Contractual Appointment) Rules, 2013. It needs to be mentioned here that the appointment of the Petitioner is dated back to the year 1996 when no such rules for contractual posts were there and the continuance of the Petitioner for the post was never objected by the Government at any point of time. So the objection made in the counter affidavit of the State with regard to initial appointment of the Petitioner as irregular cannot be allowed to sustain for the reason that his employment and continuance in service was though irregular but never stated as illegal and never objected by anyone at any point of time. The long continuance of the Petitioner in service for last 28 years without any interruption would definitely justify his requirement in the post for substantial discharge of duty necessited for the employer. Therefore, in view of the principles settled by Hon'ble Apex Court as stated above the Petitioner has a strong case and right in his favour to be permanently observed in the post as a regular employee. Accordingly the impugned order of the Government dated 19th June, 2020 (Annexure-7) to refuse the regularization of the Petitioner as such is quashed and the Opposite Parties are directed to regularize the service of the Petitioner in the post of Junior Clerk with all consequential service benefits from the date of his regularization, within a period of two months from the date of receipt of certified copy of this order.

8. The Writ Petition is disposed of as allowed.

Headnotes prepared by :
Smt. Madhumita Panda, Law Reporter
(Verified by : Shri Pravakar Ganthia, Editor-in-Chief)

Result of the case :
Writ Petition allowed.

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2024 (III) ILR-CUT-745

BASANTA DISIRI
V.
STATE OF ODISHA & ORS.

(W.P.(C) NO. 14965 OF 2020)

6 NOVEMBER 2024

[B.P. ROUTRAY, J.]

Issue for Consideration

Whether promotion and fixation of seniority are coming under the ambit of consequential service benefit.

Headnotes

SERVICE JURISPRUDENCE – The Tribunal in O.A. No. 2168 (C) of 2012 filed by the petitioner vide order dated 11.09.2015 directed for regularization of the service of the Petitioner along with all consequential service and financial benefits – State preferred SLP(C) – Diary No. 18329 of 2018 before the Hon'ble Supreme Court of India, which was dismissed – The petitioner was regularized and got the financial benefits but his Consequential service benefits including promotion were not considered.

Held: – When the service of the Petitioner was regularized pursuant to the direction of the learned Tribunal w.e.f. 7.8.1994, he should have given all consequential service benefits along with his regularization as directed by the learned Tribunal – Such consequential service benefits definitely include counting of his seniority and promotion as admissible to him at par with other regular employees and permissible under the relevant service rule. (Para 13)

Consequential benefits – Meaning and connotation – The consequential benefits include many things more than the financial benefits *viz* promotion and fixation of seniority etc. (Para 13)

Citation Reference

Jute Corporation of India Ltd. vs. Judhistira Swain, **2014 (II) ILT-CUT-165**; J.K. Synthetics vs. K.P. Agarwal, **AIR 2007 SC (Supp.) 637**; Akhilananda Sahoo vs. Jt. General Manager, OSFC & Ors.,**119 (2015) CLT-281**; Ramakanta Parija vs.Deputy Chief Mining Engineer, Sub-Area Manager, Belpahar, Sub Area, IB Valley Area, Jharsuguda, **2022 (I) OLR-615 – referred to.**

List of Rules

Odisha Ministerial Services (Methods of Recruitment & Conditions of Service of Clerks in District Registration Offices) Rules, 1975.

Keywords

Consequential service benefits; fixation of seniority; Regularization of service.

Case Arising From

Order dated 11.09.2015 passed in O.A. No. 2168(C) of 2012.

Appearances of Parties

For Petitioners : Mr. S. Mohanty
For Opp. Parties: Ms. B.L. Tripathy, AGA

Judgment/Order

Judgment

B.P. ROUTRAY, J.

1. Heard Mr. S. Mohanty, learned counsel for the Petitioner and Ms. B.L. Tripathy, learned Additional Government Advocate for the State-Opposite Parties.

2. The prayer of the Petitioner is to grant him all consequential service benefits in terms of the direction of the learned Tribunal dated 11.09.2015 passed in O.A. No. 2168(C) of 2012.

3. The case of the Petitioner is that, he earlier filed O.A. No.2168(C) of 2012 before the learned Tribunal praying for regularization of his service along with all consequential benefits. Accordingly, learned Tribunal in its order dated 11.09.2015 directed for regularization of the service of the Petitioner along with all consequential service and financial benefits. The relevant portion of the direction of the learned Tribunal is re-produced below.

> "In view of the above facts and analysis thereof and keeping in view the earlier order of the Tribunal dated 16.4.1999 passed in O.A. 1515/1994 in respect of the applicant and relying on the decision of the Tribunal in other similar matters cited supra, we direct the state respondents to take immediate steps for regularization of the service of applicant by relaxing rule 3(i) of the O.M.S. Rules, 1985 and grant him all consequential service as well as financial benefits w.e.f.7.8.1994 as he has been continuing in service from the said date without any break, without taking any further action pursuant to Annexure-8.
>
> The entire exercise be completed within a period of four months from the date of receipt of a copy of this order."

4. Then the State preferred writ petition before this Court against said order of the learned Tribunal and being failed therein also approached Hon'ble Supreme Court in SLP(C)- Diary No.18329 of 2018, which was also dismissed.

5. Thereafter, the Opposite Parties regularized the service of the Petitioner and released all financial benefits w.e.f. 7.8.1994. But the grievance of the Petitioner is that, though his service was regularized as Junior Clerk w.e.f. 7.8.1994 pursuant to the direction of learned Tribunal and the financial benefits were released in his favour, but the consequential service benefits including promotion was not considered. He was given promotion to the post of Senior Clerk in the year 2020 only without taking note of his period of service from 7.8.1994.

6. The State has filed their counter stating that, the service of the Petitioner has been regularized pursuant to the direction of the learned Tribunal w.e.f. 7.8.1994 and all consequential financial benefits were released in his favour. The State has also contended in the counter that, the consequential service benefits has been extended in favour of the Petitioner and he was given promotion to the post of Senior Clerk in

2020. Therefore, the prayer of the Petitioner has no merit to be considered for giving him promotion from any earlier period.

7. In view of the controversy, it falls to determine here that, whether the consequential service benefits in terms of the direction of the learned Tribunal has been extended in favour of the Petitioner from 7.8.1994 in actual ?

8. The fact that the service of the Petitioner was regularized w.e.f. 7.8.1994 as a Junior Clerk is not disputed. Consequent upon his regularization in service, the conditions of service are governed under the Odisha Ministerial Services (Method of Recruitment and Condition of Service of Clerks in District Registration Offices) Rules, 1975. According to the hierarchy of posts specified in the said 1975 Rules, the Junior Clerks are required to be promoted to the post of Senior Clerks on the basis of merit and suitability with regard to seniority upon completion of two years of service and subject to passing the departmental examination. Further, the promotion to the posts of Head Clerks shall also be on the basis of merit and suitability with due regard to seniority from amongst the Senior Clerks, who have passed the departmental examination.

9. The Petitioner has prayed for his promotion in terms of the said Rules in view of the direction of the learned Tribunal that he has been regularized with all consequential service benefits. The dispute is with regard to the promotion of the Petitioner and according to the State, the same is not included in the consequential service benefits as directed by the learned Tribunal.

10. In ***Jute Corporation of India Ltd. vs. Judhistira Swain, 2014 (II) ILT-CUT-165***, this Court taking into consideration of the principles enumerated in the case of ***J.K. Synthetics vs. K.P. Agarwal, AIR 2007 SC (Supp.) 637*** have held as follows:-

> "In view of the above, "consequential benefit" to a person does not mean only back wages. It includes much more things beyond back wages, such as promotion, fixation of seniority and grant of financial benefits admissible to the post etc. Therefore, if the termination of the opposite partyworkman in the guise superannuation has been declared as illegal and unjustified, then the opposite party-workman is entitled to get all the consequential service benefits admissible to the post. Back wages may be one facet of getting monetary benefits, but that is not the conclusive one. On the other hand, service benefit, which would have accrued to him had he continued in service cannot be denied by the petitioner-Management."

11. The aforesaid principles has been relied on several other decisions including ***Akhilananda Sahoo vs. Joint General Manager, OSFC and others, 119 (2015) CLT-281*** and ***Ramakanta Parija vs. Deputy Chief Mining Engineer, Sub-Area Manager, Belpahar, Sub Area, IB Valley Area, Jharsuguda, 2022 (I) OLR-615***, etc.

12. In the instant case, undoubtedly the Petitioner has been given financial benefits including the promotion to the post of Senior Clerk. But the question is whether his promotion in the hierarchy of posts would be counted from 7.8.1994 or not.

13. As stated above, the consequential benefits include many things more than the financial benefits Viz., promotion and fixation of seniority, etc. Thus when the service of the Petitioner was regularized pursuant to the direction of the learned Tribunal w.e.f. 7.8.1994, he should have given all consequential service benefits along with his regularization as directed by the learned Tribunal. Such consequential service benefits definitely include counting of his seniority and promotion as admissible to him at par with other regular employees and permissible under the relevant service rule.

14. Thus the Petitioner succeeds in his prayer to get the benefits of seniority and promotion in service consequent upon his regularization of service w.e.f. 7.8.1994. The Opposite Parties are thus directed to extend him all such consequential service benefits including fixation of his seniority and promotion, counting his service period w.e.f. 7.8.1994.

15. The writ petition is disposed of as allowed.

Headnotes prepared by :
Smt. Madhumita Panda, Law Reporter
(Verified by : Shri Pravakar Ganthia, Editor-in-Chief)

Result of the case :
Writ petition allowed.

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2024 (III) ILR-CUT-749

BASANTA KUMAR MARTHA
V.
STATE OF ODISHA & ORS.

(W.P.(C) NO.21603 OF 2016)

24 SEPTEMBER 2024

[Dr. S.K. PANIGRAHI, J.]

Issue for Consideration

Whether the disciplinary proceeding initiated by the department after the retirement of the petitioner is leagally valid.

Headnotes

SERVICE LAW – Departmental Proceeding pending since 2003, nearly about two decades – Vigilance case which was initiated already been closed as the investigation report did not disclose any criminal liability – Petitioner meanwhile retired from service and retiral benefits like gratuity and leave salary have been held up – Plea of delay and latches pleaded – Effect of such long protraction/delay in conclusion of the departmental proceeding.

Held: The petitioner has already endured substantial hardship due to the ongoing disciplinary proceedings – In fact, the mental anguish & suffering experienced by the petitioner as a result of these prolonged proceedings would far outweigh any potential punishment – Hence, there is no hesitation to quash the charge memo and the departmental proceeding issued against the petitioner in toto – The petitioner will be entitled to all the withheld retiral benefits with 10% simple interest from the date of retirement. (Paras 20-22)

Citation Reference

B.C. Chaturvedi vs. Union of India, **(1995) 6 SCC 749**; Om Kumar & Ors. vs. Union of India, **(2001) 2 SCC 386**; State of Madhya Pradesh v. Bani Singh, **1990 Supp SCC 738**; State of Andhra Pradesh v. N. Radhakishan, **(1998) 4 SCC 154**; State of Punjab & Ors. v. ChamanLalGoyal : **1995 (2) SCC 570** – **referred to.**

Keywords

Service Law, Departmental proceeding after retirement, Delay in concluding the proceeding.

Appearances of Parties

For Petitioner : Mr. Krishna Chandra Sahu
For Opp.Parties : Mr. G.R. Mohapatra, ASC, Mr. Somnath Mishra

Judgment/Order

Judgment

Dr. S.K. PANIGRAHI, J.

1. The petitioner, through the Writ Petition, challenges the legality of disciplinary proceeding initiated against the petitioner vide Memorandum No.16, dated 1.1.2003 of the Housing and Urban Development Department and is continuing till today although he has been retired since 31.7.2013.

I. FACTUAL MATRIX OF THE CASE:

2. The brief fact of the case as presented by the Petitioner is that:

(i) In compliance with Order No. 39213/OSHB dated 15.12.1992, the petitioner was initially appointed as Assistant Law Officer under the Odisha State Housing Board (OSHB) to fill an existing vacancy, with a pay scale of Rs. 2000-60-2300-EB-75-3200-100-3500/-, along with applicable allowances as permissible to OSHB employees at the relevant time.

(ii) The petitioner retired on 31.7.2013 (AN) upon reaching the age of superannuation, as communicated through Letter No. 5111/OSHB dated 29.4.2013. He was subsequently relieved from service on 31.7.2013, in compliance with Letter No. 9381/OSHB (Estt.) dated 30.7.2013, issued by the Secretary, pursuant to the orders of the Chairman, OSHB.

(iii) After 2½ months' post-retirement/ the OSHB disbursed the petitioner's Employee Provident Fund (EPF) dues via Office Memo No. 11763 dated 17.10.2013. However, his Gratuity and Leave Salary remain unpaid.

(iv) Upon inquiry with the OSHB, the petitioner was informed that his Gratuity and Leave Salary had been withheld due to the pendency of disciplinary proceedings initiated against him in 2003, based on the Special Audit Report dated 1.7.2002 about gross irregularities in three Joint venture projects erected by OSHB namely Chandrama Appartment at Malisahi, Bhubaneswar, Banaja Apartment at Unit-VI, Bhubaneswar, and Satyasai Enclave at Aiginia, Bhubaneswar.

(v) The said proceedings were initiated by the Principal Secretary of the Housing & Urban Development Department via Office Memorandum No. 16/HUD dated 1.1.2003, against the petitioner and three others, namely S.N. Sethy (Secretary, OSHB), FACAO, and Sri R.N. Pattanaik, Asst. Engineer SR Das. The petitioner was charge-sheeted in this disciplinary proceeding.

(vi) The petitioner submitted his explanation to the charge sheet on 20.02.2004. Despite his retirement on 31.7.2013, the Vigilance Department had submitted its investigation report on 11.02.2004, which did not disclose any criminal liability. Additionally, the Government has since settled the revised agreements for two projects, namely Satyasai Enclave and Banaja Apartment. However, the disciplinary proceeding initiated in 2003 is yet to be concluded, resulting in the withholding of the petitioner's retirement benefits by OSHB.

(vii) Consequently, the petitioner filed a writ petition before this Court being numbered as W.P.(C) No.14883/15. On 26.8.2015, this Court directed the Opposite Parties to expedite and conclude the departmental proceedings against the petitioner. However, this Court's order has not yet been complied with.

(viii) Despite the aforementioned Court's order, the disciplinary proceedings against the petitioner remain incomplete, and as a result, he has not received his retirement benefits, including Gratuity and Leave Salary till date. The petitioner, a non-pensionable employee of OSHB, is entirely reliant on his retirement benefits for his livelihood. The withholding of his legitimate retirement benefits, including interest, on account of a prolonged and incomplete disciplinary proceeding, which could not be concluded during his service period, is unlawful.

II. SUBMISSIONS ON BEHALF OF THE PETITIONER:

3. Learned counsel for the Petitioner earnestly made the following submissions in support of his contentions:

(i) Criminal charges were examined in connection with the same allegations set forth in the charge memoranda that are challenged in the writ petition. The Superintendent of Police, Vigilance Department, in the investigation report concerning the matter, concluded that the inquiry did not establish any criminal liability, as per Order dated 11.02.2004.

(ii) The petitioner is 69 years old now and the charges have been pending since 2003-04 without any progress at all even after declaration of no criminal liability by the Vigilance Dept. In view of the pendency of the departmental action, the petitioner has been suffering without any retirement benefits. According to him, there cannot be any justifiable reason for such a long delay in not completing the disciplinary action in respect of the impugned charge memoranda

(iii) The present proceedings cannot be countenanced in law for the simple reason that it is ex facie illegal to continue the disciplinary proceedings for nearly two decades. This should be treated like a speedy trial which is a fundamental right of the citizen.

III. SUBMISSIONS ON BEHALF OF THE OPPOSITE PARTIES:

4. In reply, learned counsel for the Opposite Party Nos.3 and 4 earnestly made the following submissions in support of his contentions:

(i) The Director of Municipal Administration and Ex-Officio Additional Secretary of the Housing and Urban Development (H&UD) Department was designated as the Inquiry Officer to investigate the charges levelled against the petitioner in this matter. The Secretary of the OSHB was appointed as the Presenting Officer, pursuant to the order from the H&UD Department in July 2004, as referenced in Annexure-5 of this writ petition. Subsequently, the Government of the H&UD Department, via Letter No. 10642/H&UD dated 05.04.2012, communicated the initiation of disciplinary proceedings against another officer, Sri Rabi Narayan Pattanaik, former Chief Accounts Officer (CAO) of OSHB, as he was an employee of OSHB. Following this, the Government of the H&UD Department, through Letter No. 17257/HUD dated 08.07.2015, instructed the OSHB to conclude the proceedings against Sri R. N. Pattanaik and Sri B.K. Martha in accordance with the OSHB Act and Rules, with the Chairman of OSHB acting as the appointing and disciplinary authority.

(ii) The disciplinary proceedings initiated against the petitioner would be concluded by the OSHB as per the OSHB Rules of 1970, with notification to the Government in the H&UD Department. After several correspondences with the Government in the H&UD Department, the OSHB Authority issued Order No. 7078 dated 26.08.2015, appointing the Chief Engineer of OSHB as the Inquiry Officer to investigate the proceedings against the petitioner, Sri Basanta Kumar Martha, former Law Officer of OSHB. The Inquiry Officer has been directed to complete the inquiry and submit a report promptly. A copy of the order dated 26.08.2015 was communicated to the petitioner for his information and necessary action. The inquiry proceedings are currently ongoing, with two phases of inquiry having been conducted by the then Chief Engineer, who served as the Inquiry Officer. The petitioner has participated in the inquiry and submitted his defense statement. The inquiry concerning another individual, Dr. R.N. Pattanaik, is also in progress, and he has requested time to submit his defense statement, as noted in the report from the relevant wing.

(iii) In light of the ongoing departmental proceedings initiated by the Government and the H&UD Department, as well as the ongoing inquiry/the petitioner's retirement benefits/including gratuity/have been understandably withheld. However/ the petitioner's provident fund dues have been fully disbursed. It is important to note that the petitioner's legitimate dues/ as per the prescribed rules of the Orissa Service Code and the Board's regulations, may be disbursed following the proper procedures, but such disbursement is contingent upon the outcome of the pending departmental proceedings against the petitioner, which he is aware of, as these proceedings were initiated prior to his retirement. The withheld retirement benefits for the petitioner amount to approximately (i) Gratuity Rs. 5,64,383/- and (ii) Unutilized Leave Salary Rs. 4,59,459/-.

(iv) Based on the findings of the Special Audit Report regarding the irregularities committed by the petitioner and several other officers of OSHB in their official capacities concerning three joint venture projects, which resulted in significant financial losses to OSHB, the Government in the H&UD Department has initiated departmental proceedings, and the inquiry is ongoing.

(v) Although the Government in the H&UD Department appointed the Director of Municipal Administration as the Inquiry Officer to investigate the matter, no further progress was made in the inquiry. As indicated in the preceding paragraphs, following a

series of correspondences, the Chief Engineer of OSHB has now been appointed as the Inquiry Officer to investigate the proceedings against the petitioner and another officer of OSHB. The current Inquiry Officer has taken all necessary steps to adhere to the proper inquiry procedures, providing opportunities for defense and hearings to the involved officers, including the petitioner, to ensure the expeditious resolution of the proceedings.

IV. COURT'S REASONING AND ANALYSIS:

5. I have heard the representations of the counsels appearing for the respective parties at length and perused the material placed on record.

6. First of all, it is trite in law that the power of judicial review exercised by a Court or a Tribunal against the orders of a departmental enquiry committee is only limited to ensuring that the individual receives fair treatment and not to ensure that the conclusion which the authority reaches is necessarily correct in the eye of the Court.

7. Similar case has been confronted by the Apex Court in ***B.C. Chaturvedi vs. Union of India***,[1] wherein the Supreme Court also held that judicial review is not an appeal from a decision but a review of the manner in which the decision is made. Power of judicial review is meant to ensure that the individual receives fair treatment and not to ensure that the conclusion which the authority reaches is necessarily correct in the eye of the Court. The relevant excerpt is produced hereinbelow:

> "12. *Judicial review is not an appeal from a decision but a review of the manner in which the decision is made. Power of judicial review is meant to ensure that the individual receives fair treatment and not to ensure that the conclusion which the authority reaches is necessarily correct in the eye of the court. When an inquiry is conducted on charges of misconduct by a public servant, the Court/Tribunal is concerned to determine whether the inquiry was held by a competent officer or whether the inquiry was held by a competent officer or whether rules of natural justice are complied with. Whether the findings or conclusions are based on some evidence, the authority entrusted with the power to hold inquiry has jurisdiction, power and authority to reach a finding of fact or conclusion. But that finding must be based on some evidence. Neither the technical rules of Evidence Act nor of proof of fact or evidence as defined therein, apply to disciplinary proceeding. When the authority accepts that evidence and conclusion receives support therefrom, the disciplinary authority is entitled to hold that the delinquent officer is guilty of the charge. The Court/Tribunal in its power of judicial review does not act as appellate authority to re-appreciate the evidence and to arrive at its own independent findings on the evidence. The Court/Tribunal may interfere where the authority held the proceedings against the delinquent officer in a manner inconsistent with the rules of natural justice or in violation of statutory rules prescribing the mode of inquiry or where the conclusion or finding reached by the disciplinary authority is based on no evidence. If the conclusion or finding be such as no reasonable person would have ever reached, the Court/Tribunal may interfere with the conclusion or the finding, and mould the relief so as to make it appropriate to the facts of each case*.

1. (1995) 6 SCC 749

> 13. *The disciplinary authority is the sole judge of facts. Where appeal is presented, the appellate authority has coextensive power to reappreciate the evidence or the nature of punishment. In a disciplinary inquiry, the strict proof of legal evidence and findings on that evidence are not relevant. Adequacy of evidence or reliability of evidence cannot be permitted to be canvassed before the Court/Tribunal. In Union of India v. H.C. Goel, this Court held at p. 728 that if the conclusion, upon consideration of the evidence reached by the disciplinary authority, is perverse or suffers from patent error on the face of the record or based on no evidence at all, a writ of certiorari could be issued.*
>
> *xxxxxxxxx*
>
> 18. *A review of the above legal position would establish that the disciplinary authority, and on appeal the appellate authority, being fact-finding authorities have exclusive power to consider the evidence with a view to maintain discipline. They are invested with the discretion to impose appropriate punishment keeping in view the magnitude or gravity of the misconduct. The High Court/Tribunal, while exercising the power of judicial review, cannot normally substitute its own conclusion on penalty and impose some other penalty. If the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the High Court/Tribunal, it would appropriately mould the relief, either directing the disciplinary/appellate authority to reconsider the penalty imposed, or to shorten the litigation, it may itself, in exceptional and rare cases, impose appropriate punishment with cogent reasons in support thereof*." (Emphasis supplied)

8. When an inquiry is conducted on the charges of misconduct by an employee of the state, the Court or Tribunal would be concerned only to the extent of determining whether the inquiry was held by a competent officer or whether the rules of natural justice and statutory rules were complied with.

9. Further, in ***Om Kumar & Others vs. Union of India***,[2] the Supreme Court after considering the Wednesbury Principles and the doctrine of proportionality held that the question of quantum of punishment in disciplinary matters is primarily for the disciplinary authority, and the jurisdiction of the High Courts under Article 226 of the Constitution or of the Administrative Tribunals is limited and is confined to the applicability of one or the other of the well-known principles known as "Wednesbury Principles" namely whether the order was contrary to law, or whether relevant factors were not considered, or whether irrelevant factors were considered or whether the decision was one which no reasonable person could have taken. The Apex held as following:

> *"In this context, we shall only refer to these cases. In Ranjit Thakur v. Union of India, [1987] 4 SCC 611, this Court referred to 'proportionality' in the quantum of punishment but the Court observed that the punishment was 'shockingly' disproportionate to the misconduct proved. In B.C. Chaturvedi v. Union of India, [1995] 6 SCC 749, this Court stated that* ***the court will not interfere unless the punishment awards was one which shocked the conscience of the Court. Even then, the Court would remit the matter back to the authority and would not normally substitute one punishment for the other. However, in rare situations, the Court could award an alternative penalty****. It was also so stated in Ganayutham.*

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2. (2001) 2 SCC 386

> *Thus, from the above principles and decided cases, it must be held that where an administrative decision relating to punishment in disciplinary cases is questioned as 'arbitrary' under Article 14, the Court is confined to Wednesbury principles as a secondary reviewing authority. The court will not apply proportionality as a primary reviewing Court because no issue of fundamental freedoms nor of discrimination under Article 14 applies in such a context. The Court while reviewing punishment and if it is satisfied that Wednesbury principles are violated, it has normally to remit the matter to the administrator for a fresh decision as to the quantum of punishment. Only in rare cases where there has been long delay in the time taken by the disciplinary proceedings and in the time taken in the Courts, and such extreme or rare cases can the Court substitute its own view as to the quantum of punishment.*" (Emphasis supplied)

10. Now, with the above principles in mind, this Court shall consider the arguments of the counsel for the petitioners, one by one, against the arguments of the counsel for the Opp. Parties.

11. This Court finds the aforementioned arguments unacceptable, as the extraordinary delay in concluding the disciplinary proceedings against the petitioner is indefensible under any circumstances.

12. This Court is astonished by the department's inaction, having allowed the proceedings to remain unresolved for nearly 20 years without any advancement, especially considering the fact that there has been no legal barrier or hindrance to conducting the departmental inquiry against the petitioner, particularly after the Vigilance Department determined in 2004 that there was no criminal liability.

13. The Supreme Court and High Courts have consistently ruled in various decisions that an excessive delay in the initiation or completion of disciplinary proceedings can itself result in significant prejudice to the rights of government employees, warranting intervention in disciplinary proceedings on that basis alone. In the present case, to assert that there has been an excessive delay in completing the departmental action is indeed a gross understatement.

14. In yet another case, in the ***State of Madhya Pradesh v. Bani Singh***,[3] the officer in question challenged the initiation of departmental inquiry proceedings and the issuance of a charge sheet and the departmental inquiry on the grounds of excessive delay, exceeding 12 years, in initiating the proceedings related to the incidents from 1975-76. An appeal was subsequently lodged in this Court, contending that the Tribunal erred in quashing the proceedings solely based on the grounds of delay and laches, and that the inquiry should have been permitted to proceed to assess the matter on its merits. This Court dismissed the learned counsel's arguments. In dismissing the appeal, the Supreme Court made the following observations:

> "*The irregularities which were the subject-matter of the enquiry are said to have taken place between the years 1975-77. It is not the case of the department that they were not aware of the said irregularities, if any, and came to know it only in 1987. According to them even in April 1977 there was doubt about the involvement of the officer in the said*

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3. 1990 Supp SCC 738

irregularities and the investigations were going on since then. If that is so, it is unreasonable to think that they would have taken more than 12 years to initiate the disciplinary proceedings as stated by the Tribunal. There is no satisfactory explanation for the inordinate delay in issuing the charge memo and we are also of the view that it will be unfair to permit the departmental enquiry to be proceeded with at this stage. In any case there are no grounds to interfere with the Tribunal's orders and accordingly we dismiss this appeal."

15. In ***State of Andhra Pradesh v. N. Radhakishan,***[4] The respondent was appointed as Assistant Director of Town Planning in 1976. In 1987, the Director General of the Anti-Corruption Bureau, Andhra Pradesh, Hyderabad, submitted a report to the Secretary of the Government, Housing, Municipal Administration, and Urban Development Department, Andhra Pradesh, regarding irregularities related to deviations and unauthorized constructions in multi-storeyed complexes within the twin cities of Hyderabad and Secunderabad, allegedly in collusion with municipal authorities. Following this report, the State issued two memos, both dated 12.12.1987, concerning the respondent, Radhakishan, who was then serving as the Assistant City Planner. However, as of 31.07.1995, the articles of charges had not yet been served on the respondent. The Tribunal determined that the memo dated 31.07.1995 pertained to incidents that occurred ten years or more prior to the issuance of the memo and noted the complete lack of explanation from the Government regarding this excessive delay in framing charges and conducting the inquiry against the respondent. The Tribunal concluded that there was no justification for the State to pursue an inquiry against the respondent concerning these long-ago incidents at such a late stage. The Supreme Court observed as follows:

"19. It is not possible to lay down any predetermined principles applicable to all cases and in all situations where there is delay in concluding the disciplinary proceedings. Whether on that ground the disciplinary proceedings are to be terminated each case has to be examined on the facts and circumstances in that case. The essence of the matter is that the court has to take into consideration all the relevant factors and to balance and weigh them to determine if it is in the interest of clean and honest administration that the disciplinary proceedings should be allowed to terminate after delay particularly when the delay is abnormal and there is no explanation for the delay. The delinquent employee has a right that disciplinary proceedings against him are concluded expeditiously and he is not made to undergo mental agony and also monetary loss when these are unnecessarily prolonged without any fault on his part in delaying the proceedings. In considering whether the delay has vitiated the disciplinary proceedings the court has to consider the nature of charge, its complexity and on what account the delay has occurred. If the delay is unexplained prejudice to the delinquent employee is writ large on the face of it. It could also be seen as to how much the disciplinary authority is serious in pursuing the charges against its employee. It is the basic principle of administrative justice that an officer entrusted with a particular job has to perform his duties honestly, efficiently and in accordance with the rules. If he deviates from this path he is to suffer a penalty prescribed. Normally, disciplinary proceedings should be allowed to take their course as per relevant rules but then delay defeats justice. Delay

4. (1998) 4 SCC 154

causes prejudice to the charged officer unless it can be shown that he is to blame for the delay or when there is proper explanation for the delay in conducting the disciplinary proceedings. Ultimately, the court is to balance these two diverse considerations."

16. In similar stead, the Supreme Court in ***State of Punjab and others v. ChamanLalGoyal***,[5] held as follows:

"9. *Now remains the question of delay. There is undoubtedly a delay of five and a half years in serving the charges. The question is whether the said delay warranted the quashing of charges in this case. It is trite to say that such disciplinary proceeding must be conducted soon after the irregularities are committed or soon after discovering the irregularities. They cannot be initiated after lapse of considerable time. It would not be fair to the delinquent officer. Such delay also makes the task of proving the charges difficult and is thus not also in the interest of administration. Delayed initiation of proceedings is bound to give room for allegations of bias, mala fides and misuse of power. If the delay is too long and is unexplained, the court may well interfere and quash the charges. But how long a delay is too long always depends upon the facts of the given case. Moreover, if such delay is likely to cause prejudice to the delinquent officer in defending himself, the enquiry has to be interdicted. Wherever such a plea is raised, the court has to weigh the factors appearing for and against the said plea and take a decision on the totality of circumstances. In other words, the court has to indulge in a process of balancing... "*

17. Given the circumstances, this Court is of the opinion that permitting the respondent to continue with the departmental proceedings after such a significant passage of time would be highly detrimental to the petitioner. Subjecting a retired man of 69 years to allegations of corruption and questioned integrity could inflict severe mental distress and anguish on the officer involved. It is essential to avoid protracted disciplinary inquiries against government employees, not only to protect their interests but also in the public interest, as well as to maintain confidence among government employees.

18. The counter submitted by the opposing parties is replete with excuses and a pattern of administrative blame-shifting, illustrating how various departments have engaged in a game of passing the responsibility, resulting in undue delays and inaction concerning the petitioner's case. This behavior has led to an unacceptable deferral of justice, as the petitioner has been subjected to prolonged uncertainty due to the lack of serious handling of the proceedings.

19. Had the various departments approached the matter with the necessary diligence and urgency, the petitioner would not have endured the extensive suffering that has arisen from these protracted proceedings. The departmental inquiry has remained unresolved for nearly two decades, during which the petitioner bears no culpability for the inordinate delays or the resultant lapses. Such a prolonged inquiry, absent any fault attributable to the petitioner, raises significant concerns regarding fairness and due process, and highlights the need for immediate remedial action to conclude these proceedings.

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5. 1995 (2) SCC 570

20. At this juncture, it is necessary to terminate the inquiry. The petitioner has already endured substantial hardship due to the ongoing disciplinary proceedings. In fact, the mental anguish and suffering experienced by the appellant as a result of these prolonged proceedings would far outweigh any potential punishment. The petitioner should not bear the consequences of procedural errors made by the department in initiating these disciplinary proceedings.

V. CONCLUSION:

21. In view of the reasons stated above, this Court has no hesitation to quash the charge memo and the departmental proceeding issued against the Petitioner in toto.

22. The Petitioner will be entitled to all the withheld retiral benefits with 10% simple interest from the date of the retirement of the Petitioner.

23. The retiral benefits shall be disbursed within three months from the date of receipt of copy of this judgment/order.

24. Accordingly, this Writ Petition is allowed.

Headnotes prepared by :
Shri Jnanendra Kumar Swain (Judicial Indexer)
(Verified by : Shri Pravakar Ganthia, Editor-in-Chief)

Result of the case :
Writ Petition allowed.

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2024 (III) ILR-CUT-758

N. SONAM SHILPA
V.
UNION OF INDIA & ORS.

(W.P.(C) NO. 23888 OF 2020)

24 SEPTEMBER 2024

[Dr. S.K. PANIGRAHI, J.]

Issue for Consideration

Whether the married daughter is eligible to get appointment under the Rehabilitation Scheme.

Headnotes

SERVICE LAW – Appointment under the Rehabilitation Scheme – Married daughter – Eligibility.

Held: Marriage is no longer a deciding factor in determining a daughter's responsibility toward her family – The idea that a daughter becomes part of her husband's family after marriage and is thereby relieved of her obligation

to her own family is outdated – In reality married daughters often play crucial role in looking after their parent, financially and emotionally regardless of their marital status – This shift recognizes that the bond between a daughter & her parents is not severed by marriage, and that her responsibilities to her natal family remain intact – In today's society, gender-based distinctions in familial duties have gradually faded as women have become equal contributors to the economic, emotional, and social well-being of their families – Daughters, whether married or unmarried, actively participate in supporting their parents and ensuring the smooth functioning of their households, debunking the traditional notion that sons alone are responsible for family care. Moreover, the evolving societal and legal landscape increasingly acknowledges that care giving responsibilities and family support should not be confined to gender or marital status – Now, it is true that the petitioner got married in 2015, but she has continued to care for the needs of her widowed mother – There is no legal prohibition on granting compassionate appointment to a married daughter, and the rejection of her claim, despite her being otherwise eligible, lacks rational justification.

(Paras 13-15)

Citation Reference

State of W.B. v. Purnima Das, **2017 SCC OnLine Cal 13121**; Court on its own motion v. State of H.P., **2018 SCC OnLine HP 2177**; Central Coalfields Limited v. Hemanti Devi, **2018 SCC OnLine Jhar 918**; State of U.P. v. Noopur Srivastava, **2019 SCC OnLine All 3212**; Udham Singh Nagar District Coop. Bank Ltd. v. Anjula Singh, **2019 SCC OnLine Utt 1856**; Meenakshi Dubey v. Madhya Pradesh Poorv Kshetra Vidyut Vitran Co. Ltd., **2020 SCC OnLine MP 383** – **referred to.**

Keywords

Compassionate appointment, Right/eligibility of a married daughter

Appearances of Parties

For Petitioner : Mr. Bisikesan Pradhan
For Opp.Parties : Mr. Satyabrata Panda, CGC

Judgment/Order

Judgment

Dr. S.K. PANIGRAHI, J.

1. The Petitioner has filed this Writ Petition to contest the order dated 05.06.2018, issued by Opp. Party No. 5, which denied her claim for a compassionate appointment in the CISF based on the fact that the Petitioner was married before the death of her father. The Petitioner asserts that this decision is arbitrary and violates her rights under Article 14 of the Constitution of India.

I. FACTUAL MATRIX OF THE CASE:

2. The crux of the matter as submitted by the Petitioner:

(i) The petitioner's father was serving in the Central Industrial Security Force as ASI/Exe. While posted at the CISF Unit in BSL, Bokaro, and undergoing medical treatment, he passed away on 11.09.2016.

(ii) After completing the funeral rites for her father, the petitioner, as the deceased's daughter, applied for a compassionate appointment. She was physically and medically fit for the position. The petitioner states that her mother was dependent on her and lived with her both before and after her marriage. The petitioner has been responsible for caring for her mother as well as her 92-year-old mother-in-law, as her brother, who is employed elsewhere and lives away from home, neither sought a compassionate appointment in the CISF nor did he show interest in caring for their widowed mother or grandmother. Additionally, her brother was ineligible for the appointment due to age restrictions. On the other hand, the petitioner's husband is employed in a private company, earning a meager salary insufficient to support the household adequately.

(iii) By a letter dated 30.10.2017, the Commandant of CISF Unit, BSL, Bokaro ("Opp. Party No. 6") requested the petitioner's mother to submit: (a) a certificate from her daughter (the petitioner) affirming that she would provide financial support to her widowed mother, and (b) the marriage certificate of her daughter, specifying the exact date, issued by the appropriate authority. In compliance with this request, the petitioner's mother submitted: (a) an affidavit sworn by the petitioner before the Notary Public, Kendrapara, on 10.11.2017, wherein the petitioner affirmed that she would support her widowed mother, covering her maintenance and daily expenses for the remainder of her life to ensure her well-being; and (b) a copy of the petitioner's marriage certificate issued by the Marriage Officer, Kendrapara, on 14.03.2017.

(iv) After receiving the aforementioned documents, on 26.02.2018, the Deputy Commandant (Administration) of CISF Unit, BSL, Bokaro requested the petitioner's mother to clarify whether the petitioner, being married, was still dependent on her. On 17.03.2018, he again asked the petitioner's mother to provide supporting documents from a Sub-Divisional Officer (SDO) or higher authority confirming the petitioner's dependency, as well as an unemployment certificate for the petitioner's husband.

(v) In response to the Deputy Commandant's letters, the petitioner submitted an application to the Sub-Collector, Kendrapara, on 31.03.2018, requesting the issuance of a dependency certificate in her favor, and attached a dependency certificate issued by the Sarpanch of Karilopatna Gram Panchayat. Subsequently, the Additional District Magistrate (ADM) of Kendrapara, via letter dated 02.04.2018, directed the Tahasildar of Marshaghai to conduct an inquiry into the petitioner's case and submit a report.

(vi) The Tahasildar of Marshaghai submitted a report from the Revenue Inspector (RI) of Karilopatna Circle to the Additional District Magistrate (ADM) of Kendrapara on 04.04.2018. The report stated that the petitioner, N. Sonam Shilpa, had applied for a compassionate appointment as she had been dependent on her deceased father and, after his death, was relying on the family pension received by her widowed mother. However, the Sub-Collector of Kendrapara refused to issue a

dependency certificate in her favor, citing the absence of any provision for such a certificate under the Odisha Miscellaneous Certificate Rules. Following this, the petitioner's mother submitted a representation, enclosing the Tahasildar's report dated 04.04.2018, along with an affidavit executed by the petitioner's husband before the Notary Public, Kendrapara, on 02.04.2018, affirming that he had not secured employment in any government or semi-government department for his livelihood.

(vii) After receiving the above documents, the Deputy Inspector General of CISF Unit, BSL, Bokaro ("Opp. Party No. 5"), issued an order dated 05.06.2018, informing the petitioner that, since she was married before the death of her father, she could not be considered dependent on her deceased father. Therefore, her request for a compassionate appointment could not be considered in accordance with the relevant rules.

(viii) Following the issuance of the impugned order dated 05.06.2018 by Opposite Party No. 5, the petitioner's mother submitted a representation to the Director General (DG) of the CISF ("Opp. Party No. 2") on 21.07.2018, via registered post, challenging the decision. She argued that if her daughter's marital status was a disqualifying factor for compassionate appointment, the application and supporting documents should not have been accepted at the outset. The rejection only came after all documents were submitted. As such, she requested reconsideration of her daughter's case for compassionate appointment.

(ix) More than a year passed without any response to the representation. However, on 06.09.2019, the Assistant Inspector General (Asst. IG) of the Eastern Sector Headquarters, Ranchi ("Opp. Party No. 4"), informed the petitioner's mother, referring to a letter dated 06.11.2018 from the Deputy Inspector General (DIG) of the CISF Unit, BSL, Bokaro (Opposite Party No. 5), that the petitioner's application for compassionate appointment was denied because she had married before her father's death. The letter dated 06.11.2018 from Opp. Party No. 5 was never received by the petitioner's mother. Consequently, the petitioner filed W.P.(C) No. 23165 of 2019 before this Court on 25.11.2019, challenging the impugned order dated 05.06.2018 of Opposite Party No. 5. Additionally, the petitioner filed I.A. No. 16297 of 2019, seeking to dispense with the filing of the original copy of the impugned order, as it had been inadvertently enclosed by the petitioner's mother in her representation to the DG, CISF (Opposite Party No. 2) on 21.07.2018. However, this Court ruled that the writ petition was not maintainable without the original or certified copy of the impugned order. Accordingly, the petitioner withdrew the writ petition on 05.12.2019, with liberty to file a fresh writ petition along with a certified copy of the impugned order. The Court allowed the petitioner's request and disposed of the writ petition on 05.12.2019.

(x) On 06.12.2019, the petitioner filed an application before the CPIO of OP No. 5 under RTI Act requesting for copy of the impugned order dated 05.06.2018 of OP No. 5. However, the CPIO vide order dated 14.12.2019 rejected the application of the petitioner under Section 24 of the RTI Act, 2005. Accordingly, the petitioner filed First Appeal before the First Appellate Authority on 26.12.2019. However, the first appeal was rejected by the First Appellate Authority on self-same ground on 21.01.2020 against which the petitioner filed Second Appeal before the Central Information Commission, New Delhi on 08.02.2020.

II. SUBMISSIONS OF THE PETITIONER:

3. Learned counsel for the Petitioner intently made the following submissions:

(i) The petitioner got married on 31.05.2015 while her father, Late ASI/Exe Rajkishore Nayak, was employed with the CISF. As her husband was employed in a private company with a meager salary, the petitioner remained financially dependent on her father and continued residing with her parents at her maternal home even after marriage, as she was responsible for their care. Her brother, being employed and residing elsewhere, was unable to provide support. Due to her husband's financial hardship and the lack of any other family member to care for her widowed mother and her 92-year-old grandmother, who was suffering from cancer, the petitioner remained fully dependent on her parents. Following her father's death, she continued to reside at her maternal home, caring for her widowed mother.

(ii) The dependency certificate issued by the Sarpanch of Karilopatna Gram Panchayat and the report from the Revenue Inspector (RI) of Karilopatna Circle, forwarded by the Tahasildar of Marshaghai to the Additional District Magistrate (ADM) of Kendrapara, clearly demonstrates that the petitioner is wholly dependent on her widowed mother.

(iii) Despite being fully aware that the petitioner was married before the death of her father, the opposite parties repeatedly requested various documents from the petitioner and her widowed mother. Both the petitioner and her mother complied with these requests. However, the impugned order dated 05.06.2018, issued by Opp. Party No. 5, rejecting the petitioner's request for a compassionate appointment on the grounds that she was married before her father's death and could not be considered dependent on him, is illegal and arbitrary.

(iv) The petitioner's mother, being aggrieved by the impugned order dated 05.06.2018, submitted a representation to Opp. Party No. 2. She contended that her daughter's case was not unique, as other married daughters had previously been considered for compassionate appointments following the death of their fathers. However, the letter dated 06.09.2019 from Opposite Party No. 4, referring to a non-received letter dated 06.11.2018 from Opp. Party No. 5, is also illegal.

(v) The Government of India, through the Ministry of Personnel, Public Grievances, and Pensions (Department of Personnel & Training), issued consolidated instructions on 16.01.2013 for compassionate appointments, reaffirming Office Memorandum dated 09.10.1998. Additionally, through a letter dated 30.05.2013 (FAQ), the Department of Personnel & Training clarified that a "Married Daughter" (Para-12) could be considered for a compassionate appointment, provided that: (i) she was wholly dependent on the deceased government servant at the time of their death in service or retirement on medical grounds, and (ii) she supports other dependent family members. Therefore, the impugned order dated 05.06.2018 (Annexure-11) issued by Opposite Party No. 5 is illegal, arbitrary, and unsustainable in law, warranting its quashing in the interest of justice. This view has been upheld by the Uttarakhand High Court (FB) in ***Udham Singh Nagar District Cooperative Bank Ltd. and another v. Anjula Singh and others*** on 27.03.2019 and by the Allahabad High Court (DB) in ***Mala Devi vs. State of U.P.*** on 13.02.2020.

(vi) The impugned order dated 05.06.2018, rejecting the petitioner's application for compassionate appointment in the CISF, was issued by Opposite Party No. 5 and communicated to the petitioner at her home in the district of Kendrapara, which falls under the territorial jurisdiction of this Hon'ble Court. All correspondences have also been sent to her home address in Kendrapara.

(vii) The Central Public Information Officer (CPIO) of Opp. Party No. 5, as well as the First Appellate Authority, rejected the petitioner's application seeking a copy of the impugned order dated 05.06.2018 under Proviso-2 to Section 24 of the Right to Information (RTI) Act, 2005, on the ground that the CISF is a security organization and the impugned order does not pertain to either corruption or human rights violations. This rejection was upheld by the First Appellate Authority. Although the petitioner filed a second appeal with the Central Information Commission (CIC), New Delhi, on 08.02.2020, the outcome of the appeal is unlikely to be resolved within 2-3 years, especially given the delays caused by the Covid-19 pandemic. By that time, the petitioner may become age-barred, rendering her application for a compassionate appointment would become infructuous. It is important to note that neither the CPIO nor the First Appellate Authority disputed the existence of the impugned order dated 05.06.2018; they only refused to provide a copy of it due to the statutory bar under Section 24 of the RTI Act, 2005.

III. SUBMISSIONS OF THE OPPOSITE PARTIES:

4. Per contra, learned counsel for the Opposite Parties intently made the following submissions:

(i) The said Sub-Officer (Inspector/Exe.) had submitted the inquiry report based on the information/details provided by Smt. Sukanti Nayak i.e. mother of the petitioner. But, subsequently, she disclosed that her son is serving elsewhere and, staying away from home. Moreover, he is over aged for Government service.

(ii) Thereafter, on receipt of the various relevant supporting documents from the mother of the petitioner in piecemeal duly rectifying observations raised by the office of DIG/CISF Unit BSL Bokaro, finally the matter was forwarded to CISF ES (HQrs.) Ranchi vide CISF Unit BSL Bokaro letter dated 17.05.2018 for appointment of the petitioner on Compassionate Ground, for the post of ASI/Exe in CISF. But on examination of supporting documents, it was noticed by ES / HQrs. Ranchi that the petitioner already got married with Shri Manoranjan Pradhan of District - Kendrapara (Orissa) on 31.05.2015 i.e before death of his father Late ASI/Exe Rajkishore Nayak. Accordingly, it was intimated by ES/HQrs. Ranchi vide letter dated 24.05.2018 that as per DoP&T clarification dated 30.05.2013: "Married daughter can be considered for Compassionate Appointment but subject to condition that she was wholly dependent on the Government servant at the time of his/her death in harness or retirement on medical grounds" and also directed to intimate the petitioner that her case could not be considered for Compassionate Appointment as, she had already got married before death of his father and was not a dependent upon his father at the time of his death (Late ASI/Exe Rajkishore Nayak)

(iii) The object to grant appointment on compassionate grounds to a dependent family member of a Government servant who has died while in service, thereby leaving the family in penury and without any means of sustainable livelihood so as

to provide relief to the family of the Government servant concerned from financial destitution and to help it get over the emergency.

(iv) As per report submitted by the Insp./Exe. as well as documents provided by Smt. Sukanti Nayak wife of the deceased, the matter was forwarded to CISF ES (HQrs.) Ranchi vide office letter dated 17.05.2018 for appointment of the petitioner on compassionate grounds.

(v) But, on examination of supporting documents, it was noticed by ES/HQrs. Ranchi that the petitioner already got married with Shri Manoranjan Pradhan of District-Kendrapara (Orissa) on 31.05.2015 i.e. before death of her father Late ASI/Exe Rajkishore Nayak. Accordingly, it was intimated by CISF ES/HQrs. Ranchi vide letter dated 24.05.2018 that as per DoP&T clarification dated 30.05.2013: *"Married daughter can be considered for Compassionate Appointment but subject to conditions: that she was wholly dependent on the Government servant at the time of his/her death in harness or retirement on medical grounds".*

(vi) Accordingly, the petitioner had been informed vide office of the DIG, CISF Unit BSL Bokaro letter dated 05/06/2018 that her case could not be considered for Compassionate Appointment as she had already got married before death of his father and not depended upon his father at the time of his death.

(vii) As per procedure, to verify the financial conditions, number of dependants, liabilities of family etc. of the deceased, Inspector/Exe. Kulamani Behera (not Beura) had been detailed to the native place of Late ASI/Exe Rajkishore Nayak to conduct a circumstantial enquiry. As per report submitted by the. Insp./Exe. as well as documents produced by Smt. Sukanti Nayak wife of Late ASI/Exe Rajkishore Nayak, the matter was taken up with CISF ES (HQrs.) Ranchi for appointment of the petitioner on Compassionate Ground, to the post of ASI/Exe in CISF But, in the light of DoP&T clarification dated 30.05.2013, her case could not be considered for Compassionate Appointment, since the petitioner already got married on 31.05.2015 i.e. before the death of deceased and not depended upon his father on 11.09.2016.

(viii) As regards dependency certificate issued by the Sarpanch, Karilopatna, it is submitted that on 04.03.2018, a letter was issued by Shri Sukanta Kumar Sahoo, Sarpanch, Karilopatna Grama Panchayat in which he stated that the petitioner was married but her husband (i.e. Manoranjan Pradhan) was not employed. However, it was certified by the authorized signatory of 'Parents Eye Private Limited' mentioning therein *"Mr. Manoranjan Pradhan is working in our organization as 'Field Technician' since 12th August 2015. He is a Full-time permanent employee in our organization..... His monthly drawing salary is Rs.4,600/-..."*. These facts have also been accepted by the petitioner at para- 15 of this writ petition. Hence, the letter/certificate issued by the Sarpanch is ambiguous and not sustainable in the eyes of law.

(ix) Moreover, looking after of widow mother by a married daughter and married daughter is wholly dependent on her parents are two different issues. A married daughter can easily look after her aged widow mother but that does not mean she remains wholly dependent upon her widow aged mother. Apart from above, the petitioner had failed to produce dependent certificate duly issued by the prescribed authority. Hence, her candidature could not be considered by the competent authority for Compassionate Appointment in CISF, in the light of DoP&T clarification dated 30.05.2013

IV. COURT'S REASONING AND ANALYSIS:

5. I have heard the learned counsel for the respective parties at length and relied on the material placed on record.

6. For the record, there is no dispute in the fact that the petitioner's late father, who served as an ASI/Ex in the CISF, passed away while still in active service. As a legal heir of the deceased, the petitioner is entitled to be considered for appointment under the Rehabilitation Assistance Scheme, which governs the appointment of legal heirs of deceased government servants. The petitioner's mother, in accordance with the relevant statutory provisions, duly submitted the application and all requisite documents. However, the petitioner's application was rejected by Opposite Party No. 5 on the grounds that (i) the petitioner was married at the time of her father's death, and (ii) the family of the deceased was not in immediate need of financial assistance. This court shall now address both the grounds and decide accordingly.

7. It is trite in law that eligibility for compassionate appointment hinges on proving severe financial hardship and the inability of the applicant or the family to sustain themselves following the death of the government employee. Crucially, the criteria for compassionate appointment do not differentiate between married or unmarried daughters and married sons. The primary consideration is whether the individual was financially dependent on the deceased for daily living expenses and is therefore likely to experience considerable financial difficulty after the death of the breadwinner. The purpose of compassionate appointment is to address the urgent financial needs of the family caused by the loss of income due to the demise, rather than to grant employment as an automatic entitlement or inheritance. This fundamental principle applies universally, without regard to marital status, and aims solely to provide relief to those who were truly reliant on the deceased for sustenance.

8. I had an opportunity to deal with a similar question of law in ***Seemarani Pandab v. State of Odisha & Ors.***[1]**,** wherein this Court held that dismissal of the candidature of a married daughter for compassionate appointment under the Rehabilitation Assistance Scheme is not justifiable as it is arbitrary and violative of constitutional guarantees as envisaged in Articles 14, 15 and 16(2) of the Constitution. The relevant excerpt is produced hereinbelow:

> *"A daughter after her marriage doesn't cease to be daughter of the father or mother and obliged to maintain their parents and daughter cannot be allowed to escape her responsibility on the ground that she is now married, therefore, such a policy of the State Government disqualifying, a 'married' daughter and excluding her from consideration apart from being arbitrary and discriminating is a retrograde step of State Government as welfare State, on which stamp of approval cannot be made by this Court…"*

9. Now, The learned counsel for the Opposite Parties has relied upon the Department of Personnel & Training (DoP&T) clarification dated 30.05.2013, which

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1. RVWPET No. 416 of 2023

permits the consideration of a married daughter for compassionate appointment, subject to the condition that she was wholly dependent on the deceased government servant at the time of their death while in service or upon retirement due to medical reasons. The petitioner's application for compassionate appointment was denied on the grounds that she had married on 31.05.2015, prior to the death of her father on 11.09.2016, and was not deemed to be financially dependent on him at the time of his demise.

10. The Opposite Parties have sought to emphasize that the petitioner's marriage prior to her father's demise implies a separation from her parental family, effectively suggesting that a married daughter's ties and responsibilities to her natal family are severed upon marriage. This position, as asserted by the state in its counter-affidavit, is grounded in a paternalistic and outdated understanding of a woman's role in society, particularly the status of a daughter following her marriage. The affidavit presupposes that upon entering matrimony, a daughter is subsumed into her husband's family and that her financial well-being thereafter becomes the exclusive responsibility of her spouse. Such a stance undermines the autonomy of married daughters and perpetuates a regressive notion that denies them their rightful place within their parental family, even in cases of genuine need and dependency.

11. It will be relevant to refer to the decision of the Allahabad High Court in ***Madhavi Mishra v. State of U.P.,*** wherein it was held that Marriage cannot be a valid ground to exclude someone from being considered a member of the family under a social welfare policy based on dependency. In cases of compassionate appointment, the key test is dependency, not marital status. The relevant excerpt is produced hereinbelow:

> *"Marriage cannot be regarded as a justifiable ground to define and exclude from who constitutes a member of the family when the state has adopted a social welfare policy which is grounded on dependency. The test in matters of compassionate appointment is a test of dependency within defined relationships. There are situations where a son of the deceased government servant may not be in need of compassionate appointment because the economic and financial position of the family of the deceased are not such as to require the grant of compassionate appointment on a preferential basis. But the dependency or a lack of dependency is a matter which is not determined a priori on the basis of whether or not the son is married. Similarly, whether or not a daughter of a deceased should be granted compassionate appointment has to be defined with reference to whether, on a consideration of all relevant facts and circumstances, she was dependent on the deceased government servant. Excluding daughters purely on the ground of marriage would constitute an impermissible discrimination and be violative of Articles 14 and 15 of the Constitution.*
>
> *A variety of situations can be envisaged where the application of the rule would be invidious and discriminatory. The deceased government servant may have only surviving married daughters to look after the widowed parent - father or mother. The daughters may be the only persons to look after a family in distress after the death of the bread earner. Yet, under the rule, no daughter can seek compassionate appointment only because she is married. The family of the deceased employee will not be able to tide over the financial crisis from the untimely death of its wage earner who has died in*

harness. The purpose and spirit underlying the grant of compassionate appointment stands defeated. In a given situation, even though the deceased government employee leaves behind a surviving son, he may not in fact be looking after the welfare of the surviving parents. Only a daughter may be the source of solace - emotional and financial, in certain cases. These are not isolated situations but social realities in India. A surviving son may have left the village, town or state in search of employment in a metropolitan city. The daughter may be the one to care for a surviving parent. Yet the rule deprives the daughter of compassionate appointment only because she is married. Our law must evolve in a robust manner to accommodate social contexts. The grant of compassionate appointment is not just a social welfare benefit which is allowed to the person who is granted employment. The purpose of the benefit is to enable the family of a deceased government servant, who dies in harness, to be supported by the grant of compassionate appointment to a member of the family. Excluding a married daughter from the ambit of the family may well defeat the object of the social welfare benefit."

12. Similarly, in many exemplary decisions such as ***State of W.B. v. Purnima Das***, 2017 SCC OnLine Cal 13121; ***Court on its own motion v. State of H.P.***, 2018 SCC OnLine HP 2177; ***Central Coalfields Limited v. Hemanti Devi***, 2018 SCC OnLine Jhar 918; ***State of U.P. v. Noopur Srivastava***, 2019 SCC OnLine All 3212; ***Udham Singh Nagar District Coop. Bank Ltd. v. Anjula Singh***, 2019 SCC OnLine Utt 1856; ***Meenakshi Dubey v. Madhya Pradesh Poorv Kshetra Vidyut Vitran Co. Ltd.***, 2020 SCC OnLine MP 383 wherein, the High Courts have consistently upheld the principle that married daughters are to be treated on an equal footing with unmarried daughters, and both married and unmarried sons, particularly, in matters of family responsibility and compassionate appointments.

13. Marriage is no longer a deciding factor in determining a daughter's responsibility toward her family. The idea that a daughter becomes part of her husband's family after marriage and is thereby relieved of her obligations to her own family is outdated. In reality, married daughters often play crucial roles in looking after their parents, financially and emotionally, regardless of their marital status. This shift recognizes that the bond between a daughter and her parents is not severed by marriage, and that her responsibilities to her natal family remain intact.

14. In today's society, gender-based distinctions in familial duties have gradually faded as women have become equal contributors to the economic, emotional, and social well-being of their families. Daughters, whether married or unmarried, actively participate in supporting their parents and ensuring the smooth functioning of their households, debunking the traditional notion that sons alone are responsible for family care. Moreover, the evolving societal and legal landscape increasingly acknowledges that care giving responsibilities and family support should not be confined to gender or marital status.

15. Now, it is true that the petitioner got married in 2015, but she has continued to care for the needs of her widowed mother. There is no legal prohibition on granting compassionate appointment to a married daughter, and the rejection of her claim, despite her being otherwise eligible, lacks rational justification.

16. Given the facts presented, it is evident that the petitioner's family faces significant financial hardship. The son of the deceased is unemployed and stays aloof of the struggles of the family. The petitioner has, thus, assumed the primary role in caring for her widowed mother and elderly grandmother, both of whom are wholly dependent on her for their dayto-day needs. The financial strain is further exacerbated by her husband's limited income from private employment, which fails to meet the basic requirements of the household.

17. Therefore, denying the petitioner compassionate appointment under these circumstances is not only unjust but also defeats the very purpose of the compassionate appointment scheme, which is intended to provide immediate relief to families in financial distress following the loss of a Government servant. The Petitioner's dependency on her father prior to his death, combined with the ongoing financial struggles faced by her family, clearly merits reconsideration of her application.

V. CONCLUSION:

18. In light of the facts and circumstances of the present case, it is adjudged that the Opp. Parties erred in non-considering the claim of the Petitioner for compassionate appointment. The impugned order dated 05.06.2018 issued by Opposite Party No.5 is hereby quashed.

19. A direction is issued to the Opp. Parties to reconsider the Petitioner's claim for compassionate appointment in light of this decision and the directions provided herein, and the Petitioner's application shall not be denied solely on the basis of her marital status as a married daughter.

20. The time elapsed during the litigation of this case shall be condoned for the purposes of determining age limit and related eligibility.

21. In view of the foregoing, this Writ Petition is allowed.

Headnotes prepared by :
Shri Jnanendra Kumar Swain (Judicial Indexer)
(Verified by : Shri Pravakar Ganthia, Editor-in-Chief)

Result of the case :
Writ Petition allowed.

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2024 (III) ILR-CUT-768

NIRUPAMA PANDA
V.
STATE OF ORISSA & ORS.

(W.P.(C) NO. 5608 OF 2016)

09 OCTOBER 2024

[Dr. S.K. PANIGRAHI, J.]

Issue for Consideration

Whether the service of the Petitioner can be regularized from the initial date of appointment.

Headnotes

(A) SERVICE JURISPRUDENCE ─ Regularization ─ Petitioner was duly appointed to a regular post pursuant to the order of the Hon'ble Court, which created a legitimate expectation on her part to continue in said post ─ The authority reverted back the petitioner to an *ad hoc* post without affording an opportunity of hearing ─ Whether the petitioner is entitled for regularization.

Held: Yes ─ The arbitrary removal from the position coupled with her reversion to an ad-hoc status is wholly unjustifiable and procedurally improper ─ The authorities are obligated to grant the petitioner all consequential benefits lawfully due to her, effective from the date of her initial regularization. (Paras – 12 & 16)

(B) INTERPRETATION OF STATUTES ─ Doctrine of legitimate expectation ─ Discussed with reference to case laws. (Paras 7-10)

Citation Reference

Schmidt v. Secretary of Home Affairs, **(1969) 2 Ch 149**; R v. North and East Devon Health Authority, ex pCoughlan, **[2001] QB 213**; Jitender Kumar v. State of Haryana, **(2008) 2 SCC 161**; National Buildings Construction Corporation vs S. Raghunathan, **(1998) 7 SEC 66 – referred to.**

Keywords

Legitimate expectation, Regularization, Retiral benefits.

Appearances of Parties

For Petitioner : Mr. Jayanta Kumar Rath, Sr. Adv.
For Opp.Parties : Mr. Gyanaranjan Mahapatra, ASC
Mr. Milan Kanungo, Sr. Adv.

Judgment/Order

Judgment

Dr. S.K. PANIGRAHI, J.

1. In this Writ Petition, the Petitioner seeks a direction from this Court to acknowledge her as having been regularly appointed as a Tracer effective from 01.07.1989, along with all related benefits. Additionally, she requests that the regularization of Opposite Party No.4 be halted, asserting that such action is both illegal and unjustified.

I. FACTUAL MATRIX OF THE CASE:

2. The brief facts of the case are as follows:

(i) The petitioner was appointed as a Tracer on 01.07.1989, after being selected by Orissa Bridge Construction Corporation Ltd. (OBCC), a public sector undertaking. She was initially appointed for a three-month period under the Recruitment Rules of the Corporation. This appointment was against a sanctioned post and continued until 21.03.1996.

(ii) The petitioner then filed a Writ Petition (OJC No. 9122 of 195) seeking substantive appointment as a Tracer. On 04.01.1996, the Court directed the Opposite Party No. 3 to pass a reasoned order considering the petitioner's case.

(iii) Accordingly, on 21.03.1996, Opposite Party No. 3 passed a reasoned order regularizing the petitioner's appointment with increments. Opposite Party No. 4, who was initially not eligible for the post of Tracer; was allowed to continue on an ad hoc basis against a reserved vacancy, subject to future regularization after de-reservation.

(iv) Aggrieved by this decision, Opposite Party No. 4 filed a Writ Petition (OJC No. 2706 of 1996). This Court, 26.03.1996, passed an interim order allowing opposite Party No. 4 to continue in the regular post, leading to the petitioner's reversion to an ad hoc position.

(v) On 11.04.2014, this Court disposed of the Writ Petition and directed the authorities to consider the case of the Opposite Party No. 4 for regular absorption as a Tracer, following specific government resolutions from 1997 and 2012.

(vi) Following the order of this Court, the Board of Directors of Opposite Party No. 2 convened a meeting on March 29, 2016, and decided to absorb Opposite Party No. 4 on a regular basis. However, the implementation of this decision was put on hold following an order by the Court on March 30, 2016, which required the Board to obtain leave from the Court before executing its decision.

(vii) During the pendency of the present Writ Petition, Opposite Party No. 4 retired from service on July 31, 2019, and filed another Writ Petition (W.P. (C) No. 26304 of 2019) seeking the release of his retiral benefits.This Court directed the Corporation to consider his request, and the benefits were subsequently disbursed.

(viii) Aggrieved by the action of Opposite Party No. 3, the petitioner filed the present Writ Petition, seeking a directive from this Court to recognize her as having been regularly appointed as a Tracer from 01.07.1989,with all associated benefits, and to prevent the regularization of Opposite Party No. 4, which she deems illegal and unjustified.

II. SUBMISSIONS ON BEHALF OF THE PETITIONER:

3. Learned counsel for the Petitioner earnestly made the following submissions in support of his contentions:

(i) The petitioner submitted that despite being duly selected and appointed for a regular vacancy, she was given only a temporary position, while Opposite Party No. 4, who lacked the necessary qualifications and was not selected through the proper process, was regularized.

(ii) He further submitted that she has a rightful claim to the Tracer position and her qualifications and selection were sidelined in favour of Opposite Party No. 4, who was appointed irregularly due to favouritism.

(iii) The petitioner contended that the authorities misinterpreted previous court orders, leading to the unjust treatment of her case and the undue regularization of Opposite Party No. 4.

(iv) He further contended that the Opposite Party No.4 was not qualified for the position of Tracer and did not follow the due selection process, yet was allowed to continue and be regularized in violation of the rules.

III. SUBMISSIONS ON BEHALF OF THE OPPOSITE PARTIES:

4. The Learned Counsel for the Opposite Parties earnestly made the following submissions in support of his contentions:

(i) It is submitted that the petitioner's claim lacks merit. The petitioner's initial appointment was temporary, and her status was altered following this Court's directives in favour of Opposite Party No. 4.

(ii) It is further submitted that the Writ Petition should be dismissed since Opposite Party No. 4 has already retired and his retiral benefits have been settled.

(iii) It is contended that the Opposite Party No. 3 has complied with Court's orders, including considering and disbursing the retiral benefits of Opposite Party No. 4. He asserts that the petitioner's claim for regularization no longer holds substantial weight given the subsequent developments, including the retirement of Opposite Party No. 4.

(iv) It is further contended that the petitioner’s case is not substantiated by the facts and that the issues have already been resolved through the Court’s directives and subsequent Board decisions.

IV. COURT'S REASONING AND ANALYSIS:

5. Heard learned counsel for the parties and carefully examined the documents submitted to this Court. It is clear that the petitioner was initially appointed on ad-hoc basis. Following the order of this Court in OJC No. 9122 of 1995, she was appointed as a Tracer on a temporary basis against a regular vacancy. However, her status was subsequently reverted to ad-hoc, while Opposite Party No. 4 was granted the position that the petitioner initially held.

6. It is evident that Opposite Party No. 3 initially displayed a clear intention to appoint the petitioner to a regular vacancy, which was subsequently carried out. However, in an unexpected turn of events, her appointment was reversed. This matter must be examined in light of the doctrine of legitimate expectations, which is rooted in the principle of fairness in governmental actions.

7. In Common Law jurisprudence, this doctrine finds its origins in an obiter dictum by Lord Denning in ***Schmidt v. Secretary of Home Affairs***[1]. In this case, alien students at Hubbard College sought extensions for their stay in the UK, which were denied by the Home Secretary. They claimed the decision was unlawful and violated principles of natural justice. The Court of Appeal ruled that the students had no legitimate expectation for an extension, thus no right to a hearing, despite previous expectations. To this Lord Denning added that

> *"The speeches in Ridge v. Baldwin show that an administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. It all depends on whether he has some right or interest or I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say .. "*

8. This principle was further substantiated in the case of ***R v. North and East Devon Health Authority, ex pCoughlan:***[2]

> "56 *... Where the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedurat authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy."*

9. The Supreme Court has also judicially recognized this principle and in the case of ***Jitender Kumar v. State of Haryana***[3], it drew a distinction between legitimate expectation and mere anticipation and held that :

> *"A legitimate expectation is not the same thing as an anticipation. It is distinct and different from a desire and hope. It is based on a right. It is grounded in the rule of law as requiring regularity, predictability and certainty in the Government's dealings with the public. We have no doubt that the doctrine of legitimate expectation operates both in procedural and substantive matters."*

10. Similarly, a more nuanced interpretation of this doctrine was provided by a three-judge bench of the Supreme Court in ***National Buildings Construction Corporation vs S. Raghunathan.***[4] In paragraph 18 of the judgment, the Court elaborated on the doctrine, holding that:

> *"18. The doctrine of "legitimate expectation" has its genesis in the field of administrative law. The Government and its departments, in administering the affairs of the country,*

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1. **(1969) 2 Ch 149**
2. **[2001] QB 213**
3. **(2008) 2 SEC 161**
4. **(1998) 7 SEC 66.**

> *are expected to honour their statements of policy or intention and treat the citizens with full personal consideration without any iota of abuse of discretion. The policy statements cannot be disregarded unfairly or applied selectively. Unfairness in the form of unreasonableness is akin to violation of natural justice. It was in this context that the doctrine of "legitimate expectation" was evolved which has today become a source of substantive as well as procedural rights. But claims based on "legitimate expectation" have been held to require reliance on representations and resulting detriment to the claimant in the same way as claims based on promissory estoppel"*

11. The aforementioned judicial precedents unequivocally establish that fairness must be the cornerstone of any decision-making process undertaken by a public authority. It is a fundamental tenet of administrative law that a public body, in exercising its powers, must adhere to the principles of natural justice, ensuring that its actions are not arbitrary or capricious. Any individual who stands to be adversely affected by the decisions of such a body must be afforded both a reasonable opportunity to present their case and be provided with a clear, reasoned explanation for the course of action being undertaken.

12. In the present case, the petitioner was duly appointed to a regular post pursuant to the order of this Court in 1996, creating a legitimate expectation on her part to continue in said post. However, her subsequent and arbitrary removal from this position, coupled with her reversion to an ad-hoc status, is wholly unjustifiable and procedurally improper.

13. The action taken by the Opposite Parties, purportedly to accommodate Opposite Party No. 4, is devoid of any legal foundation and fails to provide a sufficient or compelling rationale for altering the petitioner's employment status. Such a decision not only undermines the petitioner's rightful expectations but also contravenes the principles of fairness, transparency, and non-arbitrariness that must govern the actions of public authorities. The reasoning advanced by the Opposite Parties lacks substantive merit and does not meet the standard required to justify such a significant deviation from the petitioner's established position.

14. It is deeply troubling to observe that the actions of Opposite Party No.3, a governmental body, engaging in conduct that appears both arbitrary and ill-considered. This Court firmly admonishes the Opposite Party against engaging in such conduct in the future. As a public institution, there exists an inherent expectation that its actions will adhere to principles of integrity and sound governance, reflecting accountability and adherence to lawful procedures. The doctrine of legitimate expectation compels public bodies to maintain consistency and to act within the bounds of their legal and moral obligations, ensuring that their decisions do not result in undue hardship or inequity. The erratic conduct displayed in this instance not only infringes upon the petitioner's rightful claims but also erodes public confidence in the governance and accountability of such institutions.

V. CONCLUSION:

15. The competent authorities are hereby instructed to conduct a comprehensive review of the petitioner's representation, ensuring that all pertinent facts and considerations are carefully evaluated.

16. The authorities are obligated to grant the petitioner all consequential benefits lawfully due to her, effective from the date of her initial regularization.

17. Accordingly, this Writ Petition is allowed and the above exercise shall be complete within three months from the date of presentation of an authenticated copy of this judgment/ order before the appropriate authority.

18. Interim order, if any, passed earlier stands vacated.

Headnotes prepared by :
Smt. Madhumita Panda, Law Reporter
(Verified by : Shri Pravakar Ganthia, Editor-in-Chief)

Result of the case :
Writ Petition allowed.

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2024 (III) ILR-CUT-774

MANOJ KUMAR SAHOO @ MAHANTA
V.
STATE OF ODISHA

(BLAPL NO. 3644 OF 2024)

27 SEPTEMBER 2024

[MISS. SAVITRI RATHO, J.]

Issue for Consideration

Whether bail can be granted to a person who does not have any antecedents under the NDPS Act.

Headnotes

CODE OF CRIMINAL PROCEDURE, 1973 – Section 439 – The petitioner is charge sheeted U/s. 29 of the NDPS Act – The Petitioner was not present at the spot where the ganja was seized – He was arrested subsequently on the basis of the confessions of the accused persons who were arrested at the spot – Nothing incriminatory has been seized from his possession – The Petitioner does not have any antecedent under the NDPS Act – Whether the prayer for bail can be allowed.

(Para 7)

Held: Yes – The Petitioner shall be released on bail on such terms and conditions as may be fixed by the learned court below. (Para 9)

Citation Reference

Tofan Singh vs State of Tamil Nadu, **(2021) 4 SCC 1 – referred to.**

List of Acts

Code of Criminal Procedure, 1973, Narcotic Drugs and Psychotropic Substances Act, 1985

Keywords

Bail, Co-accused, Antecedent, Confession.

Case Arising From

Maitri Vihar P.S. Case No. 03 of 2024 corresponding to T.R. Case No. 06 of 2024 pending in the Court of the learned District & Sessions Judge, Khurda at Bhubaneswar.

Appearances of Parties

For Petitioner : Mr. Pranab Ranjan Chhatoi
For Opp.Party : Mr. S.S. Mohapatra, A.S.C

Judgment/Order

Judgment

SAVITRI RATHO, J.

This application under Section 439 of Cr.P.C. has been filed by the petitioner in connection with Maitri Vihar P.S. Case No. 03 of 2024 corresponding to T.R. Case No. 06 of 2024 pending in the Court of the learned District & Sessions Judge, Khurda at Bhubaneswar under Section 20(b)(ii)(C)/29 of NDPS Act.

2. This application has been listed before me as BLAPL No. 678 of 2024 filed by co-accused Siba Behera had been dismissed by me on 09.02.2024 and BLAPL No. 804 of 2024 filed by co-accused Siba Sundar Paranga had been dismissed by me on 13.02.2024. Both had been granted liberty to move for bail afresh after completion of investigation.

3. FIR had been registered against co-accused Uttam Pradhan, Sumanta Bhuyan, Siba Sundar Paranga and Siba Behera on 04.01.2024 under Section 20 (b) (ii)/(C)/29 of the NDPS Act. Chargesheet dated 30.06.2024 in this case has been submitted against co-accused (i) Siba Behera and (ii) Uttam Pradhan, (iii) Sumanta Bhuyan, (iv) Siba Sundar Paranga, under Sections 20 (b) (ii)/(C)/29 of the NDPS Act and against (v) Manoj Kumar Sahoo @ Mahanta (present petitioner), (vi) Bijay Kumar Mandal, (vii) Dillip Kumar Baral @ Dilua and (viii) Santa @ Santosh Kumar Sahoo under Section 29 of the NDPS Act.

4. The prosecution case in brief is that on 04.01.2024 morning, the IIC, Maitri Vihar PS received information regarding transportation of contraband ganja in a black colour auto rickshaw for delivery of the same to customers near Hatiasuni.

The informant and his team proceeded to the spot and found persons standing near the auto rickshaw. They were detained and the auto rickshaw searched 36 kgs of contraband ganja kept in two packets was recovered from the seat of the auto rickshaw. During interrogation, the four accused person revealed their identity to be -(i) Siba Behera, (ii) Uttam Pradhan (driver of the auto rickshaw),(iii) Sumanta Bhuyan, and (iv) Siba Sundar Paranga and they confessed that they have procured the ganja from Kandhamal side to sell to customers and they were doing this business regularly along with accused Dilua Baral, Bijay Mandal, Manoj Kumar Mahanta (present petitioner) and Santa of Salia Sahi. As they could not produce any authority/document in support of possession of the ganja, the ganja was seized and they were arrested.

5. Mr. Pranab Ranjan Chhatoi, learned counsel for the petitioner submitted that the petitioner is in custody since 26.02.2024 and he has no antecedents under the NDPS Act. He also submits that the petitioner has been arrested on the basis of the confession of the accused persons who were arrested at the spot and nothing incriminatory has been seized from him. Investigation has been completed but apart from the confession of the co-accused, no other incriminatory materials are available against the petitioner.

6. Mr. S.S. Mohapatra, learned Additional Standing Counsel opposes the prayer for bail stating that the accused persons arrested at the spot have confessed that were regularly procuring ganja and selling it to customers along with the present petitioner. In view of the quantity of ganja seized, Section 37 of the NDPS Act will be a bar for considering his prayer for bail, for which his prayer for bail should be rejected.

7. The petitioner was not present at the spot from where the ganja was seized. He has been arrested subsequently on the basis of the confessions of the accused persons who were arrested at the spot. Nothing incriminatory has been seized from his possession. Investigation has been completed. It has been submitted that he does not have any antecedents under the NDPS Act.

8. Considering the nature of implication of the petitioner in the present case (confession of co accused), decision of the Supreme Court in the case of ***Tofan Singh vs State of Tamil Nadu : (2021) 4 SCC 1,*** the quantity of ganja seized and the submission that the petitioner has no antecedents under the NDPS Act, I am inclined to allow the prayer for bail.

9. The petitioner-Manoj Kumar Sahoo @ Mahanta shall be released on bail on such terms and conditions as may be fixed by the learned Court below in seisin over the matter, after verifying that he has no antecedents under the NDPS Act, including the following conditions:

(i) He will not commit any offence while on bail.

(ii) He will not threaten or try to influence the prosecution witnesses while on bail.

(iii) He will remain present in the trial Court on each date fixed for trial.

10. Violation of any condition will entail in cancellation of bail.

11. The BLAPL is accordingly disposed of.

12. Observations in this order shall not influence the learned trial court which is to try the case, as they have been made for the sole purpose of consideration of the prayer for bail.

Headnotes prepared by :
Smt. Madhumita Panda, Law Reporter
(Verified by : Shri Pravakar Ganthia, Editor-in-Chief)

Result of the case :
BLAPL disposed of.

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2024 (III) ILR-CUT-777

NITIN KAPOOR
V.
STATE OF ODISHA (DGGI)

(CRLREV NO.297 OF 2024)

15 JULY 2024

[R.K. PATTANAIK, J.]

Issue for Consideration

Whether travel of petitioner to abroad should be restricted due to pendency of Criminal proceeding.

Headnotes

CODE OF CRIMINAL PROCEDURE, 1973 – Section 401 r/w section 205 and section 317 – The learned court below rejected the application of the petitioner for permission to travel South Africa for business purpose due to pendency of the proceeding in 2(c)C.C. case for the offence U/s. 69 r/w section 132(1)(b), 132(1)(c) and 132(1)(f) of the CGST Act, 2017 – Whether the movement of petitioner to abroad should be restricted due to pendency of proceeding?

Held: No – Having regard to the nature of the offences alleged, the delay in commencement of trial with the charge framed, attendance of the petitioner all along duly represented by a counsel without default with no instance cited and the fact that the petitioner has a past travel history and unlikely to abscond having his roots in India, the Court reached at a conclusion that the learned court below was not right in denying the permission to travel abroad which could have been ensured imposing suitable conditions. (Para 7)

Citation Reference

Parvez Noordin Lokhandwalla Vrs. State of Maharashtra & Anr., **(2020) 10 SCC 77**; M/s. Bhaskar Industries Limited Vrs. M/s. Bhiwani Denim & Apparels Ltd. & Ors., **AIR 2001 SC 3625** - **referred to.**

List of Acts

Code of Criminal Procedure, 1973; Central Goods and Services Tax Act, 2017

Keywords

Pendency of Criminal Case, Bar to travel abroad, Permission to travel abroad.

Case Arising From

Out of order dtd. 03.05.2024 passed by the S.D.J.M, BBSR in 2(c) C.C. No. 61 of 2023.

Appearances of Parties

For Petitioner : Mr. R.P. Kar, Sr. Adv. & Mr. Saurav Tibrewal
For Opp. Party : Mr. Tushar Kanti Satapathy, Senior SC for GST and Central Tax

Judgment/Order

Judgment

R.K. PATTANAIK, J.

1. Instant revision petition is filed at the behest of the petitioner assailing the impugned order dated 3rd May, 2024 passed in 2(c) C.C. No. 61 of 2023 by the learned S.D.J.M., Bhubaneswar, whereby, an application to allow him to travel to South Africa for business purposes was disallowed on the grounds inter alia that the same is unjust, arbitrary and untenable in law, hence, therefore, liable to be interfered with and set aside with consequential directions issued in that regard.

2. As revealed from the record, the petitioner is on bail by the order of this Court in BLAPL No. 9999 of 2023 as at Annexure-2 subject to conditions imposed. In the meantime, with a plea to attend a business commitment, the petitioner moved the learned court below with an application under Annexure-4 to travel to South Africa along with supported documents (Annexure-5 series), as against which, an objection (Annexure-6) was received from the side of the State but such request was rejected by the impugned order under Annexure-7 on the premise that no document has been filed by him to show any specific business transaction in South Africa; no material was produced to showcase about any business schedule/ itinerary; co-accused being in judicial custody; and that, the charge is to be framed on the next date i.e. 13th May, 2024, for which s, he has to be physically present. Being aggrieved by the impugned order under Annexure7, the petitioner has knocked the portals of this Court to set it aside in exercise of revisional jurisdiction.

3. Heard Mr. Kar, learned Senior Advocate appearing for the petitioner and Mr. Satapathy, learned Senior Standing Counsel, GST and Central Tax.

4. Mr. Kar, learned Senior Advocate for the petitioner would submit that the petitioner is on bail and as per one of the conditions imposed by the Court, he may be allowed to travel subject to leave of the court below and in the meantime, the coaccused who was in judicial custody by then, has been granted bail in the meantime. It is further submitted that the petitioner having business related work in South Africa, for which, he used to travel frequently to the said country, hence, having travel history by citing Annexure-3, a letter received by the petitioner from one M/s. Motek 1017 (pty) Ltd. having its registered office at Cape Town, South Africa, Mr. Kar, learned Senior Advocate submits that in response to the same, he has to travel this time again to South Africa for providing necessary services to the client. With respect to the claim of prior visits to South Africa, Mr. Kar, learned Senior Advocate relies on the visa documents. Such claim of travel to South Africa till recently, it is sought to be proved by a visa document of the year 2022. It is stated that on a complaint filed, the proceeding in 2(c) C.C. Case No. 61 of 2023 was registered for offence under Section 69 read with Sections 132(1)(b), 132(1)(c) and 132(1)(f) of the CGST Act, 2017 pending in the file of learned S.D.J.M., Bhubaneswar. It is apprised to the Court by Mr. Kar, learned Senior Advocate that the case is based on inquiry made by the Bankers of two firms, namely M/s. Jasem Overseas and M/s. Rompather General Overseas and it is alleged that one Mr. Rony used to visit the Banks (Federal Bank and Central Bank, Kalpana Square, Bhubaneswar) to enquire about the accounts of the firms and thereafter, on 11th July, 2023, the officials of DGGI apprehended him and two others including the petitioner. The details of the allegations against the accused persons are also described by Mr. Kar, learned Senior Advocate, which are not reproduced at present for the sake of brevity. The contention is that co-accused No.2 is on bail and the petitioner is having travel history and in view of the business commitment for having received the letter from his client, he is required to travel to South Africa. It is contended by Mr. Kar, learned Senior Advocate that the petitioner has roots in the society and is one of his family members stood as a bail surety and therefore, he cannot abscond. it is further contended that the reason assigned by the learned court below to deny such travel to South Africa by the petitioner does not carry any sense and really gibberish. In other words, it is alleged that while denying such travel, learned court below failed to exercise due judicial discretion. Furthermore, the manner in which the proceeding in 2(c) C.C. 61 of 2023 has been conducted, the same is brought to the notice of the Court by Mr. Kar, learned Senior Advocate referring to order dated 4th March, 2024 of the learned S.D.J.M., Bhubaneswar, inasmuch as, considerable delay and laches is attributed to the Special Public Prosecutor managing the case on behalf of Directorate General of Goods and Services, Tax Intelligence, hence, considering the same, the travel of the petitioner to South Africa cannot be postponed indefinitely. With such other grounds, Mr. Kar, learned Senior Advocate submits that the impugned order under Annexure-7 is liable

to be set aside. In support of the plea and contention advanced, Mr. Kar, learned Senior Advocate relies on a decision dated 15th April, 2024 of this Court in Criminal Revision No.690 of 2023 and a citation reported in **(2020) 10 SCC 77** in the case of **Parvez Noordin Lokhandwalla Vrs. State of Maharashtra and Another**, wherein, the Apex Court had the occasion to deal with such a matter, where the accused was seeking permission to travel to USA for revalidating Green Card issued to him, similarly having past travel history.

5. On the contrary, Mr. Satapathy, learned Senior Standing Counsel, GST and Central Tax submits that considering the severity of the offences alleged and its magnitude, as huge amount of tax fraud is involved and as there is a possibility of abscondence, the petitioner should not be allowed any such travel, which is likely to impede the prosecution before the court of learned S.D.J.M., Bhubaneswar. It is further submitted that the petitioner is not a resident of Odisha but stays at Gurgaon, Haryana and it may also be difficult for the prosecution to ensure his attendance during inquiry and trial when charge is about to be framed.

6. Whether the petitioner should be allowed to travel to South Africa considering the plea of business commitment? Being an accused one has to remain present during inquiry at the time of trial. Such presence of an accused may be dispensed with as per the provisions of Sections 205 and Section 317 Cr.P.C. If situation demands, such exemption may be allowed to the accused unless it shatters speedy trial. While considering exemption, the principles of natural justice are to be ensured. Absence of an accused must have due regard to the smooth and efficient functioning of the criminal proceeding before the court. It has been held time and again that as long as the accused can ensure the presence through a counsel and consents to any evidence being taken in his absence, the attendance can be dispensed with and in certain situation, additional conditions may be imposed considering the gravity of the offence or where the presence is statutorily mandatory. All such aspects have been dealt with elaborately by the Apex Court in **M/s. Bhaskar Industries Limited Vrs. M/s. Bhiwani Denim & Apparels Ltd. & others AIR 2001 SC 3625**. It is also a recognized judicial principle that restrictions against travel to abroad for a time shorter than necessary may amount to unreasonable confinement, which is patently unethical and illegal. As it is well known, liberty of an individual cannot be curtailed solely because the investigation is pending. The sole concern of a court, in case of any such travel to abroad, is the efficient functioning of the trial in absence of the accused. The primary consideration of the courts is, whether, the presence of the accused can be enforced at the time of trial. To ensure the presence of the accused during inquiry and trial, conditions may have to be imposed, which would deter him from absconding or fleeing from justice. In this regard, the decision referred to by Mr. Kar, learned Senior Advocate in the case of **Parvez Noordin Lokhandwalla** (supra) is to be taken cognizance of. In the said decision, the Apex Court outlined the relevant considerations, when a request for travel to abroad is received from an accused and held and observed that human right

to dignity and protection of constitutional safeguards should not become illusory by imposition of conditions, which are disproportionate to the need to secure his presence during investigation and eventually, at the time of trial. It is also observed therein that the conditions which are imposed by the Court must bear a proportional relationship to the purpose of imposing it and the nature of risk which is posed by the grant of permission must be carefully evaluated in each particular case. It is held that everyone has a constitutional right guaranteed under Article 21 of the Constitution of India, which is to be preserved and maintained and the presence of the accused to be ensured with safeguards imposing conditions when a request to travel abroad is received from him keeping in view the nature of allegations levelled by the prosecution.

7. In the case at hand, the petitioner is a businessman and has had previous travels to South Africa since 1998 till recently in 2022 and the same is supported by the visa documents submitted by him before the learned court below. No doubt, the prosecution against the petitioner relates to tax fraud but is a native of Gurgaon, Haryana and runs business. In the meantime, the letter of a client was received by the petitioner which reveals some services are to be offered to the said client. Mr. Kar, learned Senior Advocate submits that the purpose of the business as per the communication received by the petitioner still survives and merely for the reason that a prosecution has been lunched, he cannot be denied to travel to South Africa and while advancing such an argument, the principle based on a *maxim omnis indemnatus pro innoxio legibus habetur*, which means, everyone who has not been found guilty is deemed innocent by the law is cited. In course of hearing of this case, a Gazette Notification of Government of India dated 20th June, 2007 is produced to claim existence of an extradition treaty between India and South Africa, hence, there is a remote possibility of not getting the petitioner back for the purpose of trial as apprehended by the learned court below and as according to Mr. Kar, learned Senior Advocate, any such apprehension, in the facts and circumstances of the case, is totally misplaced and misconceived. Having regard to the nature of the offences alleged, the delay in commencement of trial with the charge framed, attendance of the petitioner all along duly represented by a counsel without default with no any instance cited and the fact that the petitioner has a past travel history and unlikely to abscond having his roots in India, the Court reaches at a conclusion that the learned court below was not right in denying the permission for him to travel abroad which could have been ensured imposing suitable conditions.

8. In fact, Mr. Satapathy learned Senior Standing Counsel for the opposite parties apprehends the abscondance of the petitioner, which for the facts discussed hereinabove, as according to the Court, is inappropriate. The Court finds that the petitioner has been diligent during inquiry after the complaint was filed without any incident of default and complied with the direction of the court below and for being a permanent native and a family behind, it is most unlikely that he would abscond or flee from the course of justice. Such permission, it is further concluded, can be granted to the petitioner imposing stringent conditions on him to ensure his

attendance during trial. Inasmuch as, the duration of such travel as disclosed by Mr. Kar, learned Senior Advocate may be a month or two. The Court is not inclined to burden the series of citations related to the case of present nature as it has been referred to including the citation in the case of **Parvez Noordin Lokhandwalla** (supra) while dealing with and disposing of the CRLREV No.690 of 2023 in the case of **Indrajit De Vrs. Republic of India (C.B.I.).**

9. Hence, it is ordered.

10. In the result, the revision petition stands allowed. As a necessary corollary, the impugned order under Annexure-7 passed in 2(c)C.C. No.61 of 2023 by the learned S.D.J.M., Bhubaneswar is hereby set aside with a direction that the petitioner shall be allowed to receive the original Passport and retain it for such period depending on his itinerary/travel to visit South Africa. It is further directed that the petitioner shall forthwith submit the schedule of his visit with all details regarding duration and place of stay in South Africa before learned court below, which shall further impose such other conditions as would be deemed just and expedient in the facts and circumstances of the case.

Headnotes prepared by :
Smt. Madhumita Panda, Law Reporter
(Verified by : Shri Pravakar Ganthia, Editor-in-Chief)

Result of the case :
CRLREV allowed.

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2024 (III) ILR-CUT-782

GOUTAM CHARAN DAS
V.
BISWADARSANI DAS

(CRLREV NO.64 OF 2023)

12 AUGUST 2024

[R.K. PATTANAIK, J.]

Issue for Consideration

Whether interim maintenance in two separate proceedings is maintainable.

Headnotes

HINDU MARRIAGE ACT, 1955 – Section 24 r/w Section 23 of the Protection of Women from Domestic Violence Act, 2005 – The learned Judge, Family Court while entertaining an application U/s. 24 of the 1955 Act allowed Rs. 10,000/- per month as interim maintenance and Rs. 50,000/- towards litigation expenses in favour of Opp. Party – The learned SDJM granted interim maintenance of ₹ 6000/- in favor of Opp.

Party U/s. 23 of 2005 Act which was reduced to Rs. 4000/- by the Appellate Court.

Held : A DV Court has Jurisdiction to entertain such relief of maintenance during the subsistence of an earlier order but to determine the quantum and make the necessary adjustment or set off accordingly, provided a case is made out by the aggrieved spouse stating the circumstances and the need for the same – It is hence to be concluded that the spouse, in whose favor an order of maintenance has been passed, shall have to disclose it to the subsequent Court but for any such nondisclosure, the Court shall have the jurisdiction to modify the order or even review or recall the same on being informed by the other spouse. (Para 10)

Citation Reference

Hemlataben Maheshbhai Chauhan Vrs. State of Gujarat, **SCr.A No. 2080/2010**; Ravindra Haribhau Karmarkar Vrs. Mrs. Shaila Ravindra Karmarkar, **1992 CriLJ 1845**; Smt. Mamta Jaiswal Vrs. Rajesh Jaiswal II, **(2000) DMC 170**; Shri Bhavin Shah Vrs. Smt. Sapna Shah, **2016(I) OLR 755**; Rajnesh Vrs. Neha and Another, **(2021) 2 SCC 32** – **referred to.**

List of Acts

Hindu Marriage Act, 1955, Protection of Women from Domestic Violence Act, 2005.

Keywords

Maintenance, Maintainability of interim maintenance in two proceedings.

Case Arising From

Criminal Appeal No.80 of 2021 of the learned 2nd Additional Sessions Judge, Cuttack.

Appearances of Parties

For Petitioner : M/s. Bijayananda Dash
For Opp. Party : M/s. Bijaya Kumar Parida-2

Judgment/Order

Judgment

R.K. PATTANAIK, J.

1. Instant revision is filed by the petitioner assailing the correctness, legality and judicial propriety of the impugned order under Annexure-1 passed in Criminal Appeal No.80 of 2021 by learned 2nd Additional Sessions Judge, Cuttack, whereby, the decision of learned S.D.J.M.(Sadar), Cuttack in D.V. Misc. Case No.44 of 2021 under Section 23 of the Protection of Women from Domestic Violance Act, 2005 (hereinafter referred to as 'the DV Act') granting interim maintenance in favour of the opposite party stands confirmed though with reduction of monthly alimony on

the grounds inter alia that the same is not sustainable in law and hence, therefore, liable to be interfered with and set aside in the interest of justice.

2. As per the order in the DV proceeding, learned S.D.J.M. (Sadar), Cuttack allowed Rs.6,000/- towards interim maintenance in favour of the opposite party wife, which was reduced to Rs.4000/- by the learned Court below. The said order dated 17th January, 2023 in appeal by learned Sessions Court is under challenge. According to the petitioner husband, the opposite party suppressed the earlier order of the Family Court in C.M.A. No.87 of 2019 arising out of a proceeding in C.P. No.139 of 2018 instituted by him, wherein, while entertaining an application under Section 24 of the Hindu Marriage Act, 1955, interim maintenance @ Rs.10,000/- per month was allowed with an additional payment of Rs.50,000/- towards litigation expenses borne by her. Furthermore, it is pleaded by the petitioner that the opposite party could not have been allowed interim maintenance in two separate proceedings as the same is not legally tenable. That apart, as per the petitioner, the opposite party is well educated and qualified and has had been in employment, hence, it was not right for the learned Courts below to grant such relief to her. With the above contention, the impugned order under Annexure-1 is questioned by the petitioner.

3. Heard Mr. Dash, learned counsel for the petitioner and Mr. Parida-2, learned counsel for the opposite party.

4. According to Mr. Dash, learned counsel for the petitioner, the interim maintenance should not have been granted to the opposite party when she could be in employment being an Engineering Graduate and the same cannot be allowed under the DV Act, when learned Family Court has already directed the petitioner to pay Rs.10,000/- a month to her as interim maintenance. It is contended that such demand for maintenance in two different forums is unfair and not justifiable in law. It is also contended that since the opposite party is a qualified professional and can earn on her own, any such maintenance as directed by the learned Courts below is not proper. In support of such contention, Mr. Dash, learned counsel for the petitioner relies on the orders of Gujarat High Court in Special Criminal Application No.2080 of 2010 dated 21st October, 2010 (**Hemlataben Maheshbhai Chauhan Vrs. State of Gujarat**; of Bombay High Court in **Ravindra Haribhau Karmarkar Vrs. Mrs. Shaila Ravindra Karmarkar 1992 CriLJ 1845**; of Madhya Pradesh High Court in **Smt. Mamta Jaiswal Vrs. Rajesh Jaiswal II (2000) DMC 170**; and **Shri Bhavin Shah Vrs. Smt. Sapna Shah 2016(I) OLR 755** of this Court to submit that both the learned Courts below fell into serious error in granting interim maintenance to the opposite party when she was allowed such a relief earlier by learned Family Court.

5. Mr. Parida-2, learned counsel for the opposite party justifies the impugned order under Annexure-1 and rather submits that the interim maintenance amount has been reduced to Rs.4000/-. It is further submitted that as domestic violence was prima facie proved and established, learned S.D.J.M.(Sadar), Cuttack was justified to entertain an application under Section 23 of the D.V. Act as law does not prohibit

exercise of such jurisdiction by a Court even during the pendency of any other proceeding, wherein, interim alimony is granted.

6. The provisions of the DV Act in view of Section 36 thereof shall be in addition to and not in derogation of the provisions of any other law for the time being in force. Inasmuch as, the DV Act does not affect the rights of the parties conferred under the existing laws. In fact, maintenance could be awarded both under the DV Act as well as in any other proceeding provided the parties seeking similar relief specifically mention any such order previously passed by a Court of competent jurisdiction. It is however to be understood that though the wife can simultaneously claim for maintenance under different enactments, it does not in any way mean that the husband should be made liable to pay the same in each of the such proceedings. In so far as the DV Act is concerned, a proceeding thereunder carries reliefs which cannot be granted by other Courts while exercising jurisdiction in proceedings under Section 125 Cr.P.C. or before a Family Court or other Courts, hence, therefore, each of such proceedings is maintainable. If a spouse is neglected or one of them refuses to maintain the other, maintenance can be prayed for before a Criminal Court under Section 125 Cr.P.C., a proceeding which is entertained and disposed of summarily. As it is known, a proceeding before a Family Court with reliefs sought for is quite distinct and independent of any other proceedings before other Courts. Under the DV Act, apart from maintenance many other reliefs are sought for, such as, right of residence, protection orders, custody rights, compensation etc. besides monetary relief, which cannot be specifically considered by other Courts. For such relief under the DV Act, a Court must be prima facie satisfied about a domestic violence to have been committed against the aggrieved person. The existence of a domestic relationship is also a condition to be fulfilled before granting reliefs under the DV Act. But at the same time, it is to be kept in mind that interim maintenance cannot be allowed ignoring the earlier orders of a Court in a different proceeding. The maintainability of the proceedings being exclusive and independent of each other cannot be questioned but once a relief of maintenance is granted, while such a relief is once again prayed for, the subsequent Court is to take cognizance of the earlier order, while dealing with an application received from one of the spouses.

7. In **Hemlataben Maheshbhai Chauhan** (supra), it is held that once maintenance is allowed under Section 125 Cr.P.C., the proceeding under the DV Act with a similar relief cannot be allowed unless and until strong reasons exist with an observation that in the event of change in circumstances, it is always open to the wife to seek modification of the maintenance order under Section 127 Cr.P.C. The said decision does not bar a DV Court from granting interim maintenance but held that in case, circumstances demand, the same can be considered with one more option available for the wife to seek modification of order in terms of Section 127 Cr.P.C. In **Ravindra Haribhau Karmakar** (supra), the Bombay High Court held that when the parties are before a Civil Court, the proceeding under Section 125 Cr.P.C. before a Magistrate is to be stayed as it is unlikely to cause any prejudice to the aggrieved wife, who has been receiving maintenance every month. In **Smt.**

Mamta Jaiswal (supra), the Madhya Pradesh High Court made certain observations while dealing with an application for maintenance when the wife was having good qualification but was not having the source of income and was unemployed depending on the husband for sustenance. On a proper reading of the above decision, the Court finds that such observation was made keeping in view the facts and circumstances of the case and parties involved therein. It cannot be universally held that one of the spouses is always guilty of sitting idle draining out the other half for demanding maintenance. Even when a wife is qualified, she may not be in employment and the same could be for variety of reasons, hence, it may not at all be justified to suspect her conduct or intent, while demanding monthly alimony approaching a Court. It is of course true that a Court must be vigilant to any such suspectful action of one of the spouses. But by considering the above decision, it would not be proper to treat the opposite party in such manner alleging her conduct as suspectful. No doubt, the learned Courts below were required to examine the plea of the opposite party when she was allowed interim maintenance of Rs.10,000/- by the Family Court. If in case, the opposite party did not seek modification of such an order, she cannot either be prevented from demanding any additional sum before the DV Court. As it was earlier mentioned, all such proceedings are maintainable and a wife may simultaneously claim relief under the DV Act and also in other proceeding as in each of such proceedings, the cause of action is different and also the effect.

8. In **Rajnesh Vrs. Neha and Another (2021) 2 SCC 32**, the Apex Court discussed in detail about the overlapping jurisdictions of different Courts while dealing with a matrimonial dispute. It is held therein that the wife is under statutory obligation to disclose earlier orders of maintenance revealing all the information before the subsequent Court with an affidavit of disclosure of assets and liabilities and laid down the guidelines on interim maintenance. As per the DV Act, such disclosure about a previous order of maintenance is a statutory requirement. All such provisions of different enactments, on a harmonious reading, leads to an irresistible conclusion that the proceedings before different Courts co-exist and hence, maintainable but there should not be repetition of reliefs with orders passed by the Courts prejudicial to the interest of one of the parties involved. In the instant case, the petitioner alleges that interim maintenance was managed by the opposite party without disclosing the earlier order of the Family Court. In fact, both the orders arrived in a span of six months or a year. The Court in appeal held that the disclosure was not made by the opposite party while seeking maintenance under the DV Act. But, the fact remains, the opposite party was not granted any such maintenance ex parte. The petitioner participated in the proceeding before learned S.D.J.M. (Sadar), Cuttack and it is believed that he must have disclosed about the earlier order by the Family Court. In any case, learned Court below in appeal was made aware of the previous order of interim maintenance by the Family Court under Section 24 of the Hindu Marriage Act. In other words, the Jurisdiction was exercised by the learned Sessions Court being conscious of the Family Court's order of maintenance in favour of the opposite party. Even if, the opposite party is to be held

guilty for any such lapse for non-disclosure, she cannot be non-suited before the DV Court and could not have been by the orders of the learned Sessions Court in appeal. The only consideration in the given set of facts would be that whether learned Court below rightly exercised the discretion in allowing maintenance with a reduced amount of Rs.4000/-. To sum up, the Court reaches at a conclusion that earlier order of maintenance or proceeding before the Family Court with such an order cannot and could not have prevented the opposite party to approach the DV Court but any such interim alimony since allowed, had to be keeping in view the previous order to make the necessary adjustment upon proof of existence of a cause of action seeking further monetary sustenance and support from the petitioner. It is reiterated that for Section 36 of the DV Act, all such provisions of the said Act are always supplemental to other enactments in force. If a case is made out for additional amount of maintenance payable to the wife, the DV Court can do so even when the previous order on alimony by a different Court is in existence. The Court is of the view that the aggrieved spouse has two options open, one being to approach the earlier Court for enhancement of the maintenance in the change circumstances or even pursue such relief before the later Court, which is to consider granting such remedy and may direct maintenance over and above the amount earlier awarded. So, to say, an adjustment has to be made while allowing further maintenance when the spouse is receiving alimony by virtue of an earlier order of another Court.

9. In the case at hand, no such ground is made out by the opposite party for interim maintenance in addition to the amount of monthly alimony of Rs.10,000/- awarded by the Family Court. The said order in a proceeding under the Hindu Marriage Act is dated 5th February, 2021, whereas, the impugned order in the DV proceeding was passed on 6th November, 2021. What were the circumstances for the opposite party to demand maintenance again, may be on the premise of being a victim of domestic violence, when she was already awarded alimony of Rs.10,000/- a month in a proceeding initiated by the petitioner under the Hindu Marriage Act seeking dissolution of marriage is not discernible from the record. The said question was not dealt with at least by the Court in appeal, which allowed further maintenance as a routine duty under the impression that it is bound to grant the same when a prima facie case of domestic violence is made out against the petitioner. In the humble view of the Court, unless the opposite party was to satisfy the DV Court for any such further maintenance in addition to Rs.10,000/-, it was not right for the Courts below to accede to such request. It was also incorrect on the part of the learned court below to conclude that no evidence is necessary before passing an interim order in favour of the opposite party in view of the aim and objective of the DV Act though relief granted ex parte may be based on affidavit. In absence of any material on record except evidence regarding domestic violence by itself not to be sufficient for a Court to consider quantum of interim maintenance. Otherwise without any evidence on record, while dealing with an application under Section 23 of the DV Act, it would just be a guess work for the Courts where there may not be proper decisions taken especially with regard to the quantum of maintenance in

juxtaposition to the capacity, living standard and life style of the spouses involved and therefore, to deal with such situations, disclosure of assets and liabilities as directed by the Apex Court in **Rajnesh** (supra) to be necessary.

10. It is, therefore, to be held that a DV Court has the jurisdiction to entertain such relief of maintenance during the subsistence of an earlier order but to determine the quantum and make the necessary adjustment or set off accordingly provided a case is made out by the aggrieved spouse stating the circumstances and the need for the same. It is hence to be concluded that the spouse, in whose favour an order of maintenance has been passed, shall have to disclose it to the subsequent Court but for any such nondisclosure, the Court shall have the jurisdiction to modify the order or even review or recall the same on being informed by the other spouse. The further conclusion is that a spouse cannot be non-suited for having earlier approached a Court and obtained relief but as held and discussed, adjustment as to quantum of alimony shall have to be considered by the latter Court. Since in the present case, the opposite party had not applied for enhancement of maintenance approaching the Family Court, so was required to convince the DV Court, the need for additional amount over and above Rs.10,000/-. In absence of any such facts revealed by the opposite party and a case made out by her, the learned Courts below were not justified to allow further maintenance. A conclusion has to be reached at that the opposite party though did not seek enhancement of the maintenance amount but the same was to be necessary on account of the changed circumstances and for adequate reasons. Even assuming that such an exercise has been under taken by the learned Court below, no decision has been rendered as to if the maintenance amount of Rs.10,000/- allowed by the Family Court in favour of the opposite party to be sufficient or otherwise. That apart, the learned Court below without any logic or reason fixed the maintenance amount at Rs.4000/- in addition to Rs.10,000/-. Again, it has been a guess work by the learned Sessions Court without the decision being supported by any reason. A Court has to take judicial notice of all such aspects before considering maintenance and passing orders especially during the existence of an earlier order on a similar relief in favour of one of the spouses. As it appears, both the learned Courts below, at least the learned Sessions Court could have examined the above aspects keeping in view the decision of the Apex Court in Rajnesh (supra) even at a time while considering the maintenance insisting upon the parties to make the necessary disclosure of assets and liabilities and also considering, whether, the opposite party is still entitled to any additional sum when she was granted interim alimony of Rs.10,000/-. Only under demanding circumstances assigning reasons with a case made out by the opposite party, further amount of maintenance could be allowed with the set off, otherwise, one of the spouses would always be in a difficult and disadvantaged position to bear the brunt, which can never be the intent of any such law in force.

11. Hence, it is ordered.

12. In the result, the revision petition stands allowed. As a necessary corollary, the impugned orders under Annexure-1 and 3 passed by the learned Courts below are hereby set aside with the matter remitted back to the Court of learned S.D.J.M.(Sadar), Cuttack with the restoration of the proceeding in D.V. Misc. Case No.44 of 2021 for a fresh decision on the application filed under Section 23 of the DV Act by the opposite party followed by an order on merit keeping in view the settled legal position and the discussions with the observations made herein above.

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

Headnotes prepared by : *Result of the case :*
Smt. Madhumita Panda, Law Reporter CRLREV allowed.
(Verified by : Shri Pravakar Ganthia, Editor-in-Chief)

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2024 (III) ILR-CUT-789

ARNAPURNA PRADHAN
V.
TRINATH BARIK & ORS.

(RSA NO. 301 OF 2014)

27 SEPTEMBER 2024

[SASHIKANTA MISHRA, J.]

Issues for Consideration

Succession – Plaintiff is the only legal heir of Sumitra Barik and she is entitled to succeed to the properties of Sumitra.

Adoption – Sumitra had adopted defendant No. 1 as her son on 22.05.1979 and he (defendant No.1) is entitled to succeed to the properties of Sumitra Barik.

Headnotes

HINDU SUCCESSION ACT, 1956 – Sections 4, 14 & 15 – The plaintiff claimed that she is the only legal heir and successor of Sumitra Barik, that defendant No. 1 is not the adopted son of Sumitra Barik and as such not entitled to her (Sumitra's) properties – Defendant No. 1 denied the same and claims to be in possession of the suit land – Suit was decreed – Matter went in Appeal by defendant Nos. 1 & 3 – The First Appellate Court partly reversed the decree of the Court below – The present Appeal is filed against the decree of the First Appellate Court.
(Paras 1, 5, 6, 8.2 & 9.1)

Held: Right of a female Hindu widow to succeed to the property of her deceased husband is absolute and cannot be restricted in any manner including the fact of her remarriage – In the event of the widow dying intestate without any issue, the provisions of sub-section (2) of Sec.15 would apply – But in the event the widow has remarried and dies leaving behind children begotten out of the remarriage, the property succeeded by her from her husband of the first marriage would devolve on her children begotten out of the second marriage as her legal heirs, provided she was issueless from her first marriage. (Para 16)

Meaning of the words "son" or "daughter", etc. mentioned in the proposition – Whether "son" or "daughter", etc. mentioned in the proposition can include son and daughter begotten by the widow through her remarriage.

Held: Yes – The legal position is that 'son-daughter' includes natural son, adopted son and sons/daughters by different husbands. (Para 12.12)

Citation Reference

Bhagat Ram v. Teja Singh, **AIR 2002 SC 1**; Smt. Dhanistha Kalita v. Ramakanta Kalita & Ors., **AIR 2003 Gauhati 92**; Eramma v. Veerupana, **AIR 1966 SC 1879**; Vaddeboyina Tulasama v. Seshi Reddy, **AIR 1977 SC 1944**; Sulochana Dei v. Khali Dei, **1986 AIR Ori. 11**; Lachman Singh v. Kirpa Singh, **(1987) 2 SCC 547**; Sashidhar Barik & Ors.V. Ratnamani Barik & Anr., **OLR 2014 Ori 202**; Gajodhari Devi v. Gokul & Anr., **AIR 1990 SC 46**; Punithavalli Ammal v. Minor Ramalingam & Anr., **AIR 1970 SC 1730**; Harabati & Ors. v. Jasodhara Debi & Ors., **AIR 1977 Ori. 142**; Khageswar Naik v. Domuni Bewa, **AIR 1989 Ori.10**; Jagdish Mohton v. Mohammed Elahi, **AIR 1973 Patna 170**; Chando Mahtain v. Khublal Mahto & Ors., **AIR 1983 Patna 33**; Cherotte Sugathan v. Cherotte Bharathi, **AIR 2008 SC 1467** – **referred to.**

List of Acts

Hindu Succession Act, 1956

Keywords

Declaration; adoption; succession; ancestral properties; stridhana; any property; ownership; acquisition; devolution; intestate.

Case Arising From

From the judgment dated 07.05.2014 passed by the Addl. District Judge, Sundargarh in RFA No. 11/14 of 2012-2014.

Appearances of Parties

For Appeallant : Mr. C.A. Rao, Sr. Adv., M/s. A.K. Nanda, G.N. Sahu, T.P.Tripathy
For Respondents : Mr. P.K. Rath, Sr. Adv., M/s. S.K. Mohapatra, R.N. Parija, A.K. Rout, S.K. Patnaik, P.K. Sahoo, A. Behera

Judgment/Order

Judgment

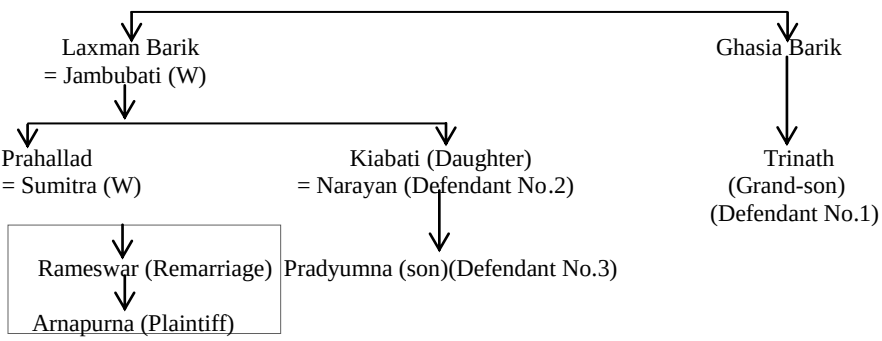
SASHIKANTA MISHRA, J.

This is an appeal by the plaintiff against a reversing judgment passed by the learned Addl. District Judge, Sundargarh in RFA No. 11/14 of 2012-14 on 07.05.2014 followed by decree, whereby the judgment dated 18.02.2012 followed by decree passed by the learned Civil Judge (Sr. Division), Sundargarh in Civil Suit No. 219 of 2009 was partly set aside.

2. For convenience, the parties are referred to as per their respective status before the trial Court.

3. The following genealogy shows the relationship between the parties.

Geneology



4. Suit Land

The suit land pertains to land measuring Ac.5.57 dec. under Khata No.65 and land measuring Ac.0.11 dec. under Khata No.67 in village Girisuan.

5. Plaintiff's case:

The suit land under khata no.65 was recorded in the name of the mother of the plaintiff Sumitra Barik and her grand-mother Jambubati Barik in the Hal Settlement operation. Land under khata no.67 stands recorded in the name of her mother Sumitra Barik alone. Laxman died leaving behind his son-Prahallad, daughter-Kiabati and widow-Jambubati. Kiabati died leaving behind her husband-Narayan (defendant no.2) and son-Pradumna (defendant no.3). Prahallad died leaving behind his widowSumitra and mother-Jambubati. Prahallad and Sumitra had no issue. After the death of Prahallad, Sumitra married another person named Rameswar. The plaintiff, namely, Annapurna was begotten out of such remarriage. It is claimed that after the death of Sumitra, the plaintiff, being her only legal heir,

succeeded to the properties of her mother. The defendant No.1 filed mutation cases before Tahasildar, Hemgir being Misc. Cases No. 387 of 2004 and No.388 of 2004 for mutation of the suit properties in his name on the ground that he is the adopted son of Sumitra. The Tahasildar allowed the mutation applications in favour of defendant no.1, but without the knowledge of the plaintiff. After coming to know of the above, the plaintiff filed appeal being M.A. No.5 of 2006 before the Sub Collector, Sundargarh, which came to be dismissed on the ground that Sumitra having remarried, the plaintiff would have no right, title and interest over the properties belonging to the family. The plaintiff, however, claims to be possessing the suit properties. After dismissal of the appeal thus, the plaintiff filed the suit for a declaration that she is the only legal heir and successor of Sumitra Barik, as also a declaration that defendant no.1 is not the adopted son of Sumitra and not entitled to succeed to her properties.

6. Defendant No.1's case:

The defendant no.1 in his written statement admitted the basic facts averred in the plaint relating to the relationship between the parties. In addition, he claimed that being the nephew of Sumitra, as he was adopted by her on 22.05.1979 in the presence of relatives and villagers, which fact was acknowledged on a plain paper adoption deed, he possessed the properties of Prahallad and looked after his adoptive mother Sumitra. Subsequently, Sumitra left the village voluntarily and married Rameswar Das and gave birth to the plaintiff. Further, Sumitra abandoned all her properties in the suit village and cut off all relationship with her first husband"s family and resided in the house of Rameswar till his death. Being the adopted son of Sumitra, defendant no.1 succeeded to her landed properties and after her death he got the same mutated in his favour, as per orders passed in the mutation cases filed by him before the Tahasildar, Hemgir. The plaintiff"s appeal against the orders of the Tahasildar was dismissed. Since the properties under khata no.65 are the ancestral properties of all the defendants and Sumitra had remarried, she is not entitled to the same. Moreover, the plaintiff being the daughter of Rameswar also has no right, title and interest over the landed properties. Despite not having any right or title over the suit land, the plaintiff has sold away lands measuring Ac.4.11 dec. from khata no.65 to one Basanta Kumar Naik by a registered sale deed no.93 of 2006. Said Basanta Kumar Naik has, however, not taken possession of the land and it continues to be possessed by defendant no.1.

Defendant nos.2 and 3 though appeared before the trial Court, yet they remained absent subsequently, for which they were set ex parte.

7. Issues framed by the Trial Court:

Basing on the rival pleadings, the trial Court framed the following issues for determination:-

"(I) Whether the suit is maintainable?

(II) Whether the plaintiff has cause of action for filing the suit?

(III) Whether the suit is barred for non- joinder of necessary parties?

(IV) Whether the Plaintiff is the only legal heir of Sumitra Barik and she is entitled to succeed to the properties of Sumitra?

(V) Whether Sumitra had adopted defendant No. 1 as her son on 22-5-79 and he is entitled to succeed the properties of Sumitra Barik?

(VI) Whether the plaintiff has right, title and interest over the landed properties under Khata No.55 and 67 of village Girisuan? (Strike out on 25.11.2011)

(VII) To what other relief, the plaintiff is entitled?"

8. <u>Findings of the trial Court:</u>

Taking up issue nos. (IV) & (V) together for consideration at the outset, the trial Court first considered whether defendant no.1 is the adopted son of Sumitra, as claimed by him. After analyzing the documentary evidence, including the plain paper will deed dated 22.05.1974 (Ext.B) and the oral evidence adduced by both parties, the trial Court disbelieved the claim of adoption mainly on the ground that defendant no.1 continued to be shown as the son of his natural father in all records and has been living in his natural father‟s house. The trial Court further found that the giving and taking of the child was not proved to satisfaction.

8.1. On the question whether the plaintiff is entitled to succeed to the properties of Sumitra, the trial Court held that after enactment of the Hindu Succession Act, 1956, Sumitra became the absolute owner of the properties succeeded by her from her husband. Such being the position, her re-marriage cannot forfeit her absolute right over the properties. On such basis and on the finding that the plaintiff is the only legal heir and successor of Sumitra, the trial Court held that she alone is entitled to succeed to the properties of her mother.

8.2. The principal issues being determined thus, all remaining issues were answered in favour of the plaintiff and the suit was decreed by granting all the reliefs claimed by her.

9. Being aggrieved, defendant nos.1 and 3 carried the matter in appeal. The First Appellate Court framed two issues (sic., points) for determination.

"(a) Whether respondent No.1 is the adopted son of the said Sumitra?

(b) Whether the plaintiff being the daughter of the said Sumitra through her marriage to one Rameswar Das is to succeed to her properties as her only legal heir?"

9.1. **<u>Findings of the First Appellate Court:</u>**

In answering the first point, the First Appellate Court, after analyzing the oral and documentary evidence found that the trial Court had rightly held that defendant no.1 was never adopted by Sumitra during her widowhood. On the question of succession of the suit properties of Sumitra by the plaintiff, the Court heavily relied upon the judgment of the Supreme Court rendered in the case of

Bhagat Ram v. Teja Singh,[1] and a judgment of the Gauhati High Court rendered in the case of ***Smt. Dhanistha Kalita v. Ramakanta Kalita & Ors.***[2]. Basing on such decisions, the Court held that the plaintiff is not entitled to succeed to the suit properties and the same would revert back to the legal heirs of Prahallad, the first husband of Sumitra, if there are any. On such findings, the judgment and decree of the trial Court was thus, partly reversed with the claim of defendant no.1 being allowed with the appropriate declaration.

10. Being aggrieved, the plaintiff has approached this Court in the present appeal, which has been admitted on the following substantial questions of law:-

> *"(1) Whether the judgment of the learned Lower Appellate Court that the property inherited by a Hindu female from her first husband shall revert back to the legal heirs of her first husband and not to the issues of the female born through the second husband is vitiated in law being contrary to Section 15 (2) (b) of the Hindu Succession Act, 1956?"*

11. Heard Shri C.A. Rao, learned Senior Counsel assisted by Shri Tarini Prasad Tripathy, learned counsel for the plaintiff-appellant, and Shri P.K. Rath, learned Senior Counsel assisted by Shri A.Behera, learned counsel for defendant-respondents.

(i) **Submissions on behalf of plaintiff-appellant**:

Learned Senior Counsel Shri Rao would assail the impugned judgment only insofar as the same relates to the finding that the plaintiff is not entitled to succeed to the properties of Sumitra. Shri Rao argues that the trial Court had rightly discussed the law to the effect that a female Hindu succeeds to the properties of her husband as an absolute owner in view of Sec.14 of the Hindu Succession Act. It is further well settled that such absolute ownership cannot be qualified or nullified in any manner whatsoever including remarriage by the widow. In the instant case, admittedly, Prahallad died intestate leaving behind his mother and widow. Insofar as the widow Sumitra is concerned, she must be held to have succeeded to the properties of her late husband absolutely. The plaintiff was born out of her second marriage with Rameswar. In view of the settled position of law, as laid down by the Supreme Court and this Court in several judgments, the fact of remarriage cannot divest Sumitra from her absolute ownership over the suit properties. According to Shri Rao, the First Appellate Court has misread the judgment of the Supreme Court which has no application to the facts of the present case. Further, Shri Rao has cited several judgments in support of his contentions, which would be discussed later.

(ii) **Submissions on behalf of defendant-respondents**:

Shri Prafulla Kumar Rath, learned Senior Counsel supports the judgment passed by the First Appellate Court by holding that the matter relating to succession of the properties of a female Hindu dying intestate is squarely

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1. AIR 2002 SC 1 2. AIR 2003 Gauhati 92

governed by the provisions of Sec.15 of the Hindu Succession Act. As per sub-sec.(2) of Sec.15, it is the source from which the property was inherited, which is relevant to decide its succession. It is the settled law that the property would revert to persons related to the original owner and never intended to devolve on persons not even remotely connected to the original holder of the property. In the instant case, admittedly, Prahallad, the original holder of the property and his wife-Sumitra had no children. Therefore, the property of Prahallad would devolve on his widow-Sumitra after his death at the first instance and thereafter, would revert back to the other legal heirs of Prahallad, because of absence of any issue out of her marriage with Prahallad. The plaintiff is not connected at all to the family of Prahallad and therefore, she cannot succeed to his property, as rightly held by the First Appellate Court. Shri Rath has also cited several judgments to buttress his arguments which would be discussed later.

12. **Analysis & findings**:

12.1. After discussing the facts of the case and the rival contentions put forth, this Court deems it apposite to discuss the relevant statutory provisions at the outset. In this context, Sections 14 and 15 of the Hindu Succession Act, 1956 are relevant. Sec.14 reads as follows:-

> *"**14. Property of a female Hindu to be her absolute property**.—(1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.*
>
> *Explanation.—In this sub-section, "property" includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her stridhana immediately before the commencement of this Act.*
>
> *(2) Nothing contained in sub-section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil Court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property."*

12.2. Having regard to the legislative history of Sec.14, it has been held that the rule laid down in sub-sec. (1) has very wide and extensive application and has to be read in a comprehensive manner. The Act overrides inter alia, the old law on the subject of 'Stridhana' in respect of properties possessed by a female, whether acquired by her before or after the commencement of the Act and this section declares that all such properties shall be held by her as full owner. The Act confers full heritable capacity on the female heir and this section dispenses with the traditional limitations on the powers of a female Hindu to hold and transmit property. The effect of the rule laid down in this section is to abrogate the stringent provisions against proprietary rights of a female which are often regarded as evidence of her perpetual tutelage and to recognize her status as independent and absolute owner of property. *(Refer Mulla- Principles of Hindu Law, 20th Edn., Vol-II, Page 394).*

12.3. In the case of ***Eramma v. Veerupana***,[3], the Supreme Court observed as follows:-

> *"The property possessed by a female Hindu, as contemplated in the section, is clearly property to which she has acquired some kind of title, whether before or after the commencement of the Act. It may be noticed that the Explanation to s 14(1) sets out the various modes of acquisition of the property by a female Hindu and indicates that the section applies only to property to which the female Hindu has acquired some kind of title, however restricted the nature of her interest may be. The words 'as full owner thereof and not as a limited owner' in the last portion of sub-s (1) of the section clearly suggest that the legislature intended that the limited ownership of a Hindu female should be changed into full ownership. In other words, s 14(1) of the Act contemplates that a Hindu female, who, in the absence of this provision, would have been limited owner of the property, will now become full owner of the same by virtue of this section. The object of the section is to extinguish the estate called 'limited estate' or 'widow's estate' in Hindu law and to make a Hindu woman, who under the old law would have been only a limited owner, a full owner of the property with all powers of disposition and to make the estate heritable by her own heirs and not revertible to the heirs of the last male holder....."* ***[Emphasis added]***

12.4. In the case of **Vaddeboyina Tulasama v. Seshi Reddy**[4], the Supreme Court adopted the approach of giving "most exhaustive interpretation" to the sub-section with a view to advance the social purpose of the legislation, which is to bring about a change in the social and economic position of women.

12.5. Sec.14 should be read with Sec.4 which gives overriding effect to the provisions of this Act with respect to all matters dealt with in the Act and also enumerates matters which are not affected by this Act. (Refer Mulla- Principles of Hindu Law, 20th Edn., Vol-II, Page 395).

12.6. Thus, it is seen that the provision begins with the expression "any property", which is further delineated in the explanation as property "acquired from any source", which is obviously a very broad and pervasive depiction.

12.7. Now, what would be the effect of remarriage of a widow succeeding to the property of her husband. By operation of Sec.14 she would become the absolute owner of the property. It has been held that once a widow succeeds to the property of her husband and acquires absolute right over the same, she would not be divested of that absolute right on her remarriage and Sec.2 of Hindu Widows Remarriage Act, 1956 will not be attracted on account of the overriding effect given to the provisions of this Act under Sec.4. Such a view was taken by this Court in the case of ***Sulochana Dei v. Khali Dei***,[5]. This is, however, subject to the qualification that the remarriage was post 1956, i.e., after coming into force of the Hindu Succession Act, 1956.

12.8. Thus, the legislature in its wisdom and taking note of the societal norms prevailing at the time of commencement of the Hindu Succession Act in 1956 have

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3. AIR 1966 SC 1879 **4. AIR 1977 SC 1944**
5. 1986 AIR Ori. 11

unequivocally enacted the provision under Sec.14 with a view to confer absolute ownership on a widow succeeding to the property of her deceased husband. Such a right is not qualified in any manner whatsoever including her remarriage.

12.9. Now, coming to Sec.15 of the Act, the same governs the general rules of succession in case of female Hindus and reads as follows:-

> ***"15. General rules of succession in the case of female Hindus**.—(1) The property of a female Hindu dying intestate shall devolve according to the rules set out in section 16,—*
>
> *(a) firstly, upon the sons and daughters (including the children of any pre-deceased son or daughter) and the husband;*
>
> *(b) secondly, upon the heirs of the husband;*
>
> *(c) thirdly, upon the mother and father;*
>
> *(d) fourthly, upon the heirs of the father; and*
>
> *(e) lastly, upon the heirs of the mother.*
>
> *(2) Notwithstanding anything contained in subsection (1),—*
>
> *(a) any property inherited by a female Hindu from her father or mother shall devolve, in the absence of any son or daughter of the deceased (including the children of any pre-deceased son or daughter) not upon the other heirs referred in sub-section (1) in the order specified therein, but upon the heirs of the father; and*
>
> *(b) any property inherited by a female Hindu from her husband or from her father-in-law shall devolve, in the absence of any son or daughter of the deceased (including the children of any predeceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the husband."*

12.10. It has been argued forcefully by Shri Rath, learned Senior Counsel appearing for the defendant-respondents that sub-section (2) of Sec.15 places importance on the source of acquisition of the property, which is the deciding factor for devolution of the intestate after death of the female Hindu. At this stage, it would be fruitful to refer to 'Mulla' yet again wherein the propositions enumerated under Sec.15 have been summarized in the following words:-

> *"**ORDER OF SUCCESSION***
>
> *The effect of the rules laid down in this section is that the property of a female intestate will devolve as summarized in the following propositions:*
>
> *(1) The general order of succession laid down in entries (a) to (e) in sub-s (1) applies to all property of a female intestate however acquired except in case of property inherited by her from her father, mother, husband or father-in-law.*
>
> *(2) In case of a female intestate leaving a son or a daughter or a child of a predeceased son or of a predeceased daughter, that is leaving any issue, all her property, howsoever acquired, devolves on such issue regardless of the source of acquisition of the property and such issue takes the property simultaneously, and if the husband of the intestate is alive they take simultaneously with him in accordance with entry (a). In such a case sub-s (2) does not at all come into operation.*
>
> *(3) In case of a female intestate dying without issue but leaving her husband, the husband will take all her property, except property inherited by her from her father or mother which will revert to the heirs of the father in existence at the time of her death.*

(4) In case of female intestate dying without issue property inherited by her from her husband or father-in-law (the husband being dead), will go to the heirs of the husband and not in accordance with the general order of succession laid down in sub-s(1).

(5) In case of female intestate dying without issue property inherited by her from her husband or father-in-law (the husband being dead), will go to the heirs of the husband and not in accordance with the general order of succession laid down in sub-s(1).

Propositions (3), (4) and (5) above state the special order of succession, which is confined only to property acquired by the female intestate from the specified sources. Proposition (2) is the obvious corollary to the statement of law in the whole section."

[Emphasis added]

[Refer Mulla- Principles of Hindu Law, 20th Edn., Vol-II]

Considering the facts of the present case, it is apparent that Proposition-(2) quoted above would be applicable.

12.11. Now, the question is, whether the words "son" or "daughter", etc. mentioned in the proposition can include son and daughter begotten by the widow through her remarriage.

12.12. In **Mulla** (supra) it is held that the expression 'son' used in Entry (a) has not been defined in the Act. It includes both a natural son and a son adopted in accordance with the law relating to adoption among Hindus in force at the time of the adoption. In case of a female intestate who had remarried after the death of her husband or after divorce, her sons by different husbands would all be her natural sons and entitled to inherit the property left by the female Hindu regardless of the source of the property. Further, the rules relating to a „son" stated above apply mutatis mutandis to the case of a „daughter". Thus, the legal position that emerges is, a widow succeeding to the property of her husband without having any issue from such marriage inherits the property as an absolute owner. Subsequent remarriage does not and cannot divest her from such absolute ownership. In case she dies intestate without any issue then the situation described under clause (b) of Sub-Section (2) of Section-15 would apply. In other words, devolution of the property would depend upon the source on which it was acquired and in case the property was inherited by the female Hindu from her husband or from her father-in-law, it would devolve upon the heirs of the husband. Similarly, if she dies intestate without any issue, any property inherited by her from her father or mother would revert to the heirs of her father. But the situation would be totally different in case she has any issue, which is a situation described under Proposition-(2) referred to in Mulla quoted above. If the argument of Shri Rath would be accepted, it would render the provision under Section 14 redundant. Further, the legal proposition that "son-daughter" includes natural son, adopted son and sons/daughters by different husbands would also be nullified. This is obviously not the intendment of the legislature as reflected in the statute.

12.13. This Court is, therefore, of the considered view that the issue in the present case turns entirely on the fact that Sumitra, after death of her husband-Prahallad, had remarried Rameswar and she died leaving behind her only child Arnapurna

(plaintiff). Therefore, there is no way, by which Arnapurna could be deprived of or held disentitled to the property of her mother. It is reiterated at the cost of repetition that had Sumitra died without any issue from her second marriage, then the matter would have been entirely different. This has also been explained in Mulla (supra) in the following words:-

> ***"Female intestate who had remarried***
>
> *Where a female intestate had remarried after the death of her first husband, the „heirs of the husband" would be the heirs of the second husband, who if alive at the time of the death of the intestate would himself have been entitled to succeed as her husband under Entry (a). Therefore, so far as the expression 'heirs of husband' relates to the general order of succession laid down in subs (1), the heirs contemplated in Entry (b) must be the heirs of the last husband, that is of the person whose widow the intestate was at the time of her death*.
>
> The position, however, is quite different in respect of a case governed by cl (b) of sub-s (2) which has the effect of laying down a special order of succession under which in case of a female intestate who dies without issue, the property inherited by her from her husband or father-in-law does not devolve upon the order of heir or heirs referred to in sub-s (1) in the order specified therein, but upon the heirs of the husband. It follows from the context that the heirs of the husband mentioned in sub-s (2) (b) are not the heirs of the husband she had married after the death of her first husband, but heirs of 'the husband' whose property she had inherited as his widow; and in case of property inherited from her father-in-law which could only be as the widow of a predeceased son, the heirs there contemplated are heirs of 'the husband' from whose father she inherited the property. Therefore, in respect of property that the intestate might have inherited from her first husband or the father of the first husband as the widow of a predeceased son, such property will, in case of her dying without issue, devolve upon the heirs of that husband. In such a case, the heirs of the second husband cannot succeed to the property of the intestate so inherited by her. Reference may be made to cl (b)."
>
> **[Emphasis added]**

13. Now, this Court shall proceed to discuss the applicability or otherwise of the judgments cited by both parties.

13.1. In the case of ***Bhagat Ram (Dead) v. Teja Singh,*** (2002) 1 SCC 210, cited by Shri Rath, the Supreme Court held as follows:-

> *8. We do not find any merit in the contention raised by the counsel for the respondents. Admittedly, Smt. Santi inherited the property in question from her mother. If the property held by a female was inherited from her father or mother, in the absence of any son or daughter of the deceased including the children of any predeceased son or daughter, it would only devolve upon the heirs of the father and, in this case, her sister Smt Indro was the only legal heir of her father. The deceased Smt Santi admittedly inherited the property in question from her mother. It is not necessary that such inheritance should have been after the commencement of the Act. The intent of the legislature is clear that the property, if originally belonged to the parents of the deceased female, should go to the legal heirs of the father. So also under clause (b) of sub-section (2) of Section 15, the property inherited by a female Hindu from her husband or her father-in-law, shall also under similar circumstances, devolve upon the heirs of the husband. It is the source from which the property was inherited by the*

> *female, which is more important for the purpose of devolution of her property. We do not think that the fact that a female Hindu originally had a limited right and later, acquired the full right, in any way, would alter the rules of succession given in sub-section (2) of Section 15.* ***[Emphasis added]***

This Court fails to understand as to how the cited case would be applicable to the present case inasmuch as there can be no quarrel with the proposition laid down therein that the source from which the widow inherits the property is always important and that would govern the situation. But then, the Supreme Court has distinguished the case of a female Hindu dying intestate without any issue. Further, in holding so, the Supreme Court has referred to the reasons given by the Joint Committee of the Rajya Sabha as per Clause-17 of the Bill while introducing sub-section (2) of Sec.15, which is quoted herein below:-

> *"While revising the order of succession among the heirs to a Hindu female, the Joint Committee have provided that, properties inherited by her from her father reverts to the family of the father in the absence of issue and similarly property inherited from her husband or father-in-law reverts to the heirs of the husband in the absence of issue. In the opinion of the Joint Committee such a provision would prevent properties passing into the hands of persons to whom justice would demand they should not pass."*

It is evident that the situation contemplated is that of a widow dying intestate, but without any issue. In such a situation, the property would obviously revert back to the legal heirs of the original holder. Shri Rath has tried to draw much mileage out of the observation of the Joint Committee that the provisions would prevent properties passing into the hands of the persons to whom justice would demand they should not pass, which is stated by the Supreme Court in the following words:-

> *"……Otherwise persons who are not even remotely related to the person who originally held the property would acquire rights to inherit that property. That would defeat the intent and purpose of sub-section (2) of Section 15, which gives a special pattern of succession."*

As already stated, this observation would not take within its ambit a case where there are children of the widow begotten out of her remarriage, because, then Sec.14 would come into play, as already discussed in detail herein before. In fact, the observations do not at all relate to the case of a widow remarrying and begetting children thereby.

13.2. In the case of ***Smt. Dhanistha Kalita*** (supra), a learned Single Judge relied upon the aforementioned observations of the Supreme Court in the case of ***Bhagat Ram*** (supra) to hold that notwithstanding the fact that as female Hindu becomes a full-fledged owner of the property inherited by her from her husband, the property, on her death, will pass-over and devolve upon, only those sons and daughters, whom she had begotten from her husband, whose property she had inherited and if there is no such issue or if such issue is not alive, then, the property instead of devolving upon the sons or daughters whom she might have begotten from another person as husband, will devolve upon the heirs of her deceased husband whose property she had inherited.

In view of what has been discussed herein before, this Court respectfully disagrees with the above proposition as in the considered view of this Court, such an interpretation would amount to restricting the meaning of the words "son" and "daughter" used in Entry (a) of subsection (1) of Sec.15. (Once again reference can be made to the Proposition (2) of Mulla (supra) quoted and discussed earlier in this judgment.)

13.3. The decision rendered in ***Lachman Singh v. Kirpa Singh***,[6], will also not be applicable to the facts of the case, for the reason that in the said case the question was decided in relation to a stepson, who obviously cannot be equated with a natural born son of the widow albeit from her second marriage.

Nevertheless, in the said judgment it has been clarified that the word "son" in clause (2) of Sec.15 of the Act includes (i) sons born out of the womb of a female by the same husband or by different husbands, including illegitimate sons too, in view of Sec.3(i) of the Act; and (ii) adopted sons who are deemed to be sons for the purposes of inheritance.

Similar view was taken by a Coordinate Bench of this Court in the case of ***Sashidhar Barik & others V. Ratnamani Barik & another***.,[7].

14. Coming to the judgments relied upon by learned Senior Counsel Shri Rao, it is seen that in the case of ***Gajodhari Devi v. Gokul & Anr.***[8] ***: Punithavalli Ammal v. Minor Ramalingam and another***[9] decided by the Supreme Court and the case of ***Harabati and others v. Jasodhara Debi and others***[10] : ***Khageswar Naik v. Domuni Bewa***[11] decided by this Court and the case of ***Jagdish Mohton v. Mohammed Elahi***[12] ***: Chando Mahtain v. Khublal Mahto and ohters***[13] decided by Patna High Court, the proposition laid down is that the rights conferred on a Hindu female under Sec. 14(1) of the Act are not restricted or limited in any manner and that such rights cannot be lost merely on her remarriage with some other person.

15. It would also be useful to refer to the observations of the Supreme Court in the case of ***Cherotte Sugathan v. Cherotte Bharathi***,[14] that the Hindu Succession Act, 1956 brought about a sea change in the Shastric Hindu Law and that Hindu widows were brought on equal footing in the matter of inheritance and succession along with the male heirs.

16. **Conclusion:**

Thus, from a conspectus of the analysis of the facts of the case, the provisions of law involved and the discussion made thereon, it is evident that the right of a female Hindu widow to succeed to the property of her deceased husband is absolute and cannot be restricted in any manner including the fact of her remarriage. In the event of the widow dying intestate without any issue, the provisions of sub-section (2) of Sec.15 would apply. But in the event the widow has remarried and

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6. (1987) 2 SCC 547 **7. OLR 2014 Ori 202** **8. AIR 1990 SC 46**
9. AIR 1970 SC 1730 **10. AIR 1977 Ori. 142** **11. AIR 1989 Ori.10**
12. AIR 1973 Patna 170 **13. AIR 1983 Patna 33** **14. AIR 2008 SC 1467**

dies leaving behind children begotten out of the remarriage, the property succeeded by her from her husband of the first marriage would devolve on her children begotten out of the second marriage as her legal heirs, provided she was issueless from her first marriage. Perusal of the impugned judgment would reveal that the trial Court appears to have considered the matter correctly from the perspective of absolute ownership of the female Hindu as per Sec.14 of the Act, but the First Appellate Court, without considering the subtle distinction in facts of the case, somewhat mechanically held that such a widow loses her absolute right because of her remarriage.

17. Another important aspect that needs mention is, the claim of defendant no.1 of being the adopted son of Sumitra has been rejected by both the Courts below. Such concurrent finding of the Courts below has become final in the absence of any appeal being preferred by defendant No.1 against such finding. Apparently, defendant No.1 appears to have confined his claim presently as one of the legal heirs of the first husband of Sumitra being the nephew of Prahallad. As discussed above, his claim has no legs to stand. This Court, therefore, holds that the First Appellate Court committed manifest error in partly reversing the judgment and decree passed by the trial Court.

18. In the result, the appeal succeeds and is, therefore, allowed. The judgment and decree passed by the First Appellate Court is hereby set aside. The judgment and decree passed by the trial Court is hereby confirmed.

Headnotes prepared by :
Shri Pravakar Ganthia, Editor-in-Chief

Result of the case :
Appeal allowed – Judgement and decree of the trial Court confirmed. Judgement and decree of the First Appellate Court set aside.

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2024 (III) ILR-CUT-802

SANJUKTA DALAI
V.
STATE OF ODISHA & ORS.

(W.P.(C) NO. 21780 OF 2018)

9 OCTOBER 2024

[SASHIKANTA MISHRA, J.]

Issues for Consideration

The petitioner in the present writ petition challenges the order passed by the ADM in appeal, whereby the appointment of Anganwadi Worker was set aside and also to quash the enquiry report submitted by the RDC.

Headnotes

CONSTITUTION OF INDIA, 1950 – Arts. 226 – Power of Writ Court – Interference to the pure findings of fact as in exercise of jurisdiction under Art. 226 of the Constitution of India – When warranted? (Para 12)

Held: The Writ court can interfere where a fact finding authority acts upon a view of the facts which cannot reasonably be entertained, or the facts found are such that no person acting judicially and properly instructed in law could have found. (Para 13)

Citation Reference

University of Mysore v. C. D. Govinda Rao & Anr., **AIR 1965 SUPREME COURT 491**; Km. Neelima Misra v. Dr. Harinder Kaur Paintal & Ors., **AIR 1990 SUPREME COURT 1402**; G. Veerappa Pillai, Proprietor, Sathi Vilas Bus Service, v. Raman & Raman Ltd., **AIR 1952 SUPREME COURT 192;** T. C. Basappa v. T. Nagappa & Anr., **AIR 1954 SUPREME COURT 440**; Nagendra Nath Bora and Anr., v. Commissioner of Hills Division & Appeals, Assam & Others, **AIR 1958 SUPREME COURT 398;** Kaushalya Devi v. Bachittar Singh, **AIR 1960 SUPREME COURT 1168;** Dharangadhara Chemical Works Ltd v. State of Saurashtra & Ors., **AIR 1957 SUPREME COURT 264 – reffered to**.

List of Acts

Constitution of India, 1950

Keywords

Findings of facts, Interference by the Writ Court.

Case Arising From

Order dated 16.08.2018 passed by the Addl. District Magistrate in Anganwadi Misc. Appeal No. 5 of 2012.

Appearances of Parties

For Petitioner : M/s. Sudhanshu Sekhar Pratap, G.C. Paikaray & B. Samal
For Opp. Parties : Mr. S.N. Pattnaik, AGA & M/s. Mr. B.K.Bal & M.K. Pradhan

Judgment/Order

Judgment

SASHIKANTA MISHRA, J.

The petitioner filed this writ application originally challenging the order dated 16.08.2018 passed by the Addl. District Magistrate, Kendrapara in Anganwadi Misc. Appeal No. 5 of 2012 whereby her selection and engagement as Anganwadi Worker of Khannagar (Majhipada) Mini Anganwadi Centre was set aside. During pendency of the writ application, the Revenue Divisional Commissioner (Central

Division) having submitted an enquiry report on 28.06.2024 pursuant to direction of this Court, the petitioner amended the writ application to challenge the said enquiry report seeking quashment of the same.

2. Though much has been pleaded and argued by the parties, the facts of the case in fact, lie in a narrow compass.

3. An advertisement was issued by the C.D.P.O., Derabish on 16.12.2009 inviting applications for engagement of Mini Anganwadi Worker of Khannagar (Majhipada) Mini Anganwadi Centre. The petitioner and the private opposite party No.5 were applicants. In the selection process that followed, the petitioner having secured highest mark was selected and accordingly engaged as Mini Anganwadi Worker as per order dated 13.03.2012 by the C.DP.O., Derabish, pursuant to which she joined on 20.03.2012. The private opposite party No.5 challenged the selection of the petitioner by filing an appeal before the A.D.M., Kendrapara being Anganwadi Misc. Appeal No. 5 of 2012 on the ground that the Anganwadi Centre was established only for village Khannagar but the C.D.P.O., Derabish tampered the notification dated 16.12.2009 to insert the name of village Majhipada therein. The ADM, Kendrapara by order dated 24.10.2013, accepted the contention of the appellant and held that the petitioner had fraudulently managed to get herself engaged as Mini Anganwadi Worker. The petitioner therefore, approached this Court in W.P.(C) No.27122 of 2013 challenging the order of the ADM. After issuance of notice of the writ application, the ADM and CDPO jointly filed a counter affidavit admitting that the Centre was created for both Khannagar and Majhipada village and the petitioner being a resident of Majhipada and having secured highest mark had rightly been appointed. This Court directed the Collector vide order dated 21.07.2015 to submit a report regarding the service area of Mini Anganwadi Centre. The Collector submitted report on 18.08.2015 but the issue remained unresolved. Ultimately, by order dated 15.01.2018, the writ application was disposed of setting aside the order of ADM and by directing him to reconsider the appeal and to consider the report of the Collector. The ADM again heard the appeal and by order dated 16.08.2018 allowed the same by holding that the centre was established only for Khannagar but not for Majhipada. Further, considering the confusion regarding the area for which the Mini Anganwadi Centre was established, this Court by order dated 29.04.2024 passed in the present case directed the RDC (Central Division), Cuttack to conduct an enquiry and submit a report. The RDC in his report dated 28.06.2024, held that the service area of the centre is only for Khannagar and not for both Khannnagar and Majhipada. According to the petitioner, the report of the RDC is contrary to the records maintained in the original file. As such, she seeks the following relief in this writ application:

> *"Under the facts and circumstances of the case the petitioner prays that this Hon'ble Court may graciously be pleased to admit this writ application, call for the records and after hearing the parties be pleased to quash order dated 16.08.2018 passed by ADM, Kendrapara in Anganwadi Misc. Appeal No. 05/2012 at Annexure-1 and enquiry report*

dated 28.06.2024 passed by RDC Central Cuttack at Annexure-10 for the interest of justice.

And pass such orders/directions as deemed fit and proper in the facts and circumstance of the case.

And for which act of your kindness the petitioner as in duty bound shall remain ever pray."

4. The stand of the opposite parties as reflected in the counter is that the Collector, Kendrapara in pursuance of the direction of this Court directed the DSWO, Kendrapara and C.D.P.O., Derabish to conduct joint field enquiry into the village hamlet Majhipada. Basing on their joint enquiry report, the Collector submitted the report indicating that Majhipada is a hamlet village of Artamula revenue village and Khanangar is a separate revenue village. Further the hamlet village Majhipada is not coming under the periphery of Khannagar Mini Anganwadi Centre.

5. The petitioner filed a rejoinder questioning the correctness of the report of the Collector on the ground that the enquiry had been conducted without verifying the advertisement dated 16.12.2009 and other documents as also without contacting the local people.

6. Counter affidavit has also been filed by the private opposite party No.5 stating therein that the original notification was only for Khannagar village but the CDPO and other officials knowingly tampered the notification dated 16.12.2009.

7. Heard Mr. S.S. Pratap, learned counsel for the petitioner, Mr. S.N. Pattnaik, learned Addl. Government Advocate for the State and Mr. B.K. Bal, learned counsel appearing for the private opposite party No.5.

8. Mr. S.S. Pratap, learned counsel for the petitioner would argue that the original file containing the notification clearly shows that the advertisement was for Khannagar (Majhipada) Mini Anganwadi Centre with initial of somebody. Both the ADM as well as the RDC have on misconception held that it was a case of tampering. Since the tampering was never conclusively proved, the original notification and documents maintained in the original file ought to have been accepted as correct. The report of the RDC, according to Mr. Pratap, should therefore, not be accepted.

9. Mr. S.N. Pattnaik, learned AGA would argue that it has been clearly proved time and again that Majhipada and Khannagar are two separate villages though situate nearby. The report of the RDC is comprehensive and clearly shows that Majhipada is not included in Khannagar. Even ignoring the question of tampering of the original notification, fact remains that the Collector, Kendrapara had approved the setting up of two Mini Anganwadi Centres namely, Khannagar and Arthamula-A, of which Majhipada is a part but Khannagar is a separate village. According to Mr. Pattnaik, therefore, the ADM has rightly directed disengagement of the petitioner.

10. Mr. Bal, learned counsel for the private opposite party No.5 also makes similar arguments as the State Counsel and in addition submits that the petitioner being a resident of Majhipada cannot be treated as a resident of service area of the Mini Anganwadi Centre in question.

11. As already stated, the writ application was filed originally challenging the order passed by the ADM on 16.08.2018. Subsequently, by way of amendment the petitioner was permitted to challenge the enquiry report submitted by the RDC. From the rival pleadings and contentions advanced before this Court it is evident that the entire case revolves around the question as to whether Majhipada is included in the revenue village of Khannagar so as to be treated as a part of the Mini Anganwadi Centre for which notification was issued. The ADM, in the order impugned has elaborately discussed the matter basing on the joint enquiry conducted by the DSWO, Kendrapara and CDPO, Derabish. He also held that the name of the centre was manipulated and tampered at the instance of the CDPO, Derabish. Since the petitioner belongs to hamlet Majhipada under Artamula revenue village, the ADM held that she was not entitled to be engaged as Anganwadi Worker for the Centre notified. Perusal of the enquiry report submitted by the RDC(Central Division) also shows that the hamlet village of Majhipada is a part of Artamula revenue village and Khannagar is a separate revenue village. Further, basing on the statement of DSWO, Kendrapara as regards the area of operation of Anganwadi Centres and establishment of such centres on the basis of population of village, the RDC categorically held that Majhipada could not have been attached to Khannagar Mini Anganwadi Centre. The RDC appears to have referred to the trace map prepared by the R.I., Janara Barimul and the Poshan Tracker App to find that the children of Khannagar are only mapped to the Khannagar AWC area and Children of Majhipada are not attending Khannagar Mini Anganwadi Centre, neither in the past nor at present. Considering all the reports, statements, trace map, other documents and status of enrolment of children in various AWCs, the RDC held that it was proved that Majhipada is not a part of Khannagar Mini Anganwadi Centre area and in fact it could never been a part of the said Mini AWC area. It is evident that these are pure findings of facts arrived at by a senior Government Officer dealing with revenue matters. Obviously, he is in the best position to determine the controversy as it is within his domain to determine the area of revenue villages and to such extent the RDC can be treated as an expert in the subject. It is well settled that normally the courts should be slow to interfere with the opinions expressed by the experts as held by the Constitution Bench of the Supreme Court in the case of **University of Mysore v. C. D. Govinda Rao and another**[1]. It is well settled that it would normally be wise and safe for the courts to leave such decisions to experts who are more familiar with the problems they face than the Courts generally can be. Reference may be had to the judgment of the Supreme Court in the case of **Km. Neelima Misra v. Dr. Harinder Kaur Paintal and others**[2].

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1. AIR 1965 SUPREME COURT 491 2. AIR 1990 SUPREME COURT 1402

12. Nothing has been placed before this Court to demonstrate that the findings of the RDC are either perverse or not tenable in the eye of law. This Court sitting in writ jurisdiction would always be slow to interfere with pure findings of fact as in exercise of jurisdiction under Article 226 of the Constitution of India, this Court does not sit as a Court of appeal. This is a long settled position of law reiterated by the Supreme Court in a catena of decisions. Reference may be had to some of such judgments of the Supreme Court in this regard such as, **G. Veerappa Pillai, Proprietor, Sathi Vilas Bus Service, v. Raman and Raman Ltd**.[3]; **T. C. Basappa v. T. Nagappa and another**[4] and **Nagendra Nath Bora and another v. Commissioner of Hills Division and Appeals, Assam and others**[5]. Of course, if the findings are based on no evidence, the writ Court can interfere as was held in the case of **Kaushalya Devi v. Bachittar Singh**[6]. It is also trite law that if a finding of fact is fully unsupported by evidence or is based on surmises, conjectures or suspicions, the High Court may quash the same as was held by the Supreme Court in the case of **Dharangadhara Chemical Works Ltd v. State of Saurashtra and others**[7].

13. Thus, the position that emerges is, the writ court can interfere where a fact finding authority acts upon a view of the facts which cannot reasonably be entertained, or the facts found are such that no person acting judicially and properly instructed in law could have found.

14. In view of what has been stated hereinbefore, such is not the case at hand inasmuch as this Court is satisfied that the report of the RDC is based on his personal examination of the relevant documents/records, reports and statements made by the relevant persons. As already stated, nothing has been placed before this Court to justify taking a contrary view save and except the contention advanced to the effect that the report runs contrary to the original notification but then, in view of the categorical finding of the ADM as well as the RDC that the original notification was tampered with, the same is of no consequence.

15. Thus, from a conspectus of the analysis of facts, law and the discussion made thereon, this Court sees no reason to find fault with either the impugned order passed by the ADM (Annexure-1) or the impugned report submitted by the RDC (Annexure-10) so as to be persuaded to interfere in the matter.

16. Resultantly, the writ petition is held to be devoid of merit and is therefore, dismissed. There shall be no order as to costs.

Headnote(s) prepared by : *Result of the case :*
Shri Jnanendra Kumar Swain (Judicial Indexer) Writ Petition dismissed.
Verified by :Shri Pravakar Ganthia, (OSJS)(Editor-in-Chief)

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3. AIR 1952 SUPREME COURT 192 **4. AIR 1954 SUPREME COURT 440**
5. AIR 1958 SUPREME COURT 398 **6. AIR 1960 SUPREME COURT 1168**
7. AIR 1957 SUPREME COURT 264

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2024 (III) ILR-CUT-808

RANJAN PARIDA
V.
STATE OF ORISSA & ORS.

(W.P.(C) NO.12466 OF 2022 & BATCH)

04 NOVEMBER 2024

[A.K.MOHAPATRA, J.]

Issue for Consideration

Should the case of petitioners be considered as per 2021 Order?

Headnotes

ORISSA POLICE SERVICES (METHOD AND RECRUITMENT AND CONDITIONS OF SERVICE OF CONSTABLES) ORDER 2010 r/w 2021 Order issued vide notification dated 08.06.2021 – The 2010 Order provides that each year the written willingness of sepoy/constable will be received through the commandant at concerned SAP headquarters by 31st January for consideration of their redeployment – The petitioners were eligible since 2017 and for no reason whatsoever is coming forth from the concerned Opp. Party authorities as to why their names were not sent for consideration for redeployments – The said 2010 Order by providing a time stipulation confers a right upon the petitioner to be considered for redeployment in the district cadre – In the meantime amended Order 2021 came into force incorporating additional disqualification criteria – Whether the case of petitioners should be considered as per 2021 order.

Held: No – The proposition of law with regard to filling up of the vacancies arising prior to the rules were amended, by applying the amended rules, would not be applicable in the present case, inasmuch as the Government was under a statutory obligation to fill up such vacancies in a time bound manner as has been laid down in the relevant Order of 2010. (Para 42)

Citation Reference

State of Tripura & Ors. vs. Nikhil Ranjan Chakraborty & Ors., **(2017) 3 SCC 646**; Gelus Ram Sahu & Ors. vs. Dr. Surendra Kumar Singh & Ors., **(2020) 4 SCC 484**; Rajendra Kumar Agrawal vs. State of Uttar Pradesh & Ors., **(2015) 1 SCC 642**; Y.V.Rangaiah vs. J.Sreenivasa Rao, **(1983) 3 SCC 284**; Deepak Agarwal vs. State of UP, **(2011) 6 SCC 725**; State of Himachal Pradesh & Ors. vs. Raj Kumar & Ors., **(2023) 3 SCC 773**; Union of India vs. Krishna Kumar, **(2019) 4 SCC 319 – referred to.**

List of Acts

Orissa Police Services (Method and Recruitment and Conditions of Service of Constables) Order 2010 r/w Amended Order of 2021.

Keywords

Re-deployment, Applicability of amended Rule in case of vacancies of the pre- amendment.

Case Arising From

Challenging the notice No. 2877 dated 08.07.2021 issued by the Special Director General of Police, SAP Opposite Party No.2.

Appearances of Parties

For Petitioner : Mr. Bigyan Kumar Sharma
Mr. S.N. Patnaik
Ms. Kananbala Roy Choudhury
Mr.Mihir Kanta Rath
Mr. Bipin Kumar Nayak

For Opp.Party : Mr.Saswat Das, A.G.A.

Judgment/Order

Judgment

A.K. MOHAPATRA, J.

1. Since the batch of abovenoted writ applications involve a common facts and law, such writ applications were heard together and is being disposed of by the following common judgment.

2. The above-named petitioners, who are serving as constables/sepoys in OSAP, 8th Battalion, Chhatrapur, have approached this Court by fling the abovenoted writ applications thereby challenging the notice No.2877 dated 08.07.2021 issued by the Special Director General of Police, SAP Opposite Party No.2 to various authorities for redeployment of Sepoys/Constables in the district police in the year 2021. The petitioners have specifically challenged a single clause, which is nothing but a disqualification clause, incorporated in the aforesaid notice, on the ground that there is no stipulation in that regard in The Orissa Police Services (Method of Recruitment and Conditions of Service of Constables) Order, 2010 (herein referred to as the "OPS order, 2010") as on 01.01.2021. The petitioners have also challenged the conduct of the Opposite Parties in rejecting their claims for redeployment.

3. For sake of brevity, the facts narrated in W.P.(C) No.12466/2022 is being taken up for analysis of the factual background of the petitioner's case by treating the said matters as the lead matter in the present batch of writ applications.

4. The factual matrix involved in the present writ application, in a nutshell, is that the post of Constable in Civil Police of each Police District shall construe a separate cadre for the purpose of the recruitment, seniority and promotions. The post

in the district cadres shall be filled up by direct recruitment from open market as per the OPS order, 2010. The said order also provides that the State Government may from time to time fill up 20% vacancies in a recruitment year by redeployment of regular Sepoys and Constables in service of Armed Police Sepoys/Constables. While this was the legal position as per the OPS order 2010, the Special Director General of Police, State Armed Forces requested various authorities in the State to send nominations of willing Sepoys/Constables belonging to their battalion/units, who have completed 15 (fifteen) years of service and attained 40 years of age as on 01.01.2021 along with written willingness and option in order of preference for consideration of their cases for redeployment as constable in the district police. The notice dated 08.07.2021 reveals that there were 3018 vacancies in different districts in respect of the year 2021.

5. Clause (C) of the Notice No. 2877 dated 08.07.2021, which has been filed as Annexure-1 to the present writ petition, stipulates the following condition:

> *"(C) The commandant may indicate major/minor punishments of willing Sepoy/ Constable correctly and also intimate up-to-date status of departmental proceeding/ criminal proceedings/vigilance case/ Human Rights Protection cell related cases as on 01.01.2021."*

Similarly, clause 5(1A)(a) of Orissa Police Services (Method of Recruitment and Conditions of Service of Constables) Order, 2010, vide notification No.57063/D & A, Bhubaneswar dated 23.10.2010, provides as follows:

> *"A sepoy/constable in order to be eligible for consideration for redeployment must have completed 15 years of service and attained the age of 40 years as on 1st day of January of the year in which "Redeployment" is to be made".*

Further, the other sub clause (b) of the aforesaid clause 5(1A) provides for constitution of a Selection Committee for consideration of redeployment of Constables/Sepoys.

6. While the above indicated parameters were the established legal position, the State Government vide notification No.20586 dated 08.06.2021 issued the Odisha Police Service (Method of Recruitment and Conditions of Service of Constables) Amendment Order, 2021. The aforesaid notification provides that the said amendments shall come into force on the date of their publication in the official gazette. The amendment introduced in the year 2021 provides as follows:

> *2. In the Odisha Police Service (Method of Recruitment and Conditions of Service of Constables) Order 2010, in the order 5(1A) (a), after the words "is to be made" occurring at the end, the following shall be added, namely;*
>
> *"Subject to the condition that he has not been inflicted with any major punishment or more than 5 (Five) minor punishments to his discredit during his entire service career and no Departmental Proceeding or Criminal Proceeding or Vigilance case or Human Rights Protection Cell related case shall be pending against him.""*

7. Further, clause 5(1A)(c) of OPS order 2010 provides that each year the written willingness of Sepoy/Constable will be received through the commandant at

concerned SAP headquarters by 31st January for consideration of their redeployment. The Opposite Parties purportedly relying on notification dated 08.06.2021 under Annexure-2, incorporated clause "C" in the impugned notice under Annexure-1 to the writ application. Thereafter, the petitioner had offered his written willingness and option for redeployment as constable in Chhatrapur, Ganjam, Berhampur, SRP Cuttack, Commissionerate of Police and Khurda Districts. A copy of the willingness from the petitioner, dated 11.07.2021, has also been filed under Annexure-3 to the writ application. However, it appears that the case of the petitioner was not considered on the ground that the petitioner had one black mark which is a major punishment to his discredit and the petitioner had also suffered a punishment of censure.

8. A perusal of the record reveals that earlier the petitioner had approached this Court by filing W.P.(C) No.23694 of 2021, wherein he had challenged the rejection of his (petitioner's) willingness for redeployment as a Constable in the district cadre. This Court vide order dated 26.08.2021 was pleased to dispose of the said writ petition with an observation that this Court was not inclined to entertain the writ petition since the cause of action for filing the writ application had not yet arisen. However, while disposing of the writ application, liberty was granted to the petitioner to approach the appropriate forum as and when the cause of action arises.

9. The present writ application further reveals that in the meantime the Opposite Parties, vide order dated 30.07.2021, have published a list of 396 Sepoys/Constables who were selected for redeployment pursuant to the notice dated 08.07.2021. A copy of such list has been annexed as Annexure-4 to the writ application. A perusal of the list under Annexure-4 reveals that out of the total vacancies, i.e. 120, 101, 34, 417 and 64, in respect of Chhatrapur-Ganjam, Berhampur SRP, Cuttack Commissionerate of Police and Khurda District respectively, a total number of 10, 19, 09,160 and 15 posts respectively were filled up.

10. Mr. B.K.Sharma, learned counsel representing the petitioner at the outset contended that the conduct of the Opposite Parties in refusing to consider the case of the petitioner is highly illegal, arbitrary, and smacks of malafide on the part of the Opposite Party-Authorities. He further contended that the principal issue involved in the present writ application, which is required to be examined by this Court, is as to whether the amendment to the OPS order, 2010 on 08.06.2021 can be applied to the redeployment of Constables/Sepoys in respect of the vacancies which had arisen prior to 08.06.2021?

11. In reply to the aforesaid issue, Mr. Sharma, learned counsel for the petitioner submitted that clause 5(1A)(c) of the OPS order, 2010 provides that each year the written willingness of Sepoys/Constables are to be called for and is received through the commandant concerned at SAP headquarters by 31st January for consideration of their redeployment. The same further provides that the selection process and issuance of redeployment order may preferably be completed before

March of every year. In such view of the matter, learned counsel for the petitioner further contended that the conduct of the Opposite Parties in preparing the list, on the basis of notice dated 08.07.2021 in respect of the recruitment year 2021, is absolutely illegal and an arbitrary exercise of the authority vested in the Opposite Parties by the OPS order, 2010. He further contended that the Opposite Parties were under a legal obligation, in view of the order 5(1A)(a) of the OPS order, 2010, to prepare the list by end of January of the year 2021, and the entire process, culminating in the issue of the redeployment order, should have been completed by end of March, 2021. He further asserted that as per the pre-amendment Rule, the petitioner was eligible for being considered for redeployment. It was also contended that the vacancies which had occurred prior to the date on which the Amended Rules came into force would be governed by the old rules and not by the later notified amended rules. In order to support his argument, learned counsel for the petitioner referred to the judgment of the Hon'ble Supreme Court in ***State of Tripura and Others vs. Nikhil Ranjan Chakraborty and Others*** reported in ***(2017) 3 SCC 646***.

12. Mr. Sharma, learned counsel for the petitioner, next argued that the impugned notice seeks information about major/minor punishments as well as information with regard to the willingness of the Sepoys/Constables as on 01.01.2021. Thus, it was contended that as on 01.01.2021 there was no such disqualification clause in OPS order, 2010. He further contended that in view of the un-amended OPS order, 2010 a valuable right had accrued in favour of the petitioner for consideration of his case for redeployment as per the existing provisions of the OPS order, 2010. Moreover, the entire exercise is statutorily to be over by March of 2021. Thus, it was argued that the amendment, brought vide notification dated 08.07.2021, under Annexure-1 to the present writ, will not be applicable to the petitioner and similarly situated other persons. He further contended that the disqualification clause which was brought subsequently by the amendment could not have been given effect to retroactively. As such, it was contended that the list for redeployment of Sepoys/Constables should have been prepared solely on the basis of the statutory rule that was prevailing on 01.01.2021.

13. Learned counsel for the petitioner would further argue that clause 5(1A) read with clause 5(1A)(f) clearly stipulates that the selection process and the issuance of the redeployment order was to be completed before March every year. In the aforesaid context, he further argued that the above referred provisions of the OPS order, 2010 imposes a responsibility/statutory obligation on the Opposite Parties to complete the selection process within the timeframe as stipulated by the statutory order itself. Further, referring to the facts of the present case, it was also contended that in respect of vacancies of the year 2021, neither the willingness was sought for by 31st January nor was the redeployment process concluded by March 2021. On such grounds, learned counsel for the petitioner submitted that the case of the petitioner and similarly situated other persons should have been considered strictly in terms of the provisions contained in the OPS order, 2010.

14. Furthermore, learned counsel for the petitioner referring to the order 5(1A)(c) and 5(1A)(a) contended that the amended rules should have been made applicable to the redeployment of Sepoys/constables beyond 08.06.2021. So far the redeployment prior to 08.06.2021 is concerned, the same should have been considered in terms of the pre-amendment rule, as a vested right which had already accrued in favour of the petitioner, could not have been taken away by enacting new laws with retrospective effect and that the statutory rules should not be allowed to be tinkered with in such a manner which would result in any discrimination or violation of any constitutional right. To buttress his arguments further, the learned counsel for the petitioner referred to the judgment of the Hon'ble Supreme Court in ***Gelus Ram Sahu and others vs. Dr. Surendra Kumar Singh and others*** reported in (***2020) 4 SCC 484***.

15. Learned counsel for the petitioner further contended that had the authorities been more careful and alert, they would have taken steps in a time bound manner as has been provided in the OPS order, 2010. Thus, the entire process of redeployment could have been concluded before end of March, 2021 as mandated in order 5(1A)(f). In such an eventuality, the petitioner's case would have definitely been considered favourably as the petitioner was complying with the terms and conditions as prescribed in the statutory rules. He further submitted that had the process been concluded as mandated in the statutory rules, the anomaly regarding the application of the notification under Annexure-1 to the Petitioner's case would not have arisen in the first place. In the aforesaid context, learned counsel for the petitioner further argued that owing to the delay and latches on the part of the concerned authorities in carrying out the provisions of the statutory rules, the petitioner and similarly situated other persons have been made to suffer.

16. It was also argued that merely because of the latches and delay on the part of the Opposite Parties to conclude the redeployment process before end of March, 2021, a valuable right, which had already accrued in favour of the petitioner and similarly situated other persons, could not be taken away merely by applying the disqualification clause which was brought into the statue book by virtue of the subsequent amendment. While concluding, learned counsel for the petitioner argued that the considerable delay in performing the statutory obligation by the Opposite Parties had resulted in the exclusion of the petitioner from the zone of the consideration. In the aforesaid context, learned counsel for the petitioner referred to the judgment Hon'ble Supreme Court in ***Rajendra Kumar Agrawal vs. State of Uttar Pradesh and others*** reported in ***(2015) 1 SCC 642***.

17. The conduct of the Opposite Parties was also assailed by the learned counsel for the petitioner on the ground of arbitrariness and discrimination. In that regard learned counsel for the petitioner brought to the notice of this Court the fact that the list dated 30.07.2021 under Annexure-4 contains, as per the knowledge of the petitioner, as many as three names, i.e. Biswa Ranjan Acharya, Sudhira Kumar Panigrahi and Purna Ch. Behera at serial No.140, 150 and 151 respectively, who

'were redeployed in Nayagarh, Cuttack and Khorda district respectively, despite having vigilance cases pending against them.

18. A counter affidavit has been filed on behalf of the Opposite Party No.3 i.e. Commandant 8th Battalion, OSAP, Chhatrapur. In the counter affidavit apart from making a formal objection, the Opposite Party No.3 has stated that the disqualification contained in notification dated 08.06.2021 was published in the Official Gazette on 18.06.2021 which is prior to the commencement of the order of redeployment issued on 30.07.2021. The Counter Affidavit further reveals that the proposal seeking willingness from Sepoys was sought for vide letter No.2877 dated 08.07.2022. Before proceeding further, this Court would like to observe that the date 08.07.2022 has erroneously been mentioned in Para-11 of the counter. However, later in the same paragraph it has been reiterated that the willingness was sought only after the OPS order 2010 was amended vide notification dated 08.06.2021. In Para-12 of the counter affidavit the amended clause, i.e. the disqualification clause, has been reproduced. The said clause stipulates that if the police personnel are having any Major punishment or more than 5 (five) Minor punishments to their discredit during their entire service career or any criminal/departmental/vigilance proceeding or HRPC related cases are found against the personnel, then his case shall not be considered for redeployment.

19. The counter affidavit of the Opposite Party No.3 further reveals that the Opposite Party No.3 has taken a stand that although the petitioner has laid emphasis on the OPS order, 2010, at the same time the petitioner has not referred to the letter dated 08.07.2021 and that no ground has been taken by the petitioner that the aforesaid notification is not in consonance with the OPS order, 2010. Similarly, with regard to the allegation of the petitioner that three Sepoys were issued with redeployment order despite such Sepoys having vigilance cases pending against them, the reply in the counter affidavit reveals that the commandant of the 1st India Reserve Battalion, Koraput has been requested vide letter No.1401/Hqrs dated 18.09.2022 to provide the relevant document/data and in reply to the aforesaid letter, the Commandant, vide letter dated 28.10.2022, has given information that the case is still sub-judice in the Court of Special Judge (Vigilance) Cuttack vide TR case No.23/2010. On perusal of the counter affidavit as well as letter under Annexure C/3 to the counter, this Court is not at all satisfied with such replies as to such serious allegation of discrimination made by the petitioner against the Opposite Parties.

20. Learned Additional Government Advocate representing the State-Opposite Party at the outset contended that all the Opposite Parties, including the State, have adopted the counter affidavit filed by the Opposite Party No.3. He further contended that the Opposite Parties while considering the cases of the eligible employees for redeployment in the district cadre have strictly followed the statutory rules. While elaborating upon hisargument, the learned Additional Government Advocate contended that admittedly the petitioner was having one black mark which is equal to a Major punishment and 5 (five) Minor penalties. The dispute involved in the

present writ application pertains to the vacancies of the year 2021. He further referred to the Odisha Gazette notification dated 8th June, 2021, under Annexure B/3 to the counter affidavit, to impress upon this Court that OPS order, 2010 was amended by OPS amended order 2021. The only amendment that is sought for through the amendment order 2021 is with regard to the provision contained in order 5(1A)(a). The aforesaid amendment, which came into force from the date of its Gazette publication on 18.06.2021, provides that the disqualification clause was suitably modified to incorporate the provision that in the event the Sepoy is having any Major punishment or more than 5 (five) Minor punishments to his discredit during his entire service career, such sepoys shall be disqualified.

21. He further contended that it is only after the amendment that the willingness was sought for vide letter dated 08.07.2021 as per Annexure-1 to the writ petition. Therefore, at the time of consideration, the amended rule was in force and accordingly, the cases of the Sepoys were considered. Since the petitioner was not found eligible, his case for redeployment has not been considered. In such view of the mater, learned Additional Government Advocate submitted that the Opposite Parties have not committed any illegality in not considering the case of the petitioner for redeployment. He further contended that in view of the settled legal position, the rules which are in force at the time of consideration of the case of employees shall be followed by the employer. Accordingly, it was contended by the learned Additional Government Advocate that the Opposite Parties have not committed any illegality in applying the amended rules to the case of the present petitioner. Therefore, no fault can be found in the conduct of the Opposite Parties in not considering the case of the petitioner for redeployment to the district cadre.

22. Heard Mr. Bigyan Kumar Sharma, learned counsel for the petitioner in the lead matter and other learned counsels for the petitioners in the connected writ petitions; and Saswat Das, learned Additional Government Advocate for all the Opposite Parties. Perused the pleadings of the respective parties as well as the materials placed on record and relied upon by the counsel appearing for both sides.

23. On a careful analysis of the factual background of the present case, this Court observes that the petitioners being aggrieved by the conduct of the Opposite Parties in not considering their cases for redeployment to the district cadre on the basis of the option given by them and further being aggrieved by the letter dated 08.07.2021 under Annexure-1 to the writ application, wherein the disqualification clause has been introduced for the first time basing upon OPS amendment order, 2021 which was published in the Official Gazette 18.06.2021, has approached this court seeking appropriate relief. The grievance of the petitioners and similarly situated other Sepoys is that although they are fulfilling the eligibility criteria which has been laid down in the OPS order, 2021 and have completed 15 years of service and have attained the age of 40 years as on 01.01.2021, their cases have not been considered for redeployment in the post of Sepoy/Constable in district cadre.

24. The further grievance of the petitioner is that although in view of the order 5(1A)(c) an obligation is cast upon the Opposite Parties to call for the willingness of Sepoys/Constables through the SAP headquarters by 31st of January for consideration of their redeployment, and in view of clause 5(1A)(f) the entire selection process was required to be completed before March of each year. However, such time stipulation in the statutory rule has not been adhered to by the Opposite Parties so far as the present petitioner and similarly situated other persons are concerned. Further, it is also the case of the petitioners that their cases are to be considered strictly in terms of the statutory rules i.e. OPS, order, 2010 and not in terms of the amendment to the said rule in the year 2021 which came into force subsequent to the point of time when the valuable right for being considered for redeployment had accrued in favour of the petitioner, in terms of the statutory rules, in the shape of OPS order, 2010.

25. Learned Additional Government Advocate on the other hand has taken a stand that the willingness was sought for only on 08.07.2021 and pursuant to such letter under Annexure-1, the petitioner and similarly situated other persons have submitted their willingness through the SAP headquarters. Therefore, at the time of the consideration of their cases the amended rule of the year 2021 was in force. Therefore, the case of the petitioner and similarly situated other persons, whose nomination was received pursuant letter dated 08.07.2021, can only be considered in the light of the amendment of the year 2021 to the OPS order, 2010 which came into force w.e.f. 18.06.2021.

26. Moreover, this Court, while adjudicating the batch of present writ applications and examining the rights and claims of the petitioners and similarly situated other persons, is required to first decide as to whether the petitioner's case is required to be considered under the pre-amended OPS order, 2010 or by taking into consideration the amendment to the said order which came into force on 18.06.2021? Before delving into the matter in detail, this Court would like to first examine the legal aspect of the matter. The petitioner claims that his right for redeployment, under the Orissa Police Service (Method of Recruitment and Conditions of Service of Constable) order, 2010, has been violated in the present case. The aforesaid order was notified by the Home Department, Govt. of Odisha on 23.12.2010. The Govt. of Odisha in the Home Department, in exercise of the power conferred by Section 2 of the Police Act, 1861 has enacted the aforesaid order. Therefore, the OPS order, 2010 is a subordinate legislation sub-servient to the Police Act, 1861. As such, there is absolutely no doubt that the same has a statutory flavour. On perusal of the aforesaid OPS order, 2010 this Court observes that order 5 was amended vide Gazette notification No.205 dated 24.01.2014 and on such amendment the new clause (1A) and ancillary sub-clauses were introduced to the order 2010. Order 5(1A)(a) provides as follows:

> *"a Sepoys/Constables in order to be eligible for consideration for redeployment must have completed 15 years of service and attained age of 40 years as on 1st day of January in the year in which the "redeployment" is to be made."*

Similarly clause (c) provides;

> *"each year the written willingness of Sepoys/Constables will be received through the commandants concerned are SAP headquarters by 31st of January for consideration of their redeployment".*

27. Further, Clause (1A)(f) of the said order 5, which is one of the main planks of the argument advanced by the learned counsel for the petitioner, provides as follows:

> *"the selection process and issue of redeployment order may preferably be completed before March of each year."*

28. On perusal of the order 5 of the OPS order, 2010, particularly the clauses which were brought into force vide Gazette notification dated 24.01.2014 and 16.01.2016, and are a part and parcel of order 5 dealing with the eligibility criteria, it can be seen that the said clauses stipulate the eligibility criteria for redeployment of Sepoys/Constables and provide for specific eligibility criteria for such redeployment. The Sepoy/Constable who has completed 15 years' of service and attained 40 years of age as on the 1st day of January of the year in which the redeployment is to be made, shall be considered for redeployment. Similarly clause (c) and clause (f) which were brought into the rule book by way of the amendment of the year 2014 and 2015, provide for time stipulation with regard to such redeployment.

Clause 5(1A)(a) of the OPS order, 2010 which has been quoted hereinabove was amended vide Home Department notification dated 08.06.2021, and the same came into force w.e.f. 18th June, 2021. The said amendment provides;

> *"subject to condition that he has not been inflicted any major punishment or more than 5(five) minor punishment to his discredit during his entire service career and no departmental proceeding or criminal proceeding or vigilance case or Human Rights Protection cell related cases shall be pending against him."*

29. In course of his argument learned counsel for the petitioner submitted that the proforma which has been appended to the letter dated 08.07.2021 under Annexure-1 stipulates a cutoff date and provides that the willingness is to be given in a particular format. Such format reveals that eligibility as provided in order 5(1A)(a) shall be considered by taking into consideration the cutoff date as 01.01.2021. Although the notice for supplying the willingness was issued on 08.07.2021 under Annexure-1, the eligibility criteria is required to be fulfilled by taking into consideration the cutoff date as on 01.01.2021. Therefore, there exists no doubt that the selection for redeployment in respect of the year 2021 and the vacancy position, which have been given district wise, appear to be up to 01.01.2021. The consent letter under Annexure-3 dated 11.07.2021, submitted by the petitioner, reveals that the petitioner was initially appointed as a Sepoy on 06.05.2002. As such, he had completed 15 years of service on 06.05.2017. Similarly, the date of birth of the petitioner has been shown to be 08.05.1977. Which implies

that the petitioner has also complied with the age requirement, i.e. he has attained 40 years of age on 08.05.2017.

Therefore, by May, 2017 the petitioner was eligible for redeployment in terms of order 5 of the OPS order, 2010. However, his case was not considered from May, 2017 to July, 2021 for the reasons that are best known to the authorities. No explanation whatsoever is coming forth from the side of the Opposite Parties for such delay in considering the case of the petitioner for redeployment to the district cadre. Moreover, letter dated 30.07.2021 under Annexure-4 reveals that the entire vacancy in the district cadre for the year 2021 was to be filled up by redeployment to the extent of 100% of vacancies in the rank of Constable. Such a decision was taken as a one-time measure by relaxing the provisions of Rule 4 (which provides for filing up of 20% vacancies) of the OPS order, 2010.

30. Learned counsel for the petitioner, in course of his argument referred to the judgment of the Hon'ble Supreme Court in ***Gelus Ram Sahu's Case*** *(Supra).* In the said judgment the Hon'ble Supreme Court was required to decide an issue as to whether retrospective changes in qualificatory requirements can affect the existing appointments. In reply to the said question, the Hon'ble Supreme Court has held that even if in a situation where the eligibility conditions are clarified from an anterior date, it may not be prudent to affect the appointments which had been made on the basis of a possible understanding of the eligibility conditions. While deciding the aforesaid question, the Hon'ble Supreme Court has further gone on to reiterate the law by observing that;

> *"this Court in a range of decisions including TR Kapur vs. State of Haryana reported in (1986) SCC 584, K. Ravindranath Pai vs. State of Karnataka reported in (1995) SUPP (2) SCC 246 and K. Narayanan vs. State of Karnataka (1994) SUPP (1) SCC 44 has opined that vested rights cannot be impaired by enacting law with retrospective effect and that such statutory rules ought not to result in any discrimination or violation of Constitutional rights."*

31. On a careful analysis of the argument advanced by the learned counsel for the petitioner, this Court has examined the OPS order, 2010, wherein, it is observed that, order 5 was amended in the year 2014 and 2015 by inserting clause (1A) and certain sub clauses. Sub Clause (c) and (f) specifically stipulate a time frame within which the willingness is to be received and the entire selection process, culminating in issuance of redeployment order, shall be concluded before March of the relevant year. On a careful analysis of the order 5 of OPS order, 2010 and subsequent amendment in the year 2014 and 2015, this Court is of the view that the law makers, in their wisdom, have incorporated the aforesaid two provisions in order to make the entire process time bound. However, as is evident from the case of the petitioner, although he was eligible from May, 2017, the petitioner's case was taken up only in the year 2021. Thus, this Court is of the further view that unless the time stipulation under clause (c) and clause (f) of order 5 is strictly adhered to by the Opposite Parties, the very purpose of such amendment would be defeated. Therefore, this Court has no hesitation in coming to a conclusion that a valuable right had accrued

in favour of the petitioner on his fulfilling the eligibility criteria for redeployment under the OPS order, 2010 in respect of the recruitment year 2021. Moreover, the Opposite Parties were under a legal obligation to initiate the process of receiving willingness by 31st of January, 2021 and to conclude the entire process of redeployment by March, 2021. Had the process been properly followed by the concerned authorities, the petitioner would have been redeployed, since he fulfills the eligibility criteria. Therefore, this Court has no hesitation in coming to a conclusion that a valuable right had indeed accrued in favour of the petitioners in view of the provisions contained in the OPS order, 2010.

32. Learned counsel for the petitioner next referred to a judgment of the Hon'ble Supreme Court in ***Rajendra Kumar Agrawal's case*** (supra)**.** By referring to the aforesaid judgment, learned counsel for the petitioner submitted that the Hon'ble Supreme Court has categorically held that relaxation of minimum qualifying service requirement, subsequent to the vacation of stay on regular selection, when selection of officiating appointees have been permitted even prior to vacation of stay on regular selection, does not amount to retrospective amendment of rules of eligibility after commencement of regular selection process. Moreover, it was held that the relaxation in that case was valid. Learned counsel for the petitioner also referred to the judgment in ***Nikhil Ranjan Chakraborty's Case*** (supra). In the said judgment, the issue involved was that the Tripura Civil Service Rules 1967 was amended to include certain feeder cadre posts under scheduled IV to the Rules. Such amendment was carried out in consultation with the Tripura Public Service Commission by publishing the Gazette notification on 24.12.2011. However, on 24.11.2011, pursuant to rule 13 of the concerned rule, a selection committee was constituted for considering the cases of eligible officers from the feeder cadre. On the basis of the amendment, the State of Tripura issued communication to all departments to send the names of all the eligible officers pursuant to such amendment. Such expansion of the cadre by the State was challenged by some officers who belonged to the un-amended feeder cadre. While deciding the issue, the Hon'ble Supreme Court in Para-8 of the judgment has held that the judgment in ***Y.V.Rangaiah vs. J.Sreenivasa Rao*** reported in ***(1983) 3 SCC 284*** would not be applicable to the facts of that case. It was further held that the said judgment (in *Y.V.Rangaiah's case*) was rendered on the interpretation of Rule 4(a)(1)(i) of the Andhra Pradesh Registration and Subordinate Service Rules, 1976. The aforesaid Rules provided for preparation of a panel of eligible candidates every year in the month of September. This was a statutory duty cast upon the state. The exercise was required to be conducted each year. Thereafter, only promotion orders were to be issued. However, no panel had been prepared for the year 1976. Subsequently, the Rule was amended which rendered the petitioners therein ineligible to be considered for promotion. In these circumstances, it was observed by the Hon'ble Supreme Court that the amendment would not be applicable to the vacancies which had arisen prior to the amendment. The vacancies which occurred prior to the amended rules would be governed by the old rules and not the amended rules. The Supreme Court further observed that the

case which they were considering was not similar to the facts involved in ***Y.V.Rangaiah's case*** as no statutory duty was cast which was required to be mandatorily performed under the applicable rules.

33. The above-noted judgment of the Hon'ble Supreme Court has further gone on to hold that by now it is a settled position of law that a candidate has a right to be considered in the light of the existing rules, which implies the "rule in force" on the date the consideration took place. There is no rule of universal or absolute application that vacancies are to be filled invariably by the law existing on the date when the vacancy arises. The requirement of filling up old vacancies under the old rules is interlinked with the candidate having acquired a right to be considered for promotion. The right to be considered for promotion accrues on the date of consideration of the eligible candidates. Unless, of course, the applicable rule, as in ***Y.V.Rangaiah's case (supra),*** lays down any particular time frame within which the selection process is to be completed.

34. The position of law is thus well settled and unambiguous that the right to be considered for promotion or redeployment, as in the present case, has to be seen in the light of the existing rules i.e. the rules in force on the date the consideration took place.

35. Learned counsel for the State on the other hand referred to the judgment in ***Deepak Agarwal vs. State of UP*** reported in (***2011) 6 SCC 725***. In ***Deepak Agarwal's Case (supra)*** the appellants were Technical Officers and along with Assistant Excise Commissioners were eligible to be considered for promotion to the post of Deputy Excise Commissioner. A few days before the DPC was scheduled to meet to consider the case of eligible officers for promotion, the concerned rules were amended. As a result, the Technical Officers stood excluded as the feeder cadre posts for promotion to the Deputy Excise Commissioner. The Technical Officers, having failed in the High Court, approached the Hon'ble Supreme Court. Ultimately the Hon'ble Supreme Court dismissed the appeal of the Technical Officers by categorically holding that it cannot be accepted that the accrued or vested right of the appellant has been taken away by the amendment.

36. Before concluding the analysis of the judgments on the issue, this Court, at this juncture would like to examine the impact of latest judgment of the Hon'ble Supreme Court in the case of ***State of Himachal Pradesh and others vs. Raj Kumar and others*** reported in (***2023) 3 SCC 773***. In ***Raj Kumar's case*** *(supra)* the Hon'ble Supreme Court was dealing with the Himachal Pradesh Recruitment and Promotion Rules, 1966 (i.e. the rules, 1966) enacted in exercise of the power under Article 309 of the Constitution. The facts of the case reveal that there were five posts of Labour Officers and such Posts were filled by promotion from i) Factory Inspectors, ii) Labour Inspectors and iii) Secretariat superintendents, being the feeder category post. On 20.07.2006, seven additional Posts of Labour Officers were created with the sanction of the Government. As a consequence, the total number of posts of Labour Officer increased from five to twelve. The respondents in the SLP were

working as Labour Inspectors. After sanction of the Additional Posts, the aforesaid rules of the year 1966 came to be amended on 25.11.2006. Under the new rules the recruitment of the post of Labour Officers was to be made by promotion as well as through direct recruitment in the ratio of 75% and 25% respectively. Accordingly, the promotional posts of Labour Officers increased from five to nine and the direct recruitment posts came out to be three. This action of the State Government was challenged by the respondents on the ground that the vacancies arose prior to the amendment or promulgation of the new rules, therefore, all such vacancies must be filled only by promotion.

37. Initially, in the aforesaid factual backdrop, the respondents in SLP approached the Administrative Tribunal. The Administrative Tribunal, by order dated 24.01.2007, directed the State Government to consider the grievance of the respondents. The State Government, after considering the grievance of the respondents, rejected the claim of the respondents. Challenging the aforesaid rejection order, the respondents again approached the State Administrative Tribunal. While the matter was pending before the State Administrative Tribunal, the Government published the advertisement for recruitment to the aforesaid posts through the Public Service Commission. The Public Service Commission completed the recruitment process and recommended the names of the respondent Nos.4 to 6, which was accepted by the State and such respondents were given appointment. Subsequently, challenging the appointment of respondent Nos.4 to 6, the Respondent Nos.1 to 3 approached the High Court of Himachal Pradesh by filing a Civil Writ Petition No.3028 of 2008, which was allowed by the Division Bench of the High Court of Himachal Pradesh vide order dated 28.12.2009. Thereafter, challenging the order of the Division Bench of High Court of Himachal Pradesh, the State Government approached the Supreme Court by filing the Civil Appeal. Similarly, the direct recruit appointees i.e. Respondent Nos.4 to 6 also filed a SLP which was numbered as Civil Appeal 9747 of 2011 after leave was granted.

38. In the above-noted Civil Appeal, the Hon'ble Supreme Court encountered the issue as to whether the vacancies were to be filled up under the un-amended rules i.e. the rules that were in force when the vacancies arose or, should such recruitment be governed under the amended rules which came into force at the time of consideration of the cases of the respondents for promotion to the post of Labour Officers. It may not be out place to mention here that the High Court of Himachal Pradesh decided the issue by following the ratio laid down in the judgment of ***Y.V. Rangaiah vs. J.Sreenevasa Rao*** reported in ***(1983) 3 SCC 284***. Therefore, essentially the Supreme Court was required to test the validity of the pronouncement of law by the Hon'ble Supreme Court in *Y.V. Rangaiah's case* in *Raj Kumar's case*.

39. While analyzing the legal position, the Hon'ble Supreme Court in *Raj Kumar's case (supra)* has taken note of at least 15 judgments wherein an exception had been carved out from the proposition of law laid down in *Y.V. Rangaiah's case (supra)*. While laying down the correct proposition of law in *Raj Kumar's case*, the

Hon'ble Supreme Court has categorically held that a review of the cases distinguishing *Y.V. Rangaiah's case* reveals that, the Hon'ble Supreme Court has been consistently carving out exceptions to the broad proposition formulated therein, holding that there is no rule of universal application to the effect that vacancies must necessarily be filled on the basis of the rules which existed then, and consequently, impliedly overruled *Y.V. Rangaiah's case*. The Hon'ble Supreme Court has also referred to the provisions contained under Articles 309, 310 and 311 of the Constitution of India and has held that though relationship between employee and the State originates in contract, but by virtue of constitutional constraints, coupled with legislative and executive rules governing service, such relationship attains "status" as against contract. Thus, it is clear that the rights and obligations of Government employees are no longer determined by consent of both parties, but by statue or statutory rules framed in that regard.

40. After analyzing the 15 judgments, the Hon'ble Supreme Court has finally arrived at a conclusion, which has been recorded in Para-82 of the said judgment ((***2023) 3 SCC 773***). It has been held therein that there is no rule of universal application that the vacancies must necessarily be filled on the basis of the law which existed on the date when they arose, and that *Y.V. Rangaiah's case* must be understood in the context of the rules involved therein. Further, it was also held that, it is now a settled proposition of law that a candidate has a right to be considered in the light of the existing rules, which implies "rule in force" as on the date on which the consideration takes place. The right to be considered for promotion occurs on the date of consideration on the eligible candidates. Further, in Para-82.5 it has been held that when there is no statutory duty cast upon the State to consider appointments/ vacancies that existed prior to the amendment, the State cannot be directed to consider the cases.

41. The Hon'ble Supreme Court has also in the judgment in ***Union of India vs. Krishna Kumar*** reported in ***(2019) 4 SCC 319,*** laid emphasis on the pronouncement of law to the effect that the right to be considered for promotion in accordance with the rules which was prevailing on the date on which consideration for promotion takes place. Finally, in Paragraph-85.1, the Hon'ble Supreme Court in *Raj Kumar's case (supra)* has categorically held that the statement in ***Y.V. Rangaiah vs. J.Sreenevasa Rao*** reported in ***(1983) 3 SCC 284*** that, "the vacancies which occurred prior to the amended rules would be governed by the old rules and not by the amended rules", does not reflect the correct proposition of law governing services under the Union and the State under Part XIV of the Constitution of India. As a result, It has been overruled by the Hon'ble Supreme Court.

42. In view of the aforesaid declaration of law by the Hon'ble Supreme Court in *Raj Kumar's case (supra)*, the proposition of law with regard to filling up of the vacancies arising prior to the amended rules is very clear, and such vacancies are to be governed by the amended rules or the Rules in force at the time of consideration for promotion. However, the case of the present petitioner stands in a different

footing. As such, the general proposition of law with regard to filling up of the vacancies arising prior to the rules were amended, by applying the amended rules, would not be applicable in the present case, in as much as, in the present case the Government was under a statutory obligation to fill up such vacancies in a time bound manner as has been laid down in the relevant rules referred to hereinabove. Therefore, this Court is of the view that the judgment in *Raj Kumar's case (supra*) would not be applicable to the facts of the petitioners' case.

43. Reverting back to the facts of the present case, it is observed that the petitioners were eligible since 2017 and that no reason whatsoever is coming forth from the concerned Opposite Party authorities as to why their names were not sent for consideration for redeployment. Be that as it may, the statutory rules, in the shape of the OPS order, 2010, provide a time stipulation within which the selection process is required to be concluded. Thus, the same confers a right upon the petitioner to be considered for redeployment to the district cadre by March, 2021. However, no such selection process was started till July, 2021. In the meantime, the rule was amended, incorporating additional disqualification criteria. The petitioner and similarly situated many other persons are likely to be adversely affected by such disqualification criteria. Learned counsel for the State has nowhere denied that the persons who had suffered major punishment earlier have not been extended with benefits of redeployment in the district cadre. However, such disqualification was introduced for the first time in June, 2021. It is further observed that had the selection process been conducted within the time frame as stipulated in the rules, then the petitioner would have received the redeployment order by March, 2021. It further appears that the reply of the State Counsel, to the specific assertion of the learned counsel of the petitioner that persons having vigilance cases against them have been extended with a benefit of redeployment, is not satisfactory. In such view of the matter, if the petitioner is kept out of the zone of the consideration in view of the amendment, then the same would definitely be discriminatory in nature, and would violate Article 14 of the Constitution of India.

44. In view of the aforesaid analysis of the legal position, further keeping in view the peculiar facts and circumstances involved in the present writ application, this Court is of the considered view that the cases of the petitioners and similarly situated other persons in the connected batch of writ applications should have been considered without applying the subsequent amendment of the year 2021 and strictly in terms of the OPS order, 2010 that too by end of March, 2021. The same having not been followed in the case of the present petitioners, this Court has no hesitation in allowing the writ application of the petitioners with a further direction to the State-Opposite Party to consider the case of the petitioners, in terms of the OPS order, 2010 as it stood prior to the amendment in June, 2021, against the vacancies in respect of the year 2021. It is stated at the bar that the vacancies of the year 2021 have not been filled up as of now. Thus, the Opposite Parties are directed to consider the case of the petitioners for their redeployment to the district cadre within a period

of two months from the date of communication of a copy of this judgment, in terms of the observations and directions given hereinabove.

45. Accordingly, the writ petition stands allowed. However, there shall be no order as to costs.

Headnotes prepared by :
Smt. Madhumita Panda, Law Reporter
(Verified by : Shri Pravakar Ganthia, Editor-in-Chief)

Result of the case :
Writ Petition allowed.

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2024 (III) ILR-CUT-824

BISHNU PRASAD MISHRA
V.
WATER RESOURCES DEPARTMENT & ORS.

(W.P.(C)(OAS) NO.46 OF 2016)

16 AUGUST 2024

[BIRAJA PRASANNA SATAPATHY, J.]

Issue/s for Consideration

Whether no work no pay is applicable once the civil servant exonerated from all the charges in a vigilance case.

Headnotes

SERVICE JURISPRUDENCE – No work No pay – Applicability of – The petitioner was exonerated from the charges in the vigilance proceeding and he was extended with the benefit of promotion to different ranks as per the order of learned Tribunal and the order passed by the Tribunal was never assailed by the State – Whether the principle of no work no pay is applicable to petitioner.

Held: No – Since the Petitioner was exonerated from all the charges and was accordingly acquitted, in view of such exoneration, the petitioner is entitled to get all service benefits as due and admissible and principle of No Work No Pay is not applicable. (Para 5.6)

Citation Reference

Commissioner, Karnatak Housing Board Vs. C. Muddaiah, **AIR (2007) SC 3100**; Union of India Vs. B.M. Jha, Hon'ble Apex Court in **Civil Appeal No. 5128 of 2001**; Union of India & Ors. Vs. K.V. Jankiraman & Ors., **(1991) 4 SCC 109**; State of U.P. & Ors. Vs. B.B.S. Rathore, Hon'ble Apex Court in **Civil Appeal No. 3041 of 2010**; Amarendra Kumar Dash Vs. Orissa Forest Development Corporation Limited & Ors., **Vol. 81 (1996) CLT 393**; Brahmananda Sahoo Vs. State of Odisha & Ors., **W.P.C.**

(OAC) No. 1970 of 2018; Union of India Vs. B.M. Jha, **(2007) 11 SCC 632 - referred to.**

Keywords

No Work No Pay; Superannuation; Exoneration; Vigilance proceeding

Appearances of Parties

For Petitioner : Mr. D.K. Panda
For Opp. Parties : Mr. M.K. Balabantaray, AGA

Judgment/Order

Judgment

BIRAJA PRASANNA SATAPATHY, J.

Petitioner has filed the present writ petition inter alia challenging order dtd.16.06.2014 so issued by Opp. Party No. 1 under Annexure16. Vide the said order claim of the Petitioner to get the financial benefit for his promotion to the rank of Asst. Executive Engineer (Civil), Executive Engineer (Civil) and Superintending Engineer Level-II (Civil), Superintending Engineer Level-I (Civil) w.e.f.06.11.2001, 28.12.2002, 26.08.2004 and 04.03.2006 was rejected on the ground that Petitioner since has not discharged the duty in the promotional post, applying the principle of No Work No Pay, Petitioner is not eligible to get the benefit.

2. It is the case of the Petitioner that Petitioner entered into service as an Asst. Engineer on ad hoc basis on 06.11.1981 and his name was concurred by Opp. Parties vide order dt.18.05.1984. While so continuing under M.I. Division, Sambalpur, he was implicated in Sambalpur Vigilance P.S. Case No. 13 dtd.16.06.1995/T.R. Case No. 40/1998 pending, before the learned Special Judge, Vigilance, Sambalpur.

3. It is contended that in the gradation list of Asst. Engineer so published while Petitioner was placed at Sl. No. 19, one Durga Prasad Pattnaik was placed at Sl. No. 20. Similarly, Shri Narayan Majhi, Sri Kamalakanta Kar, Sri Susanta Kumar Panda Shri Ananta Kumar Parmar and Sri Suresh Chandra Patra were placed at Sl. Nos. 22 to 25 respectively.

3.1. It is contended that even though Petitioner was placed above the aforesaid Durga Prasad Pattnaik and others in the gradation list of Asst. Engineer, but the aforesaid juniors when were promoted to the rank of Asst. Executive Engineer by the Govt. in the Department of Water Resources vide Notification No. 42452 dtd.06.11.2001, Petitioner being aggrieved made a representation on 27.11.2001. As no action was taken in considering his grievances, Petitioner made another representation on 08.10.2004 and thereafter approached the Tribunal by filing O.A. No. 3011(C) of 2005.

3.2. The aforesaid Original Application in O.A. No. 3011(C) of 2005 was disposed of vide order dtd. 05.02.2007 with a direction on the Opp. Party No. 1 to

consider the claim of the Petitioner and dispose of the same within a period of two (2) months from the date of receipt of the order. But claim of the Petitioner to get the benefit of promotion to the rank of Asst. Executive Engineer from the date his juniors got the said benefit vide office order dtd.06.11.2001 was rejected vide order dtd.12.06.2009 under Annexure-7 on the ground that since a Vigilance Proceeding is pending against the Petitioner vide T.R. No. 40/1998 in the file of learned Special Judge, Vigilance, Sambalpur, opening of sealed cover and promotion to the Petitioner, will be against public interest and against G.A. Department circular.

3.3. Learned counsel for the Petitioner contended that vide Judgment dtd.30.06.2011 under Annexure-8, when Petitioner was acquitted along with some other co-accused persons, Petitioner made a detailed representation before Opp. Party No. 1 on 21.07.2011 under Annexure9 inter alia claiming promotion to the rank of Asst. Executive Engineer w.e.f.06.11.2001, to the post of Executive Engineer w.e.f.28.12.2002, Superintending Engineer Level-II w.e.f.26.08.2004 and Superintending Engineer Level-I w.e.f.04.03.2006, on the ground that all his juniors have got the said benefit from the aforesaid dates.

3.4. As the claim of the Petitioner so made under Annexure-9 was neither considered nor disposed of, Petitioner approached the Tribunal once again by filing O.A. No. 85 of 2012. The Tribunal vide order dtd.29.03.2012 under Annexure-10 while disposing the writ petition issued the following direction:-

> *"6. It is explicit from Annexure-4 that his case for promotion was kept in a sealed cover due to pendency of the aforesaid criminal case. That has since been disposed of and the applicant (accused) has been acquitted of the charges leveled against him. In the circumstances, there is no reason not to open the sealed cover to find out the decision of the departmental promotion committee about the suitability of the applicant for promotion to the higher post.*
>
> *7. In the circumstances, the respondents are directed to open the sealed cover, wherein the case of the applicant has been kept sealed and to consider grant of promotion of the applicant in accordance with the finding of the D.P.C., with all service benefits."*

3.5. Learned counsel for the Petitioner contended that even though the Tribunal vide its order under Annexure-10 held the Petitioner entitled to get all service benefits on his getting the benefit of promotion, but vide order dtd.19.07.2012 so issued by Opp. Party No. 1 under Annexure-11, Petitioner was promoted to the rank of Asst. Executive Engineer (Civil) w.e.f.06.11.2001 on notional basis.

3.6. It is contended that as during the relevant time juniors to the Petitioner had got the benefit of promotion to the rank of Executive Engineer w.e.f.28.12.2002, w.e.f.26.08.2004 and Superintending Superintending Engineer Engineer Level-II Level-I w.e.f.04.03.2006, Petitioner after receipt of the order under Annexure11, made a further representation on 27.08.2012 under Annexure-12 inter alia with a prayer to extend him the benefit of promotion to the rank of Executive Engineer, Superintending Engineer Level-II & LevelI w.e.f.28.12.2002, 26.08.2004 and 04.03.2006 respectively.

3.7. It is contended that in consideration of the prayer made in Annexure-12, Opp. Party No. 1 vide order dtd.22.04.2013 under Annexure-13 extended the benefit of promotion to the rank of Executive Engineer (Civil) w.e.f.28.12.2002, to the rank of Superintending Engineer Level-II w.e.f.26.08.2004 and Level-I w.e.f.04.03.2006.

3.8. It is however contended that even though Petitioner was extended with the benefit of promotion from the date his juniors have got the said benefit to the rank of Asst. Executive Engineer, Executive Engineer, Superintending Engineer Level-II & Level-I vide orders issued under Annexure-11 and 13, but on notional basis only.

3.9. It is contended that since the Tribunal while disposing O.A. No. 85 of 2012, held the Petitioner entitled to get all service benefits, on the face of such order which was never assailed, while extending the benefit of promotion to the rank of Asst. Executive Engineer vide order dtd.19.07.2012 under Annexure-11 and to the rank of Executive Engineer, Superintending Engineer Level-II & Level- I vide order under Annexure-13, the same could not have been extended on notional basis. Petitioner in the alternate should have extended with all service benefit.

3.10. In support of his aforesaid submission, learned counsel appearing for the Petitioner relied on a decision of the Hon'ble Apex Court reported in AIR (2007) SC 3100 (***Commissioner, Karnatak Housing Board Vs. C. Muddaiah***).

3.11. Hon'ble Apex Court in Para 31 of the said Judgment has held as follows:-

> *"31. We are of the considered opinion that once a direction is issued by a Court, it has to be obeyed and implemented without any reservation. If an order competent passed by a Court of Law is not complied with or is ignored, there will be an end of Rule of Law. If a party against whom such order is made has grievance, the only remedy available to him is to challenge the order by taking appropriate proceedings known to law. But it cannot be made ineffective by not complying with the directions on a specious plea that no such directions could have been issued by the Court. In our judgment, upholding of such argument would result in chaos and confusion and would seriously affect and impair administration of justice. The argument of the Board, therefore, has no force and must be rejected."*

3.12. It is contended that on the face of the order passed by the Tribunal on 29.02.2012 in O.A. No. 85 of 2012 under Annexure-10 and the decision in the case of ***C. Muddaiah***, while extending the benefit of promotion to the rank of Asst. Executive Engineer, Executive Engineer, Superintending Engineer Level-II and Level-I vide order dtd.19.07.2012 under Annexure-11 and 22.04.2013 under Annexure-13, Petitioner should have been allowed with all service benefits, instead of extending the benefit on notional basis.

3.13. It is contended that Petitioner claiming extension of the service benefits in terms of the order passed by the Tribunal in O.A. No. 85 of 2012, once again made a detailed representation before Opp. Party No. 1 on 20.07.2013 under Annexure-14. As the same was not considered, Petitioner made a further representation on 27.05.2014 under Annexure-15. But the fact remains that prior to his acquittal in the

vigilance proceeding vide Judgment dtd.30.06.2011 under Annexure-8, Petitioner had already attained the age of superannuation on 31.01.2011.

3.14. It is contended that Opp. Party No. 1 without proper appreciation of the claim raised by the Petitioner in his representation under Annexure-14 & 15 and the order passed by the Tribunal in O.A. No. 85 of 2012 under Annexure-10, rejected the claim of the Petitioner to get the service benefits vide the impugned order dtd.16.06.2014 under Annexure-16. Applying the principle of No Work No Pay and on the ground that Petitioner has not discharged his duty in the promotional post in the rank of Asst. Executive Engineer, Executive Engineer, Superintending Engineer Level-II and Level-I w.e.f.06.11.2001, 28.12.2002, 26.08.2004 and 04.03.2006. Opp. Party No. 1 relying on an order passed by the Hon'ble Apex Court in Civil Appeal No. 5128 of 2001 (***Union of India Vs. B.M. Jha***) held accordingly.

3.15. Learned counsel appearing for the Petitioner contended that since because of the pendency of the vigilance proceeding in T.R. Case No. 40 of 1998, Petitioner was not extended with the benefit of promotion to the rank of Asst. Executive Engineer w.e.f.06.11.2001 and to the rank of Executive Engineer w.e.f.28.12.2002, Superintending Engineer Level-II w.e.f.26.08.2004 and Level-I w.e.f.04.03.2006. Prayer of the Petitioner to get the said benefit in terms of order dtd.05.02.2007 in O.A. No. 3011(C) of 2006 under Annexure-6, was rejected on the ground that during pendency of the vigilance proceeding, opening of the sealed cover and promotion to the delinquent officer will be against public interest and against the G.A. Department circular.

3.16. But it is contended that since the Petitioner was acquitted vide Judgment dtd.30.06.2011 under Annexure-8, in view of the stipulation contained in office memorandum dtd.18.02.1994 of the G.A. Department, Petitioner became entitled to get the arrear salary and allowances. Para 6 of office Memorandum dtd.18.02.1994 reads as follows:-

> *"6. On the conclusion of the disciplinary case/criminal prosecution, the sealed cover or covers shall be opened. In case the officer is completely exonerated, the due date of his promotion will be determined with reference to the findings of the Screening committee kept in the sealed cover/covers and with reference to the date of promotion of his next junior on the basis of such findings. The Government servant may be promoted, if necessary, by reverting the junior-most officiating person. He be promoted notionally with reference may to the date of promotion of his junior.*
>
> *In cases of complete exoneration, the officer will also be paid arrears of salaries and allowances. In other cases, the question of arrears will be decided by the State Government by taking into consideration all the facts and circumstances of the disciplinary/criminal proceedings, but where the Government denies arrears of salary or a part of it, the reasons for doing so shall be recorded."*

3.17. It is contended that since in the vigilance proceeding Petitioner was completely exonerated with passing of the order of acquittal vide Judgment dt.30.06.2011, in view of the provisions contained under Para 6 of office memorandum dtd.18.02.1994, Petitioner became eligible and entitled to get all the

arrear of salary and allowances. With regard to the claim of the Petitioner to get the benefit of salary and allowances on the ground of complete exoneration, learned counsel for the Petitioner relied on the decision of the Hon'ble Apex Court in the case of (i) ***Union of India & Ors. Vs. K.V. Jankiraman & Ors***. reported in (1991) 4 SCC 109, (ii) Civil Appeal No. 3041 of 2010 (***State of U.P. & Ors. Vs. B.B.S. Rathore***) and a decision of this Court in the case of ***Amarendra Kumar Dash Vs. Orissa Forest Development Corporation Limited & Ors***. reported in Vol. 81 (1996) CLT 393 and another order passed in the case of ***Brahmananda Sahoo Vs. State of Odisha & Ors.***, W.P.C.(OAC) No. 1970 of 2018 disposed of on 04.01.2023.

3.18. Hon'ble Apex Court in the case of K.V. Jankiraman in Para 24, 25 & 26 of the said Judgment has held as follows:-

> *"**24**. It was further contended on their behalf that the normal rule is "no work no pay". Hence a person cannot be allowed to draw the benefits of a post the duties of which he has not discharged. To allow him to do so is against the elementary rule that a person is to be paid only for the work he has done and not for the work he has not done. As against this, it was pointed out on behalf of the concerned employees, that on many occasions even frivolous proceedings are instituted at the instance of interested persons, sometimes with a specific object of denying the promotion due, and the employee concerned is made to suffer both mental agony and privations which are multiplied when he is also placed under suspension, When, therefore, at the end of such sufferings, he comes out with a clean bill, he has to be restored to all the benefits from which he was kept away unjustly.*
>
> ***25**. We are not much impressed by the contentions advanced on behalf of the authorities. The normal rule of "no work no pay" is not applicable to cases such as the present one where the employee although he is willing to work is kept away from work by the authorities for no fault of his. This is not a case where the employee remains away from work for his own reasons, although the work is offered to him. It is for this reason that F.R. 17(1) will also be inapplicable to such cases.*
>
> ***26**. We are, therefore, broadly in agreement with the finding of the Tribunal that when an employee is completely exonerated meaning thereby that he is not found blameworthy in the least and is not visited with the penalty even of censure, he has to be given the benefit of the salary of the higher post along with the other benefits from the date on which he would have normally been promoted but for the disciplinary/criminal proceedings. However, there may be cases where the proceedings, whether disciplinary or criminal, are, for example, delayed at the instance of the employee or the clearance in the disciplinary proceedings or acquittal in the criminal proceedings is with benefit of doubt or on account of non-availability of evidence due to the acts attributable to the employee etc. In such circumstances, the concerned authorities must be vested with the power to decide whether the employee at all deserves any salary for the intervening period and if he does, the extent to which he deserves it. Life being complex, it is not possible to anticipate and enumerate exhaustively all the circumstances under which such consideration may become necessary. To ignore, however, such circumstances when they exist and lay down an inflexible rule that in every case when an employee is exonerated in disciplinary/criminal proceedings he should be entitled to all salary for the intervening period is to undermine discipline in the administration and jeopardise public interests. We are, therefore, unable to agree with the Tribunal that to deny the salary to an employee would in all circumstances be illegal. While, therefore, we do not*

approve of the said last sentence in the first sub-paragraph after clause (iii) of paragraph 3 of the said Memorandum, viz., "but no arrears of pay shall be payable to him for the period of notional promotion preceding the date of actual promotion", we direct that in place of the said sentence the following sentence be read in the Memorandum:

"However, whether the officer concerned will be entitled to any arrears of pay for the period of notional promotion preceding the date of actual promotion, and if so to what extent, will be decided by the concerned authority by taking into consideration all the facts and circumstances of the disciplinary proceeding/criminal prosecution. Where the authority denies arrears of salary or part of it, it will record its reasons for doing so.""

3.19. Similarly, Hon'ble Apex Court in the case of B.B.S. Rathore in Para 9 of the Judgment has held as follows:-

The following principles emerge from the aforesaid judgments:

(i) When a retrospective promotion is given to an incumbent, normally he is entitled to all benefits flowing therefrom.

(ii) In case of a notional promotion with retrospective effect, in normal course the incumbent is not automatically entitled to arrears of salary as he/she has not worked in the promotional post.

(iii)The principle of "no work, no pay" is not applicable in case of retrospective promotion where the incumbent was willing to work but was denied the opportunity to work for no fault of him. For example, if the employee is kept under suspension during departmental enquiry and sealed cover procedure is adopted. In such cases if notional promotion is granted after completion of the proceeding the employee is entitled to the arrears of salary."

3.20. This Court in the case ***Amarendra Kumar Dash*** in Para 10 has held as follows:-

"We may profitably refer to the case of Jankiraman (supra) in this regard. A contention was advanced in that case that a person who has not worked in the promotional post is not entitled to the financial benefits as the normal rule of "no work, no pay" is applicable. Repelling the said contention, their Lordships held as follows:-

"It was further contended on their behalf that the normal rule is 'no work, no pay'. Hence a person cannot be allowed to draw the benefits of a post the duties of which he has not discharged. To allow him to do so is against the elementary rule that a person is to be paid only for the work he has done and not for the work he has not done. As against this, it was pointed out on behalf of the concerned employees, that on many occasions even frivolous proceedings are instituted at the instance of interested persons, sometimes with a specific object of denying the promotion due, and the employee concerned is made to suffer both mental agony and privations which are multiplied when he is also placed under suspension. When, therefore, at the end of such sufferings, he comes out with a clean bill, he has to be restored to all the benefits from which he was kept away unjustly.

We are not much impressed by the contentions advanced on behalf of the authorities. The normal rule of 'no work no pay' is not applicable to cases such as the present one where the employee although he is willing to work is kept away from work by the authorities for no fault of his. This is not a case where the employee remains away from work for his own reasons, although the work is offered to him..."

The aforesaid decision was also relied upon in the case of Syed Nassem Zahir and others (supra) wherein their Lordships as follows:

"..... In case he is completely exonerated, the 'sealed cover' shall be opened and if the recommendation is in his favour, he shall be notionally promoted with effect from the date when a person junior to him was promoted to the post of Chief Engineer. In that event, he shall be entitled to all consequential benefits including back wages....."

3.21. Similarly, this Court in Para 6.3 of the order dtd.04.01.2023 has held as follows:-

"6.3. Therefore, in view of the aforesaid analysis made by this Court, this Court is of the view that the petitioner is eligible and entitled to get the benefit of promotion from 28.02.2018 with all service and financial benefit. While holding so, this Court directs Opposite Party No.1 to calculate the differential entitlements of the petitioner from 28.02.2018 to 30.11.2019 and release the same in favour of the petitioner. Opposite Party No.1 is also further directed to recalculate the pensionary benefits of the petitioner and also take steps for release of the differential pension and pensionary benefits in favour of the petitioner. This Court directs Opposite Party no.1 to complete the entire exercise in all respect within a period of three months from the date of receipt of this order."

3.22. Placing reliance on the decisions on as cited supra and the order passed by the Tribunal in O.A. No. 85 of 2012 under Annexure-10 as well as the stipulation in Para 6 of Office Memorandum dt.18.02.1994, learned counsel for the Petitioner contended that since Petitioner was exonerated from the charges in the vigilance proceeding and he was extended with the benefit of promotion to different ranks vide orders issued under Annexure-11 & 13, Petitioner is eligible and entitled to get all service benefits and rejection of the same by holding the Petitioner entitled to the same on notional basis applying the principle of No Work No Pay vide the impugned order dtd.16.06.2014 under Annexure-16 is not sustainable in the eye of law and requires interference of this Court.

4. Mr. M.K. Balabantaray, learned Addl. Govt. Advocate on the other hand made his submission basing on the stand taken in the counter affidavit so filed by the Opp. Parties. It is contended that after receipt of the order dtd.05.02.2007 so passed by the Tribunal in O.A. No. 3011(C) of 2005 under Annexure-6, claim of the Petitioner was considered and rejected vide order dtd.12.06.2009 under Annexure-7 inter alia on the ground that, during pendency of the vigilance proceeding, in view of the circular issued by the G.A. Department, opening of sealed cover and promotion of the Petitioner will be against public interest.

4.1. However, when the Petitioner was acquitted in the vigilance proceeding vide Judgment dtd.30.06.2011 under Annexure-8 and the Tribunal vide order dtd.29.02.2012 in O.A. No. 85 of 2012 under Annexure-10 directed the Opp. Parties to open the sealed cover and to consider the grant of promotion to the Petitioner in accordance with the finding of the DPC with all service benefits, the matter was referred to he G.A. Department seeking their view. View expressed by the Department so reflected in the counter reads as follows:-

> *"The said Deptt. opined that since the vigilance case has been disposed of and the applicant has been acquitted of the charges and set at liberty by court order, the sealed cover in respect of the applicant is to be opened and if he is found suitable for promotion then promotion is to be given from the date of which his next junior was given promotion and fixed his inter- se-seniority accordingly."*

4.2. It is contended that keeping in view the opinion of G.A. Department and the order passed by the Tribunal in O.A. No. 85 of 2012, Petitioner though was extended with the benefit of promotion to the rank of Asst. Executive Engineer w.e.f.06.11.2001, to the rank of Executive Engineer w.e.f.28.12.2002, to the rank of Superintending Engineer Level-II w.e.f.26.08.2004 and Level-I w.e.f.04.03.2006 vide order issued on 19.07.2012 under Annexure-11 and order dtd.22.04.2013 under Annexure-13, but applying the principle of No Work No Pay and the fact that the Petitioner never discharged the duty in the promotional post and by the time he was extended with the benefit of promotion, he had already retired from his services on attaining the age of superannuation on 31.01.2011, such benefit of promotion was extended on notional basis.

4.3. In support of his aforesaid submission learned Addl. Govt. Advocate relied on an order passed by the Hon'ble Apex Court in the case of ***Union of India Vs. B.M. Jha*** (2007) 11 SCC 632. View expressed by the Hon'ble Apex Court in Para 5 of the said order reads as follows:-

> *"5. We have heard learned counsel for the parties. It was argued by learned counsel for the respondent that when a retrospective promotion is given to an incumbent, normally he is entitled to all benefits flowing therefrom. However, this Court in State of Haryana v. O.P. Gupta [(1996) 7 SCC 533 : 1996 SCC (L&S) 633 : (1996) 33 ATC 324] and followed in A.K. Soumini v. State Bank of Travancore [(2003) 7 SCC 238 : 2003 SCC (L&S) 1041 : JT (2003) 8 SC 35] has taken the view that even in case of a notional promotion from retrospective date, it cannot entitle the employee to arrears of salary as the incumbent has not worked in the promotional post. These decisions relied on the principle of "no work no pay". The learned Division Bench in the impugned judgment has placed reliance on State of A.P. v. K.V.L. Narasimha Rao [(1999) 4 SCC 181: 1999 SCC (L&S) 841: JT (1999) 3 SC 205]. In our view, the High Court did not examine that case in detail. In fact, in the said judgment the view taken by the High Court of grant of salary was set aside by this Court. Therefore, we are of the view that in the light of the consistent view taken by this Court in the abovementioned cases, arrears of salary cannot be granted to the respondent in view of the principle of "no work no pay" in case of retrospective promotion. Consequently, we allow this appeal and set aside the impugned order of the High Court dated 17-5-2000 passed by the Division Bench of the High Court as also the order dated 11-1-2000 passed by the Central Administrative Tribunal, Principal Bench."*

4.4. Learned Addl. Govt. Advocate placing reliance on the provisions contained under Rule 56 of the Odisha Service Code and Finance Department Office Memorandum dtd.18.02.1988 contended that since Petitioner never discharged his duty in the promotional post applying the principle of No Work No Pay and the fact that the Petitioner never assume the duty in the promotional post, he was extended with the benefit vide order under Annexure-11 & 13 on notional basis. It is

accordingly contended that claim of the Petitioner has been rightly rejected and it requires no interference.

5. Having heard learned counsel appearing for the Parties and considering the submissions made, this Court finds that in the gradation list of Asst. Executive Engineer published under Annexure-2 Petitioner was placed at Sl. No. 19 and one Durga Prasa Pattnaik at Sl. No. 20. Because of the pendency of the vigilance proceeding in T.R. Case No. 40 of 1998 before the learned Special Judge, Vigilance, Sambalpur, Petitioner was not extended with the benefit of promotion to the rank of Asst. Executive Engineer while such benefit was extended in favour of Sri Durga Prasad Pattnaik w.e.f.06.11.2001. Claim of the Petitioner to get the said benefit in terms of order dtd.05.02.2007 of the Tribunal in O.A. No. 3011(C) of 2005 was rejected vide order dtd.12.06.2009 under Annexure-7 on the ground that because of the pendency of the vigilance proceeding, opening of sealed cover and promotion to the Petitioner will be against public interest. By the time claim of the Petitioner was so rejected, his juniors have already got the benefit of promotion to the rank of Executive Engineer w.e.f.28.12.2002, Superintending Engineer Level-II w.e.f. 26.08.2004 and Level-I w.e.f.04.03.2006.

5.1. Since claim of the Petitioner to get the benefit of promotion was rejected only on the ground that the vigilance proceeding is pending against him, Petitioner on being acquitted in the said vigilance proceeding vide Judgment dtd.30.06.2011 under Annexure-8, moved Opp. Party No. 1 to get the benefit of promotion to the rank of Asst. Executive Engineer w.e.f.06.11.2001, Executive Engineer w.e.f.28.12.2002, Superintending Engineer Level-II w.e.f.26.08.2004 and Level-I w.e.f.04.03.2006 vide Annexure-9.

5.2. As the claim of the Petitioner after his acquittal in the vigilance proceeding so made in Annexure-9 was not considered, Petitioner approached the Tribunal in O.A. No. 85 of 2012. The Tribunal vide office order dtd.29.02.2012 under Annexure-10 while directing the Opp. Parties to open the sealed cover and to consider the claim of the Petitioner to get the benefit of promotion, held that Petitioner will be entitled to get all service benefits. In terms of the said order passed by the Tribunal Petitioner was promoted to the rank of Asst. Executive Engineer (Civil) w.e.f.06.11.2001 vide Notification dtd.19.07.2012 under Annexure-11, but on notional basis.

5.3. Petitioner thereafter claiming the benefit of promotion to the rank of Executive Engineer w.e.f.28.12.2002, to the rank of Superintending Engineer Level-II w.e.f.26.08.2004 and Level-I w.e.f.04.03.2006 made further representation under Annexure-12. Vide Notification dtd.22.04.2013 under Annexure-13, Petitioner was extended with the benefit of such promotion w.e.f.28.12.2002, 26.08.2004 and w.e.f.04.03.2006, but such benefit was extended on notional basis.

5.4. Petitioner challenging such extension of benefit on notional basis to different ranks on the face of the order passed by the Tribunal under Annexure-10,

made further representation under Annexure-14 & 15 inter alia with the prayer to extend him with the service benefits as directed by the Tribunal in its order under Annexure-10. But the said claim of the Petitioner was rejected vide the impugned order dtd.16.06.2014 under Annexure-16 placing reliance on the principle of No Work No pay and the decision in the case of ***B.M. Jha*** as cited (supra).

5.5. It is the view of this Court that the Tribunal while directing the Opp. Parties to open the sealed cover and to consider the claim of the Petitioner to get the benefit of promotion vide order under Annexure10, held the Petitioner entitled to get all service benefits. The said order of the Tribunal was never assailed by the Opp. Parties and in the alternate Petitioner vide Notification dtd.19.07.2012 under Annexure11 and Notification dtd.22.04.2013 under Annexure-13 was extended with the benefit of promotion to different rank w.e.f.06.11.2001, 28.12.2002, 26.08.2004 and 04.03.2006.

5.6. Since the order passed by the Tribunal under Annexure-10 was never assailed by the State and it was implemented vide Notification issued under Annexure-11 & 13, placing reliance on the said direction of the Tribunal and the decision in the case of ***C. Muddaiah***, it is the view of this Court that the Petitioner is eligible and entitled to get the service benefits as due and admissible. Not only that placing reliance on the decision in the case of ***K.V. Jankiraman*** so followed in the case of ***B.B.S. Rathore*** by the Hon'ble Apex Court and the decision of this Court in the case of ***Amarendra Kumar Das*** and W.P.C.(OAC) No. 1970 of 2018 and the stipulation contained in Para 6 of Office Memorandum dt.18.02.1994, it is the view of this Court that since the Petitioner was exonerated from all the charges and was accordingly acquitted vide Judgment under Annexure-8, in view of such exoneration and the order passed under Annexure-10 and the decision in the case of ***C. Muddaiah***, Petitioner is entitled to get all service benefits as due and admissible and principle of No Work No Pay cannot be applied to the claim of the Petitioner.

5.7. On the face of the view expressed by the Hon'ble Apex Court in the case of ***K.V. Jankiraman*** and ***B.B.S. Rathore*** as well as ***Syed Naseem Zahir*** (1974) (SC) 460, this Court is unable to accept the view relied on by the learned State Counsel in the case of ***B.M. Jha*** as cited (supra).

5.8. Therefore, this Court is inclined to quash the impugned order dtd. 16.06.2014 so issued by Opp. Party No. 1 under Annexure-16. While quashing the same, this Court directs Opp. Party No. 1 to extend the service benefits as due and admissible by making a detailed calculation and release the same by completing all the exercise within a period of three (3) months from the date of receipt of this order.

6. The writ petition is disposed of with the aforesaid observation and direction.

Headnotes prepared by : *Result of the case :*
Smt. Madhumita Panda, Law Reporter Writ petition is disposed of.
(Verified by : Shri Pravakar Ganthia, Editor-in-Chief)

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2024 (III) ILR-CUT-835

PADMANAVA SETHY
V.
STATE OF ODISHA & ORS.

[W.P.(C) NO.38292 OF 2021 & WPC(OAC) NO.266 OF 2018]

23 SEPTEMBER 2024

[BIRAJA PRASANNA SATAPATHY, J.]

Issue for Consideration

Whether a major punishment can be imposed when the proceeding was initiated under Rule 16 of 1962 Rules.

Headnotes

ORISSA CIVIL SERVICES (CCA) RULES, 1962 – Rules 15 and 16 – A proceeding was initiated against the petitioner vide office order dated 04.04.2019 – It is found that petitioner was never held guilty of the charges in the proceeding – The Opp. Party No. 4 passed the order of removal which was confirmed by the appellate authority (Opp. Party No. 2) – Whether the order of removal is sustainable.

Held: No – When the proceeding was initiated under Rule 16 of the 1962 Rules and the petitioner was never held guilty, no major punishment can be imposed – Only minor punishment can be imposed. (Para 6.8)

List of Rules/Code

Orissa Civil Services (CCA) Rules, 1962; Odisha Service Code.

Keywords

Major punishment; Minor punishment; C.R.C.C.; B.E.O.; D.E.O.

Case Arising From

Out of order dated 11.05.2020 passed by Opp. Party No.4 in W.P.(C) No. 38292 of 2021 and order dated 05.12.2007 passed by Opp. Party No.2 in W.P.C (OAC) No.266 of 2018.

Appearances of Parties

For Petitioner : M/s. K.K. Swain, S.C.D. Dash
For Opp. Parties : M/s. M.K.Balabantaray, AGA

Judgment/Order

Judgment

BIRAJA PRASANNA SATAPATHY, J.

1. This matter is taken up through hybrid mode.

2. Since the issue involved in both the Writ Petitions are corelated to each other, both the matters were heard analogously and disposed of by the present common order.

3. While W.P(C) No.38292 of 2021 has been filed inter alia challenging the order of dismissal passed by Opp. Party No.4 vide Office Order dt.11.05.2020, communicated vide letter dt.20.06.2020 under Annexure-12, further confirmed in Appeal vide Order dt.06.11.2021 of Opp. Party No.2; under Annexure-16, W.P.C (OAC) No.266 of 2018 has been filed challenging order dt.05.12.2007, so passed by Opp. Party No.2.

4. It is contended that Petitioner vide order dt.11.05.2020 under Annexuxre-12 was removed from Government service w.e.f 18.08.2009 relying on the provision contained under Rule-72 (2) of the Orissa Service Code of Opp. Party No.4. Petitioner challenging the order of removal, when preferred an appeal before the appellate authority-Opp. Party No.2, vide Order dt.06.11.2021 under Annexure-16, Opp. Party No.2 while rejecting the same, confirmed the order of removal, so passed against the Petitioner vide Office Order dt.11.05.2020 under Annexure-12.

4.1. It is the case of the Petitioner that Petitioner while continuing as a Sikshya Karmi w.e.f 22.08.1989; he was regularized as a Primary School Teacher w.e.f 25.05.1992. It is contended that while so continuing as a Level-V Asst. Teacher in the Elementary Cadre, Petitioner vide Office Order dt.02.08.2023 under Annexure-1 was promoted to Level-IV Headmaster.

4.2. It is contended that while so continuing as a Level-IV Headmaster, in terms of Order dt.02.08.2003 under Annexure-1, Petitioner was transferred to Ullibasa Primary School vide Order dt.15.06.2009 of the then Block Development Officer, Anandapur and was relieved vide Order dt.17.08.2009. Petitioner challenging the order of transfer, approached the Tribunal in OA No.1969(C) of 2009. The Tribunal vide Order dt.31.08.2009, while disposing the matter, directed Opp. Party No.2 to take a decision on the claim of the Petitioner. But Opp. Party No.2 vide Order dt.09.10.2009 while rejecting the claim of the Petitioner, directed him to join in his place of transfer. But, Subsequently vide Office Order dt.27.05.2010 under Annexure-3, the then District Inspector of Schools, Anandapur deployed the Petitioner to work as C.R.C.C in Taratara Centre under Sarba Sikshya Avijan with immediate effect. Petitioner in terms of the order issued under Annexure-3, joined as C.R.C.C on 01.07.2010, so reflected under Annexure-4.

4.3. However, order dt.27.05.2010 when was kept in abeyance vide Office Order dt.04.06.2010 and Petitioner was directed to handover the charge of C.R.C.C to his predecessor, challenging order dt.04.06.2010, Petitioner again approached the Tribunal by filing OA No.3341 (C) of 2010. The Tribunal vide Order dt.28.10.2010 though directed for payment of the duty pay as due and admissible, but the same was never released. In the meantime, Petitioner also filed OA No.3032 (C)of 2011 with a prayer to direct the Opp. Parties to release the salary of the Petitioner, taking into

account his date of joining as C.R.C.C on 01.07.2010. The Tribunal vide Order dt.16.12.2014, as an interim measure, directed that if the Petitioner is currently discharging his duty, he may be paid his current salary, as due and admissible, within a period of one month from the date of receipt of this order.

4.4. It is contended that while the matter stood thus, the Tribunal disposed of O.A. No.3341(C) of 2010 and 3032(C) of 2011 vide a common order dt.27.01.2017. Observation and direction of the Tribunal so contained in para-7 of the order reads as follows:

> *"7. Considering the rival contention, it may be noted that the applicant has stated that he approached the Tribunal in O.A. NO.888(C)/2009 and O.A. NO.3341(C)/2010, yet he has not whispered a word that he had moved the Tribunal in O.A. No.1969(C)/2009, where he challenged the order of transfer from Badadanda Primary School to at Ullibass (Badasahi) New Primary School and the Tribunal directed the Director, Elementary Education to consider the representation fo the applicant and compliance with the said order of the Tribunal, the Director vide order 09.10.2010 rejected the representation of the applicant. It appears that though the applicant was relieved from the said school on 17.08.2009, yet he has never joined in the new place of posting. Though the applicant claimed that he be on leave from 10.08.2009 to 30.06.2010, yet no document or material been produced showing that he applied for leave in time, which ws sanctioned. Therefore the action of the respondent/authorities treating the said period as unauthorized absence and initiating disciplinary proceeding cannot be faulted. The applicant in one hand claimed that he was on leave due to illness, for which he could not join in the School, to which he would transferred; on the other hand he approached the Tribunal challenging the order of transfer. This shows the seriousness of his illness which prevented him from joining in the new place of posting. Be that as it may, when administrative action has been taken against the applicant by initiating a disciplinary proceeding for unauthorized absence, there is no scope to direct regularization till disposal of the disciplinary proceeding. Accordingly, the grievance of the applicant for regularization of the service for the period from 10.08.2009 to 30.06.2010 as made in O.A. No.3341(C)/2010 is not entertainable.*
>
> *So far as grievance in O.A. No.3032 (C)/2011, is concerned, where he has challenged the letter dtd.30.12.2010, it may be noted that the order deplying him as CRCC have been kept in abeyance vide order dt.04.06.2010. The applicant has stated that the said order was never served on him but from the pleadings it appears that the applicant has refused to receive the said order from the Sub Inspector of Schools and the said order which was sent by registered post could not be served due to his long absence. Since the office orders have been communicated following due procedure, the applicant's plea that the order was not served on him cannot be accepted. As discussed above, when the order of deployment as CRCC has been kept in abeyance vide order dtd.04.06.2010 and the said orders have not been challenged and is force; there is no illegality in issuing the impugned order keeping the appellant away from the post of CRCC. The letter dtd.30.12.2010 is consequential ad in compliance with the order dtd.04.06.2010 and hence no illegality has been committed in issuing the letter dtd.30.12.2010 and the grievance of the applicant is not entertainable."*

4.5. It is contended that challenging the common order passed by the Tribunal on 27.01.2017, Petitioner approached this Court by filing W.P.(C) 6727 of 2017. This

Court vide order dt.14.07.2017 disposed of the Writ Petition inter alia with the following direction so contained in Para-5.

> *"5. In the present writ petition opposite parties have filed their counter affidavit. Petitioner has also filed rejoinder affidavit and annexed some further documents which are not part of the record in the original applicant. As both the parties raised disputed questions of facts which are beyond the records, we are not inclined to go into all those controversy. Therefore, it is deem just and proper to direct the Director, Elementary Education, Bhubaneswar to enquire into matter. Accordingly, we dispose of the work petition with a direction to Director, Elementary Education, Bhubaneswar to enquire into the matter and given an opportunity of hearing to the Petitioner regarding his grievance from 2009 onwards as well as the administrative decision taken by the authority. For convenience, the petitioner shall appear before him on 27th July, 2017 and produce all the relevant documents. On his appearance the Director shall fix a date of hearing call for the records from the concerned authorities and take consequential steps in accordance with the law. The above exercise shall be completed within a period of two months."*

4.6. Learned counsel for the Petitioner contended that pursuant to the order passed by this Court on 14.07.2017 in W.P.(C) No.6727 of 2017, Opp. Party No.2 when passed an order on dt. 05.12.2017 under Annexure-5 inter alia holding therein that Petitioner has remained on unauthorized absent from his duty w.e.f 26.10.2009 for more than 5 years violating Rule 72(2) of the Orissa Service Code and disciplinary Proceeding be initiated against the Petitioner by D.E.O, Keonjhar. Opp. Party No.2 also held that joining of the Petitioner as C.R.C.C is illegal as the Petitioner without joining in his parent post at Ullibasa Primary School had joined there. Opp. Party No.2 also held that since the Petitioner has remained on unauthorized absence, he is not eligible for release of the salary, unless Petitioner joined in his post at Ullibasa Primary School, after approval of the Government.

4.7. Learned counsel for the Petitioner contended that challenging order dt.05.12.2017 so Passed by Opp. Party No.2 under Annexure-5, Petitioner approached the Tribunal by filing OA No.266(C) of 2018. But the facts remain that in terms of order dt.05.12.2017, Petitioner submitted his joining before Opp. Party No.4 vide letter dt.26.12.2017 under Annexure-6.However, vide letter dt.05.01.2018 under Annexure-7, Opp. Party No.4 intimated that joining report of the Petitioner cannot be accepted unless specific instruction is provided by the Department.

4.8. It is further contended that in terms of the order passed by Opp. Party No.2 vide Office Order dt.05.12.2017 under Annexure-5 and during pendency of the matter before the Tribunal in O.A. No.266 (C) of 2018, Opp. Party No.4 vide Office Order dt.04.04.2019 proposed to take action against the Petitioner under Rule-15 of the OCS (CCA) Rules, 1962 and submitted the Memorandum along with Office Order dt.04.04.2019.

4.9. It is contended that even though Petitioner on receipt of the memorandum so enclosed to Office Order dt.04.04.2019 under Annexure-13 series vide letter dt. 06.06.2019 intimated that during pendency of the matter before the Tribunal, no

proceeding should have been initiated, but no further action was taken thereafter with regard to the proceeding initiated on 04.04.2019. In the meantime, Petitioner also attained the age of superannuation having attained the age of superannuation on 31.05.2020, taking into account his date of birth so recorded in his Service Book as 26.05.1960.

4.10. It is contended that after attaining the age of superannuation, when Petitioner raised his claim to get the benefit of pension and sought for information for non-release of the benefit vide Annexure-10, Opp. Party No.4 vide letter dt.20.06.2020 under Annexure-11, intimated the Petitioner that Petitioner has been removed from Government service w.e.f 18.08.2009, being found guilty of the charges, vide Order dt.11.05.2020. Vide another letter issued on 20.06.2020 under Annexure-12 series, petitioner was provided with the order of removal so issued vide Office Order dt.11.05.2020 of Opp. Party No.4. Vide such Order dt.11.05.2020, Petitioner was shown removed from Government service w.e.f 18.08.2009, basing on the charges levelled against him vide Office Order dt.26.05.2010 of the erstwhile D.I of Schools, Anandapur and Office Order No.883 dt.04.04.2019 of Opp. Party No.4.

4.11. Learned counsel for the Petitioner contended that vide Office Order dt.04.04.2019 so available under Annexure-13 series, a proceeding was initiated against the Petitioner under Rule-15 of the OCS (CCA) Rules, 1962 in terms of the direction issued by O.P. No.2 in his order dt.05.12.2017 and no further progress was made to the said proceeding with passing of any final order till the Petitioner attained the age of superannuation on 31.05.2020.

4.12. It is also contended that vide Office Order dt.26.05.2010, no such charges were ever framed against the Petitioner and such a fact was never reflected in Order dt.05.12.2017 of Opp. Party No.2. Vide Order dt.05.12.2017 under Annexure-5, Opp. Party No.2 only observed that since the Petitioner has remained on unauthorized absence for a period exceeding 5 years, the Proceeding under Rule-15 of the OCS (CCA) Rules, 1962 be initiated against him. It is accordingly contended that Office Order dt.11.05.2020, so communicated to the Petitioner under Anexure-12 series showing him to be removed from Government service w.e.f 18.08.2009, basing on Office Order dt.26.05.2010 of the then D.I of School, Anandapur and Office Order dt.04.04.2019 of B.E.O, Anandapur is prima facie illegal and not sustainable in the eye of law.

4.13. It is further contended that challenging the order of removal so issued vide Office Order dt.11.05.2020 under Annexure-12 series, Petitioner when preferred an appeal before Opp. Party No.2, the appellate authority without proper appreciation of the same and without following his own order dt.05.12.2017 rejected the appeal vide the impugned Order dt.06.11.2021 under Annexure-16.

4.14. Learned counsel for the Petitioner contended that Petitioner vide Office Order dt.11.05.2020 under Annexure12 series was shown removed from Government

service w.e.f 18.08.2009, and such an order of removal was passed, on the ground that Petitioner was found guilty of the charges vide Office Order dt.26.05.2010 and Office Order dt.04.04.2019 of the then D.I of School, Anandpur and B.E.O, Anandpur respectively.

4.15. It is contended that vide Office Order dt.04.04.2019, only the proceeding was initiated against the Petitioner under Rule 15 of OCS (CCA) Rules, 1962 and in terms of the said order, Petitioner cannot held to be found guilty of the charges. It is contended that no such order dt.26.05.2010 was ever issued to the Petitioner, holding therein that the Petitioner has been found guilty of the charges levelled against him. It is accordingly contended that the Order of removal passed vide Office Order dt.11.05.2020 of Opp. Party No.4 under Annexure-12, so confirmed vide Office Order dt.06.11.2021 of Opp. Party No.2 under Annexure-16 are not sustainable in the eye of law and requires interference of this Court.

4.16. It is also contended that since at no point of time, Petitioner was found guilty of the charges in the proceeding initiated against him on 04.04.2019 under Annexure-13 series, the ground on which he was removed from service vide Office Order dt.11.05.2020 under Annexure-12 is not sustainable in the eye of law.

5. This Court in course of hearing and taking into account the submission of the learned State Counsel that Petitioner has been rightly removed from his services vide Office Order dt.11.05.2020 so confirmed vide Office Order dt.06.11.2021, passed the following order on 08.08.2024.

> *"**1**. This matter is taken up through Hybrid Arrangement (Virtual/Physical) Mode.*
> ***2.** Heard learned counsel appearing for the parties.*
> ***3.** Date chart and written notes of submission filed in Court be kept in record.*
> ***4**. Considering the nature of order passed under Annexure-12, wherein Petitioner was removed from Government service, this Court directs learned Addl. Government Advocate to produce copy of Office Order No.1990 dtd.26.05.2010 and office order NO.883 dtd.04.04.2019 on the next date.*
> ***5.** As requested, list this matter on 16th August, 2024."*

5.1. Pursuant to the aforesaid, order copy of Office Order dt.26.05.2010 and Office Order dt.04.04.2019 were produced before this Court. This Court, after going through Office Order dt.26.05.2010 found that vide the said order, the then D.I of Schools, Anandpur proposed to take action against the Petitioner under Rule-16 of the OCS (CCA) Rules, 1962. Similarly, vide Office Order dt.04.04.2019, Opp. Party No.4 proposed to take action against the Petitioner under Rule-15 of the OCS (CCA) Rules, 1962. Contents of Office Order dt.26.05.2010 and dt. 04.04.2019 so produced by the learned Addl. Govt. Advocate before this Court on 16.08.2024 reads as follows:

> "Office Order No.1990 Date 26.05.2010
>
> Whereas Sri Padmanav Sethy, Ex-Headmaster, Badadanda Pry. School, Anandapur has disobeyed the order of the higher authorities, neglected in his duty, remained unauthorized absent from duty and violated official document for which it is proposed to take action against him under Rule-16 of the O.C.S (CCA) Rules1962.

Office Order Dated 4th Apr. 2019

No.883/Whereas Sri Padmanav Sethy, ExHeadmaster, Badadanda Primary School, Anandapur has disobeyed the order of the higher authorities, neglected in his duty, remained unauthorized absent from duty for more than 9 years and violated official decorum for which it is proposed to take action against him under Rule-15 of the O.C.S (CCA) Rules,1962."

5.2. However, on the face dt.26.05.2010 of Office order and 04.04.2019 learned Addl. Govt. Advocate taking into account the stand taken in the counter affidavit so filed by Opp. Party No.4 contended that Petitioner while continuing as a Level-IV Headmaster, he was transferred to Ullibasa Primary School vide Order dt. 15.06.2009 of the then D.I of Schools, Anandpur. Petitioner in terms of Order dt.15.06.2009 was relieved from his duty w.e.f 17.08.2009 of the then B.D.O, Anandpur. Petitioner after being so relieved w.e.f 17.08.2009, instead of joining in his place of transfer i.e. Ullibasa Primary School, challenged the same before the Tribunal by filing O.A. No. 1969(C) of 2009.

5.3. The Tribunal vide Order dt. 31.08.2009 while disposing O.A. No.1969(C) of 2009, directed Opp. Party No.2 to take a decision on the claim of the Petitioner. But Opp. Party No.2 vide his Office Order dt.09.10.2009, rejected the representation of the Petitioner and directed the Petitioner to join in his place of transfer. But Petitioner in terms of the said order never joined in his place of posting at Ullibasa New Primary School.

5.4. However, in the meantime, vide Office Order dt.03.02.2010 of District Project Coordinator, Sarba Sikshya Abhijan, Keonjhar, Petitioner was deployed to work as C.R.C.C, Taratara Centre under Sarva Sikshya Abhijan. In terms of the said order issued by the D.P.C on 03.02.2010, Petitioner vide Office Order dt.27.05.2010 of the then D.I of Schools, was deployed to work as CRCC, Tartara Centre under Sarba Sikshya Abhijan Scheme with immediate effect. Pursuant to the said order, which is an additional assignment, Petitioner though joined on 01.07.2010, but he never joined in his place of transfer i.e. Ullibasa Primary School. However, prior to joining of the Petitioner as C.R.C.C on 01.07.2010, order dt.27.05.2010 had already been kept in abeyance vide Office Order dt.04.06.2010 of the then D.I of Schools, Anandspur under Annexure-A/4.

5.5. Challenging order dt.04.06.2010 so passed under Annexure-A/4, Petitioner approached the Tribunal by filing O.A. No.3341(C) of 2010. Claiming release of his salary, Petitioner also approached the Tribunal by filing O.A. No.3032(C) of 2011. The Tribunal vide a common order passed on 17.01.2017, disposed of both O.A. No. 3341 of 2010 and 3032 of 2011 inter alia with some observation and direction.

5.6. Petitioner challenging the common order dt.27.01.2017 of the Tribunal approached this Court by filing W.P(C) No.6727 of 2017. This Court vide order dt.14.07.2017 while disposing the matter, directed Opp. Party No.2 to enquire into the matter by giving opportunity of hearing to the Petitioner regarding his grievance from 2009 onwards as well as the administrative decision taken by the authority.

5.7. It is contended that in terms of the order passed by this Court in W.P.(C) No.6727 of 2017, Opp. Party No.2 took up the matter and passed an order on 05.12.2017 under Annexure-5. Petitioner challenging order dt. 05.12.2017 approached the Tribunal by filing O.A. NO. 266 (C) of 2018.

It is however contended that much prior to such passing of order dt.05.12.2017, vide Office Order dt.25.05.2010 of the then D.I. of School, Anandapur, a proceeding was initiated against the Petitioner and the said memorandum though was issued vide letter dt.11.10.2010 under Annexure-B/4, but the same could not be served on the Petitioner and instead returned back.

5.8. Thereafter, when memorandum dt.25.05.2010 was served on the Petitioner, he refused to accept the same. Accordingly with due appointment of the Inquiry Officer to enquire into the charges levelled against the Petitioner, the enquiry was conducted. Since Petitioner never attended the inquiry, the Inquiry Officer submitted the inquiry report by holding the Petitioner guilty of the charges. Basing on such report submitted by the Inquiry Officer, a show-cause was issued to the Petitioner vide Office letter No.1298 dt.07.04.2017 of Opp. Party No.4 proposing therein to remove him from Government service. However, since Petitioner never submitted his reply to such show-cause issued on 07.04.2017, he was removed from Government Service vide Office Order dt.11.05.2020 under Annexure-12 series w.e.f 18.08.2009.

5.9. It is contended that challenging order dt.11.05.2020, Petitioner when approached this Court in W.P.(C) No.19638 of 2020, this Court while disposing the matter vide Order dt.20.08.2020 granted liberty to the Petitioner to file an appeal within a period of two (2) weeks hence and with a further direction to the appellate authority to give due opportunity of hearing to the Petitioner and to take into consideration as to whether Petitioner can be removed from Government service from a retrospective date.

5.10. It is contended that pursuant to the liberty granted by this Court in its order dt.20.08.2020, Petitioner filed an appeal before Opp. Party No.2 and the appellate authority after due appreciation of the grounds of appeal, rejected the same vide order dt.06.11.2021 under Annexure-16.It is accordingly contended that since in the proceeding initiated against the Petitioner vide proceeding dt.25.05.2010, Petitioner neither received the memorandum nor participated in the inquiry, basing on the report of the Inquiry Officer and the show-cause issued on 07.04.2017, Petitioner was removed from Government service vide Order dt. 11.05.2020 w.e.f. 18.08.2009, which was confirmed vide Office Order dt.06.11.2021 of Opp. Party No.2 under Anexure-16.

5.11. Making all these submissions, learned Addl. Govt. Advocate contended that since the Petitioner w.e.f 18.08.2009 remained on unauthorized absent and he was found guilty of the charges in the proceeding initiated against him vide Office Order

dt. 25.05.2010 and 04.04.2019, he was rightly removed from his services, which requires no interference of this Court.

6. Having heard learned counsel for the parties, considering the submission made by the learned counsel appearing for the parties and after going through the materials placed before this Court, this Court finds that Petitioner was appointed as a Level-V Headmaster vide Office Order dt.02.08.2003 under Annexure-1. While so continuing as a Level-V Asst. Teacher in Badadanda Primary School , Petitioner vide Office Order dt.15.06.2009 was transferred to Ullibasa Primary School and he was relieved w.e.f 17.08.2009 of the then B.D.O, Anandapur. Challenging the order of transfer so passed on 15.06.2009 and the relieve order dt.17.08.2009; Petitioner approached the Tribunal by filing O.A. NO.1969(C) of 2009.

6.1. The Tribunal vide Order dt.31.07.2009 when directed Opp. Party No.2 to take a decision on the Petitioner's claim so made in O.A. No.1969 (C) of 2009, Opp. Party No.2 rejected the claim of the petitioner. As found, on the face of such rejection issued vide Office Order dt.09.10.2009, in terms of letter dt.03.02.2010 of District Project Coordinator, S.S.A., Keonjhar, Petitioner vide Office Order dt.27.05.2010 under Annexure-3 was deployed to work as C.R.C.C, Tartara Centre under Sarva Sikshya Avijan Scheme with immediate effect.

6.2. In terms of the order dt.27.05.2010, Petitioner joined as C.R.C.C in Tartara Centre on 01.07.2010 as reflected under Annexure-4. But when it came to the knowledge of the Petitioner that order dt.27.05.2010 has been kept in abeyance vide Order dt.04.06.2010, Petitioner challenging the same, again approached the Tribunal by filing OA No. 3341 of 2010. Petitioner seeking release of his salary on the face of his joining as C.R.C.C on 01.07.2010 also approached the Tribunal by filing O.A. No. 3032(C) of 2011. The Tribunal vide a common order dt. 27.01.2017 when disposed of OA No. 3341(C) of 2010 and 3032(C) of 2011, Petitioner challenging the common order dt.27.01.2017, approached this Court in W.P.(C) No.6727 of 2017.

6.3. It is found that this Court vide order dt.14.07.2017 while disposing the Writ Petition directed Opp. Party No.2 to enquire into the matter and give an opportunity of hearing to the Petitioner regarding his grievance from 2009 onwards as well as the administrative decisions taken by the authority. Pursuant to the order passed by this Court in WP (C) No.6727 of 2017, Opp. Party No.2 passed an order on 05.12.2017 under Annexure-5 with an observation that a proceeding under Rule-15 of OCS (CCA) Rules was required to be initiated against the Petitioner as the Petitioner has remained on unauthorized absent for more than 5 years, violating Rule 72(2) of the Odisha Service Code. Petitioner challenging order dt. 05.12.2017 filed O.A. No.260(C) of 2018.

6.4. It is found that while disposing the claim of the Petitioner vide order dt.05.12.2017, though it was brought to the notice of Opp. Party No.2 that a proceeding has been drawn up against the Petitioner vide Office Order 3084 dt.

11.10.2010 of B.E.O, Anandapur (erstwhile D.I, Anandapur) and the order of deployment of the Petitioner as C.R.C.C has been kept in abeyance vide Office Order dt.04.06.2010, but Opp. Party No.2 taking into account the submission of the concerned authority that proceeding dt.11.10.2010 and order dt.04.06.2010 since could not be served on the Petitioner held that appropriate steps should have been taken to make paper publication of the same. Taking into account the stand of the concerned authority and the Petitioner, Opp. Party No.2 vide Order dt.05.12.2017 observed that a proceeding is required to be initiated against the Petitioner under Rule 15 of the OCS (CCA) Rules, 1962.

6.5. It is found that pursuant to the order passed by Opp. Party No.2 on 05.12.2017, a proceeding under Rule -15 of the OCS (CCA) Rules, 1962 was initiated against the Petitioner vide Officer order dt. 04.04.2019 under Annexure-13 series. However, it is found that Petitioner was never held guilty of the charges in the proceeding initiated against the Petitioner vide Order dt.26.05.2010 or vide Office Order dt.04.04.2019.

6.6. Since Petitioner was never held guilty of the charges in the proceeding initiated against the Petitioner vide Office Order dt.26.05.2010 or vide Office Order dt.04.04.2019, it is the view of this Court that in absence of any such finding holding the Petitioner guilty of the charges, no order of removal could have been passed vide the impugned Office Order dt.11.05.2020 of Opp. Party No.4 under Annexure-12 removing the petitioner from his services w.e.f 18.08.2009, further confirmed by Opp. Party No.2 vide Office Order dt.06.11.2021 under Annexure-16.

6.7. Since at no point of time in proceeding initiated against the petitioner on 26.05.2010 and 04.04.2019, Petitioner was ever held guilty of the charges, the order of removal passed by Opp. Party No.4 vide Office order dt.11.05.2020 under Annexure-12 series, so confirmed by Opp. Party No.2 vide order dt.06.11.2021 under Annexure-16, as per the considered view of this Court, are not sustainable in the eye of law.

6.8. Not only that the proceeding dt.26.05.2010 was initiated under Rule-16 of the OCS (CCA) Rules, 1962, and in a proceeding initiated under Rule-16 of the OCS (CCA) Rules, 1962, no major punishment can be imposed. In a proceeding initiated under Rule-16 of the OCS (CCA) Rules, 1962, only minor punishments can be imposed as provided under Rule-13 of the OCS (CCA) Rules, 1962.

6.9. In view of the aforesaid analysis, this Court is of the view that Petitioner has been illegally removed from Government service w.e.f 18.08.2009 vide Office Order dt.11.05.2020 of Opp. Party No.4 under Annexure-12 series, so upheld by Opp. Party No.2 vide Office order dt.06.11.2021 un Annexure-16.

6.10. Therefore, this Court is inclined to quash Office order dt.11.05.2020, so issued by Opp. Party No.4 under Annexure-12 series and confirmed vide Office Order dt.06.11.2021 of Opp. Party No. 2 under Annexure-16. While quashing both

the orders, this Court held the Petitioner to have retired from Government service on attaining the age of superannuation on 31.05.2020.

6.11. This Court accordingly directs Opp. Party No.4 to regularize the services of the Petitioner for the period from 18.08.2009 till he attained the age of superannuation on 31.05.2020 as due and admissible, but on notional basis 7 and thereafter release the pension and pensionary benefit as due and admissible, in favour of the Petitioner. This Court directs Opp. Party No.4 to complete the entire exercise, as directed, within a period of four (4) months from the date of receipt of this order.

Accordingly, both the Writ Petitions are disposed of.

Headnotes prepared by : *Result of the case :*
Smt. Madhumita Panda, Law Reporter Writ Petitions are disposed of.
(Verified by : Shri Pravakar Ganthia, Editor-in-Chief)

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2024 (III) ILR-CUT-845

KANSARI BEHERA
V.
STATE OF ODISHA & ORS.

(W.P.(C) NO. 28593 OF 2022)

09 OCTOBER 2024

[MURAHARI SRI RAMAN, J.]

Issue for Consideration

Whether the disciplinary authority has any scope to seek advise of the higher authority in view of the provisions contained in Rule 30 of the OCS (CCA) Rules, 1962.

Headnotes

(A) ODISHA CIVIL SERVICES (CCA) RULES, 1962 – Rules 29 & 30 – Disciplinary authority imposed punishment treating the period of suspension as such – Petitioner preferred appeal challenging the punishment of disciplinary authority – Appellate authority set aside the order imposing penalty – The disciplinary authority without implementing the order of appellate authority sought advice from the Revenue and Disaster Management Department – Whether the disciplinary authority has any scope to seek advice from the higher authority in view of the provisions contained in Rule 30 of the 1962 Rules.

Held: No – The Disciplinary authority was bound by the quasi-Judicial order in appeal, and in defiance thereof he was not competent to pass fresh orders by adhering to directive of Revenue and Disaster Management Department on the administrative side – Such a course, in flagrant violation of provision of Rule 30 of OCS (CCA) Rules, 1962, is impermissible. (Para 6.12)

(B) ODISHA SERVICE CODE – Rule 91 – Appellate authority set aside the order of punishment treating the period of suspension as such – Disciplinary authority without complying the order of appellate authority passed the impugned order of claim of pay for the period under suspension is abandoned in consonance with Rule 91 of the Odisha Service Code – Whether the order in compliance with Rule 91 of the code is applicable once the appellate authority set aside the order of punishment.

Held: No – Present case factually does not fit into clause (1) of Rule 91. (Para 8.3)

Citation Reference

Anantdeep Singh Vrs. The High Court of Punjab and Haryana, **(2024) 9 SCR 135 = 2024 INSC 673**; Mohd. Yunus Khan Vrs. State of Uttar Pradesh, **(2010) 10 SCC 539**; Roop Sing Negi Vrs. Punjab National Bank, **(2009) 2 SCC 570**; Nirmal Chandra Panigrahi Vrs. State of Odisha, **2021 SCC OnLine Ori 807**; Shree Sidhbali Steels Limited Vrs. State of Uttar Pradesh, **(2011) 3 SCC 193**; State of Odisha Vrs. Pratima Mohanty, **(2021) 9 SCR 335**; Orissa Metaliks Pvt. Ltd. Vrs. State of Odisha, **AIR 2021 Ori 85**; State of Uttar Pradesh Vrs. Maharaja Dharmander Prasad Singh, **(1989) 1 SCR 176**; Union of India Vrs. Kamlakshi Finance Corporation Ltd., **AIR 1992 SC 711**; Tirupati Balaji Developers Private Ltd. Vrs. State of Bihar, **(2004) 5 SCC 1**; Orissa Forest Corporation Ltd. Vrs. Assistant Collector, **1982 SCC OnLine Ori 209**; Bani Bhusan Dash Vrs. State of Odisha, **2021 (II) OLR 1022** - **referred to.**

List of Rules/Code

Odisha Civil Services (CCA) Rules, 1962; Odisha Service Code.

Keywords

Duty of disciplinary authority, Punishment, Suspension.

Case Arising From

Order No.1610-Con.VI-3/2021/BBE dated 05.04.2021 passed by the Disciplinary Authority the Collector, Kandhamal.

Appearances of Parties

For Petitioner : M/s. Krishna Chandra Sahu, Sudarshan Pradhan, D.K. Mahalik, Ajaya Kumar Samal, Monalisa Tripathy

For Opp.Parties : Mr. Arnav Behera, ASC

Judgment/Order

Judgment

MURAHARI SRI RAMAN, J.

Assailed in the writ petition is the Office Order No.1610-Con.VI-3/2021/BBE dated 05.04.2021 (Annexure-15) whereby and whereunder assuming jurisdiction in purported exercise of powers as if conferred by the Appellate Authority-cum-Revenue Divisional Commissioner (Southern Division), Berhampur, the Disciplinary Authority the Collector, Kandhamal sought to pass further orders by restricting payments during the period from 30.09.2000 (date of suspension) to 30.09.2013 (date of reinstatement).

1.1. The petitioner craving to invoke extraordinary jurisdiction of this Court under Articles 226 and 227 of the Constitution of India made the following prayer(s):

> *"In view of the facts and submissions mentioned above the petitioner prays for the following relief(s);*
>
> *(i) The Hon'ble Court be pleased to admit and allow the writ petition.*
>
> *(ii)The Hon'ble Court be pleased to quash/modify the impugned Order dated 05.04.2021 under Annexure-15 so far as relating to treatment of the periods of suspension from 30.09.2000 to 30.09.2013 in respect of the petitioner as abandoned and further consequential fixation of pay on notional basis by declaring the same as illegal and unjustified one.*
>
> *(iii)The Hon'ble Court be further direct the opposite party No.3 i.e. Collector, Kandhamal to treat the periods of suspension of the petitioner from 30.09.2000 to 30.09.2013 as duty so also to grant/disburse the consequential actual differential arrear financial benefits including the consequential fixation of pay as due and admissible in favour of the petitioner instead of fixing on notional basis within a time bound period for the interest of justice.*
>
> *(iv) The Hon'ble Court may be pleased to pass any Order(s)/direction(s) as deems fit and proper for the interest of justice.*
>
> *And for this act of kindness, the petitioner shall as in duty bound ever pray."*

Facts:

2. As adumbrated in the pleadings, the petitioner while working as Revenue Inspector under Chakapad Tahasil in the district of Kandhamal, a case bearing Berhampur Vigilance P.S. Case No.36 dated 04.11.1999 was instituted and the petitioner was placed under suspension vide Order dated 30.09.2000 in exercise of powers under Rule 12(2)(b) of the Odisha Civil Services (Classification, Control and Appeal) Rules, 1962 ("OCS (CCA) Rules", for convenience).

2.1. After continuing for more than one year under suspension, a departmental proceeding was initiated against the petitioner vide Memo No.4312 dated 03.11.2000 by the Disciplinary Authority-cum-Collector & District Magistrate, Kandhamal.

2.2. As the allegations in the aforesaid vigilance case and the departmental proceeding were the identical, being emanating from same set of facts, the petitioner approached the learned Odisha Administrative Tribunal, Bhubaneswar by filing Original Application bearing O.A. No.1182 of 2001 wherein vide Order dated 14.08.2001 an interim Order was passed with a direction to the opposite parties not take any further action in the departmental proceeding and the matter was kept pending. But while the interim Order was in force and main matter was pending adjudication, the Order of dismissal of the petitioner from service was passed vide Order No.3643, dated 12.09.2001 by inflicting punishment under Rule 13 of the OCS (CCA) Rules.

2.3. With the intervention of the learned Odisha Administrative Tribunal vide Order dated 07.12.2001, the said Original Application came to be disposed of with the following observation:

> *"Heard. The prayer in O.A. is that the imposition of penalties on the applicant be held up till the criminal case in the Court of Special Judge (Vigilance)-cum-Additional District and Sessions Judge, Berhampur, Ganjam is disposed of. By Order dated 14.08.2001 the Tribunal directed that further action on the enquiry report might wait 05.09.2001. No reply has been filed in the meantime and the said date has been extended from time to time.*
>
> *2. The prayer of the applicant had actually been allowed upto a certain time and the said time has been extended on subsequent 4 occasions. Since the prayer is simple and has almost been allowed, I now direct that the final disposal of the disciplinary proceeding shall be held up till disposal of the criminal case in the Court of the Special Judge (Vigilance)-cum-Additional District & Sessions Judge, Berhampur.*
>
> *3. In the result, with the above direction, the O.A. is allowed."*

2.4. The criminal case being G.R. Case No.38 of 1999 (V)/ T.R. Case No.39 of 2021 (arising out of Berhampur Vigilance P.S. Case No.36 dated 03.11.1999 under Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988) came to an end vide judgment dated 18.04.2011 delivered by the learned Special Judge (Vigilance), Berhampur, Ganjam with the following observation:

> "***
>
> *8.In this case, the acceptance of bribe has not been proved beyond reasonable doubt. Mere demand of bribe though proved will not carry any punishment nor a conviction can be based on that. Therefore, on the entire appreciation of the record, it is found that the prosecution is not able to prove the case against the accused beyond all reasonable doubt and as such the accused is found not guilty under Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988 and is acquitted under Section 248(1) Cr.P.C. and set him at liberty. His bail bond is cancelled."*

2.5. Laying challenge against the said Order of acquittal, the Vigilance Authority approached this Court by filing CrlLP No.40 of 2012, which was dismissed vide Order dated 11.12.2018.

2.6. After finalisation of said vigilance case, the Collector, Kandhamal-opposite party No.3 being approached for withdrawal of Order of dismissal, he passed Order on 21.08.2013 with the following observation:

"***

Whereas the applicant filed O.A. No.1182/2001 challenging the continuance of Departmental Proceeding drawn up against him. Hon'ble Odisha Administrative Tribunal, Bhubaneswar in Order No.2 dated 14.08.2001 directed that let the interim Order to continue till 30.09.2001. But the said Order was received in the Office of the Collector, Kandhamal on 21.09.2001 and finally Order No.7 dated 07.12.2001 the Hon'ble Odisha Administrative Tribunal white disposing of the case, directive was issued to the effect that, the final disposal of the Disciplinary Proceeding shall be held up till disposal of the criminal case in the Court of the Special Judge (Vigilance)-cum-Additional District & Sessions Judge, Berhampur. By the time of copy of the Order dated 05.09.2001 was received, i.e., on 21.09.2001, the Departmental Proceeding bearing No 4312 dated 13.11.2000 initiated against the applicant had already been finalized and disposed of. Accordingly, the applicant was dismissed from service with immediate effect vide Order No. 3643, dated 12.09.2001.

Whereas, the applicant challenging the dismissal Order passed by the Disciplinary Authority vide Order No.3643 dated 12.09.2001 has filed a contempt petition vide C.P.(C) No.71/2002.

Whereas, the Ho'nble Odisha Administrative Tribunal, Cuttack vide Order No. 40, dated 30.01.2013 in C.P. 71(C)/2002 arising out of O.A. No. 1182/2001 filed by Sri Kansari Behera, Ex. Revenue Inspector has directed undersigned to first purge the contemptuous Order vide Order No. 3643/Estt., dated 12.09.2001 after which any apology by alleged contemnors may be considered.

Whereas, again Hon'ble Odisha Administrative Tribunal, Bhubaneswar vide Order No.41, dated 20.01.2013 served that 'the final Order in the Departmental Proceeding dismissing the applicant from service was passed while the stay Order was very much in force. The said stay Order was passed in open Court in presence of the learned Government Advocate. Therefore, even if the plea of the alleged contemnor that the Order was not communicated to him and for that he is not personally liable, is accepted, still the impugned Order of dismissal con be safely held to be non-existent in the eye of law'.

Whereas, the Government in Revenue and Disaster Management Department Odisha, in their Letter No 31273/RD&M, dated 16.08.2013 have allowed to implement the Order No.441 dated 20.03.2013 of the Hen'ble Odisha Administrative Tribunal passed in C.P.(C) No 71/2002 (arising in O.A. Case No 1182/2001).

Whervos, in the meantime the case was heard and the Hon'ble Tribunal vide Order No. 07 dated 29.07.2013 have allowed time as prayed for to file the full compliance.

Therefore, in compliance to the Order No.40 dated 30.01.2013 & No.41 dated 20.03.2013 of the Hon'ble Odisha Administrative Tribunal, Bhubaneswar passed in above Contempt Proceeding Case and as per instruction of Government in Revenue and Disaster Management Department communicated in Letter No.31273/RD&M, dated 10.08.2013, the Order of dismissal passed vide District Office Order No.3643/Estt., dated 12.09.2001 is hereby withdrawn."

2.7. Accordingly, the petitioner was reinstated in service vide Office Order No.1764—BBE-Con.VI-2/13, dated 24.09.2013 passed by the Collector, Kandhamal with effect from the date of his actual resumption in duty. Text of said Office Order runs as follows:

"Sri Kansari Behera, Ex-Revenue Inspector, Bisipada R.I. Circle who was placed under suspension vide District Office Order No.3976 dated 30.09.2000 is reinstated into service with effect from the date he actually resumes his duties.

On reinstatement, he is posted as such to Kotagarh Tahasil.

Necessary Order for treatment of the period of his suspension will be issued at the time of passing final Orders in the Disciplinary Proceeding bearing No.4312, dated 03.11.2000."

2.8. Being aggrieved by such observation as to the period of suspension, the petitioner with constraint moved the learned Odisha Administrative Tribunal, Bhubaneswar in Original Application (O.A. No.1066 of 2014) with regard to treatment of the period of suspension for about 13 years, i.e., from 30.09.2000 to 30.09.2013, which came to be disposed of on 13.10.2015 with the following observation:

"***

The case was heard. In the criminal proceeding the applicant was acquitted, whereas the departmental proceeding is still pending. The proceeding was initiated way back in the year 2000. In the meantime 15 years have already passed.

In pursuance of the Order dtd.24.09.2013 as at Annexure-7 of the Collector, Kandhamal, Phulbani, the Order of treatment of the period of his suspension would be issued at the time of passing final Orders in the Disciplinary Proceeding bearing No.4312, dated 03.11.2000. From this it is clear that there is way to withdraw this disciplinary proceeding.

At this stage when 15 years has elapsed, it is necessary that the enquiry relating to disciplinary proceeding be concluded at the earliest. Therefore, respondent No.2 is directed that this particular enquiry be completed within a period of four months from the date of receipt of a copy of this Order and subsequent thereto the treatment of the period regarding suspension be decided. In case the disciplinary proceeding is not completed within four months, then the same would be deemed to have been dropped. Further, it is directed that the financial as well as the consequential service benefits may be given to the applicant.

With these Orders the O.A. is disposed of."

2.9. Pursuant to the aforesaid direction of the learned Odisha Administrative Tribunal contained in Order dated 13.10.2015, the Disciplinary Authority-cum-Collector, Kandhamal passed the following Order dated 15.02.2016:

"***

Whereas, in the re-instatement Order the nature of period of suspension was not spelled out, Hon'ble Odisha Administrative Tribunal, Bhubaneswar in O.A. No.1066 of 2014 vide Order No.6 dated 13.10.2015 directed the respondent No.2 that

'Therefore the respondent No.2 is directed that this particular enquiry be completed within a period of four months from the date of receipt of a copy of this Order and subsequent thereto the treatment of the period regarding suspension be decided. In case the disciplinary proceeding is not completed within four months, then the same would be deemed to have been dropped. Further, it is directed that the financial as well as the consequential service benefits may be given to the applicant.'

After careful perusal of the charges framed against the D.O., enquiry report dated 30.06.2001 of I.O. wherein the I.O. suggested that the period of suspension to be treated as such and all other relevant documents incidental to the proceeding, the Disciplinary Authority and Collector, Kandhamal has been pleased to Order as follows:

'the period of suspension from 30.09.2000 to the date of reinstatement i.e. 30.09.2013 may be treated as such'."

2.10. The petitioner, thereafter, assailed the said Order before the Appellate Authority (Revenue Divisional Commissioner (Southern Division), Berhampur, Ganjam) by filing appeal petition dated 19.05.2016 through Tahasildar, K. Nuagaon, which was disposed of by the Appellate Authority in exercise of power under Rule 29 of the OCS (CCA) Rules, 1962 after the petitioner got retired from service on attaining age of superannuation on 31.03.2018. The Order-in-Appeal of the Appellate Authority with the following observation was communicated to the petitioner vide Memo No. 8706, dated 23.12.2019:

"The reason for his suspension in this case was his being in the Police Custody for more than 48 hours after arrest and initiating of criminal proceeding against him. Then the fact that when the Court has acquitted him, the very cause for suspension does not exist. It is to be noted that during the period of suspension he was paid subsistence allowance. Then he was reinstated in service in compliance to the Order of Hon'ble OAT vide Order dated 20.3.2013 passed in C.P.(C) No.71 of 2002 (arising out of OA No.1182/2001). The Prosecution was not able to prove the case against the accused beyond all reasonable doubt and as such, he was found not guilty under Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988 by the Hon'ble Court of the Special Judge (Vigilance), Berhampur and he was acquitted under Section 248(1) Cr.P.C. and set him at liberty. ***The acquittal passed by the Hon'ble Special Judge (Vigilance), Berhampur was challenged by the Government in G.A. Deptt., Cuttack before the Hon'ble High Court of Orissa vide CRLLP No.40 of 2012 which has been dismissed vide Order dated 11.12.2018. In these circumstances, his acquittal can be said to be without a blame and on merit****. The Collector, Kandhamal passed final Order vide Order No.286 dated 15.02.2016, with the penalty that the period of suspension from 30.09.2000 to the date of re-instatement i.e. on 30.09.2013 may be treated as such which was unwarranted and justified.*

Hence, in exercise of the powers conferred under Section 29 of the OCS (CC&A) Rules, 1962, and with a thorough appreciation of the case materials at hand, the appeal is allowed. Considering the merit of the case, the Order of Collector-cum-Disciplinary Authority, Kandhamal passed in Order No.286 dated 15.02.2016 of the Disciplinary Proceeding Case is hereby set aside."

2.11. The Collector, Kandhamal at Phulbani solicited clarification from the Additional Secretary to Government of Odisha in Revenue and Disaster Management Department, Odisha, by Letter No.2383/BBE, dated 16.05.2020 with respect to "treatment of period of suspension from 30.09.2000 to the date of reinstatement, i.e., 30.09.2013 (more than 13 years) of Sri Behera, Revenue Inspector". In response thereof, the Revenue and Disaster Management Department instructed the Disciplinary Authority "to pass specific orders for treatment of the suspension period basing on the finding of inquiry in the Disciplinary Proceeding keeping Rule 91 of the Odisha Service Code in view".

2.12. Accordingly, the Disciplinary Authority-opposite party No.3 passed the following Order on 05.04.2021:

"Office of the Collector,
Kandhamal, Phulbani.

No. 1610—Con V1-3/2021/BBE, dated 05.04.2021

Office Order

Whereas on consideration of the charges framed against Sri Kansari Dehera, Ex-RI, Tahasil Office, G. Udayagiri, retired as such at Tahasil Office, Chakapad, the following punishment had been awarded vide Order No. 286 dated 15.02.2016.

1.The period of suspension from 30.09.2000 to the date of reinstatement i.e., 30.09.2013 treated as such.

Whereas, against the said order the D.O. had preferred an appeal before the Hon'ble Revenue Divisional Commissioner (Southern Division), Berhampur. The Appellate Authority ordered that considering the merits of the case, the order of Collector-cum-Disciplinary Authority, Kandhamal passed in Order No.286, dated 15.02.2016 of the Disciplinary Proceeding case is hereby set aside.

Whereas, since the matter relates to service period of more than 13 years and has financial implications, Government in Revenue Department the Administrative had been moved for clarification vide District Office Letter No.2384 dated 16.05.2020. In response to the same Government in Revenue & Disaster Management Department, Odisha has intimated that the creation of the situation itself may be construed as violation in terms of Conduct Rules which needs consideration to take a stand on the intervening period. Hence, the Disciplinary Authority may pass specific order for treatment of the suspension period basing on the findings of inquiry in the Disciplinary Proceedings keeping Rule 91 of Odisha Service Code in view.

Whereas, the I.O.-cum-Revenue Officer, Sub Collector's Office, Phulbani has reported that the charges levelled against the D.O. are proved and the D.O. is found guilty. Clause (3)(b), 5 of Rule 91 of Odisha Service Code speaks that when a Government Servant, not having been exonerated of the charges fully, is reinstated in service he may be allowed subsistence allowance only for the period of suspension as admissible under Rule 90 and the period of suspension from duty shall not be treated as period spent on duty, unless such competent authority specifically directs that it shall be so treated for any specified purpose.

Now, therefore, after careful perusal of the enquiry report of I.O., Letter No.35980/ R&DM, dated 10.12.2020 of Government in Revenue & Disaster Management Department, Odisha and all other records/documents ancillary and incidental to the proceeding, the undersigned has been pleased to pass Orders as follows;

1.The punishment awarded to Sri Behera vide District Office Order No.286 dated 15.02.2016 is hereby recalled.

2.That the claim of pay minus subsistence allowance for the period under suspension is abandoned.

3.The fixation of pay of Sri Behera and settlement of all his claims relating to arrear pay as per pay fixation from time to time is to be calculated except mentioned at point No.2 above and pay should be fixed notionally.

4.The abandonment of the claim to the above extent would not be treated as punishment as will not have any effect on the service in any manner."

2.13. Dissatisfied thereby, the petitioner has knocked the doors of this Court for protection by way of filing the instant writ petition with prayer to invoke extraordinary jurisdiction under Article 226/227 of the Constitution of India.

Hearing:

3. Pleadings are completed and exchanged among the counsel for respective parties, and on consent of counsel for both sides, this matter is taken up for final hearing at the stage of admission.

3.1. Accordingly, heard Sri Krishna Chandra Sahu, learned Advocate for the petitioner and Sri Arnav Behera, learned Additional Standing Counsel appearing for the opposite parties and the matter stood reserved for preparation and pronouncement of judgment.

Rival contentions and submissions:

4. Sri Krishna Chandra Sahu, learned counsel appearing for the petitioner submitted that the tenor of the order of the Appellate Authority setting aside the Order dated 15.02.2016 of the Disciplinary Authority can very well be couched. Having the order of the Disciplinary Authority being nullified in the appeal, in absence of any further direction, the Disciplinary Authority has no authority to confer upon himself the jurisdiction and assume powers to pass fresh/further orders in furtherance of the Appellate Order.

4.1. The Disciplinary Authority, thus, transgressed his authority by passing further order inter alia directing to abandon the claim of pay minus subsistence allowance for the period of suspension inasmuch as there is categorical observation of the Appellate Authority that "the Collector, Kandhamal passed final order vide Order No.286, dated 15.02.2016, with the penalty that the period of suspension from 30.09.2000 to the date of reinstatement, i.e., on 30.09.2013 may be treated as such which was unwarranted and unjustified". It is vehemently contended that such obnoxious observation and direction of the Collector, Kandhamal, acting as quasi judicial Authority, is questionable as he sought to sit over the decision of the Appellate Authority taking shelter of advisory received from the Revenue and Disaster Management Department vide Letter dated 10.12.2020 (Annexure-14), which is not only wholly impermissible in law but also not above reproach.

4.2. It is submitted that the punishment as imposed in the Order No.286, dated 15.02.2016, that "the period of suspension from 30.09.2000 to the date of reinstatement, i.e., 30.09.2013 may be treated as such" (Annexure-10) has been set aside vide communication dated 23.12.2019 by the Appellate Authority by observing that "considering the merit of the case, the order of Collector-cum-Disciplinary Authority, Kandhamal passed in Order No.286, dated 15.02.2016 of the disciplinary proceeding case is hereby set aside" (Annexure-12). Despite such clear observation, as if the Appellate Authority has issued further direction to the Disciplinary Authority to consider imposition of order of punishment afresh, further Order ought not to have been passed on 05.04.2021 (Annexure-15) by holding

abandonment of payment, which would tantamount to imposition of penalty. It is vehemently contested that the decision of the Disciplinary Authority, which is a sanctuary of errors cannot be allowed to gain the benefit of sanctuary of protection and acceptance and therefore, the impugned Office Order dated 05.04.2021 does deserve quashment.

5. Sri Arnav Behera, learned Additional Standing Counsel appearing for the opposite parties referring to the counter affidavit filed by opposite party No.3 submitted that fresh Order dated 15.02.2016 passed by the Disciplinary Authority after the Appellate Authority set aside the punishment imposed in the disciplinary proceeding on the ground that the petitioner got acquitted in the criminal case cannot be faulted with.

5.1. He pressed into service the following replies given in counter affidavit at paragraphs-8, 10 and 11:

> *"8.That the averments made in para-6 of the writ application, the deponent humbly submits that, in Order No.7 dated 07.12.2001 the Hon'ble Odisha Administrative Tribunal, Bhubaneswar while disposing off the case, issued directive to the effect that, the final disposal of the disciplinary proceeding shall be held up till disposal of the criminal case in the court of the Special Judge (Vigilance)-cum-Additional District & Sessions Judge, Berhampur. By the time of copy of the Order dated 05.09.2001 was received i.e. on 21.09.2001, the Departmental Proceeding bearing No.4312, dated 13.11.2000 initiated against the applicant had already been finalised and disposed off and accordingly the applicant had already been dismissed from service with effect from 12.9.2001 but did not disclose the same to the Hon'ble Tribunal.*
>
> *10. That the averments made in paragraph-9 of the writ application, the deponent humbly submits that, after careful perusal of the charges framed against the D.O., enquiry report dtd.30.06.2001 of I.O. wherein he suggested that the period of suspension to be treated as such and all other relevant documents incidental to the proceedings and having regard to Order No.06 dated 13.10.2015 passed by the Hon'ble Odisha Administrative Tribunal in O.A. No.1066/2014, the Disciplinary Authority and Collector, Kandhamal decided the period of suspension treating as such vide district office Order No.286, dated 15.02.2016.*
>
> *11. That, the averments made in paragraphs 10 to 13 of the writ application, the deponent humbly submits that, the Appellate Authority-cum-RDC (SD), Berhampur had set aside the Orders passed by Collector cum Disciplinary Authority against the petitioner. Since the matter relates to regularisation of service period of more than 13 years and has financial implications, Govt. in Revenue Department, the Administrative authority had been moved for clarification. In response to the same Government in R&DM Department, Odisha has intimated that the creation of the situation itself may be construed as violation in terms of Conduct Rules which needs consideration to take a stand on the intervening period. Hence, the Disciplinary Authority may pass specific Order for treatment of the suspension period basing on the findings of enquiry in the Disciplinary Proceeding keeping Rule 91 of Odisha Service Code in view. The I.O.-cum-Revenue Officer, Sub-Collector's Office, Phulbani has reported that the charges levelled against the DO are proved and the DO is found guilty. Clause (3)(b), 5 of Rule 91 of Odisha Service Code speaks that when a Government servant, not having been exonerated of the charges fully, is reinstated in service he may be allowed subsistence*

allowance only for the period of suspension as admissible under Rule-90 and the period of absence from duty shall not be treated as period spent on duty, unless such competent authority specifically directs that it shall be so treated for any specific purpose.

After careful perusal of the enquiry report of I.O., letter No.35980/R & DM dated 10.12.2020 of Govt. in R & DM Department, Odisha and all other records/documents ancillary and incidental to the proceeding the Disciplinary Authority-cum-Collector, Kandhamal was pleased to pass Orders as follows:

1. The punishment awarded to Sri Behera and District Office Order No.286 dated 15.02.2016 is hereby recalled.

2. That the claim of pay minus subsistence allowance for the period under suspension is abandoned.

3. The fixation of pay of Sri Behera and settlement of all his claims relating to arrear pay as per pay fixation from time to time is to be calculated except mentioned at point No.2 above and pay should be fixed notionally.

4. The abandonment of the claim to the above extent would not be treated as punishment as will not have any effect on the service in any manner."

5.2. With the aforesaid backdrop, the learned Additional Standing Counsel wound up his argument by making a statement that when the Appellate Authority has merely set aside the order of the Disciplinary Authority without any instruction as to further action to be taken, there arose justified reason for the Collector, Kandhamal to approach the Government for advice, and on receipt of appropriate response, he could pass the Order dated 03.04.2021 in consonance with Rule 91 of the Odisha Service Code.

Discussion, analysis and conclusion:

6. The issue hovers round whether further order can be passed by the Disciplinary Authority after the Appellate Authority sets aside the order of punishment without spelling out further course of action.

6.1. Rule 12 of the OCS (CCA) Rules, in sub-rule (1) provides as follows:

"The Disciplinary Authority, while passing the final order of punishment or of release in the Disciplinary Proceedings against the Government servant, ***shall give directions about the treatment of the period of suspension, which is passed not as a measure of substantive punishment but as suspension pending inquiry****, and indicate whether the suspension would be a punishment or not."*

6.2. Glance at Order No.3976—Con.-III-6/2K, dated 30.09.2000 of the Collector, Kandhamal (Annexure-2) with respect to suspension reveals the fact that,

"Whereas ***a disciplinary proceeding*** *against Sri Kansari Behera, Ex. Revenue Inspector, Paburia of G. Udayagiri, Tehsil, now working as such in Khondmals Tehsil under Bisipada R.I. Circle* ***is contemplated****, now, therefore, the Collector, Kandamal, Phulbani and Disciplinary Authority,* ***in exercise of power conferred under clause (b) of sub-rule (2) of Rule 12 of the CCS (CCA) Rules, 1962****, hereby places Sri Kansari Behera, Revenue Inspector under suspension with immediate effect. ***"*

6.3. From the aforesaid it appears that while the disciplinary proceeding against the petitioner was under contemplation he was placed under suspension on 30.09.2000. Accordingly, the Disciplinary Proceeding No. 4312, dated 03.11.2000

being instituted, the petitioner was called upon to submit explanation and vide Letter No.3643/Estt, dated 12.09.2001, the Collector, Kandhamal afforded opportunity to the petitioner to have his say against the proposition made for inflicting the penalty of 'dismissal from service', which was subject matter of challenge before the Odisha Administrative Tribunal in O.A. No.1182 of 2001. As interim measure in the said case, vide Order dated 07.12.2001, the disciplinary proceeding was directed to be held up till disposal of the criminal case by the Special Judge (Vigilance)-cum-Additional District and Sessions Judge, Berhampur. Despite such interim order being pronounced in the presence of the counsel for the Government, the Disciplinary Authority proceeded to passed order of dismissal.

6.4. The criminal case being G.R. Case No.38 of 1999 (V)/ T.R. Case No.39 of 2001 culminated in order of acquittal on 18.04.2011 invoking Section 248(1) of the Code of Criminal Procedure, 1973 vide judgment of the learned Special Judge (Vigilance)-cum-Additional District and Sessions Judge, Berhampur finding the petitioner "not guilty" under Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988. Further proceeding before this Court by the Government of Odisha against such order of acquittal resulted in dismissal of Leave Petition bearing CrlLP No.40 of 2012 vide Order dated 11.12.2018.

6.5. Notwithstanding acquittal of the petitioner in the criminal case, by Order dated 24.09.2013, the Collector, Kandhamal though directed reinstatement in service, reserved consideration of "treatment of the period of his suspension" "at the time of passing final order in the Disciplinary Proceeding bearing No.4312, dated 03.11.2000". The Odisha Administrative Tribunal taking note of such fact in O.A. No.1066 of 2014, in Order dated 13.10.2015 clarified that,

> *"At this stage when 15 years has elapsed, it is necessary that the enquiry relating to disciplinary proceeding be concluded at the earliest. Therefore, respondent No.2 is directed that this particular enquiry be completed within a period of four months from the date of receipt of a copy of this order and subsequent thereto the treatment of the period of suspension be decided."*

6.6. The Disciplinary Authority passed final Order on 15.02.2016 (Annexure-10) by accepting the suggestion of the Inquiring Officer in the Inquiry Report dated 30.06.2001 that the period of suspension to be treated as such, held "the period of suspension from 30.09.2000 to the date of reinstatement, i.e., 30.09.2013 may be treated as such".

6.7. The petitioner having carried the matter in appeal, the Appellate Authority, appreciating the position with regard to criminal case held,

> *"The acquittal passed by the Hon'ble Special Judge (Vigilance), Berhampur was challenged by the Government in G.A. Deptt., Cuttack before the Hon'ble High Court of Orissa vide CRLLP No.40 of 2012 which has been dismissed vide Order dated 11.12.2018. In these circumstances,* ***his acquittal can be said to be without a blame and on merit. The Collector, Kandhamal passed final Order vide Order No.286 dated 15.02.2016, with the penalty that the period of suspension from 30.09.2000 to the date***

of re-instatement i.e. on 30.09.2013 may be treated as such which was unwarranted and justified.

Hence, in exercise of the powers conferred under Rule 29 of the OCS (CCA) Rules, 1962, and with a thorough appreciation of the case materials at hand, the appeal is allowed. Considering the merit of the case, the order of Collector-cum-Disciplinary Authority, Kandhamal passed in Order No.286, dated 15.02.2016 of the Disciplinary Proceeding Case is hereby set aside."

6.8. Perusal of aforesaid Appellate Order transpires that the Appellate Authority has not only taken into consideration the fact of acquittal of the petitioner in the criminal case, but also weighed the merit of the matter based on material on record while invoking power under Rule 29 of the OCS (CCA) Rules.

6.9. Rule 29 of the OCS (CCA) Rules spells out as follows:

"29. Consideration of Appeals.—

(1) In the case of an appeal against an order imposing any of the penalties specified in Rule 13 [1], the appellate authority shall consider—

(a)whether the procedure prescribed in these rules has been complied with and, if not, whether such non-compliance has resulted in violation of any provisions of the Constitution or in failure of justice;

(b) **whether the findings are justified**; and

(c) whether the penalty imposed is excessive, adequate or inadequate;

and, after consultation with the commission if such consultation is necessary in the case, pass orders—

(i) **setting aside**, reducing, confirming or enhancing the penalty; or

(ii) remitting the case to the authority which imposed the penalty or to any other authority with such direction as it may deem fit in the circumstances of the case:

Provided that—

(i) the appellate authority shall not impose any enhanced penalty which neither such authority nor the authority which made the order appealed against is competent in the case to impose;

(ii) no order imposing an enhanced penalty shall be passed unless the appellant is given an opportunity of making any representation which he may wish to make against such enhanced penalty; and

(iii) if the enhanced penalty which the Appellate Authority proposes to impose is one of the penalties specified in clauses (vi) to (ix) of Rule 13 an inquiry under Rule 15 has not already been held in the case, the Appellate Authority shall, subject to the provisions of Rule 18, itself hold such inquiry or direct that such inquiry be held and, thereafter, on consideration of the proceedings of such inquiry and after giving the appellant an opportunity of making any representation which he may wish to make against such penalty, pass such orders as it may deem fit.

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[1] Rule 13 of the OCS (CCA) Rules, lays down as follows:
"13. Nature of penalties.—
The following penalties may, for good and sufficient reasons and as hereinafter provided, be imposed on a Government servant, namely:
***
(v) Suspension;
****"*

(2) In the case of an appeal against any order specified in Rule 23[2] the Appellate Authority shall consider all the circumstances of the case and pass such orders as it deems just and equitable.

(3) Copies of orders passed by the appellate authority shall be supplied to the appellant free of cost."

6.10. The Appellate Authority is, thus, empowered under Rule 29 of the OCS (CCA) Rules to examine whether the findings of the Disciplinary Authority are justified and "set aside" the order imposing penalty, i.e., treating the period of suspension from 30.09.2000 to the date of reinstatement, i.e., 30.09.2013 "as such".

6.11. In view of provisions contained in Rule 30 [3] of the OCS (CCA) Rules, in absence of any further direction, there is no scope left to the Disciplinary Authority to pass any consequential further orders.

6.12. As the Appellate Authority in his Order made it clear that "The Collector, Kandhamal passed final order vide Order No.286, dated 15.02.2016, with the penalty that the period of suspension from 30.09.2000 to the date of reinstatement,

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[2] Rule 23 of the OCS (CCA) Rules stands as follows:

"23. Appeal against other orders.—

(1) A Government servant may appeal against an order which—

(a) denies or varies to his disadvantage his pay, allowances, pension or other conditions of service as regulated by any rules or by agreement, or

(b) interprets to his disadvantage the provision of any such rules or agreement,

to the Governor if the order is passed by the authority which made the rules or agreement, as the case may be, or by any authority to which such authority is subordinate, and

to the authority which made rules or agreement, if the order is passed by any other authority.

(2) An appeal against an order—

(a) stopping a Government servant at the efficiency bar in time-scale on the ground of his unfitness to cross the bar;

(b) reverting to a lower service, grade or post, a Government servant officiating in a higher service, grade or post, otherwise than as a penalty;

(c) reducing or withholding the pension or denying the maximum pension admissible under the rules; and

(d) determining the pay and allowances for the period of suspension to be paid to a Government servant on his reinstatement or determining whether or not such period shall be treated as a period spent on duty for any purpose, shall lie—

(i) in the case of an order made in respect of a Government servant on whom the penalty of dismissal from service can be imposed only by the Governor, to the Governor; and

(ii) in the case of an order made in respect of any other Government servant, to the authority to whom an appeal against an order imposing upon him the penalty of dismissal from service would lie.

EXPLANATION.—

In this rule—

(i) the expression of "GOVERNMENT SERVANT" includes a person who has ceased to be in Government service;

(ii) the expression "PENSION" includes additional pension, gratuity and any other retirement benefit."

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[3] Rule 30 of the OCS (CCA) Rules, provides as follows:

"Implementation of orders in appeal.—

The Authority which made the order appealed against shall give effect to the orders passed by the Appellate Authority."

i.e., on 30.09.2013 may be treated as such which was unwarranted and unjustified", there was no occasion for the Disciplinary Authority to seek for advisory from the Revenue and Disaster Management Department. Nothing is placed on record to show that the Appellate Order in Annexure-12 has ever been challenged and/or varied by any other competent court of law. In such view of the matter, the Collector, Kandhamal was bound by the quasi judicial order-in-appeal, and in defiance thereof he was not competent to pass fresh orders by adhering to directive of the Revenue and Disaster Management Department on the administrative side. Such a course, in flagrant violation of provision of Rule 30 of OCS (CCA) Rules, 1962, is impermissible.

6.13. It is noteworthy that the criminal case ended in acquittal and attained finality on dismissal of CrlLP by this Court and the order passed in disciplinary proceeding also got set aside on consideration of merit of matter on the basis of materials available on record. These factors are indicative of fact that nothing survives against the petitioner and the allegations levelled against the petitioner could not be substantiated by the opposite parties. Therefore, it is obligatory on the part of the Disciplinary Authority to comply with the Order dated 13.10.2015 of the Odisha Administrative Tribunal, Bhubaneswar passed in O.A. 1066 of 2014. In the said Order dated 13.10.2015, it has been stipulated that,

> *"Therefore, the respondent No.2 is directed that this particular enquiry be completed within a period of four months from the date of receipt of a copy of this order and subsequent thereto the treatment of the period regarding suspension be decided. In case the disciplinary proceeding is not completed within four months, then the same would be deemed to have been dropped. Further, it is directed that the financial as well as consequential service benefits may be given to the applicant."*

6.14. However, ultimately the disciplinary proceeding attained finality by virtue of order of the Appellate Authority which nullified the effect of punishment imposed by the Disciplinary Authority. Taking a holistic view of material on record including the finality being attained to the criminal case as also the disciplinary proceeding, there remains no scope for the opposite parties not to extend the service and financial benefits as the petitioner has been deprived of for no fault of his own.

6.15. The Hon'ble Supreme Court of India has exposited the position of the employee, when the order of termination from service is set aside, in Anantdeep Singh Vrs. The High Court of Punjab and Haryana, (2024) 9 SCR 135 = 2024 INSC 673, wherein it has been observed as follows:

> *"21.* ***Once the termination Order is set aside and judgment of the High Court dismissing the writ petition challenging the said termination Order has also been set aside, the natural consequence is that the employee should be taken back in service and thereafter proceeded with as per the directions. Once the termination Order is set aside then the employee is deemed to be in service****. We find no justification in the inaction of the High Court and also the State in not taking back the appellant into service after the Order dated 20.04.2022. No decision was taken either by the High Court or by the State of taking back the appellant into service and no decision was made regarding the back wages from the date the termination Order had been passed till the*

date of reinstatement which should be the date of the judgment of this Court. In any case, the appellant was entitled to salary from the date of judgment dated 20.04.2022 till fresh termination Order was passed on 02.04.2024. ***The appellant would thus be entitled to full salary for the above period to be calculated with all benefits admissible treating the appellant to be in continuous service.***

22. Insofar as the period from 18.12.2009 i.e., after the termination Order of 17.12.2009 was passed till 19.04.2022 the date prior to the judgment and Order of this Court, we are of the view that ends of justice would be served by directing that the appellant would be entitled to 50 per cent. of the back wages treating him to be in service continuously. Such back wages to be calculated with all benefits admissible under law to the appellant as if he was in service."

6.16. In the wake of the above situation, the Order dated 03.04.2021 (Annexure-15), being non est in the eye of law the petitioner is entitled to service and pecuniary benefits as is available in law had he not been suspended since 30.09.2000.

7. Law is no more res integra that disciplinary matters are quasi judicial proceedings. In the case of *Mohd. Yunus Khan Vrs. State of Uttar Pradesh, (2010) 10 SCC 539* the Supreme Court has held that holding disciplinary proceeding against a Government employee and imposing punishment on his being found guilty of misconduct under the statutory rule is in the nature of quasi judicial proceeding. Also in the case of *Roop Sing Negi Vrs. Punjab National Bank, (2009) 2 SCC 570* the Supreme Court of India has observed that indisputably a disciplinary proceeding is a quasi judicial proceeding and the enquiry officer performs a quasi judicial function. This Court at this juncture wishes to have regard to certain decisions of Courts eliciting the purport of appellate orders:

7.1. In Nirmal Chandra Panigrahi Vrs. State of Odisha, 2021 SCC OnLine Ori 807 this Court observed as follows:

"23.In Westminster Corpn. Vrs. L.&N. Ry., (1905) AC 426 it was held that it is a condition of any statutory power that it must be exercised reasonably, and without negligence.

24.In Cf. Karnapura Development Co. Vrs. Kamakshya Narain, 1956 SCR 325, the Apex Court held that it is a condition of any statutory power that it must be exercised bona fide.

25.In Commissioner of Police, Bombay Vrs. Gordhandas Bhanji, AIR 1952 SC 16, the Apex Court observed as follows:

*"10. *** Public authorities cannot play fast and loose with the powers vested in them, and persons to whose detriment orders are made are entitled to know with exactness and precision what they are expected to do or forbear from doing and exactly what authority is making the order. ****

*28.*** An enabling power of this kind conferred for public reasons and for the public benefit is, in our opinion, coupled with a duty to exercise it when the circumstances so demand. It is a duty which cannot be shirked or shelved nor it be evaded, performance of it can be compelled. ***"*

26.In Sirsi Municipality Vrs. Cecelia Kom Francis Tellis, (1973) 1 SCC 409 = AIR 1973 SC 855, the Apex Court observed that,

"the ratio is that the rules or the regulations are binding on the authorities".

27.The issue of writ of mandamus is a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directing to any person, Corporation, requiring him or them to do some particular thing specified in it which appertains to his or their office and is in the nature of a public duty.

28.In Comptroller and Auditor-General of India Vrs. K.S. Jagannathan, (1986) 2 SCC 679 = (1986) 2 SCC 679 = AIR 1987 SC 537, the Apex Court observed:

*'20.There is thus no doubt that the High Courts in India exercising their jurisdiction under Article 226 have the power to issue a writ of mandamus or a writ in the nature of mandamus or to pass orders and give necessary directions where the Government or a public authority has failed to exercise or has wrongly exercised the discretion conferred upon it by a statute or a rule or a policy decision of the Government or has exercised such discretion mala fide or on irrelevant considerations or by ignoring the relevant considerations and materials or in such a manner as to frustrate the object of conferring such direction or the policy for implementing which such discretion has been conferred. In all such cases and in any other fit and proper case a High Court can, in the exercise of its jurisdiction under Article 226, issue a writ of mandamus or a writ in the nature of mandamus or pass orders and give directions to compel the performance in a proper and lawful manner of the discretion conferred upon the Government or a public authority, and in a proper case, in order to prevent injustice resulting to the concerned parties, the Court may itself pass an order or give directions which the Government or the public authority should have passed or given had it properly and lawfully exercised its discretion.' ***"*

7.2. In Shree Sidhbali Steels Limited Vrs. State of Uttar Pradesh, (2011) 3 SCC 193, it has been observed that by virtue of Sections 14 and 21 of the General Clauses Act, when a power is conferred on an authority to do a particular act, such power can be exercised from time to time and carries with it the power to withdraw, modify, amend or cancel the notifications earlier issued, to be exercised in the like manner and subject to like conditions, if any, attached with the exercise of the power. It has been observed as under:

"38. Section 21 is based on the principle that power to create includes the power to destroy and also the power to alter what is created. Section 21, amongst other things, specifically deals with power to add to, amend, vary or rescind the notifications. The power to rescind a notification is inherent in the power to issue the notification without any limitations or conditions. Section 21 embodies a rule of construction. The nature and extent of its application must be governed by the relevant statute which confers the power to issue the notification etc. However, there is no manner of doubt that the exercise of power to make subordinate legislation includes the power to rescind the same. This is made clear by Section 21. On that analogy an administrative decision is revocable while a judicial decision is not revocable except in special circumstances. Exercise of power of a subordinate legislation will be prospective and cannot be retrospective unless the statute authorises such an exercise expressly or by necessary implication.

39. The principle laid down in Section 21 is of general application. The power to rescind mentioned in Section 21 is without limitations or conditions. It is not a power so limited as to be exercised only once. The power can be exercised from time to time having regard to the exigency of time. When by a Central Act power is given to the State Govt.

to give some relief by way of concession and/or rebate to newly-established industrial units by a notification, the same provision and such exercise of power cannot be faulted on the ground of promissory estoppel.

40. It would be profitable to remember that the purpose of the General Clauses Act is to place in one single statute different provisions as regards interpretations of words and legal principles which would otherwise have to be specified separately in many different Acts and Regulations. Whatever the General Clauses Act says whether as regards the meaning of words or as regards legal principles, has to be read into every statute to which it applies."

7.3. In *State of Odisha Vrs. Pratima Mohanty, (2021) 9 SCR 335* it is stated as follows:

"8.At this stage, the decision of the Karnataka High Court in the case of K. Raju vs. Bangalore Development Authority in Writ Petition No.11102 of 2008 decided on 15.12.2010 [reported at, 2010 SCC OnLine Kar 4322 = ILR 2011 Kar 120] dealing with a somewhat similar situation with respect to the allotment of plots in discretionary quota is required to be referred to. In that case also it was a case of allotment of the plots illegally and arbitrarily in the discretionary quota. Speaking from the Bench Justice S. Abdul Nazeer, J. as he then was has observed and held as under:

'It is well established that a public body invested with statutory powers has to take care not to exceed or abuse its powers. It must act within the limits of authority committed to it.'

'31.BDA is the custodian of public properties. It is not as free as an individual in selecting the recipients for its largess. For allotment of the properties, a transparent, and objective criteria/procedure has to be evolved based on reason, fair play and non-arbitrariness. In such action, public interest has to be the prime guiding consideration. In Ramana Dayaram Shetty Vrs. The International Airport Authority of India, AIR 1979 SC 1628, the Apex Court has held that it must therefore be taken to be the law that even in the matter of grant of largesses including award of jobs, contracts, quotas, licences, the Government must act in fair and just manner and any arbitrary distribution of wealth would violate the law of land. In Common Cause, A Registered Society Vrs. Union of India, (1996) 6 SCC 530, the Apex Court has held as under:

The Government today in a welfare State provides large number of benefits to the citizens. It distributes wealth in the form of allotment of plots, houses, petrol pumps, gas agencies, mineral leases in contracts, quotas and licences etc., Government distributes largesses in various forms. A Minister who is the executive head of the department concerned distributes these benefits and largesses. He is elected by the people and is elevated to a position where he holds a trust on behalf of the people. He has to deal with the people's property in a fair and just manner. He cannot commit breach of the trust reposed in him by the people In Onkar Lal Bajaj and Ors. Vrs. Union of India, (2003) 2 SCC 673, the Apex Court has summarised the cardinal principles of governance, which is as follows:

35. The expression 'public interest' or 'probity in governance' cannot be put in a straitjacket. 'Public interest' takes into its fold several factors. There cannot be any hard-and-fast rule to determine what is public interest. The circumstances in each case would determine whether Government action was taken in public interest or was taken to uphold probity in governance.

36. The role model for governance and decision taken thereof should manifest equity, fair play and justice. The cardinal principle of governance in a civilized society based

on rule of law not only has to base a transparency but must create an impression that the decision making was motivated on the consideration of probity. The Government has to rise above the nexus of vested interests and nepotism and eschew window dressing. The act of governance has to be withstand the test of judiciousness and impartiality and avoid arbitrary or capricious actions. Therefore, the principles of governance has to be tested on the touchstone of justice, equity and fair play and if the decision is not based on justice, equity and fair play and has taken into consideration other matters, though on the face of it, the decision may look legitimate but as a matter of fact, the reasons are not based on values but to achieve popular accolade, that decision cannot be allowed to operate.'

8.1 It is further observed after referring to the decision of this Court in the case of Common Cause, A Registered Society (supra) that if a public servant abuses his office whether by his act of omission or commission, and the consequence of that is injury to an individual or loss of public property, an action may be maintained against such public servant. It is further observed that no public servant can arrogate to himself powers in a manner which is arbitrary. In this regard we wish to recall the observations of this Court as under:

'The concept of public accountability and performance of functions takes in its ambit, proper and timely action in accordance with law. Public duty and public obligation both are essentials of good administration whether by the State or its instrumentalities.' [See Delhi Airtech Services (P) Ltd. Vs. State of U.P., (2011) 9 SCC 354]

The higher the public office held by a person the greater is the demand for rectitude on his part.' [See Charanjit Lamba Vs. Army Southern Command, (2010) 11 SCC 314]

'The holder of every public office holds a trust for public good and therefore his actions should all be above board.' [See Padma Vs. Hiralal Motilal Desarda, (2002) 7 SCC 564]

'Every holder of a public office by virtue of which he acts on behalf of the State or public body is ultimately accountable to the people in whom the sovereignty vests. As such, all powers so vested in him are meant to be exercised for public good and promoting the public interest. This is equally true of all actions even in the field of contract. Thus, every holder of a public office is a trustee whose highest duty is to the people of the country and, therefore, every act of the holder of a public office, irrespective of the label classifying that act, is in discharge of public duty meant ultimately for public good.' [See Shrilekha Vidyarthi (Kumari) Vs. State of U.P., (1991) 1 SCC 212]

*'Public authorities should realise that in an era of transparency, previous practices of unwarranted secrecy have no longer a place. Accountability and prevention of corruption is possible only through transparency.' [See ICAI Vs. Shaunak H. Satya, (2011) 8 SCC 781] ***"*

7.4. In *Orissa Metaliks Pvt. Ltd. Vrs. State of Odisha, AIR 2021 Ori 85* the following is the observation:

"There is also merit in the contention, based on the judgment of this Court in Rashmi Cement Ltd. Vrs. State of Odisha, 113 (2012) CLT 177, which in turn followed the judgment of the Supreme Court in Commissioner of Police Vrs. Gordhan Das Bhanji, AIR 1952 SC 16 that a quasi-judicial authority vested with the power for cancellation of a license, could not have acted under the 'dictation' of another authority. Also the impugned action of suspension of the issuance of transit passes ought to have been preceded by an enquiry, that prima facie discloses wrong doing by Petitioner No.1 in the

form of violation of the terms of the license. The suspension of a licence even before the inquiry reveals prima facie violation of the terms of the license would obviously be vulnerable to invalidation on the ground of it being arbitrary and irrational."

7.5. In State of Uttar Pradesh Vrs. Maharaja Dharmander Prasad Singh, (1989) 1 SCR 176 it has been observed as:

"It is true that in exercise of powers of revoking or cancelling the permission is akin to and partakes of a quasi-judicial complexion and that in exercising of the former power the authority must bring to bear an unbiased mind, consider impartially the objections raised by the aggrieved party and decide the matter consistent with the principles of natural justice. The authority cannot permit its decision to be influenced by the dictation of others as this would amount to abdication and surrender of its discretion. It would then not be the Authority's discretion that is exercised, but someone else's. If an authority 'hands over its discretion to another body it acts ultra vires'. Such an interference by a person or body extraneous to the power would plainly be contrary to the nature of the power conferred upon the authority. De Smith sums up the position thus:

*'The relevant principles formulated by the courts may be broadly summarised as follows. The authority in which a discretion is vested can be compelled to exercise that discretion, but not to exercise it in any particular manner. In general, a discretion must be exercised only by the authority to which it is committed. That authority must genuinely address itself to the matter before it: it must not act under the dictation of another body or disable itself from exercising a discretion in each individual case. In the purported exercise of its discretion it must not do what it has been forbidden to do, nor must it do what it has not been authorised to do. It must act in good faith, must have regard to all relevant considerations and must not be swayed by irrelevant considerations, must not seek to promote purposes alien to the letter or to the spirit of the legislation that gives it power to act, and must not act arbitrarily or capriciously. Nor where a judgment must be made that certain facts exist can a discretion be validly exercised on the basis of an erroneous assumption about those facts. These several principles can conveniently be grouped in two main categories: failure to exercise a discretion, and excess or abuse of discretionary power. The two classes are not, however, mutually exclusive.' ***"*

7.6. In *Union of India Vrs. Kamlakshi Finance Corporation Ltd., AIR 1992 SC 711* the Supreme Court had directed the department to adhere to the judicial discipline and give effect to the orders of higher appellate authorities which are binding on them. The relevant observations of made therein are required to be noted which read thus:

*"6. *** The High Court has, in our view, rightly criticised this conduct of the Assistant Collectors and the harassment to the assesse caused by the failure of these officers to give effect to the orders of authorities higher to them in the appellate hierarchy. It cannot be too vehemently emphasised that it is of utmost importance that, in disposing of the quasi-judicial issues before them, revenue officers are bound by the decisions of the appellate authorities. The order of the Appellate Collector is binding on the Assistant Collectors working within his jurisdiction and the order of the Tribunal is binding upon the Assistant Collectors and the Appellate Collectors who function under the jurisdiction of the Tribunal. The principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities.*

The mere fact that the order of the appellate authority is not "acceptable" to the department— in itself an objectionable phrase— and is the subject-matter of an appeal can furnish no ground for not following it unless its operation has been suspended by a competent Court. If this healthy rule is not followed, the result will only be undue harassment to assessees and chaos in administration of tax laws.
*****

*8. *** The observations of the High Court should be kept in mind in future and utmost regard should be paid by the adjudicating authorities and the appellate authorities to the requirements of judicial discipline and the need for giving effect to the orders of the higher appellate authorities which are binding on them."*

7.7. In the case of Tirupati Balaji Developers Private Ltd. Vrs. State of Bihar, (2004) 5 SCC 1, the Supreme Court held thus:

"The very conferral of appellate jurisdiction carries with it certain consequences. Conferral of a principal substantive jurisdiction carries with it, as a necessary concomitant of that power, the power to exercise such other incidental and ancillary powers without which the conferral of the principal power shall be rendered redundant. As held by Their Lordships of the Privy Council in Nagendra Nath Dey Vrs. Suresh Chandra Dey, AIR 1932 PC 165 (Sir Dinshah Mulla speaking for the Bench of five), an appeal is an application by a party to an appellate court asking it to set aside or revise a decision of a subordinate court. The appeal does not cease to be an appeal though irregular or incompetent. Placing on record his opinion, Subramania Ayyar, J. as a member of the Full Bench (of five Judges) in Chappan Vrs. Moidin Kutti (1899) 22 ILR Mad 68 (at page 80) stated, inter alia, that appeal is 'the removal of a cause or a suit from an inferior to a superior judge or court for re-examination or review'. According to Wharton's Law Lexicon such removal of a cause or suit is for the purpose of testing the soundness of the decision of the inferior court. In consonance with this particular meaning of appeal, 'appellate jurisdiction' means 'the power of a superior court to review the decision of an inferior court.' 'Here the two things which are required to constitute appellate jurisdiction, are the existence of the relation of superior and inferior court and the power on the part of the former to review decisions of the latter. This has been well put by Story:

*'The essential criterion of appellate jurisdiction is, that it revises and corrects the proceedings in a cause already instituted and does not create that cause. In reference to judicial Tribunals an appellate jurisdiction, therefore, necessarily implies that the subject-matter has been already instituted and acted upon by some other court, whose judgment or proceedings are to be revised, (Section 1761, Commentaries on the Constitution of the United States). ***"*

7.8. In Orissa Forest Corporation Ltd. Vrs. Assistant Collector, 1982 SCC OnLine Ori 209 this Court made the following observation:

"4.We do not think this should be the attitude of the Union Government. The demand is under the Statute and the statutory appellate authority, on the set of facts which are common both to the period when relief was granted and the period for which the impugned demand has been made, has already determined that no levy is exigible. ***As long as the appellate order stands, it must be duly respected and only when the revisional authority vacates the order and holds that the decision of the appellate authority is wrong and the demand was justified, no demand should be raised****. It has been indicated on more than one occasions by the Supreme Court with reference to*

directions of the Appellate Tribunal under the Income Tax Act that such directions are binding and decisions rendered by appellate authorities should be respected by the subordinate revenue authorities and no attempt should be made to wriggle out of the binding decisions of higher authorities as long as they remain in force. The same principle should be applied to the present set of facts and we are, therefore, inclined to take the view that the demand under Annexure-4 should be set aside but we would make it clear that in the event of the appellate orders being vacated, under the Statute the liability would revive and notwithstanding our quashing Annexure-4 the statutory authority would be entitled to raise a demand in terms of the decision which may be ultimately sustained under the Statute."

7.9. With such conspectus of legal perspective of sanctity attached to the Appellate Orders, it can be said in the present context that so long as the order in Appellate Authority in Annexure-12 stands, the Order dated 05.04.2021 passed by the Disciplinary Authority (Annexure-15) based on clarification issued by the Revenue and Disaster Management Department (Annexure-14) cannot be sustained.

8. This Court was drawn attention to Rule 91 of the Odisha Service Code by the learned Additional Standing Counsel to justify the Order passed by the Disciplinary Authority in restricting the payment made during the period of suspension.

8.1. Rule 91 of the Odisha Service Code stands as follows:

"91.Authority competent to order the reinstatement shall consider and make a specific order:

(1) When a Government servant who has been dismissed, removed, compulsorily retired or suspended is reinstated or would have been reinstated but for his retirement on superannuation while under suspension the authority competent to order the reinstatement shall consider and make a specific order:

(a) regarding the pay and allowances to be paid to the Government servant for the period of his absence from duly or for the period of suspension ending with the date of his retirement on superannuation, as the case may be, and

(b) whether or not the said period shall be treated as a period spend on duty.

(2) Where such competent authority holds that the Government servant has been fully exonerated or in the case of suspension, that it was wholly unjustified, the Government servant shall be given the full pay to which he would have been entitled had he not been dismissed, removed, compulsorily retired or suspended, as the case may be, together with any allowances of which he was in receipt to his dismissal, removal or suspension.

(3)(a)In the case of dismissal, removal and compulsory retirement when a Government servant who is not completely exonerated of the charges, is reinstated in service, it shall be open to the competent authority to decide not to allow any pay or allowances to him.

(b) In the case of suspension when a Government servant, not having been exonerated of the charges fully, is reinstated in service, he may be allowed subsistence, allowance only for the period of suspension as admissible under Rule 90.

(4) In a case falling under Clause (2) the period of absence from duty shall be treated as a period spent on duty for all purposes.

(5) In a case falling under Clause (3) the period of absence from duty shall not be treated as a period spent on duty, unless such competent authority specifically directs that it shall be so treated for any specified purpose:

Provided that if the Government servant so desires, such authority may direct that the period of absence from duty shall be converted into leave of any kind due and admissible to the Government servant.

Note.—

A permanent post vacated by the dismissal, removal or compulsory retirement of a Government servant should not be filled substantively until the expiry of the period of one year from the date of such dismissal, removal or compulsory retirement, as the case may be, where, on the expiry of the period of one year, the permanent post filled and the original incumbent of the post is reinstated thereafter, he should be accommodated against any post which may be substantively vacant in the grade to which his previous substantive post belonged. If there is no such vacant post, he should be accommodated against a supernumerary post which should be created in this grade, with proper sanction and with the stipulation that it would be terminated on the occurrence of the first substantive vacancy in that grade."

8.2. Bare reading of said provision manifests inter alia that when the Government servant, who has been dismissed is reinstated or would have been reinstated but for his retirement on superannuation while under suspension the Authority competent to order the reinstatement shall consider and make a specific order with respect to payment and allowances for the period of his absence from duty or for the period of suspension ending with the date of his retirement on superannuation and as to treatment of the period of suspension as on duty or otherwise.

8.3. The case at hand factually does not fit into clause (1) of Rule 91 of the said Code. Record reveals the fact, which remained undisputed, that the petitioner was placed under suspension vide Order dated 30.09.2000 (Annexure-2) and notwithstanding interim Order dated 07.12.2001 passed in O.A. No.1182 of 2001 by the learned Odisha Administrative Tribunal in the presence of counsel appearing for the opposite parties directing not to proceed with the disciplinary proceeding during the pendency of criminal case, he was dismissed from service by the Disciplinary Authority vide Order No.3643, dated 12.09.2001. The plea of the Disciplinary Authority that such interim order could come to his knowledge after passing final order of dismissal was negatived by the learned Tribunal in its Order No.41 dated 20.03.2013 in CP No.71(C) of 2002 (arising out of Order in O.A. No.1182 of 2001), which fact is reflected in Order dated 21.08.2013 of the Collector, Kandhamal. Such being admitted factual position, the order of dismissal passed vide District Office Order No.3643/Estt., dated 12.09.2001 was withdrawn and as a consequence thereof, the petitioner was reinstated in service by Office Order dated 24.09.2013 (Annexure-8). The petitioner got retired from service on attaining age of superannuation on 31.03.2018 during pendency of appeal before the Revenue Divisional Commissioner (Southern Division), Berhampur. The factual narration as made in the pleadings supported by documents evinces that the suspension from 30.09.2000 remained in force till dismissal from service by final Order dated 12.09.2001 passed by the Disciplinary Authority despite interim order of the learned

Odisha Administrative Tribunal. Said Order dated 12.09.2001 has been withdrawn by Order No.1485/BBE-Con.-VI-2/2013, dated 21.08.2013 (Annexure7).

8.4. Diligent consideration of the above undisputed factual matrix transpires that the case of the petitioner does not fall within the expression "the Government servant who has been dismissed … or suspended is reinstated or would have been reinstated but for his retirement on superannuation while under suspension" and, hence, there was no competence with the Authority concerned to make a specific order "regarding the pay and allowances to be paid to the Government servant … for the period of suspension ending with the date of his retirement on superannuation" and to decide "whether or not the said period shall be treated as a period spent on duty", inasmuch as he got superannuated with effect from 31.03.2018 after being reinstated by Order dated 24.09.2013.

8.5. Taking cue from the observation made by this Court in *Bani Bhusan Dash Vrs. State of Odisha, 2021 (II) OLR 1022 [Review against said Judgment being RVWPET No. 28 of 2022 has been dismissed on 28.11.2022]*, the contention raised by the learned Additional Standing Counsel stemming on the provisions contained in Rule 91 of the Odisha Service Code is liable to be repelled, and this Court does so. Apposite here to extract relevant observation made in Bani Bhusan Dash (supra):

> *"11. In Samir Kumar Mitra Vrs. State of Orissa and others, W.P.(C) No.20827 of 2016 disposed of on 25.08.2016, the Division Bench of this Court categorically held that in absence of any provision under OCS (CCA) Rules, 1962, the decision of the authorities to treat the period of suspension as leave due is not permissible. In paragraph-12 of the said judgment, this Court held as follows:*
>
> *'It is not in dispute that treating the period of suspension as leave due is not prescribed under the Statute and when the period of suspension has been treated to be leave due, it also amounts to punishment, but since it is not prescribed under the statute and we are also not in agreement with the argument advanced on behalf of the Government before the learned Tribunal that even if it is not prescribed under Rule 13, but as per Rule 12(6) of the Rules, the Disciplinary Authority, while passing the final order of punishment or of release in the disciplinary proceedings against a Government servant, shall give directions about the treatment of period of suspension, which is passed not as a measure of substantive punishment, but as suspension pending enquiry and indicate whether the suspension would be the punishment or not. The reason for deciding the said view is that the authorities have not reflected in the order as to whether the order of suspension is by way of punishment or not. Hence, passing the order regarding suspension cannot be said to be in terms of the provisions of Rule 12(6) of the Rules. Accordingly, that part of the order, which related to treating the period of suspension as leave due, is not sustainable and accordingly quashed.'*
>
> *In view of the aforesaid analysis, this Court is of the considered view that the alleged 3rd punishment imposed in the impugned order Annexure-8 dated 15.09.2018 cannot sustain in the eye of law.*
>
> *12. It is of relevance to note here the well made principle enshrined in criminal jurisprudence extending legal maxim "nulla poena sine lege", which means that a person should not be made to suffer penalty except for a clear breach of existing law. In S. Khushboo Vrs. Kanniammal and Anr, AIR 2010 SC 3196, the Apex Court held that a*

person cannot be tried for an alleged offence unless the legislature has made it punishable by law and it falls within the offence as defined under Sections 40, 41 and 42 of the Indian Penal Code, 1860, Section 2(n) of Code of Criminal Procedure, 1973 or Section 3(38) of the General Clauses Act, 1897.

13. Even though the aforementioned principle has been laid in connection with a criminal case, but the analogy can also be applicable to the present context, which has been referred to of the judgment of the Apex Court in Vijay Singh Vrs. State of U.P. and others, (2012) 5 SCC 242 = AIR 2012 SC 2840. Thereby, on this score only the 2nd punishment imposed vide order impugned under Annexure-8, having not been contemplated in any of the provisions of the service rules applicable to the employees of DRDA or even in the OCS (CCA) Rules, 1962, such punishment is not maintainable in the eye of law."

8.6. In the case at hand, since the allegations levelled against the petitioner in the criminal case could not be substantiated which resulted in acquittal by the learned Special Judge (Vigilance) invoking power under Section 248(1) of the Code of Criminal Procedure, 1973 and the punishment inflicted in the disciplinary proceeding under Rule 13 got set aside by the Appellate Authority in exercise of power under Rule 29 of the OCS (CCA) Rules, the petitioner should not be made to suffer penalty in the manner which is reflected in the fresh Order dated 05.04.2021 of the Disciplinary Authority purported to have been passed as a sequel to Appellate Order vide Memo No.8706, dated 23.12.2019 with reference to advice vide Letter dated 10.12.2020 of the Revenue and Disaster Management Department. The mandate in Rule 30 of the OCS (CCA) Rules makes it clinches that the Disciplinary Authority is required to give effect to Appellate Order without being influenced by advisory received from any other source. Therefore, Order dated 05.04.2021 as passed by the Disciplinary Authority-opposite party No.3 does require intervention of this Court.

9. In view of the above, this Court finds that Order dated 05.04.2021 (Annexure-15) is not tenable in the eye of law. Accordingly, this Court invoking power of extraordinary jurisdiction under Article 226 of the Constitution of India is inclined to quash the Order dated 05.04.2021 passed by the Collector, Kandhamal. Accordingly, the order impugned is quashed.

9.1. Needless to say that the opposite parties are required to extend all consequential service benefits including financial benefit, which the petitioner is entitled to in the light of the discussions made supra, which shall be granted within a period of three months from today.

9.2. With the above observations and directions, the writ petition stands disposed of, but there shall be no order as to costs.

Headnotes prepared by :
Smt. Madhumita Panda, Law Reporter
(Verified by : Shri Pravakar Ganthia, Editor-in-Chief)

Result of the case :
Writ Petition disposed of.

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2024 (III) ILR-CUT-870

DHULIA NAIK
V.
LAND ACQUISITION COLLECTOR, DHENKANAL

(L.A.A. NO.22 OF 2015)

8 NOVEMBER 2024

[SANJAY KUMAR MISHRA, J.]

Issue for Consideration

Whether the Referral Court can enhance the Compensation amount even the claimant has prayed for lesser amount.

Headnotes

LAND ACQUISITION – Compensation – Claimant has prayed lesser amount in his application – Whether the referral court can enhance such amount.

Held: Yes. – Law is well settled that even if the Petitioner/ Claimant has prayed for a lesser amount, if after recording evidence, the referral Court finds that the Petitioner/ Claimant is entitled to more compensation, it should award more compensation than what has been claimed by the Petitioner/ Claimant. (Para - 11)

Citation Reference

Ambya Kalya Mhatre (dead) through LRs. & Ors. Vs. State of Maharashtra, **(2011) 9 SCC 325** – **referred to.**

Keywords

Compensation, Land Acquisition, Power of referral Court, Enhanacement of compensation.

Case Arising From

Judgment dated 08.12.2014 passed by the Civil Judge (Senior Division), Kamakhyanagar in L.A. Misc. Case No.57 of 2012.

Appearances of Parties

For Appellant : Mr. A. Tripathy.
For Respondent : Mr. B. Panigrahi, ASC

Judgment/Order

Judgment

S.K. MISHRA, J.

This Appeal has been preferred against the Judgment dated 08.12.2014 passed by the Civil Judge (Senior Division), Kamakhyanagar in L.A. Misc. Case No.57 of 2012 for further enhancement of compensation.

2. The brief facts which lead to filing of this appeal is that land belonging to the Appellant measuring total area of Ac.0.81 decimals appertaining to four plots i.e. Ac.0.31 decimals from the Plot No.795, kisamJalasaya, Ac.0.04 decimals from Plot No.798 described as Adi, Ac.0.32 decimals from Plot No.800 and Ac.0.14 decimals from Plot No.805, both are of Sarada-III kisam, appertaining to Khata No.40 of Mouza-Siarimalia were acquired by the Special Land Acquisition Officer, shortly, 'LAO' for the purpose of construction of Angul-DubriSukinda Road New B.G. Rail Link Project vide Notification No.48381 dated 26.11.2010 published under Section 4(1) of the Land Acquisition Act, 1894, shortly, 'the Act, 1894'. The LAO assessed the cost of the land @ Rs.50,000/- per acre for Jalasaya & Adi kisam of land and @ Rs.30,000/- per acre for Sarad-III kisam of land. The private Respondent received a sum of Rs.1,89,059/- towards compensation from the LAO, which includes market price of the acquired land, compensation for earth work for the pond and adi, compensation for standing trees thereon and filed a protest petition in terms of Section 18 of the Act, 1894 to refer the matter to the Civil Court. After the reference was made to the Civil Court, the said petition was registered as L.A. Misc. Case No.57 of 2012 before the Court of Civil Judge (Senior Division), Kamakhyanagar. The Court below, after permitting the parties to lead evidence, passed the impugned Judgment by confirming the market price of the land awarded by the LAO. However, it awarded an amount of Rs.15,000/- towards damages for the severance and Jalasaya and an additional compensation of Rs.13,750/- towards the earth work of the Jalasaya and Adi and directed the present Respondent to pay the differential amount along with the statutory benefits as per the Act, 1894. Hence, this Appeal.

3. This Appeal has been preferred basically on the ground that the impugned Judgment is contrary to law so also evidence on record. The Court below did not consider the fact of acquisition of pond, which caused loss of potentiality so also productivity of the adjacent plots i.e. Plot Nos.800 and 805, which are of Sarad-III kisam. Further, the Court below failed to take into consideration the value of Sarad-III kisam land and valued it at Rs.30,000/- only, instead of Rs.60,000/- per acre.

A further ground has been urged that the LAO acquired Ac.0.32 decimals of land out of an area of Ac.0.52 decimals of Plot No.795 of Jalasaya kisam. The Appellant was getting Rs.32,000/- per year from pisciculture from the said plot. As more than 50% area was acquired by the LAO, the pond lost its capacity of pisciculture. The LAO did not consider the income from the pond.

It has further been stated that an area of Ac.0.04 decimals, out of Ac.0.11 decimals of Plot No.798 of Adi kisam was acquired. There were about 200 valuable standing trees like Sala, Mahula, Kendu, Asana and Mango over Plot Nos.800, 805, 795 & 798 whereas, the LAO has only awarded compensation for three Mahula standing trees. The value of each tree is not less than Rs.4,000/-. The Court below, without considering the market value, confirmed the valuation set by the LAO. The referral Court, without considering the valuation report of the Forest Department

marked as Ext.2, passed the impugned Judgment, whereas the Appellant or his legal heirs would have got more than Rs.5,00,000/- towards loss of standing trees.

4. Reiterating the grounds urged in the Memorandum of Appeal, learned Counsel for the Appellant submitted that the Court below failed to take note of the evidence on record that Plot Nos.800 & 805 were irrigated land and the Appellant was harvesting food crops in his field and the compensation awarded should have been more. Further the Court below disbelieved Ext.4 i.e the report of the Sub-Registrar, Kamakhyanagar, on the ground that those sale transactions were interested sale deeds. The Court below should have taken into consideration the Ext.4 for redetermination of the compensation amount.

5. Learned Counsel for the Appellant further submitted that Plot No.795 was of kisam-Jalasaya. Admittedly, out of Ac.052 decimals of Plot No.795, Ac.0.32 decimals was acquired and rest of the Jalasaya lost its potentiality for pisciculture. The Appellant also lost his income from the pisciculture. But the Court below failed to take note of the said admitted evidence on record for the purpose of considering the prayer of the Appellant for enhancement of the compensation. Learned Counsel for the Appellant further submitted that though certified copy of list of standing trees were obtained under the R.T.I. Act and exhibited as Ext.2, but the Court below has not awarded proper compensation for the standing trees on the acquired land. Apart from that, though the Appellant, who was the claimant before the Court below, filed certified copy of the order dated 27.03.2004 passed by the Court below in L.A. Misc. Case No.128 of 2000, but it failed to take note of the said Judgment while passing the impugned judgment. Hence, the impugned Judgment dated 08.12.2014 passed in L.A. Misc. Case No.57 of 2012 deserves interference.

6. Per contra, learned Counsel for the StateRespondent submitted that the Court below has rightly allowed the claim of the Appellant/Claimant partly by ordering to pay extra amount towards earth work of the jalasaya and Adi to the tune of Rs.13,750/- and Rs.15,000/- towards damages of severance and Jalasaya. There being no infirmity in the impugned Judgment passed in L.A. Misc. Case No.57 of 2012, the present Appeal deserves to be dismissed.

7. In view of the submission made by the learned Counsel for the parties, on perusal of the L.C.R., it is ascertained that in the Objection Petition filed under Section 18 of the Act, 1894, the Appellant, being the Claimant, specifically stated that the situation, potentiality, fertility and other characteristics of the land at the time of fixation of compensation have not been taken into consideration by the LAO. That apart, a stand has also been taken in the Objection Petition that due to acquisition of the Jalasaya, rest area of Ac.0.28 decimals under both Plot Nos.795 & 798 have been damaged and the Acquisition Authority has not considered the said aspect as to the cost of severance for the said 28 decimals of land. That apart, a specific stand has been taken in Section 18 Application/Objection that all the acquired plots under Khata No.40 are adjacent to N.H.200 and situated nearby the Basti having potential of Gharabari kisam. That apart, the present Appellant

(Petitioner before the Court below), who deposed as P.W.1, stated in his examination-in-chief regarding destroying the entire area of the pond by acquiring only Ac.0.31 decimals out of area Ac.0.52 decimals so far as plot No.795 is concerned, so also partial acquisition of Ac.0.04 decimals out of Ac.0.11 decimals of Plot No.798 i.e. Adi (ridge) of the acquired plot. P.W. No.1 also deposed regarding awarding of compensation improperly towards earth work so also his income from pisciculture and harvesting double crop from the acquired Plot Nos.800 & 805. Specific evidence was also led regarding value of the trees, as detailed in para-15 of the Affidavit evidence. Most of the statements of examination-in-chief remained untouched during cross-examination of P.W.1. The fisherman, who was catching fish, was also examined as P.W.2, who detailed about the income of the Appellant/Claimant from pisciculture so also loss caused to the Appellant/Claimant due to acquisition of the part of the said pond. Most of his statements also remained untouched during his cross-examination. As it seems, the Court below has not taken into consideration the said admitted evidences on record. Apart from that, though Form 9A (Schedule of Trees) was exhibited by the Appellant/Claimant, which details as to the kind, number so also size of the trees, the Court below erroneously observed that except few trees the rest trees are very small trees having girth of about 1 ft. or below, thereby declined to further enhance the compensation pertaining to those remaining standing trees on the acquired plots.

8. That apart, as is revealed from Ext.4, the Court below, though took into consideration Ext.4, did not take into consideration the contents of the said document for the purpose of enhancing the compensation on the ground that almost all the sale transactions were made between one Dasarathi Nayak and one Anjali nayak and the land transacted between them are part of same Khata i.e. Khata No.77, with further observation that although the area of all lands transacted through different sale deeds vary from Ac.0.04 decimals to Ac.0.36 decimals, but the consideration money paid for all the sale deeds remains the same i.e Rs.46,200/-. While observing so, the Court below did not take into consideration the remaining sale transaction on the ground that the kisam of land being Taila, cannot form the basis for deciding the market price of Sarad kisam of land. Admittedly, Sarad kisam land is much better than Taila kisam of land. Ext.4 indicates that so far as sales statistics of Taila kisam of land of village Siarimalia of Khata No.58, Plot No.931 of Ac.0.28 decimals of land was sold for an amount of Rs.15,400/- which comes to Rs.550/- per decimal, thereby the rate of Taila kisam of land of the same village was sold @ Rs.55,000/- per acre. But the Court below confirmed the compensation @ Rs.30,000/- per acre assessed and awarded by the LAO for Sarad-III kisam of land.

9. Admittedly, in order to oppose the prayer of the present Appellant/Claimant for further enhancement of compensation, the State did not lead any oral evidence. Only the working sheet prepared by the LAO was marked as Ext.A on admission. So far as the potentiality of the land is concerned, specific evidence was led by the Appellant/Claimant and in Section 18 Application/Objection, it was specifically stated regarding the potentiality of the acquired plots so also its situational

advantages in para-4 of the said Objection. Evidence was also led through P.W.1 to substantiate the said claim. P.W.1 also deposed that due to severance of his acquired pond, he lost his annual income from pisciculture and irrigation facilities for ever and other agricultural lands have been also affected due to such severance. P.W.1 also deposed that the State-Opposite Party has acquired 75 numbers of different kinds of trees (big and small size) from the boundary of Plot Nos.798, 800 and 805 and he is entitled to compensation as per the previous order passed in favour of one Dama Nayak, who is his neighbour. In para-15 of his Affidavit Evidence P.W.1 has also stated about the enhanced compensation he is entitled to for the acquired trees and during crossexamination the said evidences remain untouched. The Court below failed to take note of the said admitted evidence on record while re-determining the compensation for acquisition of land so also compensation of standing trees on the acquired lands/plots.

10. Though in the Section 18 Application/ Objection, the Claimant/Petitioner claimed higher compensation for the lands on the ground of potentiality of acquired land, but in para-8 of the impugned judgment the Court below, relying on the notes of argument and the submissions made by the learned Counsel for the Appellant/Claimant, made an observation that the learned Counsel did not put forth any claim for considering the compensation with regard to the market value of acquired land and confined the argument with regard to earth work of acquired pond and damages sustained by the Appellant/Claimant due to part acquisition of the pond. Accordingly, the impugned judgment was passed confining to the alleged submissions made by the learned Counsel for the Appellant/Claimant before the Court below.

11. Law is well settled that even if the Petitioner/Claimant has prayed for a lesser amount, if after recording evidence, the referral Court finds that the Petitioner/Claimant is entitled to more compensation, it should award more compensation than what has been claimed by the Petitioner/Claimant. The Supreme Court in ***Ambya Kalya Mhatre (dead) through LRs. & ors. Vs. State of Maharashtra***, reported in ***(2011) 9 SCC 325***, vide paragraph 29 held as follows:

> *"29.* ***The Collector making the offer of compensation on behalf of the State is expected to be fair and reasonable. He is required to offer compensation based on the market value. Unfortunately, Collectors invariably offer an amount far less than the real market value, by erring on the safer side, thereby driving the landowner first to seek a reference and prove the market value before the Reference Court and then approach the High Court and many a time this Court, if he does not get adequate compensation****. In most land acquisitions, the land acquired is the only source of livelihood of the landowner. If the compensation as offered by the Collector is very low, he cannot buy any alternative land. By the time he fights and gets the full market value, most of the amount would have been spent in litigation and living expenses and the price of lands would have appreciated enormously, making it impossible to buy an alternative land. As a result, the landowner seldom has a chance of acquiring a similar land or an equal area of similar land.* ***It would be adding insult to injury, if the landowner should be tied down to a lesser value claimed by him in the reference application, even***

though he was not required by law to mention the amount of compensation when seeking reference. The Act contemplates the landowner getting the market value as compensation and no technicalities should come in the way of the landowner getting such market value as compensation." (Emphasis Supplied)

12. Admittedly, though the Appellant/Petitioner in the protest petition filed under Section 18 of the Act, 1894 claimed more compensation for the agricultural lands and also led evidence to the said effect, but the Court below confined the adjudication of enhancement of compensation to land of kisam 'Pond' and 'Adi' and earth work on the ground of alleged argument advanced by the learned Counsel for the Appellant/Petitioner.

13. In view of the detailed discussions made above so also the settled position of law, the impugned judgment deserves interference. Accordingly, the said judgment dated 08.12.2014 passed in L.A. Misc. Case No.57 of 2012 is set aside and the matter is remitted back to the Court below for re-determination of the compensation amount keeping in mind the observations made in the foregoing paragraphs so also evidence on record and the settled position of law.

It is made clear that the Court below shall redetermine the compensation based on the evidence on record and conclude the same at the earliest, preferably within a period of four months from the date of production of the certified copy of this Judgment. It is made further clear that if the Appellant/Claimant has already been paid in terms of the impugned order dated 08.12.2014 passed in L.A. Misc. Case No.57 of 2012, while re-determining the compensation, the amount which has already been paid, if any, has to be deducted/adjusted from the re-determined amount.

14. With the said observation, the appeal stands allowed and disposed of.

Headnotes prepared by : *Result of the case :*
Shri Jnanendra Kumar Swain (Judicial Indexer) L.A.A.allowed and disposed of.
(Verified by : Shri Pravakar Ganthia, Editor-in-Chief)

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2024 (III) ILR-CUT-875

CUTTACK CENTRAL CO-OPERATIVE BANK LTD.
V.
THE JOINT LABOUR COMMISSIONER, ODISHA & ORS.

(W.P.(C) NO.9493 OF 2022)

08 NOVEMBER 2024

[SANJAY KUMAR MISHRA, J.]

Issue for Consideration

Whether the authority/employer can forfeit the gratuity of an employee after his superannuation.

Headnotes

PAYMENT OF GRATUITY ACT, 1972 – Section 4 (6) – Payment of Gratuity – Whether the authority/employer can forfeit the gratuity of an employee after his superannuation on the plea regard to outstanding of loan amount where such employee stood as a guarantor against the loan.

Held: No – The Opp.Party No.4's services were never terminated for causing any damage or loss to the bank – Rather, she was allowed to retire from service w.e.f. 31.07.2010 on attaining the age of superannuation – Hence, stand of forfeiture of gratuity of the Opp.Party No. 4 because of alleged loss caused to the bank by standing as guarantor against the loanees is misconceived and untenable in the eye of law. (Para 36)

Citation Reference

Punjab and Sind Bank Vrs. Labour Commissioner and Others, **(2008) 2 LLJ 841 P&H**; MD, OSIC Vs. Abhay Kumar Samantray, **2022 (III) ILR-CUT-639**; Senior Branch Manager, NSIC Ltd. & Another Vs. The Deputy Chief Labour Commissioner (Central), Bhubaneswar-cum-the Appellant Authority & Ors, **2024 (I) ILR CUT 1421**; Sharat Chandra Lenka Vs. Orissa State Warehousing Corporation & Anr, **W.P.(C) No.24276 of 2014**; Aska Cooperative Central Bank Ltd. Vs. Controlling Authority under the Payment of Gratuity Act-Cum-Assistant Labour Commissioner, Berhampur & Anr, **W.P.(C) No.3329 of 2018**; Dev Prakash Tiwari Vs. U.P. Cooperative Institutional Service Board, Lucknow & Others, **(2014) 7 SCC 260**; Maniben Maganbhai Bhariya Vs. District Development Officer Dahod & Ors, **Civil Appeal No.3153 of 2022**; Calcutta Dock Labour Board & Anr Vs. Smt. Sandhya Mitra & Ors., **(1985) 2 SCC 1**; H. Gangahanume Gowda Vs. Karnataka Agro Industries Corp. Ltd., **(2003) 3 SCC 40**; Rajinder Kumar Nangia Vs. Rashtriya Chemicals & Fertilizers Ltd., **W.P.C No.38 of 1995**; E-Team Informatica India (P) Ltd. Vs. Mathew M. Gerorge & Ors., **2019 LLR 296 – referred to.**

List of Acts

Payment of Gratuity Act, 1972

Keywords

Payment of gratuity, Power of the authority to forfeit the gratuity.

Case Arising From

Order dated 05.11.2019 passed by the Controlling Authority under the Payment of Gratuity Act-Cum-Divisional Labour Commissioner, Cuttack in P.G. Appeal Case No.08 of 2021.

Appearances of Parties

For Petitioner : Mr. S.J. Mohanty
For Opp.Parties : Mr. T.K. Biswal, AGA, Mr. S. Behera

Judgment/Order

Judgment

S.K. MISHRA, J.

1. This Writ Petition has been preferred by the Petitioner-Bank challenging the confirming Judgment and order dated 28.03.2022 passed by the Appellate Authority under Payment of Gratuity Act-Cum-Joint Labour Commissioner, Bhubaneswar, shortly hereinafter, 'the Appellate Authority', in P.G. Appeal Case No.08 of 2021, so also the order dated 05.11.2019 passed by the Controlling Authority under the Payment of Gratuity Act-Cum-Divisional Labour Commissioner, Cuttack shortly hereinafter, 'the Controlling Authority', in P.G. Case No.01 of 2019.

2. The brief facts of the case, as detailed in the Writ Petition, is that the Petitioner-Bank i.e. the Cuttack Central Co-operative Bank, is a Society registered under the Odisha Co-operative Societies Act, 1962, shortly hereinafter, 'OCS Act, 1962'. The Opposite Party No.4, who was working as a Deputy Manager in the Petitioner-Bank, superannuated from her service w.e.f. 31.07.2010. After her retirement, she submitted a representation before the Registrar, Co-Operative Societies, Odisha for release of the retiral benefits, which was forwarded by the Joint Registrar, Co-Operative Societies to the Petitioner-Bank vide letter dated 17.04.2012 directing to take prompt action towards payment of her retiral benefits.

3. After receipt of the said letter, the Petitioner Bank, after thorough scrutiny on the liabilities and proceeding lying against the Opposite Party No.4, came to a conclusion that Rs.7,44,084/- is lying against her towards recovery. Out of which Rs.3,91,495/- towards loan and guarantee liability, Rs.3,52,589/- towards interest. After adjustment of retiral benefits, Rs.1,68,874/- is pending against the Opposite Party No.4 towards recovery. Thereafter, the Secretary of the Petitioner-Bank issued demand notice requesting the Opposite Party No.4 for payment of the said outstanding amount. Despite receiving notice, the Opposite Party No.4 remained silent over the matter for a long period and also did not deposit the recoverable amount wilfully causing a huge financial loss to the Petitioner-Bank.

4. While the matter stood thus, after nine years of her superannuation, the Opposite Party No.4 approached the Controlling Authority (O.P.2) claiming Rs.4,28,765/- (incorrectly typed as Rs.78,765/-) towards gratuity along with interest. Despite issuance of notice, as the Petitioner-Bank could not appear before the Controlling Authority, due to some unavoidable circumstances, an ex-parte judgment was passed on 05.11.2019 directing the Petitioner-Bank to deposit Rs.8,25,849/- within 30 days from the date of pronouncement of the Judgment, which came to the knowledge of the Petitioner-Bank after the initiation of the certificate proceeding against it before the Sub-Collector, Cuttack, Sadar. However,

the period of limitation to challenge the said order before the Appellate Authority had elapsed by then. Thus, the Petitioner-Bank challenged the ex-parte judgment so also certificate proceeding before this Court in W.P.(C) No.7285 of 2021. The said Writ Petition stood disposed of vide order dated 03.03.2021 directing the Petitioner-Bank to file an Appeal along with a petition for condonation of delay within 10 days. Accordingly, the Petitioner-Bank preferred an Appeal before the Appellate Authority (O.P.1), which was registered as P.G. Appeal Case No.08 of 2021. The Opposite Party No.1, after hearing, confirmed the order passed by the Controlling Authority vide Judgment and order dated 28.03.2022 directing the Petitioner-Bank to deposit a sum of Rs.8,25,849/- towards gratuity along with interest. Hence, this Writ Petition.

5. Both the orders passed by the Appellate Authority so also Controlling Authority have been challenged in this Writ Petition basically on the following grounds;

i) The Appellate Authority has not applied his judicious mind to access the documents pertaining to recovery filed by the Petitioner-Bank.

ii) The Appellate Authority should have borne in mind that the Petitioner-Bank was set ex-parte by the Controlling Authority, for which it was neither able to file the documents in respect of damages caused by the Opposite Party No.4 nor got chance to lead rebuttal evidence.

iii) As per sub-section 6(a) of Section 4 of the P.G. Act, the Authority can wholly or partly forfeit the claim of the applicant towards gratuity, if the delinquent employee makes any damage or loss to the organization while in service. As the Opposite Party No.4 was held responsible for financial irregularity, her gratuity was forfeited by a written order passed by the Management. Thus, there is no irregularity or illegality on the part of the Petitioner-Bank to withhold the gratuity of the Opposite Party No.4.

iv) Due to irregularities and illegalities committed by the Opposite Party No.4, the Petitioner-Bank sustained huge loss. Hence, with due intimation her gratuity was withheld. After adjustment of retiral benefits, there is still outstanding against the Opposite Party No.4. Hence, demand notice was issued for recovery of such amount.

v) As the Opposite Party No.4 caused pecuniary loss to the Petitioner-Bank, provisions under Section 7(3) and 7(3A) of the Payment of Gratuity Act, 1972, shortly, 'the Act, 1972' are not applicable to it.

6. The Opposite Party No.4 has filed a Counter Affidavit disputing the facts so also opposing to the prayer of the Petitioner-Bank stating therein that she was working under the Petitioner-Bank and superannuated from her service w.e.f. 31.07.2010. The total qualifying period of service was 33 years and her last drawn salary was Rs.22,521/-. After her retirement from service, though she requested the Petitioner-Bank for payment of gratuity of Rs.4,28,765/-, the same was not paid to her. Because of non-payment of gratuity so also interest for the delayed payment, she approached the Controlling Authority vide P.G. Case No.01 of 2019. The Controlling Authority, after analyzing several pronouncements of the Supreme Court and taking into consideration the facts on record, allowed the claim of the Opposite Party No. 4 vide order dated 05.11.2019 directing the Petitioner-Bank to

deposit an amount of Rs.8,25,849/- in her favour, which includes interest, within the period of 30 days, failing which it was ordered to pay simple interest @ 10% per annum over and above the said awarded amount.

Being aggrieved by the said order, the Petitioner-Bank preferred Appeal No.08 of 2021 before the Appellate Authority. The Appellate Authority, vide order dated 28.03.2022 confirmed the order of the Controlling Authority and directed the Petitioner-Bank to pay the gratuity along with admissible interest to the Opposite Party No.4 in terms of the provisions under the Orissa Payment of Gratuity Rules, 1974, shortly hereinafter, "the Rules, 1974".

It has further been stated in the Counter that the Petitioner-Bank deliberately withheld the gratuity of the Opposite Party No.4 without any authority, after allowing her to retire from service on superannuation. It has also been stated that as per Section 7(3A) read with the Central Government Notification dated 01.10.1987, she is entitled to 10% simple interest for the delayed period. Therefore, the order of imposition of interest in terms of section 7(3A) under the Act, 1972 is justified and the Writ Petition is liable to be dismissed.

7. In response to the Counter filed by the Opposite Party No.4, the Petitioner-Bank has filed a Rejoinder Affidavit reiterating therein that the Opposite Party No.4 while in service, caused a huge financial loss to the Petitioner-Bank being a Guarantor of two loans, which also became NPA and the loan amounts could not be recovered. As per the settled position of law, the Borrower and the Guarantor are equally liable for repayment of loan outstanding dues. A letter was also issued by the Petitioner-Bank to the Opposite Party No.4 for recovery of the same, who thereafter gave an undertaking to keep her guarantee liabilities lien to Bank till clearance of the loan availed by two persons on 09.07.2012. It is also the case of the Petitioner-Bank that, as the Opposite Party No.4 realized that the Petitioner-Bank has sustained financial loss, she had given such undertaking.

Further, though the Opposite Party No.4 retired from service on 31.07.2010, she approached the Controlling Authority for release of gratuity after 9 years of her superannuation without explaining the reason behind the said delay. Since the Controlling Authority passed an ex-parte judgment, the Petitioner-Bank has neither been heard nor been able to rebut the claim of Opposite Party No.4.

8. For the first time it has been stated in the Rejoinder that as the Opposite Party No.4 suppressed the facts before the Controlling Authority about her giving an undertaking for repayment of loans in which she stood Guarantor and claimed gratuity and she did not approach the Authority with clean hands. Moreover, it is the case of the Petitioner-Bank that in view of the written consent and undertaking given by Opposite Party No.4, she is not eligible to get gratuity and retiral benefits unless and until the loan outstanding dues, for which she stood as Guarantor is cleared. Thus, as per the written consent, the Opposite Party No.4 should have taken steps to clear the outstanding dues first. Therefore, the judgments of Controlling Authority as well as Appellate Authority are liable to be set aside.

9. Learned Counsel for the Petitioner-Bank submitted that, though the Bank Management was duly noticed by the Controlling Authority, it could not participate in the said proceeding due to official dislocation, for which it was set ex-parte. Taking advantage of such non-appearance, the Opposite Party No.4 suppressed the undertaking given by her on 09.07.2012 to keep her guarantee liabilities lien to bank till clearance of the loan availed by two loanees. Realizing the fact that the Petitioner-Bank has sustained financial loss, she had given such undertaking. Though the said fact was brought to the notice of the Appellate Authority in P.G. Appeal Case No.08 of 2021, while passing the impugned order of confirmation, it did not take note of the said admitted fact and erroneously passed the impugned order with an observation that the Petitioner-Bank has deliberately withheld the gratuity of the Opposite Party No.4 without any authority of law, after allowing her to retire on superannuation.

10. Learned Counsel for the Petitioner, to substantiate his submission, relied on the judgment of Punjab & Haryana High Court in **Punjab and Sind Bank Vrs. Labour Commissioner and others,** reported in (2008) 2 LLJ 841 P&H, wherein, in view of the authorisation to appropriate set off of the liabilities from the Provident Fund/Gratuity executed by the employee, it was held that the Petitioner-Bank was entitled to adjust the gratuity amount of Rs.1,61,700/- towards the outstanding housing loan amount.

11. Per contra, Mr. Behera, learned Counsel for the Opposite Party No.4 submitted that the employees of the Petitioner-Bank are governed under the Staff Service Rules, 2011 of Central Cooperative Banks. Hence, OCS (CC & A) Rules, 1962 so also Orissa Civil Services (Pension) Rules, 1992 are not applicable to the employees of the Petitioner-Bank. Further, as per Rule 50 of the Staff Service Rules, 2011, the Opposite Party No.4 is entitled for gratuity as per the provisions under the Act, 1972, read with the Rules, 1974.

12. Mr. Behera, learned Counsel for Opposite Party No.4 further submitted that in terms of the provisions under Section 4(6) of Payment of Gratuity Act, 1972, the Employer is only entitled to forfeit gratuity of an employee partially or wholly, whose service has been terminated. Since the Opposite Party No.4 was allowed to retire from service on attaining the age of superannuation on 31.07.2010, the Petitioner-Bank has no authority under law to withhold or forfeit the gratuity of his client. Further, there is no such specific provision in the Staff Service Rules, 2011 of the Petitioner-Bank for withholding gratuity on account of pendency of any loan or guarantee liability against an employee after his/her retirement. Thus, as per the settled position of law, in the absence of any specific provision to the said effect, the plea of the Petitioner to forfeit the gratuity of Opposite Party No.4 because of outstanding recoverable amount against her is not tenable. That apart, the Petitioner-Bank for the first time has taken a plea in its Rejoinder as to undertaking given by his client on 09.07.2012 to keep the guarantor liability lien to Bank till clearance of the loan amount by the loanee. In the said so called undertaking the Opposite Party

No.4 never authorised the Petitioner-Bank to adjust or recover the unpaid loan amount from the after retiral dues including gratuity.

13. Further, drawing attention of this Court to the Judgment of this Court in **MD, OSIC Vs. Abhay Kumar Samantray**, reported in 2022 (III) ILR-CUT-639, learned Counsel for the Opposite Party No.4 submitted that his client is entitled for 10% simple interest per annum on the gratuity amount from the date of her superannuation till the date of actual payment. The Controlling Authority (O.P.2) calculated interest from 01.08.2010 to 05.11.2019 (date of Judgment) to be 9 years 3 months 4 days in P.G Case No. 01 of 2019 vide Judgment dated 05.11.2019, which has been subsequently confirmed by the Appellate Authority (O.P.1) in P.G Appeal Case No.08 of 2021.

14. Mr. Behera, learned Counsel for the Opposite Party No.4, further submitted that admittedly the Opposite Party No.4 was allowed to retire from service on attaining the age of superannuation. There is no such provision either under the H.R. Policy of Central Cooperative Banks incorporating Staff Service Rules, 2011 applicable to the employees of Petitioner- Bank or in the Act, 1972 for withholding Gratuity on account of outstanding recoverable amount after allowing the concerned employee to retire from service on superannuation. Mr. Behera, drawing attention of this Court to the provision of Sub-Section 2 of Section 7 of P.G. Act, 1972, submitted that the Petitioner being the Employer is under an obligation to determine the amount of gratuity and give notice in writing to the person to whom the gratuity is payable and also the Controlling Authority under the P.G Act specifying the amount of gratuity so determined irrespective of an application for gratuity being filed by the employee concerned or not. Though the Opposite Party No.4 was superannuated on 31.07.2010, no communication was made thereafter to forfeit the gratuity of his client on the plea of causing loss to the Employer in terms of Section 4(6) of the Act, 1972.

15. Learned Counsel for the Opposite Party No.4 further submitted that as the Petitioner-Bank failed to appear on the date fixed, despite service of notice, the Controlling Authority passed an ex-parte order after hearing the Opposite Party No.4. Since no sufficient reason was assigned by the Petitioner-Bank before the Controlling Authority within 30 days of the ex-parte order, the Petitioner-Bank is estopped to raise the self-same issue.

16. To substantiate his submissions, learned Counsel for the Opposite Party No.4 relied on the judgments of this Court in **Senior Branch Manager, NSIC Ltd. & another Vs. The Deputy Chief Labour Commissioner (Central), Bhubaneswar-cum-the Appellant Authority and others**, reported in 2024 (I) ILR CUT 1421, **Sharat Chandra Lenka Vs. Orissa State Warehousing Corporation & another**, passed in W.P.(C) No.24276 of 2014, **Aska Cooperative Central Bank Ltd. Vs. Controlling Authority under the Payment of Gratuity Act-Cum-Assistant Labour Commissioner, Berhampur and another**, passed in W.P.(C) No. 3329 of 2018, **MD OSIC Vs. Abhaya Kumar Samantray**, reported in 2022

(III) ILR CUT 639 so also judgments of the Supreme Court in **Dev Prakash Tiwari Vs. U.P. Cooperative Institutional Service Board**, **Lucknow & others**, reported in (2014) 7 SCC 260, **Maniben Maganbhai Bhariya Vs. District Development Officer Dahod & others**, passed in Civil Appeal No.3153 of 2022, **Calcutta Dock Labour Board and another Vs. Smt. Sandhya Mitra and others**, reported in (1985) 2 SCC 1, **H. Gangahanume Gowda Vs. Karnataka Agro Industries Corp. Ltd.**, reported in (2003) 3 SCC 40. He also relied on the judgment of Bombay High Court in **Rajinder Kumar Nangia Vs. Rashtriya Chemicals & Fertilizers Ltd.**, passed in W.P. No.38 of 1995 so also judgment of Keral High Court in **E-Team Informatica India (P) Ltd. Vs. Mathew M. Gerorge and others**, reported in 2019 LLR 296.

17. On perusal of the order dated 05.11.2019, passed by the Controlling Authority, it is found that the Petitioner-Bank (Opposite Party in P.G. Case No.01 of 2019), being noticed, did not appear on 16.02.2019. Hence, it was set ex-parte on the very same day. All the four issues framed in the said case were answered in favour of the Opposite Party No.4. However, while answering Issue No.4, as to what should be the quantum of gratuity payable to the Opposite Party No.4, it was held that she is entitled for gratuity of Rs.4,28,765/- so also interest @ 10% on the said amount from the date it became due till the date of payment. While ordering so, the Controlling Authority relied on several judgments of the Supreme Court so also judgment of Allahabad High Court as well as this Court.

18. From the pleadings and documents on record so also arguments advanced by the learned Counsel for the parties, it is amply clear that despite issuance of notice to the Petitioner-Bank, it chose not to appear before the Controlling Authority, as a result of which, an ex-parte Judgment was passed on 05.11.2019 directing the Petitioner-Bank to deposit an amount of Rs.8,25,849/- within a period of 30 days from the date of pronouncement of the Judgment. Thereafter, the Petitioner-Bank, as provided under Section 7(7) of the Act, 1972, instead of preferring an Appeal, directly approached this Court in W.P.(C) No.7285 of 2021, which was disposed of on 03.03.2021 giving liberty to the Petitioner-Bank to prefer an Appeal.

19. Liberty being granted, the Petitioner-Bank preferred P.G. Appeal Case No.8 of 2021 basically on the grounds that on thorough scrutiny on the liabilities against the Opposite Party No.4, it came to a conclusion that Rs.7,44,084/- is lying against her towards recovery. Out of which Rs.3,91,445/- is lying as loan and guarantee liability. After adjustment of the recoverable amount from the retiral benefits, Rs.1,68,874/- is pending against the Opposite Party No.4 towards recovery. The Petitioner-Bank also made request to the Respondent No.4 vide letter dated 18.05.2012 to deposit the said amount of Rs.1,68,874/- within a period of fifteen days from the date of issue of said notice. Thereafter, the Opposite Party No.4 remained silent over a long period and also not deposited the said recoverable amount willfully.

Though notice given by the Controlling Authority was duly served on the Petitioner-Bank directing it to appear on 16.02.2019, due to official dislocation in the legal section, adequate steps could not be taken by the Petitioner-Bank towards filing of Objection before the Controlling Authority. As a result, the said Application was decided ex-parte vide order dated 05.11.2019 directing the Petitioner Bank to deposit Rs.8,25,849/- within 30 days from the date of pronouncement of the said judgment.

A further ground was urged in the Appeal that there was sufficient cause to held up the gratuity so also retiral benefits of the Opposite Party No.4 because of the aforesaid reasons and the said facts could not be brought to the notice of the Controlling Authority. That apart, a ground was also taken before the Appellate Authority that in view of the provisions under Clause-6(a) of Section 4 of the Act, 1972, the Petitioner/Appellant-Bank stopped payment of gratuity to the Opposite Party No.4 (Respondent No.3 before the Court below) after her retirement because of damage or loss caused to the organization during her service tenure.

Relying on the judgment in **Punjab & Sind Bank** (supra), it was stated that the gratuity amount as well as retirement benefits of Opposite Party No.4 were rightly held up till recovery of outstanding dues against her towards loan and guarantee liability.

20. As it reveals from the impugned order dated 28.03.2022 passed by the Appellate Authority, taking into consideration the said grounds urged in the Memorandum of Appeal, it was held as follows:-

> *"**5.** xxxx xxxx xxxx*
>
> *On perusal of the judgment passed by the learned Controlling Authority, it appears that the issues were framed and the said issues have been answered by the learned Controlling Authority in affirmative in favour of the respondent No.1.* ***So far the relevant service rules of the bank it is crystal clear that the employees of Cuttack Central Cooperative Bank Ltd., are entitled to gratuity as per the provision of Payment of Gratuity Act, 1972 read with Orissa Payment of Gratuity Rules, 1974.***
>
> ***The rules of the Bank clearly speaks as follows:-***
>
> ***"Every employee of the Bank shall be entitled to payment of gratuity as per the provisions of the Payment of Gratuity Act, 1972 read with the Orissa Payment of Gratuity Rule, 1974."***
>
> *In so far as Sec. 4(6)(b) of the Payment of Gratuity Act, 1972 is concerned, the same read as follows;*
>
> *(b) The gratuity payable to an employee (may be wholly or partially forfeited)-*
>
> *(i) If the services of such employee have been terminated for his riotous or disorderly conduct or any other act of violence on his part or*
>
> *(ii) If the services of such employee have been terminated for any act which constitutes an offence involving moral turpitude, provided that such offence is committed by him in the course of his employment.*
>
> ***6.*** *On perusal of the "Staff Service Rule, 1980" as well as Sec.4(6)(b) of the Payment of Gratuity Act, 1972, it is made clear that if the services of an employee have been*

terminated for any act which constitute an offence involving moral turpitude that the Authority is empowered to withheld the gratuity wholly or partly. ***But in the present case, the respondent No.1 has not been terminated rather he was allowed to retire by the appellant bank on attaining the age of superannuation w.e.f. 31.07.2010 without even initiating any disciplinary proceeding.*** *Neither in the Staff Service Rule nor in the Payment of Gratuity Act, there is any provision for withholding of gratuity merely on pendency of a criminal case or departmental proceeding against the employee who has been allowed to retire on superannuation by the employer.*

Since, in the present case at hand, the respondent No.1 has been allowed to retire on superannuation w.e.f. 31.07.2010 as per the order passed by the appellant bank and all his retirement dues along with gratuity has not been paid to her. ***But withholding her gratuity after her superannuation is not tenable since the gratuity amount of the respondent No.1 is protected under Article 300(A) of the Constitution of India as the Hon'ble Apex Court has termed the gratuity amount of an employee as property.***

xxxx xxxx xxxx

8. *Mr. P.K. Rout further argued that in the recent decisions of the Hon'ble Apex Court in the case of "Chairman-cum-Managing Director, Mahanadi Coal Field Ltd. Vrs. Rabindranath Choubey : AIR 2020 SC 2978", the respondent No.1 is not entitled for gratuity.*

On perusal of the said judgment of the Hon'ble Apex Court, it is crystal clear that the fact of the said case is not identical to the present one. In that case, a departmental proceeding is pending against the employee of the MCL as per CDA Rules, 1978 and as per the relevant Service Rules i.e., Rules, 34.3 of the CDA Rules, 1978 in which there was a provision for "withholding of gratuity during pendency of disciplinary proceeding". But in the present case no such provision is there under the Staff Service Rules for withholding of gratuity amount of a retire employee on account of pendency of criminal case. As such, the fact of that case is totally a different one from the present case at hand.

xxxx xxxx xxxx

On perusal of record as well as impugned order it is found that since the appellant bank has deliberately withheld the gratuity of the respondent No.1 without any authority of law after allowing the respondent No.1 to retire on superannuation, the order of imposition of interest as per Sec. 7(3A) of the Payment of Gratuity Act is justified in the present situation.

10. *Considering the argument advanced by the respective parties as well as on perusal of the documents filed and going through the written arguments replies filed by the respective parties,* ***it is crystal clear that the respondent No.1 has been allowed to retire on superannuation w.e.f. 31.07.2010 by the appellant bank and since there is no such provision under the Staff Service Rules, read with Payment of Gratuity Act, 1972 for withholding of gratuity on account of pendency of a disciplinary/departmental proceeding after superannuation of the employee of the Cuttack Central Cooperative Bank Ltd., this court came to a conclusion that the learned Controlling Authority has not committed any error while passing the order dt. 05.11.2019. In P.G. case No.07 of 2018*** *and directing the appellant bank to pay the gratuity along with admissible interest to the respondent No.1 as per provisions of the Orissa Payment of Gratuity Rules, 1974. Hence, the present appeal is dismissed being devoid of merit." (**Emphasis supplied**)*

21. Admittedly, the Opposite Party No.4 was superannuated from service w.e.f. 31.07.2010. Since the Petitioner-Bank did not pay the amount of gratuity along with interest, the Opposite Party No.4 approached the Controlling Authority vide P.G. Case No.01 of 2019. Despite notice, the Petitioner-Bank did not appear before the Controlling Authority. However, because of the facts detailed above, liberty being granted by this Court, it approached the Appellate Authority in P.G. Appeal Case No.8 of 2021, taking a plea of further recovery of outstanding amount of Rs.1,68,874/- after adjustment of the recoverable amount from the retiral benefits of the Opposite Party No.4, including gratuity.

22. As held by the Supreme Court in **Rabindranath Choubey** (supra), relied upon by the learned Counsel for the Petitioner-Bank, the employer has a right to held up the gratuity amount as well as retirement benefits till finalization of the proceedings lying against the Opposite Party No.4. However, in the present case, no proceeding was even initiated against the Opposite Party No.4 till her retirement for alleged loss caused to the Petitioner-Bank nor service of the Opposite Party No.4 was terminated on that ground.

It was further held by the Supreme Court in the said case that in view of the specific service rules of the employer in the said case to withhold gratuity during pendency of departmental as well as criminal proceeding against an employee, it was justified to do so. So far as the Petitioner-Bank is concerned, admittedly, there is no such service rule with regard to withholding or forfeiting the gratuity. Rather, the service rules of the Petitioner Bank provides as to applicability of the Act, 1972 so far as payment of gratuity to its employees. Sub-section (3A) of Section 7 of the Act, 1972 permits the employer to withhold the gratuity of a retired employee, subject to seeking permission from the Controlling Authority to do so, failing which the employer is liable to pay interest.

23. As provided under sub-section (6) (b) of Section 4 of the Act, 1972, gratuity payable to an employee can be wholly or partially forfeited, if the services of such employee have been terminated for his riotous or disorderly conduct or any other act of violence on his part; or, if the services of such employee have been terminated for any act, which constitutes an offence involving moral turpitude, provided that such offence is committed by him in course of his employment. But in the present case, the Opposite Party No.4 has not been terminated. Rather she was allowed to retire by the Petitioner-Bank on attaining the age of superannuation w.e.f. 31.07.2010 without initiating any proceeding for recovery of the loan amount, for which she stood as guarantor.

24. Admittedly, though this Court granted liberty to the Petitioner-Bank to prefer an Appeal before the Appellate Authority under Section 7(7) of the Act, 1972, the Petitioner-Bank failed to demonstrate before the Appellate Authority that the service rules of the employer entitles it to withhold the gratuity of an employee after her retirement. That apart, it also failed to demonstrate before the Appellate Authority regarding any communication made to the Opposite Party No.4 indicating

therein as to its intention to withhold or forfeit the gratuity earned by her. Rather, it chose to remain silent on the plea of outstanding dues lying against the Opposite Party No.4 towards unpaid loan and guarantee liability.

25. This Court in a recent judgment in **The Sr. Branch Manager, the National Small Industries Corporation Ltd.** (supra), taking note of various provisions under the Act, 1972 so also Rules, 1972 and various judgments of the Supreme Court held as follows:

> ***"42.*** *On examination of the various legal provisions under the Act, 1972 and Rules made thereunder so also the Judgments cited by the learned Counsel for the parties, as detailed above, this Court is of the following views:*
>
> *a) As prescribed under section 4(1) of the Act, 1972, gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for not less than five years on his superannuation or on his retirement or resignation or on his death or disablement due to accident or disease. However, completion of continuous service of five years shall not be necessary where the termination of the employment of any employee is due to death or disablement.*
>
> *b) In terms of section 7(1) of the Act, 1972 read with rule 7(1) & (6) of the Rules, 1972, a person, who is eligible for payment of gratuity under the said Act, 1972 or any person authorized, in writing, to act on his behalf, shall send a written application to the Employer in Form 'I' ordinarily within thirty days from the date the gratuity became payable, either by personal service or by registered post acknowledgement due.*
>
> *c) As provided under rule 7 (1) of the Rules, 1972, where the date of superannuation or retirement of an employee is known, the employee may apply to the Employer before thirty days of the date of superannuation or retirement for payment of gratuity.*
>
> *d) Rule 7(5) of the Rules, 1972 provides that an application for payment of gratuity filed after the expiry of the periods specified in rule 7(1) of the Rules, 1972 shall also be entertained by the Employer, if the applicant adduces sufficient cause for the delay in preferring his claim.*
>
> *e) As provided under rule 7(5) of the Rules, 1972, no claim for the gratuity under the Act, 1972 shall be invalid merely because the claimant has failed to present his application within the specified period.*
>
> *f) In terms of Rule-8(1) under Rules, 1972, within fifteen days of the receipt of an application under rule 7 for payment of gratuity, the Employer shall, if the claim is found admissible on verification, issue a notice in Form 'L' to the applicant employee, nominee or legal heir, as the case may be, specifying the amount of gratuity payable and fixing a date, not being later than the thirtieth day after the date of receipt of the application, for payment thereof.*
>
> *g) As provided under rule 8(1) (ii) of the Rules, 1972, if the claim for gratuity is not found admissible, the Employer is to issue a notice in Form 'M' to the applicant employee, nominee or legal heir, as the case may be, specifying the reasons as to why the claim for gratuity is not considered admissible. In either case, where the gratuity claimed is admissible or inadmissible, a copy of the notice in Form 'L' or 'M' given to the applicant shall be endorsed to the Controlling Authority.*
>
> *h)* ***An Employer cannot simply issue notice in Form-M to the employee rejecting claim for payment of gratuity. If the Employer so desires to forfeit the gratuity, a Show Cause Notice has to be given, because the gratuity amount to which the***

Employee is otherwise entitled is to be forfeited, which is a drastic consequence for the Employee concerned.

i) As provided under rule 10(1)(iii) of the Rules, 1972, if pursuant to the application filed in terms of rule 7 of Rules, 1972 a notice is given under rule 8(1) either specifying an amount of gratuity which is considered by the application less than what is payable or rejecting his/her eligibility for payment of gratuity or the Employer fails to issue any notice as required under rule 8 within the time specified therein, the claimant employee, nominee or legal heir, as the case may be, may, within ninety days of the occurrence of the cause for the application, apply in Form 'N' to the Controlling Authority for issuing a direction under section 7(4) of the Act, 1972 with as many extra copies as are the opposite parties.

j) In view of the provisions enshrined under section 7(2) of the Act, 1972, as soon as gratuity becomes payable, the Employer shall, whether an application referred to in sub-section (1) has been made or not, determine the amount of gratuity and give notice in writing to the person to whom the gratuity is payable and also the Controlling Authority, specifying the amount of gratuity so determined.

k) As prescribed under section 7(3) of the Act, 1972, the Employer shall arrange to pay the amount of gratuity, within thirty days from the date it becomes payable to the person to whom the gratuity is payable.

l) In terms of section 7(3-A) of the Act, 1972, if the amount of gratuity payable under sub-section (3) is not paid by the Employer within the period specified in sub-section (3), the Employer shall pay, from the date on which the gratuity becomes payable to the date on which it is paid, simple interest at such rate, not exceeding the rate notified by the Central Government from time to time for repayment of long-term deposits, as that Government may, by notification specify (As per the notification dated 10.10.1987 issued by the Central Government, in exercise of powers conferred under sub-section (3-A) of section 7 of the P.G. Act, 1972, 10% interest is payable).

m) In view of the proviso under section 7(3-A) of the Act, 1972, no such interest is payable if the delay in the payment is due to the fault of the employee and the Employer has obtained permission in writing from the Controlling Authority for the delayed payment on the said ground.

n) As prescribed under section 7(4)(a) of the Act, 1972, if there is any dispute as to the amount of gratuity payable to an employee under the said Act or as to the admissibility of any claim of, or in relation to, an employee for payment of gratuity, or as to the person entitled to receive the gratuity, the Employer shall deposit with the Controlling Authority such amount as he admits to be payable by him as gratuity.

o) Where there is a dispute with regard to any matter or matters specified in clause (a), the Employer or employee or any other person raising the dispute may make an application to the Controlling Authority for deciding the dispute, in terms of section 7(4)(b) of the Act, 1972.

p) As provided under section 7(4)(c) of the Act, 1972, the Controlling Authority shall, after due inquiry and after giving the parties to the dispute a reasonable opportunity of being heard, determine the matter or matters in dispute and if, as a result of such inquiry any amount is found to be payable to the employee, the Controlling Authority shall direct the Employer to pay such amount or, as the case may be, such amount as reduced by the amount already deposited by the Employer.

q) As provided in sub-section (6) of section 4 of the Act, 1972, the gratuity of an employee, whose services have been terminated for any act, wilful omission or

negligence causing any damage or loss to, or destruction of, property belonging to the Employer, shall be forfeited to the extent of the damage or loss so caused.

r) As per the settled position of law, as detailed above, before forfeiting the gratuity of an employee in terms of clause (1) of sub-section 6 of section 4 of the Act, 1972, any damage or loss to, or destruction of, property belonging to the Employer has to be quantified by the Employer.

s) Similarly, as prescribed in clause (b) of sub-section 6 of section 4 of the Act, 1972, the gratuity payable to an employee may be wholly or partially forfeited, if the services of such employee have been terminated for his riotous or disorderly conduct or any other act of violence on his part, or if the services of such employee have been terminated for any act which constitutes an offence involving moral turpitude, provided that such offence is committed by him in course of his employment.

t) As held by the apex Court in ***Union Bank of India*** *(supra), under sub-section (6)(b)(ii) of section 4 of the Act, forfeiture of gratuity is permissible if the termination of an employee is for any misconduct which constitutes an offence involving moral turpitude, and the employee concerned is convicted accordingly by a Court of competent jurisdiction. It is not for the Employer to decide whether the offence has been committed amounting to involving moral turpitude.*

u) As held in Rabindranath Choubey (supra), if departmental proceeding has been initiated against an employee before his retirement, if the service rules of the Employer provide so, the departmental proceeding can continue even after retirement of an employee and if the employee is found guilty, minor or major punishment, including the punishment of dismissal can be imposed by the Employer, even the employee has retired.

v) As was further held by the apex Court in Rabindranath Choubey (supra), the enquiry proceeding has to be concluded first on merit and after passing appropriate order in accordance with law, thereafter necessary consequences as per section 4 of the Act, 1972, more particularly sub-section (6) of section-4 of the Act, 1972 and the Rules of the Employer shall to follow. The recovery, as provided under section-4(6) of the Act, 1972, is in addition to a punishment that can be imposed on an employee after his superannuation." ***(Emphasis Supplied)***

26. A coordinate Bench of this Court in **Sharat Chandra Lenka** (supra) held as follows:

> ***"27. Since the petitioner has not been terminated from service but has been superannuated, Section 4(6)(a)(b) of the Act is not applicable against him for the recovery of the loss from his gratuity. On the whole, withholding of his entitlement to the gratuity, CPF and unutilized leave salary as detailed in Annexure-1 being de hors to the provisions of law is liable to be quashed.*** *At the same time, the order of recovery of Rs.11,71,840/- being also contrary to the provisions of the Act and the Regulation of the Corporation as discussed hereinabove are also liable to be quashed. On the whole, the Office Order vide Annexure-1 being illegal, invalid is hereby quashed and opposite party Nos.1 and 2 are directed to pay all the retiral benefits to the petitioner within a period of two months failing which the opposite party Nos.1 and 2 shall pay such amount with 6% simple interest per annum from the date of superannuation till the date of payment.*
>
> *In the result, the writ petition is allowed".* ***(Emphasis supplied)***

27. The High Court of Bombay in **Rajinder Kumar Nangia** (supra) held as follows:

> *"**4.** It would be seen that Sub-section (1) of Section 4 of the Payment of Gratuity Act, 1972 provides that gratuity shall be payable to an employee on termination of his employment after he has rendered continuous service for not less than five years. The termination of the employment may be on superannuation or on retirement or resignation or death or disablement due to accident or disease of the employee. Thus, an employee becomes entitled to payment of gratuity under the statute.* ***Sub-section (6) is an exception to Sub-section (1) and makes a provision of forfeiture of the gratuity wholly or partially in the circumstances mentioned therein. According to Sub-section (6), gratuity of an employee may be forfeited to the extent of damage or loss caused to the employer if service of that employee has been terminated for any act, wilful omission or negligence on that ground****. The gratuity payable to an employee may also be forfeited wholly or partially if the service of such employee has been terminated for his riotous or disorderly conduct or any other act of violence on his part or service of such employee has been terminated for any act constituting an offence involving moral turpitude. Though a criminal case was registered against the petitioner by CBI in the year 1993, the fact is petitioner's services have been terminated simpliciter on his superannuation and not for any of the grounds mentioned under Sub-section (6) of Section 4 of the Payment of Gratuity Act, 1972.* ***As a matter of fact, admittedly till petitioner's superannuation and even till date no departmental proceedings of misconduct have been initiated against the petitioner. In this backdrop of facts, it was not open to the respondents to refuse to release the gratuity amount to the petitioner.***
>
> ***5.*** *The learned Counsel for respondents heavily relied on the judgment of the Apex Court in Jarnail Singh v. Secretary, Ministry of Home Affairs and Ors. 1993 LLJ 962 in support of his contention that gratuity can be withheld by the employer respondents if any judicial proceedings are pending against the petitioner relating to his misconduct or negligence during the period of his service. We are afraid the judgment of the Apex Court in Jarnail Singh (supra) has no application in the facts and circumstances of the case before us. The Apex Court in the case of Jarnail Singh (supra) was concerned with the provisions of Central Civil Services (Pension) Rules, 1972 and in the light of the specific Rules 3, 9, 69(1)(c), 71 and 73 held that there was nothing wrong in the order of the President in withholding the gratuity of the employee.* ***In the present case, none of the Rules under consideration before the Apex Court or the similar Rules are applicable but the petitioner is governed by the provisions of the Payment of Gratuity Act, 1972 and as per Section 4(1) petitioner has a statutory right to receive gratuity from his employer save and except in the circumstances provided under Sub-section (6) of Section 4. We have already indicated that none of the circumstances provided in Sub- section (6) is applicable in the present case and, therefore, we do not find any justifiable cause on the part of the respondents in withholding the gratuity. Mere pendency of a criminal case lodged by CBI shall not disentitle the petitioner from receiving gratuity nor shall entitle the respondents to not to release the gratuity to the petitioner as petitioner's services came to an end on his attaining superannuation simpliciter.*** *We may note here that Rule 45 of the RCF Employees (Conduct, Discipline and Appeal) Rules, 1993 does provide for departmental action against retired employees. Clause (iii) of Rule 45 provides that in case of an officer who had already retired on superannuation before instituting any departmental proceedings and who has received all retiral benefits, as far as possible only criminal prosecution can be recommended against him. Even under Clause (ii) of Rule 45, it appears that now no*

departmental action can be initiated against the present petitioner as it provides that if departmental proceedings had not been instituted while the officer was in service, proceedings under Rule 38 for imposition of major penalties can be initiated only by or sanction of the Board of Directors and in respect of a cause of action which arose or in respect of an offence which took place not earlier than four years before the institution of the-proceedings. The petitioner was superannuated in the year 1994: the criminal case was registered against him in the year 1993 before his superannuation but till date I.e. more than seven years of his superannuation, no departmental action has been Initiated and, therefore, such action has become beyond time provided in clause (ii) of Rule 45 of the RCF Employees (Conduct, Discipline and Appeal) Rules, 1993.

6. For all these reasons, we are satisfied that the decision taken by respondents to not to release payment of gratuity to the petitioner cannot be sustained*".*

(Emphasis Supplied)

28. So far as imposing 10% interest by the Controlling Authority, the Supreme Court in **H. Gangahanume Gowda** (supra), held as follows.

"7. *It is evident from Section 7(2) that as soon as gratuity becomes payable, the employer, whether any application has been made or not, is obliged to determine the amount of gratuity and give notice in writing to the person to whom the gratuity is payable and also to the controlling authority specifying the amount of gratuity. Under Section 7(3), the employer shall arrange to pay the amount of gratuity within 30 days from the date it becomes payable. Under sub-section (3-A) of Section 7, if the amount of gratuity is not paid by the employer within the period specified in sub-section (3), he shall pay, from the date on which the gratuity becomes payable to the date on which it is paid, simple interest at such rate not exceeding the rate notified by the Central Government from time to time for repayment of long- term deposits; provided that no such interest shall be payable if the delay in the payment is due to the fault of the employee and the employer has obtained permission in writing from the controlling authority for the delayed payment on that ground. From the provisions made in Section 7, a clear command can be seen mandating the employer to pay the gratuity within the specified time and to pay interest on the delayed payment of gratuity. No discretion is available to exempt or relieve the employer from payment of gratuity with or without interest as the case may be.* ***However, under the proviso to Section 7(3-A), no interest shall be payable if delay in payment of gratuity is due to the fault of the employee and further condition that the employer has obtained permission in writing from the controlling authority for the delayed payment on that ground.*** *Under Section 8, provision is made for recovery of gratuity payable under the Act, if not paid by the employer within the prescribed time. The Collector shall recover the amount of gratuity with compound interest thereon as arrears of land revenue and pay the same to the person entitled. A penal provision is also made in Section 9 for non- payment of gratuity. Payment of gratuity with or without interest, as the case may be, does not lie in the domain of discretion but it is a statutory compulsion. Specific benefits expressly given in a social beneficial legislation cannot be ordinarily denied. Employees on retirement have valuable rights to get gratuity and any culpable delay in payment of gratuity must be visited with the penalty of payment of interest was the view taken in State of Kerala v. M. Padmanabhan Nair[1]. Earlier there was no provision for payment of interest on the delayed payment of gratuity. Sub-section (3-A) was added to Section 7 by an amendment, which came into force with effect from 1-10-1987. In the case of Charan Singh v. Birla Textiles this aspect was noticed in the following words: (SCC pp. 214-15, para 4)*

"4. There was no provision in the Act for payment of interest when the same was quantified by the controlling authority and before the Collector was approached for its realization. In fact, it is on the acceptance of the position that there was a lacuna in the law that Act 22 of 1987 brought about the incorporation of sub-section (3-A) in Section 7. That provision has prospective application".

9. *It is clear from what is extracted above from the order of the learned Single Judge that interest on delayed payment of gratuity was denied only on the ground that there was doubt whether the appellant was entitled to gratuity, cash equivalent to leave etc., in view of divergent opinion of the courts during the pendency of enquiry. The learned Single Judge having held that the appellant was entitled to payment of gratuity was not right in denying the interest on the delayed payment of gratuity having due regard to Section 7(3-A) of the Act. It was not the case of the respondent that the delay in the payment of gratuity was due to the fault of the employee and that it had obtained permission in writing from the controlling authority for the delayed payment on that ground. As noticed above, there is a clear mandate in the provisions of Section 7 to the employer for payment of gratuity within time and to pay interest on the delayed payment of gratuity. There is also provision to recover the amount of gratuity with compound interest in case the amount of gratuity payable was not paid by the employer in terms of Section 8 of the Act. Since the employer did not satisfy the mandatory requirements of the proviso to Section 7(3-A), no discretion was left to deny the interest to the appellant on belated payment of gratuity. Unfortunately, the Division Bench of the High Court, having found that the appellant was entitled to interest, declined to interfere with the order of the learned Single Judge as regards the claim of interest on delayed payment of gratuity only on the ground that the discretion exercised by the learned Single Judge could not be said to be arbitrary.* ***In the first place in the light of what is stated above, the learned Single Judge could not refuse the grant of interest exercising discretion as against the mandatory provisions contained in Section 7 of the Act. The Division Bench, in our opinion, committed an error in assuming that the learned Single Judge could exercise the discretion in the matter of awarding interest and that such a discretion exercised was not arbitrary". (Emphasis supplied)***

29. Similarly, this Court in **Abhay Kumar Samantray** (supra), referring to the notification made by the Central Government dated 01.10.1987 in terms of sub-section (3-A) of section 7 of the Act, 1972, held as follows:

"22. *Hence, this Court is of the view that the Controlling Authority under P.G. Act-Cum-Divisional Labour Commissioner, Cuttack, was justified to take into consideration the total period of service of the Opposite Party from the date of his initial engagement (14.11.1991) till the date of his superannuation (31.03.2018),* ***so also award 10% simple interest on the awarded amount for the delayed period, so also ordering to pay further simple interest @ 10% per annum till the payment is made, if the Petitioner-Corporation fails to deposit the said ordered amount within 30 days from the date of pronouncement of the judgment". (Emphasis supplied)***

30. In **Dev Prakash Tiwari** (supra), the Supreme Court held as under:

"8. Once the appellant had retired from service on 31.03.2009, there was no authority vested with the respondents for continuing the disciplinary proceeding even for the purpose of imposing any reduction in the retiral benefits payable to the appellant. In the absence of such an authority it must be held that the enquiry had lapsed and the appellant was entitled to get full retiral benefits."

31. In **Calcutta Dock Labour Board** (supra) the Supreme Court, referring to Section 13 & 14 of the Act, 1972, held that section 13 of the Act, 1972 gives total immunity to gratuity from attachment. Paragraph Nos.5 & 6 of the said judgment, being relevant, are extracted below:

> ***"5.*** *Reference may now be made to Sections 13 and 14 of the Act which are very relevant.*
>
> ***13.*** *Protection of gratuity – No gratuity payable under this Act shall be liable to attachment in execution of any decree or order of any civil, revenue or criminal court.*
>
> ***14.*** *Act to override other enactments, etc.- The provisions of this Act or any rule made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument or contract having effect by virtue of any enactment other than this Act.*
>
> ***6.*** *We may point out that by Central Act No.25 of 1984 Section 13 has been amended with effect from July 1, 1984, and the amended section reads thus:*
>
> ***No gratuity payable under this Act and no gratuity payable to an employee employed in any establishment, factory, mine, oilfield, plantation, port, railway company or shop exempted under Section 5 shall be liable to attachment in execution of any decree or order of any civil, revenue, or criminal court.***
>
> *In the absence of any notification within the meaning of Section 5 of the Act the amendment is not relevant for consideration. Section 14 has overriding effect and Section 13 gives total immunity to gratuity from attachment. The preamble of the Act clearly indicates the legislative intention that the Act sought to provide a scheme for payment of gratuity to all employees engaged in, inter alia, ports and under this Act gratuity was payable to workers like Md. Safiur Rehman. The gratuity which was payable to him squarely came within the purview of the Act and, therefore, became entitled to immunity under Section 13 thereof".* ***(Emphasis supplied)***

32. It is worthwhile to mention here that the Petitioner-Bank took a stand before the Appellate Authority in P.G. Appeal Case No.8 of 2021 that it could not appear before the Controlling Authority, even though it was duly noticed, due to official dislocation in the Legal Section of the Petitioner-Bank on 16.02.2019. But in the Memorandum of Appeal, as at Annexure-4, it has not been explained as to what prevented the Petitioner-Bank to take adequate steps thereafter till the ex-parte judgment was passed on 05.11.2019, directing the Petitioner-Bank to deposit Rs.8,25,849/-.

33. Further a new stand has been taken in para-7 of the present Writ Petition that due to some unavoidable situation, though the Petitioner-Bank was duly noticed by the Controlling Authority, it could not appear before the said Authority, for which it was set ex-parte. Even though it is a Certiorari proceeding, new facts have been pleaded for the first time in the Writ Petition so also Rejoinder Affidavit and documents have been appended to the Rejoinder as annexures, though the said facts were never pleaded before the Appellate Authority and no such documents were appended to the Memorandum of Appeal.

34. For the first time the so called undertaking given by the Opposite Party No.4 dated 09.07.2012 has been annexed to the Rejoinder as Annexure-8, the contents of which are extracted below for ready reference.

> *"To*
>
> *The Secretary, Cuttack CCB.*
>
> *Sir,*
>
> *With due respect and humble submission, I beg to state that* ***the guarantor liability*** *in respect of Nikunja Bihari Pattanaik of Jagatsinghpur Branch and Minati Mohanty of Mahila Branch* ***may be kept as Fixed Deposit under lien to Bank. After clearance of loan availed by them the said amount may refunded to me***.
>
> *Yours faithfully,*
> *Sd/-*
> *Sarojini Dei*
> *Deputy Manager, Retired*
> *09.07.2012*
>
> ***Witness***
>
> *Nadia Bihari Patanaik*
> *09.07.2012* *Sd/-*
> *Sarojini Dei*
> *This is the signature of Smt. Sarojini Dei*
> *Sd/-*
> *09.07.2012"* ***(Emphasis supplied)***

35. As may be seen from the said letter dated 09.07.2012, the Opposite Party No.4, almost after two years of her retirement, gave in writing to keep the guarantor's liability in respect of two loanees as fixed deposit under lien to bank and refund the said amount to her after clearance of loan availed by the loanees. She never gave in writing to the bank management to adjust the loan amount from her after retiral dues, more particularly from the gratuity amount. Admittedly, neither before the Appellate Authority nor before this Court, it has been pleaded about the status of recovery of loans availed by the loanees pertaining to Jagatsinghpur Brach and Mahila Branch of the bank.

36. Since the Petitioner Bank has taken a stand of withholding/forfeiting the gratuity payable to the Opposite Party No.4 in terms of Section 4(6) of the Act, 1972, the said provision is quoted below for ready reference.

> *"**4. Payment of gratuity**.*
>
> *1) xxx*
> *2) xxx*
> *3) xxx*
> *4) xxx*
> *5) xxx*
>
> (6) Notwithstanding anything contained in sub-section (1), -
>
> (a) the gratuity of an employee, **whose services have been terminated for any act, wilful omission or negligence causing any damage or loss to, or destruction of, property belonging to the employer, shall be forfeited to the extent of the damage or loss so caused**;

(b) the gratuity payable to an employee may be wholly or partially forfeited] –

(i) if the services of such employee have been terminated for his riotous ordisorderly conduct or any other act of violence on his part, or

(ii) if the services of such employee have been terminated for any act which constitutes an offence involving moral turpitude, provided that such offence is committed by him in the course of his employment." ***(Emphasis supplied)***

From the said provision, it is amply clear that if the service of an employee is terminated for any act, willful omission or negligence causing any damage or loss to, or destruction of property belonging to the employer, gratuity of the concerned employee can be forfeited to the extent of damage or loss so caused. Admittedly, the Opposite Party No.4's services were never terminated for causing any damage or loss to the bank. Rather, she was allowed to retire from service w.e.f. 31.07.2010 on attaining the age of superannuation. Hence, stand of forfeiture of gratuity of the Opposite Party No.4 because of alleged loss caused to the bank by standing as guarantor against the loanees is misconceived and untenable in the eye of law.

37. In view of the discussions made above, legal provisions under the Act, 1972 so also settled position of law, this Court is of the view that the Appellate Authority has passed a well discussed and reasoned order dealing with all the points raised in the Appeal and there is no infirmity or illegality in the impugned judgment dated 28.03.2022 passed by the Appellate Authority under the Act, 1972 so also the order passed by the Controlling Authority in P.G. Case No.01 of 2019.

38. Accordingly, the Writ Petition stands dismissed, being devoid of any merit. No order as to cost.

39. In view of dismissal of the Writ Petition, the interim order dated 28.07.2022 passed in I.A. No.4970 of 2022, which stood extended from time to time, stands vacated.

40. The Authority concerned is at liberty to release the deposited amount in favour of the Opposite Party No.4.

Headnotes prepared by :
Shri Jnanendra Kumar Swain (Judicial Indexer)
(Verified by : Shri Pravakar Ganthia, Editor-in-Chief)

Result of the case :
Writ Petition dismissed.

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2024 (III) ILR-CUT-894

SUKADEV MAJHI
V.
SAROJINI MAJHI & ANR.

(RPFAM NO. 209 OF 2024)

07 NOVEMBER 2024

[G. SATAPATHY, J.]

Issue for Consideration

Whether the maintenance can be denied to the Opp. Party being not legally wedded wife but living together with Petitioner.

Headnotes

(A) CODE OF CRIMINAL PROCEDURE, 1973 – Section 125 – The learned Judge Family court granted maintenance of Rs. 7.500/- per month to each Opp. Parties– Petitioner took a stand that the Opp. Party No. 1 is not his legally wedded wife as no marriage was performed so also Opp. Party No. 2 is not his daughter – Whether the Order of maintenance can be interfered.

Held: No – When the parties live together as husband and wife, there is a presumption that they are legally married couple for claim of maintenance U/s. 125 of Cr.P.C. Reference is made to **Kamala and Others vrs. M.R. Mohan Kumar; (20190 11 SCC 491 of the Apex Court.** (Para 7)

(B) FAMILY COURTS ACT, 1984 – Section 19(4) r/w section 442 of BNSS, 2023 – The petitioner disputed that the Opp. Party No. 1 is not his legally wedded wife as no marriage was performed so also Opp. Party No. 2 is not his daughter – The learned Judge Family Court after considering the rival submission upon taking into consideration the evidence on record passed the Order directing the petitioner to pay monthly maintenance – Whether the revisional court has power to re-appreciate the evidence on record and subtitle its view on a finding of fact.

Held: No – Revisional Court has no power to re-appreciate the evidence on record and substitute its views on a finding of fact. (Para 7)

(C) INTERPRETATION OF STATUTE – The words appearing in Sec. 125 Cr.P.C. has to be liberally constructed without doing any hairsplitting interpretation since the provision is a measure of social justice and specially enacted to protect women and children and it falls within the sweep of Article 15(3) of the Constitution of India which is further reiterated by Article 39 of the Constitution of India – Further, in a case of live-in relationship too, a woman is also entitled to get maintenance and the children born out of void and voidable marriages are also entitled to maintenance U/s. 125 Cr.P.C. (Para 7)

Citation Reference

Kamala and Others vrs. M.R. Mohan Kumar, **(2019) 11 SCC 491** – **referred to.**

List of Acts

Code of Criminal Procedure, 1973 ; Family Courts Acts, 1984

Keywords

Maintenance, Power of Revisional Court, live-in relationship.

Case Arising From

Out of order dated 10.05.2024 passed by the learned Judge Family Court, Keonjhar in Criminal Petition No. 32 of 2014.

Appearances of Parties

For Petitioner : Mr. H.S. Mohanty
For Opp. Parties :

Judgment/Order

Judgment

G. SATAPATHY, J.

1. This RPFAM by the petitioner seeks to challenge the impugned order dated 10.05.2024 passed by the learned Judge Family Court, Keonjhar in Criminal Petition No.32 of 2014 granting maintenance to each of the Opposite Parties @ Rs.7,500/- per month as maintenance with further direction to pay the arrear maintenance with effect from the date of filing of the application on 24.03.2014 within three months with further stipulation for realization of the amount through process of the Court, if the same is not paid by the Petitioner.

2. The facts in precise are that the Opposite Party No.1 claiming her to be the legally married wife of the Petitioner has filed a proceeding before the learned Judge Family Court, Keonjhar for grant of maintenance to her and her daughter, but the Petitioner on being noticed took a stand that the Opposite Party No.1 is not his legally wedded wife as no marriage was performed so also Opposite Party No.2 is not his daughter. The petition for maintenance by the Opposite Parties came to be registered as Criminal Petition No.32 of 2014 and the learned trial Court after inviting and receipt of objection from the present Petitioner proceeded with the proceeding and took evidence from both the sides. Accordingly the present Opposite Party No.1 examined four witnesses on her behalf as against the oral evidence of four witnesses by the present Petitioner, but no documentary evidence was adduced by the present Petitioner, whereas four documents were admitted in evidence for Opposite Parties. The learned trial Court, however, after considering the rival submissions upon taking into consideration the evidence on record passed the impugned order directing the Petitioner to pay monthly maintenance of Rs.7,500/- to each of the Opposite Party, all total Rs.15,000/- per month w.e.f. 24.03.2014. Being aggrieved with such order, the Petitioner has preferred this revision.

3. In the course of hearing Mr. Himansu Sekhar Mohanty, learned counsel for the Petitioner at the outset submits that although the marriage of the Petitioner with Opposite Party No.1 is disputed from the very inception of the proceeding, but the learned trial Court ignoring such fact and on erroneous appreciation of evidence

passed the impugned order notwithstanding to the fact that the documents as admitted in evidence for OPs were objected to by the Petitioner and same were marked with objection and, therefore, when the marriage of the Petitioner with Opposite Party No.1 has not been established, the direction for grant of maintenance to Opposite Party Nos. 1 and 2 is unsustainable in the eye of law and liable to be set aside. Accordingly, Mr. Mohanty prays to issue notice to Opposite Parties. Further, Mr. Mohanty also prays to allow the revision petition.

4. After hearing the learned counsel for the Petitioner upon perusal of the record, it appears to the Court that the learned trial Court in the impugned judgment at Paragrah-9 has observed as under:-

> *"9. On an analysis of the evidence adduced on behalf of the Petitioners and the O.P. it is seen that the petitioners have filed this proceeding in the year 2014 claiming maintenance. Since the hearing of said case was not commenced, the petitioners have filed one I.A. No.1/2015 against the O.P. after more than one year of filing of this case which was dismissed by this Court on 04.12.2015. Against the said dismissal order the petitioners preferred the revision before the Hon'ble Court vide RPFAM No.96/2016 and after hearing the learned counsel for both the parties the Hon'ble Court after taking into consideration the documents relied on by the petitioner no.1 which are prima facie indicate that the petitioner no.1 is the wife and petitioner no.2 is the daughter of O.P. and further held that the impugned order dt.04.12.2015 is not sustainable in the eye of law and the same is liable to be set aside. As such the Hon'ble Court directed the O.P. to pay Rs.5000/- to each of the petitioners as interim maintenance from the date of filing of I.A. on 01.08.2015. When the Hon'ble Court prima facie observed that the petitioner no.1 is wife and petitioner no.2 is the daughter of O.P., this court has no power/ jurisdiction to observe adversely against the said order."*

5. A careful scrutiny of the aforesaid observation, it would go to disclose that this Court had occasion to deal with the dispute between the parties in the aforesaid RPFAM, when the Opposite Parties had approached this Court against the order of refusal to grant interim maintenance to them, which was passed by the same Family Court, but this Court, however, directed the present petitioner to pay @ Rs.5,000/- per month to each of the OPs as interim maintenance. In the course of argument, learned counsel for the Petitioner has not placed this fact before this Court despite knowing the same and instead it is submitted for the Petitioner that the Petitioner is not the husband of Opposite Party No.1 and father of Opposite Party No.2. When interim maintenance has been granted to the present OPs by this Court in RPFAM No.96 of 2016 and when this Court has directed the present Petitioner to pay Rs.5,000/- to each of the Opposite Parties as interim maintenance from the date of filing of said I.A. on 01.08.2015, it would be inappropriate to consider such finding to be not in accordance with law since the petitioner is unable to dispute such order of this Court. Further, nothing was placed before this Court to indicate that the aforesaid order of this Court has either been set aside or varied and unless the said order has been disturbed or set aside/modified in subsequent proceeding on the plea as advanced by the Petitioner, the same cannot be brushed aside.

6. Besides, the proof of marriage as required in a proceeding U/S 125 of the CrPC which is an enquiry to be conducted summarily is not the same as required in a proceeding for dissolution of marriage or divorce or penal proceeding and strict proof of marriage in a proceeding for maintenance is not necessary and it is sufficient to grant maintenance in a proceeding U/S. 125 CrPC, if a man or woman are proved to be living together as husband and wife and treated as such by the society. Law is also well settled that the findings in a proceeding U/S. 125 of CrPC with regard to status of the party as husband or wife would not be decisive or operate as a bar with regard to declaration of status of party as such in a subsequent civil proceeding specifically brought for declaration of status of the parties either as husband/wife or not. The underlying object and purpose of Sec. 125 of CrPC is to redress the grievance of the neglected relations like wives, minor children and dependant parents unable to maintain themselves to save them from vagrancy.

7. The words appearing in Sec. 125 CrPC has to be liberally constructed without doing any hairsplitting interpretation since the provision is a measure of social justice and specially enacted to protect women and children and it falls within the sweep of Article 15(3) of the Constitution of India which is further reiterated by Article 39 of the Constitution of India. Further, in a case of live-in relationship too, a woman is also entitled to get maintenance and the children born out of void and voidable marriages are also entitled to maintenance U/S. 125 CrPC. The aforesaid view of this Court is well fortified by the decision in ***Kamala and others vrs. M.R. Mohan Kumar; (2019) 11 SCC 491*** wherein the Apex Court has held that when the parties live together as husband and wife, there is a presumption that they are legally married couple for claim of maintenance of wife U/S. 125 of CrPC. It is of course true that the findings arrived at by the Court in a proceeding U/S. 125 CrPC does not determine the rights and obligation of the parties conclusively nor it declares the status of the party as either husband or wife. It is, however, observed that if by some evidence, it is established that the parties lived together as husband and wife and begotten a child, maintenance cannot be denied to the lady on the ground that she has not entered into marriage with the man, but, however, the aforesaid finding is based on presumption of marriage which is a rebuttable presumption. It is also equally important that the revisional Court has no power to reappreciate the evidence on record and substitute its views on a finding of fact. The grounds as advanced by the petitioner disputing his marriage with OP No.1 as also his parentage with OP No.2 are question of facts which cannot be decided in a revisional proceeding and the submissions as advanced in this regard to decide the same by re-appreciating the documentary evidence under Exts. 1 to 4 on the ground that the same were marked with objection is unacceptable and doing so, would be doing violence to the well recognized principle of impermissibility of appreciation of evidence in revisional proceeding. In this case, the learned Judge Family Court, Keonjhar after appreciating the evidence on record which includes documentary evidence like Voter identity card of OP No.1, residential certificate, caste certificate and certificate issued by school and oral evidence of four witnesses led by each of

the parties, has come to a conclusion that the OPs are entitled to maintenance from the petitioner which in the circumstance appears to be reasonable and there is no scope for re-appreciation of evidence by this Court to take a contrary view to refuse maintenance to the OPs. In the premises, especially when no other plea except the plea of OPs being not related to petitioner as wife and daughter has been advanced, the RPFAM does not merit any consideration.

8. At this stage, this Court with anguish notes that not a single word was whispered or referred to in the oral submission to the earlier order passed by this Court in RPFAM No. 96 of 2016, but the averments made in the present RPFAM only discloses that this Court in RPFAM No. 96 of 2016 has directed the petitioner to pay a sum of Rs.5,000/- per month to each party, however, the petitioner in the present case has neither annexed the copy of the order passed in RPFAM No. 96 of 2016 nor has discussed the details of such order which in the circumstance appears to be suppression of fact and such acts of the petitioner is not only deplorable, but also is deprecated. Thus, the Petitioner is liable to be penalized with cost for suppressing such facts with a view to get a favourable order or to notice the other side to harass them with the agony of another litigation, since the certificate appended to the present RPFAM discloses institution of number of proceedings by the petitioner, majority of which were either withdrawn or dismissed as withdrawn.

9. In the result, the present RPFAM being devoid of merit stands dismissed, but the Petitioner is imposed with a cost of Rs.20,000/-(Rupees twenty thousand) to be paid to the Opposite Parties for misleading and suppressing the fact before this Court. The aforesaid cost shall be paid to the Opposite Parties within eight weeks' hence, failing which the same shall be recovered from the petitioner in accordance with law.

Headnotes prepared by :
Smt. Madhumita Panda, Law Reporter
(Verified by : Shri Pravakar Ganthia, Editor-in-Chief)

Result of the case :
RPFAM dismissed.

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2024 (III) ILR-CUT-899

BABULAL SAHU
V.
STATE OF ORISSA

(CRA NO.155 OF 1997)

29 OCTOBER 2024

[SIBO SANKAR MISHRA, J.]

Issue for Consideration

Whether mere recovery of currency notes can constitute the offence U/s. 7 of the P.C. Act, 1988.

Headnotes

(A) PREVENTION OF CORRUPTION ACT, 1988 – Section 13 (1) (d), 13 (2), 7 and 20 – The appellant/ accused in his statement has taken a specific plea of his defense regarding the acceptance of alleged tainted money towards the fee for mutation – The said statement was substantiated by him by adducing evidence of the Amin who was indeed present at the spot, while the trap was laid – Whether mere recovery of currency notes constitutes the offence U/s. 7 of the Act.

Held: No – The evidence to establish the said defence plea of the appellant sounds reasonable, trustworthy, therefore, creates a serious doubt on the prosecution version. (Para 15)

Citation Reference

B. Jayaraj vrs. State of Andhra Pradesh, **(2014) 13 SCC 55**; C.M. Girish Babu vrs. CBI, Cochin, High Court of Kerala, **(2009) 3 SCC 779**; P. Sarangapani (Dead) Through Lr Paka Saroja vs. State of Andhra Pradesh, **AIR 2023 SC 4739 – referred to.**

List of Acts

Prevention of Corruption Act, 1988; Code of Criminal Procedure, 1973.

Keywords

Trap, Tainted money, Bribe, Sanction, Presumption.

Case Arising From

Order dated 11.07.1997 passed by learned Special Judge (Vigilance), Sambalpur in T.R. Case No. 26 of 1994.

Appearances of Parties

For Appellant : Mr. Abhas Mohanty
For Respondent : Mr. M.S. Rizvi, Addl. Standing Counsel (Vigilance)

Judgment/Order

Judgment

S.S. MISHRA, J.

The present Criminal Appeal at the behest of the appellant under Section 374(2) of the Cr. P.C., is directed against the impugned judgment and order dated 11.07.1997 passed by the learned Special Judge (Vigilance), Sambalpur in T.R. Case No. 26 of 1994, whereby the learned trial Court has convicted the accused-appellant for the offences under Section 13(1)(d) read with Section 13(2) and Section 7 of the Prevention of Corruption Act, 1988 and sentenced him on that count.

2. The prosecution case, in brief, is that the father of the complainant owned landed property measuring about Ac.27.00 dec. and he sought for mutation of the said property in his name. He approached the Tahasildar, Rengali who initiated the

Mutation cases bearing Nos.588/91 to 595/91 and called for the enquiry report from the R.I. of Laida. However, when the complainant approached the R.I. of Laida, the accused-appellant in the present case demanded Rs.1,000/- as bribe in relation to the said mutation case. Subsequently, the accused agreed to a lesser amount of Rs.600/- as bribe, out of which, the complainant agreed to pay Rs.250/- in the first instance against his will. Aggrieved by such demand, the complainant reported this incident to the S.P. (Vigilance), who then directed registration of the Vigilance P.S Case No.29 dated 02.11.1991 at the Sambalpur Vigilance Police Station.

3. Trap was arranged as per the Standard Procedure and the accused was caught red-handed while accepting the bribe amount of Rs.250/- from the complainant. The sanction of prosecution against the accused was obtained and the accused was accordingly put to trial.

4. During the trial, the Prosecution, in order to substantiate the charges, examined 8 witnesses and exhibited 14 documents, whereas the defence presented a stance of denial of allegations and examined 1 witness, i.e., D.W.1, thereof. Out of the 8 prosecution witnesses, P.W.1, a Senior Clerk working in the office of the Settlement Officer, Major Settlement, Sambalpur, was the accompanying witness. P.W.2, an Assistant Store Keeper in the Sambalpur Major Settlement Office, was a member of the trap party and a seizure witness. P.W.3, a Senior Clerk in the office of the Tahasildar, Rengali, produced the relevant Mutation Case Records for seizure by the I.O. P.Ws.4 & 5 were present during the trap set for the accused. P.W.6 was the then District Magistrate & Collector, Sambalpur, who accorded the sanction to prosecute the accused/appellant. P.W.7 was the A.S.O. of Sambalpur Major Settlement Office, whereas, P.W.8 was the I.O. in the present case.

5. The learned trial Court made assessment of the evidence on record and relied on the testimony of P.W.8, the I.O., which as per the prosecution fully corroborated with that of the complainant's version, and thus, convicted the accused-appellant. The learned trial Court sentenced the accused-appellant to undergo R.I. for a period of one year and to pay a fine of Rs.1,000/-, and in default, to undergo R.I. for three months more under Section 13(1)(d) read with Section 13(2) of the P.C. Act and to undergo R.I. for six months and to pay a fine of Rs.500/-, and in default, to undergo R.I. for one more month under Section 7 of the P.C. Act, whereby the sentences on both the counts was directed to run concurrently.

6. The accused-appellant is aggrieved and dissatisfied by the judgment of conviction and order of sentence of the learned trial Court, assailed the same in the present Criminal Appeal.

7. I have carefully evaluated the evidence and analysed the judgment of the learned trial Court. The learned trial Court found the evidence brought on record by the prosecution to be credible and relying upon those evidence recorded a finding that the prosecution has proved the factum of demand and acceptance of bribe by the accused/appellant from the complainant. The trial Court has also recorded that the

paraphernalia procedure has been meticulously followed by the trap laying party. Therefore, there is enough material brought on record by the prosecution to establish the case against the appellant without any doubt. The trial Court recorded the following findings:-

> *"11. Evidence of trap witnesses, such as P.Ws.5,7 & 8 leaves no doubt that the accused became fumbled at the first instance, and he could not say anything to the querry made by the I.O. P.W.8 as to how the tainted money came into his possession. He could have stated at the first instance itself that he accepted the said amount as demarcation fee but instead he kept quiet. It is only after his palm wash was taken, he admitted to have accepted the money from the complainant. This shows, the accused made of his mind and stated so, which is nothing but the result of afterthought. It is also seen from the cross-examination of the I.O. (P.W.8) that the defence has not suggested to him that he did not allow the collection Mohurrir, if at all present, in the office of the R.I. at the material time, to issue receipt to the complainant for acceptance of Rs.250/- as demarcation fee. Therefore, considering evidence of P.W.5, Detection Report (Ext.2), handwash of the accused coupled with evidence of P.W.7 and 8, I am bound to arrive at an irresistible conclusion that the accused after renewal of his demand, accepted the tainted money from the complainant as bribe for submitting Enquiry Report in connection with Mutation Cases, as a motive or reward. This conclusion becomes unescapable also for the reason that when P.W.8, the I.O. made over the detection report (Ext.2) to the accused, he accepted it without objection making his endorsement thereon to this effect after its contents were read over and explained to him. Nothing prevented him from protesting the said report, had his plea that Rs.250/- was accepted by him as demarcation fee been true. He has examined Bhimsen Sahu as D.W.1 to substantiate his plea, but his admission in his evidence to the effect that he has stated that the accused accepted the money towards demarcation fee and he was going to get the Receipt Book from the almirah to issue Receipt to the complainant and just then the accused was caught by the raiding party, and he was also prevented from issuing any receipt to the Complainant, shows that he has made this statement in the court for the first time. If at all, he was present on the spot, and had the money been paid as demarcation fee, then he could have made hue and cry before his authority that the innocent R.I. has been entrapped. That being so, his evidence is not at all worthy of credence, and it cannot be accepted and relied upon to believe the defence theory of the accused so as to disbelieve and discard the prosecution case in support of which there is over-whelming evidence of P.W.5 the complainant corroborated by evidence of the other trap witnesses including the Magistrate (P.W.7) and the I.O. (P.W.8) who played the major role in successfully detecting the case of bribery against the accused. For another reason, why the explanation offered by the accused through D.W.1 is not acceptable, is that in his evidence, he has stated that the complainant threatened the accused to see him in future but this fact has never been suggested to the complainant during his cross-examination, for which it is held that D.W.1 is no other than a got up witness who has spoken falsehood to save the accused-R.I. In this connection, evidence of P.W.3 can be referred to, to the effect that in Mutation Cases, demarcation fee is required to be collected after finalisation of Mutation proceeding, and that not in all cases the R.1.collects demarcation fee before submitting enquiry reports. In the present case, the accused-R.I. with-held enquiry reports till the date of trap. For the reason stated above, and in view of the facts and circumstances of the case, inference can be drawn that he was not submitting enquiry report for obtaining illegal gratification from the complainant unless and otherwise there was no reason why the complainant would go to*

the Vigilance Office to report against the accused-R.I. particularly when there was no inimical relation between them prior to the occurrence."

8. Mr. Mohanty, learned counsel for the appellant submitted that the trial Court has completely brushed aside the defence plea taken by the appellant to dispel the presumption under Section 20 of the P.C. Act which was read against the petitioner by the prosecution. He has stated that the accused-appellant in his statement under Section 313 Cr.P.C. has taken a specific plea on his defence regarding the acceptance of alleged tainted money towards the fee for mutation. The said statement was substantiated by him by adducing evidence of the Amin who was indeed present at the spot, while the trap was laid. The credible defence evidence of D.W.1 could not have been ignored by the trial Court. Learned counsel has highlighted question Nos.10 & 17 put to him in his statement under Section 313 Cr.P.C. which are reproduced below:-

"Q-10 It transpires from the evidence of P.W.1 & 5 that as per the instruction given to them they went to your office. P.W.5 entered into your office along with P.W.1 whom was introduced to you as his relation. Then you asked the complainant if he had brought the money as per your earlier bargain. Accordingly, he handed over the tainted money to you on your demand, you counted the tainted money and kept the same on your table under a paper weight. Soon thereafter P.W.1 gave pre-arranged signal to the raiding party who rushed immediately inside your office. What have you got to say?

Ans- The Complainant paid the amount towards fees of demarcation in 8 mutation cases in respect of 55 plots. But I have not received the said amount as bribe for doing his work.

Q-17. After hearing the entire evidence of the prosecution witnesses what more have you got to say?

Ans- The complainant has encroached a Govt. Land. When I objected to it he became revengeful. So he foisted this false case me. He paid Rs.250 towards demarcation fees. At that time Bhimsen Sahu collection Moharir was in my office. I told him to bring the receipt for Rs.220 but before the said receipt was issued I was caught by the raiding party. I am innocent of the allegation."

9. The aforementioned stance taken by the appellant has been substantiated by the appellant in his defence evidence through D.W.1, who in his testimony inter alia stated as under:-

"2. On 2.11.91, I and the R.I.-accused at about 7 to 8 A.M. set out from our office together with official records for collection of revenue. We met one Prafulla Patel on the way at the entrance. He asked the R.I. as to why he has not submitted his report in the Mutation Cases filed by his father. The R.I. replied that he had not deposited the demarcation fee at the rate of Rs.4/- per plot, altogether coming to Rs.220/- for 55 plots to which the land to be demarcated was consisted of.

Hearing this, Prafulla Patel got angry with the accused and he went away telling that he would see him. Then we went for collection of revenue and returned at about 6 P.M. of the said day. On our return, I found Prafulla Patel accompanied by another. Prafulla Patel called the accused and offered demarcation fee in my presence. Then accused went inside his office followed by me. Prafulla Patel entered the room thereafter. Prafulla Patel made over Rs.250/- in the shape of five 50 rupee G.C. notes. The accused-R.I. kept the said money on his table and told me to bring Receipt Book,

Mutation Case records and also to issue Receipts in support of payment of demarcation fee. Accordingly, I brought the Receipt Book and 8 Mutation Applications. While I was about to issue receipts to the complainant by setting carbon, the raiding party entered our office, caught hold of the hands of the accused giving their identity to him and told me not to issue receipt to the complainant. Then they challenged the accused-R.I. to have taken bribe from the complainant to which he denied and stated instead that the complainant paid him a sum of Rs.250/- towards demarcation fee of 55 plots in respect of which mutation applications were put in by his father for which he told his mohurrir to grant the receipt in support of the said amount and to return the balance amount of Rs.30/-. The Vigilance Raiding Party seized the receipt book and also the money of Rs.250/- from me along with Mutation Applications. It is not a fact that the Complainant Prafulla Patel made over Rs.250/- to the accused as bribe, for submitting his enquiry report, in the Mutation Cases."

The said defence witness sustained elaborate cross-examination by the prosecution but the prosecution could not elucidate anything in its favour, rather in the cross-examination, the said witness has categorically stated as under:-

"It is not a fact that the R.I. told me to issue receipts in support of payment of demarcation fee of Rs.220/- by the complainant in the evening of 2.11.91. It is a fact that it is for the first time I am giving the statement in the Court that the accused R.I. told me to issue Receipt to the complainant in support of payment of Rs.220/- as demarcation fee and that I could not issue the said receipts as the I.O. seized the same. It is not a fact that I am telling lie to save the accused as he is my colleague."

10. The defence version could also be inferred from the prosecution evidence. P.W.1 in his statement in paragraph-3 has stated that *one Amin (D.W.1) was present in the office of the R.I./appellant. The Amin, who had come with the R.I. to their office, was going to issue a receipt to the decoy by bringing the receipt book from the almirah, just at that time, the vigilance raiding party members rushed in. Two vigilance police officers caught hold the hands of the accused by disclosing their identity. After reaching the office of the accused/R.I., the decoy did not report anything before us. After the alleged raid, we went outside for taking tea and again returned to the office of the R.I.*

Similarly, P.W.3 in his deposition at paragraph-2 has stated that *"if a party makes an application for mutation of the land is made, the Tahasildar concerned asked the R.I. to furnish a report." The R.Is. in some cases collected demarcation fees and then furnish a report to the Tahasildar and sometimes the demarcation fee is collected at the time of finalisation of the mutation proceeding. The demarcation fees are collected @ of Rs.4/- per plot. Such fees are being collected since 1980.*

11. The statement of the aforementioned prosecution witnesses assume much importance on the face of the allegation of the unusual nature of demand alleged to have been made by the accused. P.W.5 in his evidence has stated that <the appellant/accused R.I. demanded a bribe of Rs.1,000/- to do the work stating it would take a lot of time for him. P.W.5, the decoy expressed inability to pay such amount. On 01.11.1991, the accused reduced the demand of bribe to Rs.600/-. Thereupon, P.W.5 agreed to pay Rs.250/- on the following day.

The demand of Rs.1,000/- subsequently reduced to Rs.600/- and thereafter the agreement to pay Rs.250/- sounds improbable particularly in the light of the defence plea taken by the accused. It is admitted on record that the demarcation fees are required to be paid by the decoy @ of Rs.4/- per plot, which come to Rs.220/-. When the complainant paid Rs.250/-, the accused was supposed to return Rs.30/- and issue appropriate receipt towards receiving Rs.220/-. That perhaps the reason, after receiving the alleged tainted notes, the accused had kept the money on the table and preparing to issue the receipt. At that juncture, the raiding party trapped the appellant and prevented to complete the process of issuing the receipt. This aspect of the matter was not appropriately appreciated by the learned trial Court. The trial Court in paragraph-9 has only made a passing remark instead of dealing the defence plea adequately and appreciated the same in the right prospective. Paragraph-9 of the impugned judgment reads as under:-

> *"9. But at the same time, it has been contended on behalf of the accused that the accused had received Rs.250/- not as bribe from the complainant but as demarcation fee amounting to Rs.220/- in respect of 55 plots of land applied for mutation @ Rs.4/- per plot, in support of which he has examined D.W.1 who was just going to issue receipt to the complainant for such payment, but he could not issue receipt as the Vigilance raiding party caught the accused and also prevented D.W.1 from issuing any receipt."*

12. In my considered view, the stand taken by the defence which has been proved on record by the appellant ought to have been taken into consideration particularly, since the hint of the defence plea is found from the evidence of the prosecution.

13. Mr. Mohanty, learned counsel for the appellant to substantiate his case has relied upon the judgment in the case of ***B. Jayaraj vrs. State of Andhra Pradesh*** reported in ***(2014) 13 SCC 55***. He emphasized paragraphs-7 & 8 of the judgment, which reads as under:-

> "7. Insofar as the offence under Section 7 is concerned, it is a settled position in law that demand of illegal gratification is sine qua non to constitute the said offence and mere recovery of currency notes cannot constitute the offence under Section 7 unless it is proved beyond all reasonable doubt that the accused voluntarily accepted the money knowing it to be a bribe. The above position has been succinctly laid down in several judgments of this Court. By way of illustration reference may be made to the decision in C.M. Sharma v. State of A.P.[2] and C.M. Girish Babu v. CBI[3].
>
> 8. In the present case, the complainant did not support the prosecution case insofar as demand by the accused is concerned. The prosecution has not examined any other witness, present at the time when the money was allegedly handed over to the accused by the complainant, to prove that the same was pursuant to any demand made by the accused. When the complainant himself had disowned what he had stated in the initial complaint (Ext. P-11) before LW 9, and there is no other evidence to prove that the accused had made any demand, the evidence of PW 1 and the contents of Ext. P-11 cannot be relied upon to come to the conclusion that the above material furnishes proof of the demand allegedly made by the accused. We are, therefore, inclined to hold that the learned trial court as well as the High Court was not correct in holding the demand alleged to be made by the accused as proved. The only other material available is the

recovery of the tainted currency notes from the possession of the accused. In fact such possession is admitted by the accused himself. Mere possession and recovery of the currency notes from the accused without proof of demand will not bring home the offence under Section 7. The above also will be conclusive insofar as the offence under Sections 13(1)(d)(i) and (ii) is concerned as in the absence of any proof of demand for illegal gratification, the use of corrupt or illegal means or abuse of position as a public servant to obtain any valuable thing or pecuniary advantage cannot be held to be established."

He has also relied upon another judgment of the Hon'ble Supreme Court in the case of ***C.M. Girish Babu vrs. CBI, Cochin, High Court of Kerala*** reported in ***(2009) 3 SCC 779***. Paragraph-18 of the said judgment reads as under:-

> *"18. In Suraj Mal v. State (Delhi Admn.)[1] this Court took the view that (at SCC p.727, para 2) mere recovery of tainted money divorced from the circumstances under which it is paid is not sufficient to convict the accused when the substantive evidence in the case is not reliable. The mere recovery by itself cannot prove the charge of the prosecution against the accused, in the absence of any evidence to prove payment of bribe or to show that the accused voluntarily accepted the money knowing it to be bribe."*

14. *Per contra*, Mr. Rizvi, learned Additional Standing Counsel for the Vigilance Department has submitted that the prosecution could successfully prove its case beyond all reasonable doubt regarding the demand and acceptance. Therefore, there is no scope at the appellate stage to upset the finding recorded by the Court below. He has relied upon the judgment of the Hon'ble Supreme Court in the case of ***P. Sarangapani (Dead) Through Lr Paka Saroja vs. State of Andhra Pradesh***, reported in ***AIR 2023 SC 4739***. He emphasized on the paragraph-12 of the said judgment which reads as under:-

> *"12. In the instant case the pre-trap and post-trap proceedings were duly proved by the prosecution by examining the concerned witnesses, who had duly supported the case of prosecution. Both the courts below have recorded the findings that the prosecution had proved beyond reasonable doubt the conscious acceptance of the tainted currency by the accused and also the recovery of tainted currency from the appellant. Therefore, the burden had shifted on the appellant to dispel the statutory presumption under Section 20 of the said Act, and prove that it was not accepted as a motive or reward for the performance of his public duty, which the appellant has failed to dispel. The explanation offered by the appellant did not tally with the statement of the complainant recorded under Section 164 of Cr.P.C. The High Court had also recorded that the defence taken by the appellant that the acceptance of tainted currency by him was towards the Audit fees of the Society was not proved by him in as much as there was nothing on record to show that the amount paid by the complainant Immadi Laxmaiah to the appellant was out of the funds of the Society."*

On the strength of the above referred judgments, Mr. Rizvi, learned Additional Standing Counsel for the Vigilance Department submitted that no interference by this Court is called for as the findings recorded by the Court below is justified and apt on the face of record.

15. I have given a conscious attention to the submission made by both the counsel appearing for the respective parties. I have also carefully gone through the

evidence led by the prosecution as well as the defence. I am unable to accept the submission made by Mr. Rizvi. The quality of evidence led by the prosecution to prove the fact of demand and acceptance has created a serious doubt in view of the specific defence evidence adduced by the appellant. The defence plea that the <so called= tainted money of Rs.250/- paid to the appellant was meant for the fee towards mutation, in my considered view, is established from the evidence of D.W.2, the Amin, who was present at the spot at the time of trap. His evidence stands corroborated with the evidence of P.W.5 and he other P.Ws., those who were form part of the raid. It has eminently came on record that the money although was received by the appellant, but, he kept the money on the table and was waiting to issue receipt towards the payment of fee of the mutation, at that time, the raiding party apprehended him. The evidence to establish the said defence plea of the appellant sounds reasonable, trustworthy, therefore, creates a serious doubt on the prosecution version.

16. Regard being had to the aforementioned and the nature of evidence, this Court is of the considered view that the appellant is entitled to benefit of doubt. Hence, the impugned judgment and order passed by the learned trial Court is liable to be set aside.

17. Accordingly, the impugned judgment and order dated 11.07.1997 passed by the learned Special Judge (Vigilance), Sambalpur in T.R. Case No.26 of 1994 is set aside and the appellant is acquitted from all the charges. The bail bond furnished by the appellant stands discharged.

18. The CRA is accordingly disposed of.

Headnotes prepared by :
Smt. Madhumita Panda, Law Reporter
(Verified by : Shri Pravakar Ganthia, Editor-in-Chief)

Result of the case :
CRA is disposed of.

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2024 (III) ILR-CUT-907

DIPESH ROY & ANR.
V.
STATE OF ORISSA & ANR.

(CRLMC NO.3208 OF 2019)

29 OCTOBER 2024

[SIBO SANKAR MISHRA, J.]

Issue for Consideration

Whether the petitioner can be prosecuted U/s. 138 of the Act when there is no privy between the petitioner and complainant.

Headnotes

(A) NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 138 – Present petitioners were impleaded as accused Nos. 2 and 3 in the complaint on the allegation that they have given the power of attorney to accused No. 1 for sale of the land – The cheque issued by accused No. 1 got dishonored for insufficiency of funds – The statutory notice U/s. 138 of the Act issued to the present petitioners could not be served on them as the addresses were insufficient – There is no privy between the complainant and the petitioners – Whether the petitioners can be prosecuted under section 138 of the Act.

Held: No – The liability of the offence punishable U/s. 138 Act cannot be fastened on the present petitioners merely because they had given the power of attorney to the principal accused for the purpose of securing the land deal – Since the principal accused had issued the cheque to the Opp. Parties, he is solely liable to be prosecuted U/s. 138 Act. (Para 10)

(B) NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 138 – Necessary ingredients to attract the offence U/s. 138 of the Act – Discussed with reference to case laws.

Citation Reference

Jugesh Sehgal vs. Shamsher Singh Gogi, **(2009) 14 SCC 683**; Alka Khandu Avhad vs. Amar Syamprasad Mishra & Ors, **(2021) 4 SCC 675**; Krishna Trading Co. v. State of Gujarat, **2017 SCC OnLine Guj 2589**; Smt. Nagawwa vs. Veeranna Shivalingappa Konjalgi & Ors, **(1976) 3 SCC 736 : AIR 1976 SC 1947**; Bhushan Kumar vs. State (NCT of Delhi) & Anr, **(2012) 5 SCC 424 : AIR 2012 SC 1747**; S.K. Sinha Chief Enforcement Officer vs. Videocon International Ltd. & Ors., **(2008) 2 SCC 492 : AIR 2008 SC 1213**; Rajeshbhai Muljibhai Patel vs. State of Gujarat, **(2020) 3 SCC 794**; Sova Mukherjee vs. Rajiv Mehra, **1996 SCC OnLine Cal 207**; A.C. Narayanan & Anr. v. State of Maharashtra & Ors., **(2014) 11 SCC 790** – **referred to.**

List of Acts

Negotiable Instruments Act, 1881

Keywords

Attorney holder, Statutory notice, Vicarious criminal liability.

Case Arising From

1.C.C. Case No.3500 of 2019 pending in the Court of learned S.D.J.M., Bhubaneswar.

Appearances of Parties

For Petitioner : Mr. Gautam Mukherjee, Sr. Adv.
For Opp. Parties : Mr. Sashanka Patra, ASC (O.P. No.1)
Mr. Aswini Pattnaik (O.P. No.2)

Judgment/Order

Judgment

S.S. MISHRA, J.

In the present petition, the petitioners have invoked the inherent jurisdiction of this Court under Section 482 Cr.P.C. seeking quashing of the complaint case being 1.C.C. Case No.3500 of 2019 pending in the Court of the learned S.D.J.M., Bhubaneswar.

2. The complaint case has been initiated against the petitioners under Section 138 of the Negotiable Instruments Act by the opposite party No.2.

3. The facts of the present case, as revealed from the complaint petition, is that the accused-opposite party No.1, Subhasish Roy, describing himself as the power of attorney holder of the petitioners, the accused Nos.2 & 3, had executed an agreement with the opposite party No.2 on 28.09.2012 to sell a land in Bhubaneswar, and for such purpose, Subhasish Roy had received Rs.50 lakhs through three banker cheques. Thereafter, the sale could not be materialized, as the land was found to be disputed. Ultimately, Subhasish Roy decided to refund the amount of Rs.50 lakhs and for this purpose, he issued a cheque of Rs.50 lakhs vide Cheque No.006278 dated 10.06.2019 drawn on his banker HDFC Bank, Vivekananda Marg, Bhubaneswar to the opposite party No.2. The opposite party No.2 on 23.07.2019 deposited the cheque with its bank, namely, Oriental Bank of Commerce, Bhubaneswar, but the same was dishonoured by the banker of Subhasish Roy on 24.07.2019 with the endorsement "Funds Insufficient". The opposite party No.2 on 01.08.2019 issued notice to the accused persons under Section 138 of the N.I. Act demanding payment of the cheque amount. The accused No.1, Subhasish Roy, received the notice on 05.08.2019. However, the notices were also sent to the accused Nos.2 and 3, i.e., the present petitioners herein respectively, were returned with the remarks "Address Insufficient". Thereafter, the opposite party No.2 has filed the complaint under Section 138 of the N.I. Act by deeming that the notices have been served on accused Nos.2 & 3 i.e. the petitioners herein.

4. From the pleadings and the documents in the present case, the following admitted facts are emerging on record:

(A) Subhasish Roy is the drawer of the subject cheque, which got dishonoured on presentation as sufficient fund was not available in his account.

(B) The present petitioners were impleaded as accused Nos.2 & 3 in the complaint on the allegation that they have given the power of attorney to Mr. Subhasish Roy for sale of the land. The cheque issued by the accused No.1, Subhasish Roy, got dishonoured for insufficiency of funds.

(C) The statutory notice under Section 138 of the Negotiable Instruments Act issued to the present petitioners could not be served on them as the addresses were insufficient.

(D) For the want of service of notice, the present petitioners could not reply to the demand made under Section 138 of the N.I. Act.

(E) There is no privy between the complainant and the petitioners.

Therefore, the present petition has been filed.

5. Heard Mr. Gautam Mukherjee, learned Senior Advocate appearing on behalf of the petitioners, Mr. Sashanka Patra, learned Addl. Standing Counsel appearing on behalf of the opposite party No.1, and Mr. Aswini Pattnaik, learned counsel appearing on behalf of the opposite party No.2.

6. Mr. Mukherjee, learned Senior Advocate appearing for the petitioners, has taken me through the averments made in the complaint case. He submitted that the facts narrated in the complaint case, even if admitted, may not be relevant for the purpose of the prosecution launched against the petitioners for the offence punishable under Section 138 of the N.I. Act, because admittedly, the cheque was not issued by the petitioners. No legal notice was served on them, which is a statutory requirement under Section 138 of the N.I. Act. Therefore, even if the factual narration made in the complaint case is believed to be true, the petitioners cannot be prosecuted under Section 138 of the N.I. Act. He has relied upon the Judgment of the Hon'ble Supreme Court in the case of ***Jugesh Sehgal vs. Shamsher Singh Gogi***, reported in ***(2009) 14 SCC 683***. Relevant paragraphs 13 & 14 of the said judgment are quoted hereunder:

> *"13. It is manifest that to constitute an offence under Section 138 of the Act, the following ingredients are required to be fulfilled:*
>
> *(i) a person must have drawn a cheque on an account maintained by him in a bank for payment of a certain amount of money to another person from out of that account;*
>
> *(ii) the cheque should have been issued for the discharge, in whole or in part, of any debt or other liability;*
>
> *(iii) that cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity whichever is earlier;*
>
> *(iv) that cheque is returned by the bank unpaid, either because of the amount of money standing to the credit of the account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with the bank;*
>
> *(v) the payee or the holder in due course of the cheque makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within 15 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid;*
>
> *(vi) the drawer of such cheque fails to make payment of the said amount of money to the payee or the holder in due course of the cheque within 15 days of the receipt of the said notice.*
>
> *Being cumulative, it is only when all the aforementioned ingredients are satisfied that the person who had drawn the cheque can be deemed to have committed an offence under Section 138 of the Act.*
>
> *14. In the case before us, it is clear from the facts, briefly noted above, and in Para 3 of the complaint as extracted, that on receipt of the return memo from the Bank, the complainant is stated to have realised that the dishonoured cheque was issued from an account which was not maintained by Accused 1 – the appellant herein, but by one Shilpa Chaudhary."*

Mr. Mukherjee, learned Senior Advocate, also relied upon the judgment of the Hon'ble Supreme Court in the case of ***Alka Khandu Avhad vs. Amar Syamprasad Mishra and others***, reported in ***(2021) 4 SCC 675***. Relevant paragraph-7 of the said judgment is quoted hereunder:

> *"7. On a fair reading of Section 138 of the NI Act, before a person can be prosecuted, the following conditions are required to be satisfied:*
>
> *i) that the cheque is drawn by a person and on an account maintained by him with a banker;*
>
> *ii) for the payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability; and*
>
> *iii) the said cheque is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account.*
>
> *Therefore, a person who is the signatory to the cheque and the cheque is drawn by that person on an account maintained by him and the cheque has been issued for the discharge, in whole or in part, of any debt or other liability and the said cheque has been returned by the bank unpaid, such person can be said to have committed an offence. Section 138 of the NI Act does not speak about the joint liability. Even in case of a joint liability, in case of individual persons, a person other than a person who has drawn the cheque on an account maintained by him, cannot be prosecuted for the offence Under Section 138 of the NI Act. A person might have been jointly liable to pay the debt, but if such a person who might have been liable to pay the debt jointly, cannot be prosecuted unless the bank account is jointly maintained and that he was a signatory to the cheque."*

Mr. Mukherjee further relied upon the judgment of the High Court of Gujarat at Ahmedabad in the case of ***Krishna Trading Co. v. State of Gujarat***, reported in ***2017 SCC OnLine Guj 2589***. Relevant paragraphs41 & 45 of the said judgment are quoted hereunder:

> *"41. In view of the above statutory analysis with the aid of dictionary meaning, it can be held that the maker of cheque is a person who orders payment and signs the cheque. It follows that the drawer of a cheque is the person who orders payment and signs it. In this analysis, a cheque is said to have been completed or made as soon as the person orders payment and signs the cheque. This is the process by which the drawer makes the cheque. It is only the 'drawer' of a cheque who can be held liable for an offence under Section 138 of the N.I. Act. If that be so, the Power of Attorney Holder, who ordered payment and signed the cheque, is primarily held liable to be proceeded against for the commission of the offence under Section 138 of the N.I. Act, caused by the drawing and issuing of the cheque, when there is no sufficient fund in the account.*
>
> *45. To sum up, the principles of vicarious criminal liability cannot be attributive upon the principal, who has granted power of attorney in favour of the Power of Attorney Holder for the commission of the offence under Section 138 of the N.I. Act, caused by the dishonour of the cheque for want of sufficient fund, drawn and issued by the Power of Attorney Holder. The Power of Attorney Holder cannot escape from his penal liability by saying that he signed the cheque only under authority given by the principal and not in his individual capacity."*

7. The sum and substance of the argument of Mr. Mukherjee, learned Senior Advocate, is that even if the story put-forth by the complainant that the petitioners

had given power of attorney to the principal accused for the sale of land, for which Rs.50 lakhs in advance was given and subsequently the said consideration amount was refunded by the power of attorney holder (Accused No.1) to the complainant, the liability of the offence under Section 138 of the N.I. Act cannot be fastened on the present petitioners.

8. Per contra, Mr. Aswini Pattnaik, learned counsel appearing for the opposite party No.2, submitted that the present petition is liable to be dismissed at this stage because the petitioners are assailing the complaint case at the very threshold of the proceeding. At this stage, only the process has been issued to the petitioners, hence they should appear before the Court to explain their position on defence. He has cited various judgments in support of his submissions. The following judgments are prominently cited by him.

> (i) ***Relevant paragraphs 2, 3 & 5*** in ***(1976) 3 SCC 736 : AIR 1976 SC 1947*** in the case of ***Smt. Nagawwa vs. Veeranna Shivalingappa Konjalgi & others.***
>
> (ii) ***Paragraphs 7, 8, 13 & 14*** in ***(2012) 5 SCC 424 : AIR 2012 SC 1747*** in the case of ***Bhushan Kumar vs. State (NCT of Delhi) & Another.***
>
> (iii) ***Paragraphs 12, 22 to 24*** in ***(2008) 2 SCC 492 : AIR 2008 SC 1213*** in the case of ***S.K. Sinha Chief Enforcement Officer vs. Videocon International Ltd. & Ors.***"

Mr. Pattnaik, learned counsel, further submitted that the defence of the accused at this stage is based on the documentary evidence and cannot be considered by the High Court in its exercise of the inherent power under Section 482 Cr. P.C., particularly when such documents are in dispute and not admitted. To support this contention, he has relied upon the judgment of the Hon'ble Supreme Court in the case of ***Rajeshbhai Muljibhai Patel vs. State of Gujarat***, reported in ***(2020) 3 SCC 794***. He further submitted that the principal accused having been authorized by a valid document to issue the cheques for a legally enforceable debt is bound by the act as an attorney, as it attracts the collective legal liability. Hence, the provisions of the N.I. Act are attracted. Since the accused persons have chosen an unscrupulous power of attorney holder, who has issued the cheque in relation to the transaction made by the opposite parties with them, the petitioners are liable directly and/or vicariously. He has relied upon the judgment of the High Court of Calcutta in the case of ***Sova Mukherjee vs. Rajiv Mehra*** in ***1996 SCC OnLine Cal 207***. Relevant paragraphs-7 & 8 of the said judgment are quoted hereunder:

> *"(7). THE claim has been studiously refuted by the learned Counsel for the respondent on the ground that the cheque when issued by a constituted Attorney could not absolve the revisionist Nos. 1 and 2 either from the liability. It becomes, in the state of materials, a collective legal liability which cannot be shrived at the expense of that view. The cheque, when issued by the constituted Attorney, the revisionist No. 2, cannot relieve the revisionist No. 1 of legal liability as she was not the drawer of the cheque. This is absolutely a feeble plea as the cheque was issued under the authority of the accused No.1. A constituted Attorney by his acts and deeds can bind the principle. It means, a person appointed by another to do something for him. Therefore, a constituted Attorney when duly appointed under a document authorising the person to whom it is given to act in all respects as the grantor of the power, in relation to the matter specified in the*

document. When the power is general. It applies to every thing in which the grantor in interested. But when it is special, it applies to specific matter, such as the power to sign cheques, to make transfers, to receive money, to present documents for registration etc. Thus, the cheque issued by the constituted Attorney, the revisionist No.2 to partial discharge of the debt deemed to have been issued under the authority of the revisionist No.1, who might be a lady. The revisionist cannot shrugg off the claim of demand of the respondent opposite parties under the pretence that the revisionist No.1 owes no liability under the Negotiable Instrument Act, when the cheque was issued to discharge the partial liability is patent. A principle is always bound by the act of his or her Attorney so long the Attorney does not exceed his right. There is no scanty material on record which could be attested with ability that the attorney acted behind his power. There is no slender material to prove prima facie that the constituted Attorney participated in illegal execution. Thus, the cheque, since issued by the revisionist No. 2, cannot exonerate the revisionist No.1 from the offence complained of. She will only bear the fruit but not the burden for the act of his or her agent is an argument is founded.

(8). RETURNING to examine the offence in question, prima facie. It is undisputed that a cheque when issued by a person under authority in respect of an account maintained by the principle with the bank for payment of any amount of money to another person out of the said account for the discharge of debt in whole or in part or other liabilities is returned by bank with the endorsement that it exceeded arrangement if amounts to dishonour within the meaning of section 138 of the N.I. Act. On issuance of the notice by the payee or the holder in due course after dishonour to the drawer demanding payment within 15 days from the date of receipt of such notice, if he does not pay the same, the statutory presumption of dishonest intention subject to any other liability stands satisfied. Once the cheque has been drawn and issued to the payee in discharge of debt and the payee has presented the cheque to the bank for encashment and the cheque, since dishonoured, could attribute to any liability. It is an idle plea that the cheque issued by the constituted Attorney will put a lid on the liability of the principle as in the instant case. The apex Court in M/s. Electronics Trade Technology Development Corporation Limited, Secunderabad v. M/s. Indian Technologists and Engineers Electronics Private Unified and Others, 1996 C Cr Lr 83 held the effect of a cheque being dishonoured after its presentation to the bank and the liabilities occurred therefrom."

Mr. Pattnaik's last argument was that the power of attorney holder is the agent of the grantor. When the grantor authorizes the attorney holder, he does so as the agent of the grantor, and the initiation is by the grantor represented by his attorney holder and not by the attorney holder in his personal capacity. To substantiate this proposition, he has relied upon the judgment of the Hon'ble Supreme Court in the case of ***A.C. Narayanan & Anr. v. State of Maharashtra & Ors.***, reported in ***(2014) 11 SCC 790***. Relevant paragraph-21 of the said judgment is quoted hereunder:

"21. The power-of-attorney holder is the agent of the grantor. When the grantor authorises the attorney holder to initiate legal proceedings and the attorney holder accordingly initiates such legal proceedings, he does so as the agent of the grantor and the initiation is by the grantor represented by his attorney holder and not by the attorney holder in his personal capacity. Therefore, where the payee is a proprietary concern, the complaint can be filed by the proprietor of the proprietary concern, describing himself as the sole proprietor of the payee, the proprietary concern, describing itself as a sole

proprietary concern, represented by its sole proprietor, and the proprietor or the proprietary concern represented by the attorney holder under a power of attorney executed by the sole proprietor. However, we make it clear that the power-of-attorney holder cannot file a complaint in his own name as if he was the complainant. In other words, he can initiate criminal proceedings on behalf of the principal."

9. I have given a thoughtful consideration to the submissions made by both the learned counsels, perused the judgments cited by both the parties at the Bar, and also gone through the documents placed before the Court.

10. Taking into consideration the factual scenario of the present case and the admitted position of the documents, I am of the considered view that the liability of the offence punishable under Section 138 of the N.I. Act cannot be fastened on the present petitioners merely because they had given the power of attorney to the principal accused for the purpose of securing the land deal. In the capacity of the power of attorney holder, the principal accused, Subhasish Roy, had entered into an agreement with the complainant-opposite parties and had taken the advance of Rs.50 lakhs in his name. Since the dealing for the sale of land failed, in order to return the sale consideration, the principal accused had issued the cheque to the opposite parties-complainant. Therefore, it is the principal accused, Subhasish Roy, who is solely liable to be prosecuted under Section 138 of the N.I. Act. Moreover, the statutory notice under Section 138 of the N.I. Act was also not served upon the petitioners, as admitted by the complainant in para-8(XI) of the complaint. Therefore, the complaint under Section 138 of the N.I. Act against the present petitioners is not maintainable. Hence, I quash 1.C.C.Case No.3500 of 2019 pending in the Court of the learned S.D.J.M., Bhubaneswar qua the petitioners. However, notwithstanding the quashing of the I.C.C. Case No. 3500 of 2019 qua the petitioners, the complainant is not precluded to proceed against the present petitioners either by initiating civil and/or criminal proceedings in accordance with law.

11. The CRLMC is accordingly disposed of.

Headnotes prepared by :
Smt. Madhumita Panda, Law Reporter
(Verified by : Shri Pravakar Ganthia, Editor-in-Chief)

Result of the case :
CRLMC disposed of.

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2024 (III) ILR-CUT-914

SAMBIT SAMAL
V.
STATE OF ODISHA

(CRLMC NO.2078 OF 2024)

29 OCTOBER 2024

[SIBO SANKAR MISHRA, J.]

Issue for Consideration

Whether the F.I.R. can be quashed when the investigation is in nascent stage & the allegation is serious in nature.

Headnotes

(A) CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Prayer for quashing of FIR – It has been alleged in the FIR that the informant has paid a total of Rs. 16,35,000/- through bank transfer to petitioner – The informant also alleged that she has given one gold chain of 65 grams and one bracelet of 50 grams for the daughter's marriage of the then Judge, who was supposed to hear the bail matter of her husband – The name of the Hon'ble Judge of this court (then was) written in the complaint – The complaint alleged that she has given two mobile phones and some original title deed/ land record for the purpose of securing bail of her husband – It has also been alleged that petitioner being an advocate used blank paper signed by informant husband – Whether the prayer to quash FIR can be entertained.

Held: No – This court is not inclined to do so as the allegations are not only at a nascent stage of investigation but also quite serious in nature as the name of a former Judge of this Court has been soiled. (Para 17)

(B) ADVOCATES ACT, 1961 – Chapter V – Professional misconduct – Defined and explained with reference to case law. (Paras 5-14)

Citation Reference

Bar Council of Maharashtra v. M.V. Dabholkar & Ors, **(1975) 2 SCC 702**; V.C. Rangadurai v. D. Gopalan & Ors, **(1979) 1 SCC 308**; M. Veerabhadra Rao v. Tek Chand, **1984 (Supp) SCC 571;** An Advocate vrs. Bar Council of India & Anr, **1989 Supp (2) SCC 25;** L.D. Jaisinghani v. Naraindas N. Punjabi,,**(1976) 1 SCC 354;** Pandurang Dattatraya Khandekar Vs. Bar Council of Maharashtra, Bombay & Ors, **(1984) 2 SCC 556;** Harish Chander Singh Vs. S.N. Tripathi, **(1997) 9 SCC 694;** V.C. Rangadurai Vs. D. Gopalan & Ors., **(1979) 1 SCC 308;** Byram Pestonji Gariwala Vs. Union Bank of India & Ors., **(1992) 1 SCC 31;** Narain Pandey Vs. Pannalal Pandey, **(2013) 11 SCC 435;** Shambhu Ram Yadav vs. Hanuman Das Khatry, **(2001) 6 SCC 1;** R. Muthukrishnan vs. Registrar General, High Court of Judicature at Madras, **(2019) 16 SCC 407;** Vikas Deshpande vs. Bar Council of India & Ors, **(2003) 1 SCC – referred to.**

List of Acts

Code of Criminal Procedure, 1973; Advocates Act, 1961

Keywords

Professional misconduct, Quashing of FIR at nascent stage of investigation.

Case Arising From

Mangalabag P.S. Case No.268 of 2021 corresponding to G.R.Case No.1515 of 2021 pending in the Court of the learned J.M.F.C. (City), Cuttack.

Appearances of Parties

For Petitioner : Mr. Surya Narayan Biswal
For Opp. Party : Mr. Sangram Keshari Mishra, ASC

Judgment/Order

Judgment

S.S. MISHRA, J.

The petitioner herein has approached this Court under Section 482 of the Code of Criminal Procedure, 1973 with a prayer seeking quashing of the F.I.R. dated 11.11.2021 registered as Mangalabag P.S. Case No.268 of 2021 corresponding to G.R. Case No.1515 of 2021 pending in the Court of the learned J.M.F.C. (City),Cuttack.

2. The facts of the present case, as alleged, are that the informant in the present case is the wife of an accused in a case under the OPID Act and had approached this Court on earlier occasion seeking bail. It has been alleged in the F.I.R that the informant has paid a total of Rs.16,35,000/- (Rs.8,35,000/- through bank transfer to his account and Rs.8,00,000/- in cash) through a person named as Anil Kumar Patra of Bhubaneswar as per the petitioner's instruction. It is thereafter alleged that as per the petitioner's instruction, the informant gave him one gold chain of 65 grams and one gold bracelet of 50 grams for the daughter's marriage of the then Judge, who was supposed to hear the bail matter of her husband. The name of the Hon'ble Judge of this Court (then was) written in the complaint. Further, it has been alleged that two mobile phones were handed over to the petitioner as per his instructions. It has been stated in the F.I.R. that the corresponding phone chats between the informant and the petitioner as well as some pictures have also been enclosed herewith. It is alleged that, the petitioner also asked for handing over some original title deeds/land record for the purpose of securing bail pursuant which two original land deed of mouza-Kaushallya were handed over to him. It is further alleged that, after the informant's husband's bail matters were dismissed, the petitioner thereafter demanded additional sum of Rs.16 lakhs to file a fresh bail application. The informant further alleged that on requisitioning the return of their case file, original land documents and money, the petitioner denied the same and threatened them that he will lodge false case against them and also threatened them that he would destroy their Court cases as he has good links with many Judges of the High Court and lower Courts. The petitioner also allegedly threatened the informant that he has many friends in judiciary so he will put them to task and the informant's husband will never get bail from any Court.

It is further alleged that despite request for returning the documents, money etc., the same has been denied by the petitioner. In the meantime, the informant states to have consulted some advocates and has come to know that two false cases,

i.e., bail applications have been filed by the Petitioner by using the blank papers signed by the informant's husband. The informant thereafter alleges to have consulted some advocates in Calcutta and upon advise, informed the present Petitioner that they would write about it to Bar Council upon which the Petitioner assured the informant that he would withdraw the said cases and also assured them to return the money, file and documents, which eventually was not honoured. Being thus placed, the informant being helpless and finding no other way, came to Cuttack in a final attempt to get back the money, original documents, mobiles, gold ornaments and case files etc. upon which they were threatened with dire consequences by the Petitioner.

3. The aforesaid narration as set out in the F.I.R. makes up for sordid reading. The advocate enjoys the implicit faith of the court, each and every advocate practicing in a particular court not only an officer of that court but also acts as an ambassador of the law to the society at large. Therefore, such conduct is unbecoming of an advocate.

4. The facts of the present case, as alleged, would show that the Petitioner has insinuated and attributed wrong doing to a former judge of this Court. The allegations even taken at face value show that the informant has meticulously described certain events and named specific items that have been demanded by the Petitioner. The informant is aware of the social status of the Petitioner as an advocate. No common person would normally dare to make false allegations of such grim nature against a member of the bar knowingly fully well that there would be dire consequences in case the allegations are found to be false or motivated. It is even inconceivable that a common litigant would cook up such a grave allegation as has been made in the present case against a high constitutional functionary. Of course, the entirety of the truth of the matter can only be unearthed during the course of a detailed investigation, all that can be said that at this stage is that given the grave allegations of impropriety which touch upon the sanguineness of the judicial edifice, the present case needs a thorough and impartial investigation to get to the bottom of the matter.

5. The other aspect of the matter is that of "professional and other misconduct" as provided for under the Advocates Act, 1961 and defined by a series of judicial pronouncements. A seven-Judge Bench of the Hon'ble Supreme Court in the case of ***Bar Council of Maharashtra v. M.V. Dabholkar and others*** reported in ***(1975) 2 SCC 702*** while dealing with an appeal filed under Section 38 of the 1961 Act by the Bar Council of Maharashtra, V.R. Krishna Iyer, J. in his concurring opinion made, the following observations with regard to the Bar and its members and the onerous duty cast on the member of the profession:

> *"52. The Bar is not a private guild, like that of 'barbers, butchers and candlestick-makers'' but, by bold contrast, a public institution committed to public justice and pro bono publico service. The grant of a monopoly licence to practice law is based on three assumptions : (1) There is a socially useful function for the lawyer to perform, (2) The*

lawyer is a professional person who will perform that function, and (3) His performance as a professional person is regulated by himself not more formally, by the profession as a whole. The central function that the legal profession must perform is nothing less than the administration of justice ('The Practice of Law is a Public Utility'— 'The Lawyer, The Public and Professional Responsibility' by F. Raymond Marks et al — Chicago American Bar Foundation, 1972, p. 288-89). A glance at the functions of the Bar Council, and it will be apparent that a rainbow of public utility duties, including legal aid to the poor, is cast on these bodies in the national hope that the members of this monopoly will serve society and keep to canons of ethics befitting an honourable order. If pathological cases of member misbehaviour occur, the reputation and credibility of the Bar suffer a mayhem and who, but the Bar Council, is more concerned with and sensitive to this potential disrepute the few black sheep bring about? The official heads of the Bar i.e. the Attorney General and the Advocates General too are distressed if a lawyer 'stoops to conquer' by resort to soliciting, touting and other corrupt practices."

6. A similar view as to the nature of the profession and the responsibility of the members of the bar was expressed by the Hon'ble Apex Court in the case of ***V.C. Rangadurai v. D. Gopalan and others*** reported in ***(1979) 1 SCC 308*** in a majority judgment in an appeal filed under Section 38 of the 1961 Act speaking through V.R. Krishna Iyer, J. observed as follows:

"4. Law is a noble profession, true; but it is also an elitist profession. Its ethics, in practice, (not in theory, though) leave much to be desired, if viewed as a profession for the people. When the Constitution under Article 19 enables professional expertise to enjoy a privilege and the Advocates Act confers a monopoly, the goal is not assured income but commitment to the people — the common people whose hunger, privation and hamstrung human rights need the advocacy of the profession to change the existing order into a Human Tomorrow. This desideratum gives the clue to the direction of the penance of a deviant geared to correction. Serve the people free and expiate your sin, is the hint.

5. Law's nobility as a profession lasts only so long as the members maintain their commitment to integrity and service to the community. Indeed, the monopoly conferred on the legal profession by Parliament is coupled with a responsibility — a responsibility towards the people, especially the poor. Viewed from this angle, every delinquent who deceives his common client deserves to be frowned upon. This approach makes it a reproach to reduce the punishment, as pleaded by the learned counsel for the appellant.

6. But, as we have explained at the start, every punishment, however has a functional duality — deterrence and correction. Punishment for professional misconduct is no exception to this 'social justice' test. In the present case, therefore, from the punitive angle, the deterrent component persuades us not to interfere with the suspension from practice reduced 'benignly' at the appellate level to one year. From the correctional angle, a gesture from the Court may encourage the appellant to turn a new page. He is not too old to mend his ways. He has suffered a litigative ordeal, but more importantly he has a career ahead. To give him an opportunity to rehabilitate himself by changing his ways, resisting temptations and atoning for the serious delinquency, by a more zealous devotion to people's causes like legal aid to the poor, may be a step in the correctional direction.

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*11. Wide as the power may be, the order must be germane to the Act and its purposes, and latitude cannot transcend those limits. Judicial 'Legisputation' to borrow a telling phrase of J. Cohen [**Ed**.: Dickerson: The Interpretation and Application of Statutes, p. 238.] is not legislation but application of a given legislation to new or unforeseen needs and situations broadly falling within the statutory provision. In that sense, 'interpretation is inescapably a kind of legislation' [**Ed.**: Dickerson: The Interpretation and Application of Statutes, p. 238.]. This is not legislation stricto sensu but application, and is within the court's province.*

12. We have therefore sought to adapt the punishment of suspension to serve two purposes ─ injury and expiation. We think the ends of justice will be served best in this case by directing suspension plus a provision for reduction on an undertaking to this Court to serve the poor for a year. Both are orders within this Court's power."

7. In the case of ***M. Veerabhadra Rao v. Tek Chand*** reported in ***1984 (Supp) SCC 571***, a three-Judge Bench of the Hon9ble Supreme Court considered the relevant provisions contained in the Bar Council of India Rules with reference to standards of professional conduct and etiquette and also sub-section (3) of Section 35 of the 1961 Act. The Hon'ble Apex Court observed thus:

"28. Adjudging the adequate punishment is a ticklish job and it has become all the more ticklish in view of the miserable failure of the peers of the appellant on whom jurisdiction was conferred to adequately punish a derelict member. To perform this task may be an unpalatable and onerous duty. We, however, do not propose to abdicate our function howsoever disturbing it may be.

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30……If these are the high expectations of what is described as a noble profession, its members must set an example of conduct worthy of emulation. If any of them falls from that high expectation, the punishment has to be commensurate with the degree and gravity of the misconduct."

Thus, the yardstick or standard as expected from members of the bar while dealing with the litigants who come to the doorsteps of justice has been set to be of a high standard, what is also set out is that corresponding high standard of professional integrity expected of advocates.

8. In the case of ***An Advocate vrs. Bar Council of India and another***, reported in ***1989 Supp (2) SCC 25***, the Hon9ble Apex Court has dealt with the principle to be followed in Disciplinary proceedings and has held that;

"4. At this juncture it is appropriate to articulate some basic principles which must inform the disciplinary proceedings against members of the legal profession in proceedings under Section 35 of the Advocates Act, read with the relevant Rules:

"(i) essentially the proceedings are quasi-criminal in character inasmuch as a member of the profession can be visited with penal consequences which affect his right to practise the profession as also his honour; under Section 35(3)(d) of the Act, the name of the advocate found guilty of professional or other misconduct can be removed from the State Roll of Advocates. This extreme penalty is equivalent of death penalty which is in vogue in criminal jurisprudence. The advocate on whom the penalty of his name being removed from the roll of advocates is imposed would be deprived of practising the profession of his choice, would be robbed of his means of livelihood, would be stripped

of the name and honour earned by him in the past and is liable to become a social apartheid. A disciplinary proceeding by a statutory body of the members of the profession which is statutorily empowered to impose a punishment including a punishment of such immense proportions is quasicriminal in character;

(ii) as a logical corollary it follows that the Disciplinary Committee empowered to conduct the enquiry and to inflict the punishment on behalf of the body, in forming an opinion must be guided by the doctrine of benefit of doubt and is under an obligation to record a finding of guilt only upon being satisfied beyond reasonable doubt. It would be impermissible to reach a conclusion on the basis of preponderance of evidence or on the basis of surmise, conjecture or suspicion. It will also be essential to consider the dimension regarding mens rea."

This proposition is hardly open to doubt or debate particularly having regard to the view taken by this Court in the case of ***L.D. Jaisinghani v. Naraindas N. Punjabi*** reported in ***(1976) 1 SCC 354*** wherein Ray, C.J., speaking for the Court has observed: (SCC p. 358, para 9)

"9. ……In any case, we are left in doubt whether the complainant's version, with which he had come forward with considerable delay was really truthful. We think that in a case of this nature, involving possible disbarring of the advocate concerned, the evidence should be of a character which should leave no reasonable doubt about guilt. The Disciplinary Committee had not only found the appellant guilty but had disbarred him permanently." *(Emphasis added)*

(iii) in the event of a charge of negligence being levelled against an advocate, the question will have to be decided whether negligence simpliciter would constitute misconduct. It would also have to be considered whether the standard expected from an advocate would have to answer the test of a reasonably equipped prudent practitioner carrying reasonable workload. A line will have to be drawn between tolerable negligence and culpable negligence in the sense of negligence which can be treated as professional misconduct exposing a member of the profession to punishment in the course of disciplinary proceedings. In forming the opinion on this question the standards of professional conduct and etiquette spelt out in Chapter 2 of Part VI of the Rules governing advocates, framed under Section 60(3) and Section 49(1)(g) of the Act, which form a part of the Bar Council of India Rules may be consulted. As indicated, in the preamble of the Rules, an advocate shall, at all times compose himself in a manner befitting his status as an officer of the court, a privileged member of the community and a gentleman bearing in mind that what may be lawful and moral for one who is not a member of the Bar may still be improper for an advocate and that his conduct is required to conform to the rules relating to the duty to the court, the duty to the client, to the opponent, and the duty to the colleagues, not only in letter but also in spirit.

It is in the light of these principles the Disciplinary Committee would be required to approach the question as regards the guilt or otherwise of an advocate in the context of professional misconduct levelled against him. In doing so apart from conforming to such procedure as may have been outlined in the Act or the Rules, the Disciplinary Authority would be expected to exercise the power with full consciousness and awareness of the paramount consideration regarding principles of natural justice and fair play."

9. The Hon'ble Apex Court from time to time has also dealt with instances of professional or other misconduct. An advocate owes a duty to the client as well as to the court. In cases where an advocate has violated the confidence of the Client have

been dealt with sternly by the courts. In the case of ***Pandurang Dattatraya Khandekar Vs. Bar Council of Maharashtra, Bombay and others***, reported in ***(1984) 2 SCC 556*** dealt with a case where false affidavits had been drawn; ***Harish Chander Singh Vs. S.N. Tripathi***, reported in ***(1997) 9 SCC 694*** dealt with a case where the advocate had misused the signatures of his client; another dimension of misconduct has been highlighted in the case of ***V.C. Rangadurai Vs. D. Gopalan and others***, reported in ***(1979) 1 SCC 308***.

10. There are also allegations against the Petitioner that he has acted without authority i.e., by using some blank papers with the signatures of the husband of the informant which amount to professional misconduct as well, as has been held by the Hon'ble Apex Court in the cases of ***Byram Pestonji Gariwala Vs. Union Bank of India and others*** reported in ***(1992) 1 SCC 31*** and ***Narain Pandey Vs. Pannalal Pandey*** reported in ***(2013) 11 SCC 435***. In any view of the matter, at the present stage the allegations albeit be grave need to be looked into by a body empowered and competent to do so.

11. The case in hand reminds the memorable words of the Chief Justice Marshall on Legal Ethics which are not only global but also eternal, he said:

> *"The fundamental aim of Legal Ethics is to maintain the honour and dignity of the Law Profession, to secure a spirit of friendly co-operation between the Bench and the Bar in the promotion of highest standards of justice, to establish honourable and fair dealings of the council with his client opponent and witnesses; to establish a spirit of brotherhood in the Bar itself, and to secure that lawyers discharge their responsibilities to the community generally."*

12. The Hon'ble Supreme Court in the case of ***Shambhu Ram Yadav vs. Hanuman Das Khatry***, reported in ***(2001) 6 SCC 1 : 2001 SCC (Cri) 949 : 2001 SCC OnLine SC 867*** have dealt with the similar case where an advocate was accused of demanding bribe from the client allegedly to influence the judge ceased of the matter. The Hon'ble Supreme Court held that it is the most heinous form of professional misconduct and had severely dealt with the issue. It was held that one expects from advocates at the bar a very high standard of morality and unimpeachable sense of legal and ethical propriety. Since the Bar Councils under the Advocates Act have been entrusted with the duty of guarding the professional ethics, they have to be more sensitive to the potential disrepute on account of action of a few black sheep which may shake the credibility of the profession and thereby put at stake other members of the Bar.

13. In ***R. Muthukrishnan vs. Registrar General, High Court of Judicature at Madras***, reported in ***(2019) 16 SCC 407 : (2020) 2 SCC (Cri) 300 : (2020) 2 SCC (Civ) 502 : 2019 SCC OnLine SC 105*** the Hon'ble Supreme Court has quoted Alexander Cockburn that "*the weapon of the advocate is the sword of a soldier, not the dagger of the assassin"*. It is the ethical duty of lawyers not to expect any favour from a Judge. He must rely on the precedents, read them carefully and avoid corruption and collusion of any kind, not to make false pleadings and avoid twisting

of facts. In a profession, everything cannot be said to be fair even in the struggle for survival. The ethical standard is uncompromisable. Honesty, dedication and hard work is the only source towards perfection. An advocate's conduct is supposed to be exemplary. In case an advocate causes disrepute of the Judges or his colleagues or involves himself in misconduct, that is the most sinister and damaging act which can be done to the entire legal system. Such a person is definitely deadwood and deserves to be chopped off. It has further been held (supra) that;

> *"26. The high values of the noble profession have to be protected by all concerned at all costs and in all the circumstances cannot be forgotten even by the youngsters in the fight of survival in formative years. The nobility of the legal profession requires an advocate to remember that he is not over attached to any case as advocate does not win or lose a case, real recipient of justice is behind the curtain, who is at the receiving end. As a matter of fact, we do not give to a litigant anything except recognizing his rights. A litigant has a right to be impartially advised by a lawyer. Advocates are not supposed to be money guzzlers or ambulance chasers."*

14. In the case of ***Vikas Deshpande vs. Bar Council of India and others***, reported in ***(2003) 1 SCC 384 : 2003 SCC (Cri) 321 : 2002 SCC OnLine SC 1134***, the Hon'ble Supreme Court has held that the relationship between an advocate and his client is of trust and therefore sacred. Such acts of professional misconduct and the frequency with which such acts are coming to light distresses as well as saddens the court. Preservation of the mutual trust between the advocate and the client is a must otherwise the prevalent judicial system in the country would collapse and fail. Such acts do not only affect the lawyers found guilty of such acts but erode the confidence of the general public in the prevalent judicial system. It is more so, because today hundred percent recruitment to the Bench is from the Bar starting from the subordinate judiciary to the higher judiciary. Honest and hard-working Judges cannot be found unless honest and hard- working lawyers are groomed. Time has come when the society in general, respective Bar Councils of the States and the Judges should take note of the warning bells and take remedial steps and nip the evil or the curse in the bud.

15. The discussions as hereinabove would reveal that in the facts and circumstances of the present case, a strong action needs to be taken in order to maintain the faith of the litigant and the society at large. Provisions under Chapter-V of the Advocates Act, 1961 and the Bar Council of India Rules, 1975 provide for a mechanism of dealing with cases of professional misconduct on the part of advocates. It also provides for an opportunity of hearing to both the sides to arrive at a conclusion either way. As discussed hereinabove the nature of the allegation levelled in the present F.I.R. make out a case which need to be looked into by the Disciplinary Committee of the Bar Council to examine whether a case of professional 'misconduct" is made out or not on the part of the Petitioner herein.

16. In view of the discussion hereinabove, before disposing of this application, this Court deem it necessary to issue directions, in the facts of the present case, as required to subserve the cause of justice. This Court, therefore, directs the Bar

Council of Orissa to hold an inquiry into the allegations. The Registrar (Judicial) of this Court is directed to forward a copy of this judgment to the Secretary, Bar Council of Orissa. The Bar Council of Orissa shall hold Disciplinary Proceedings uninfluenced by any observations made above and by affording ample opportunity to all concerned to participate in the proceedings.

17. In so far as the prayer to quash the F.I.R. as sought in the present petition is concerned, this Court is not inclined to do so as the allegations are not only at a nascent stage of investigation but also as quite serious in nature as the name of a former Judge of this Court has been soiled. The informant has given meticulous details of the demands made which correlate to the period when the matter was pending before this Court. Therefore, the present petition deserves no merit. Hence, the CRLMC is dismissed with a cost of Rs.10,000/- (Rupees ten thousand) to be deposited by the Petitioner before the District Legal Services Authority, Cuttack within two weeks.

Headnotes prepared by :
Smt. Madhumita Panda, Law Reporter
(Verified by : Shri Pravakar Ganthia, Editor-in-Chief)

Result of the case :
CRLMC dismissed.

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2024 (III) ILR-CUT-923

N. KAUSHIK OJHA
V.
STATE OF ODISHA

(CRLREV NO.608 OF 2024)

30 OCTOBER 2024

[A.C. BEHERA, J.]

Issues for Consideration

Whether the rejection of bail application merely on the basis of presumption and inferences/ guess work without any substance/basis is sustainable.

Headnotes

JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2015 – Section 12 – The bail application of the CICL rejected by the Board which was confirmed by the Appellate Court – Is the rejection of bail application merely on the basis of presumption and inferences/ guess work without any substance/basis sustainable?

Held : No – Social investigation report does not show that the petitioner has been subjected to any form of abuse or was a victim of any similar incident

earlier or he was with any bad association earlier – The mother of the petitioner is expressing her willingness to take care of petitioner – The petitioner is prosecuting his study – The mother of the petitioner is serving as a teacher in English Medium Xavier School at Cuttack – The social investigation report does not reveal about any imminent chances in repeating the similar nature of incident by the petitioner – There is no reasonable apprehension of his fleeing away from the process of Justice after his release on bail – The application for bail should not be denied.

(Para 12)

Citation Reference

Exploitation of Children in Orphanages in the State of Tamil Nadu vrs. Union of India & Ors., **2020(2) OJR-73(S.C.);** Pankaj Kumar Malik vrs. State of Odisha, **2016(1) CLT Crl. (Supp.)-Criminal-17;** Vigneshwaran @ Vignesh Ram vrs. State, **2016(4) Crime-78 (Madras);** Amit Yadav Alias Monu Alias Bebo vrs. State of U.P. & anr., **2016(4) Crime-188 (Allahabad);** A Juvenile vrs. State of Orissa 2002(Orissa), **2009 Cr.L.J – reffered to.**

List of Acts

Juvenile Justice (Care and Protection of Children) Act, 2015

Keywords

CICL, JJB, Social Investigation Report (SIR), Bail to Juvenile.

Case Arising From

Dismissal order dated 23.09.2024 passed by the learned A.D.J.-cum-Special Court under POCSO Act-cum-Children's Court, Cuttack in Criminal Appeal No.02 of 2024.

Appearances of Parties

For Petitioner : Mr. Y. Das, Sr. Adv., Mr. B.K. Dash
For Opp. Party : Mr. U.R. Jena, Central Govt. Counsel (Union of India)

Judgment/Order

Judgment

A.C. BEHERA, J.

This revision has been filed under Section 102 of The Juvenile Justice (Care and Protection of Children) Act, 2015 (in short the 'J.J.(C&P) Act, 2015') by the CICL being the petitioner challenging the dismissal order of the criminal appeal vide Criminal Appeal No.02 of 2024 passed on dated 23.09.2024 by the learned A.D.J.-cum-Special Court under POCSO Act-cum-Children"s Court, Cuttack confirming the order of rejection of bail of the CICL (petitioner in this revision) passed on dated 29.09.2024 by the Juvenile Justice Board, Cuttack in JJC No.113 of 2024 arising out of N.C.B., Bhubaneswar Crime No. 05 of 2024.

2. The factual backgrounds of this revision under Section 102 of the J.J.(C&P) Act, 2015, which prompted the CICL (petitioner) for filing of the same is that, the petitioner (CICL) was brought before the Juvenile Justice Board, Cuttack alleging an incident against him(CICL) that, on 19.09.2024, commercial quantity of Narcotic Contraband Ganjas were recovered from the rented house of the CICL(petitioner), for which, he(petitioner/CICL) was brought and produced before the Juvenile Justice Board, Cuttack on dated 20.09.2024 stating about his involvement in that incident, but, the Juvenile Justice Board, Cuttack sent him(CICL) to the observation Home, Cuttack after rejecting his prayer for bail on dated 20.09.2024 assigning the reasons that, "release of the CICL would defeat the ends of justice, as his father is involved in the case. For which, the release of the CICL on bail is likely to bring him into association with known criminals and encourage him to commit similar type of offence, Therefore, psychological safety of the CICL is at stake. For which, releasing him on bail would expose him to physical and psychological danger. Rather, best interest of the CICL would be served, if he is to be kept in institutional care for more time. So, the Board is not inclined to release the CICL on bail."

3. For which, he (CICL) challenged the said order of rejection of his bail passed on 20.09.2024 by the Juvenile Justice Board in JJC. No.113 of 2024 preferring an appeal under Section 101 of the J.J. (C&P) Act, 2015 before the learned A.D.J.-cum-Special Court under POCSO Actcum-Children"s Court, Cuttack being an appellant vide Criminal Appeal No.02 of 2024.

4. The learned appellate court dismissed that Criminal Appeal No.02 of 2024 of the CICL on dated 23.09.2024 confirming the order of rejection of his bail passed by the Juvenile Justice Board, Cuttack assigning the reasons that, "the release of the CICL is likely to bring him in association with some known criminals and might be exposed him to psychological or moral danger. So, the release of the CICL at this stage would not be in his interest, as his release would defeat the ends of justice. Therefore, there is no strong reasons to release the CICL on bail at this stage. So far as appearing in the examination of the CICL is concerned, the appellant CICL can take appropriate steps at the appropriate forum to sit in his examination by remaining in the juvenile home."

5. So, the CICL filed this revision under Section 102 of the J.J. (C&P) Act, 2015 being the petitioner challenging the above dismissal order dated 23.09.2024 passed in Criminal Appeal No.02 of 2024 by the learned A.D.J.-cum-Special Court under POCSO Act-cum-Children"s Court, Cuttack.

6. I have already heard from the learned counsel for the petitioner and the learned Central Government Counsel for Union of India (Opposite Party).

7. During the course of hearing, the learned counsel for the petitioner(CICL) submitted that, the CICL is prosecuting his study, for which, his prayer for bail should not have been refused by the Juvenile Justice Board, Cuttack as well as by the learned Appellate Court, to which, learned Central Government Counsel for

Union of India objected contending in support of the reasons assigned above by the Juvenile Justice Board as well as by the learned appellate court for the refusal of the bail of the CICL (petitioner).

As per the provisions of law envisaged in the proviso of Subsection(1) of Section 12 of the J.J.(C&P) Act, 2015, the CICL can be denied with the privilege of bail, only if, the court is of the opinion that,

> (i) there appears reasonable grounds for believing that, the release of CICL on bail shall bring him into association with any known criminal or
>
> (ii) shall expose him to moral, physical and psychological danger or that his such release would defeat the ends of justice and

8. The necessary essentials/materials indicated above in (i) and (ii) of the proviso of Sub-section(1) of Section 12 of J.J.(C&P) Act, 2015 must be there in the record to make out any of the above grounds out of two, which may persuade the court not to release the CICL on bail.

9. As per The J.J.(C&P) Act, 2015, the nature and gravity of allegations alleged against the CICL has no significance for consideration of bail. So, the CICL has to be released on bail irrespective of the nature and gravity of the allegations.

The J.J.(C&P) Act, 2015 is a beneficial legislation, which has been enacted to reform the child. The solemn purpose/object of The J.J.(C&P) Act, 2015 is to achieve betterment of the child including CICL. It has a reformative approach. If it is found that, the ends of justice would be benefited or the desired goal of the legislation can be achieved by detaining a CICL in a Juvenile Home, only in that case, bail of the CICL can be denied.

10. Therefore, as per the mandate of the provisions of Section 12 of the J.J.(C&P) Act, 2015, a CICL has to be released on bail, irrespective of the nature of allegations, because, bail for the CICL is the rule and refusal is an exception. The right of privilege of bail of the CICL can be denied, only on the basis of sufficient materials with firm reasons for the same that, the enlargement of bail of CICL shall be detrimental to the interest of the CICL or his refusal of bail would benefit the ends of justice.

11. On this aspect, the propositions of law has already been clarified by the Hon‟ble Courts and the Apex Court in the ratio of the following decisions :-

> *(i)* ***2020(2) OJR-73(S.C.) : Exploitation of Children in Orphanages in the State of Tamil Nadu vrs. Union of India and others— J.J.(C&P) Act, 2015— Sections 10 & 12—Bail—***The only embargo created for bail of the CICL is that, (i) in case the release of the child is likely bring into association with known criminals or (ii) expose the child to moral, physical or psychological danger or where the release of the child would defeat the ends of justice.
>
> *(ii)* ***2016(1) CLT Crl. (Supp.)-Criminal-17 : Pankaj Kumar Malik vrs. State of Odisha— J.J.(C&P) Act, 2015—***Sections 12 & 53—Bail—Release on bail of the CICL is a rule, but refusal is an exception, which can only be done in the existence of

circumstances detrimental to the interest of the CICL or if the same would defeat the ends of justice—Heinousness and seriousness of an offence has got nothing to do in consideration of the prayer for bail.

(iii) ***2016(4) Crime-78(Madras) : Vigneshwaran @ Vignesh Ram vrs. State— J.J.(C&P) Act, 2015— Section 12—Bail—***So far as juveniles are concerned, grant of bail is the rule and non-grant of bail is only an exception.(Para-7)

(iv) ***2016(4) Crime-188(Allahabad): Amit Yadav Alias Monu Alias Bebo vrs. State of U.P.. and Anr.— J.J.(C&P) Act, 2000—Section 12—Bail—***If there are no imminent chances of his repeating the crime, bail to a juvenile should not be ordinarily refused.

(v) ***2009 Cr.L.J. : A Juvenile vrs. State of Orissa 2002(Orissa)***

"A Juvenile needs parental protection and guidance to bring him back to the main-stream of the society from which he has strayed. Thus, his release on bail would aid the ends of justice rather than defeat it."

12. When, the social investigation report does not show that, the CICL(petitioner) has been subjected to any form of abuse or was a victim of any similar incident earlier or he was with any bad association earlier, rather, it is forthcoming from para no.6 of the impugned judgment of the appellate court as per social investigation report (SIR) that, the mother of the CICL is expressing her willingness to take care of CICL and the CICL is prosecuting his study and as per the submissions of the learned counsel for the petitioner, the mother of the CICL is now serving as a teacher in English Medium Xavier School at Cuttack and when, the social investigation report does not reveal about any imminent chances in repeating the similar nature of incident by the CICL and when, there is no reasonable apprehension of his fleeing away from the process of justice after his release on bail and when the mother-guardian of the CICL(petitioner) has filed an affidavit in this revision that, she is willing to take care of CICL being his natural guardian, then at this juncture, the impugned orders concerning the rejection of bail of the CICL passed by the Juvenile Justice Board, Cuttack in J.J.C. Case No.113 of 2024 and by the learned appellate court in Criminal Appeal No.02 of 2024 merely on the basis of presumptions and inferences/guess works without any substance/basis as discussed above cannot be sustainable under law.

For which, there is justification under law, for making interference with the same through this revision filed by the CICL (petitioner).

As such, there is merit in this revision filed by the petitioner (CICL). The same must succeed.

13. In result, the revision filed by the CICL (petitioner) is allowed on merit.

The impugned order dated 20.09.2024 passed by the Juvenile Justice Board, Cuttack in J.J.C. Case No.113 of 2024 and the impugned judgment dated 23.09.2024 passed in Criminal Appeal No.02 of 2024 by the learned A.D.J.-cum-Special Court under POCSO Act-cum-Children‟s Court, Cuttack are set aside.

14. The prayer for bail of the CICL (petitioner) in J.J.C. Case No.113 of 2024 is allowed.

15. The learned P.M., Juvenile Justice Board, Cuttack is directed to release the CICL (petitioner) on bail in J.J.C Case No. 113 of 2024 with required bail bond or bail bonds imposing lawful conditions as it deems fit and proper with a compulsory condition that:-

> The mother-natural guardian of the CICL shall furnish an undertaking that, he will not allow the CICL to come in contact with his any bad association and the CICL shall not indulge with any unlawful/illegal activities.

16. Accordingly, this criminal revision is disposed of finally.

Registry is directed to transmit the copies of this judgment to the appellate court in reference to Criminal Appeal No.02. of 2024 as well as Juvenile Justice Board, Cuttack in reference to JJC No.113 of 2024 forthwith for information and lawful actions/compliances on the basis of this judgment.

The petitioner (CICL) is at liberty to use the computerized/uploaded copy of this judgment for his early release on bail, as holidays starts from tomorrow.

Headnotes prepared by :
Smt. Madhumita Panda, Law Reporter
(Verified by : Shri Pravakar Ganthia, Editor-in-Chief)

Result of the case :
Criminal Revision disposed of.

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